Law Council
OF AUSTRALIA

Draft AML/CTF Legal Professional Privilege Guidelines 2026

Department of Home Affairs

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Introduction

1. The Law Council welcomes the opportunity to provide this submission to the Department of Home Affairs regarding its draft Anti-Money Laundering and Counter-Terrorism Financing Legal Professional Privilege Guidelines 2026 (**Draft Guidelines**).

2. This submission first provides preliminary comments relevant to the Draft Guidelines, before discussing our most critical concerns with the guidelines that we think warrant particular attention. We then outline some additional concerns we have with certain aspects of the Draft Guidelines, and finally we make some minor technical recommendations.

3. For ease of reference, in this submission we refer to:

   - the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth) and the *Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2024* (Cth) as the **AML/CTF Act**;
   - the Anti-Money Laundering and Counter Terrorism Financing legislative regime as the **Regime**;
   - to the Australian Transaction Reports and Analysis Centre as **AUSTRAC**; and
   - to the Department of Home Affairs as the **Department**.

4. Finally, it is the Law Council's preference to use the term '*client legal privilege*' (**CLP**) rather than '*legal professional privilege'* (**LPP**) when discussing this species of privilege. We do so to emphasise that the privilege belongs to the client, not the legal practitioner and, by extension, that privileged communications may only be disclosed by a practitioner in very limited circumstances. Accordingly, in this submission we use the term CLP in place of the term LPP.

Background

5. In July and August 2025, the Attorney-General's Department (**AGD**) consulted on a prior version of the Draft Guidelines, together with accompanying draft LPP Forms (**2025 Consultation**). The 2025 Consultation advised that the draft guidelines and forms subject of the consultation were intended to inform development of a draft notifiable instrument under section 242A of the AML/CTF Act that would be released for public consultation in late 2025.

6. The Law Council provided a detailed submission in response to the 2025 Consultation in August 2025 (the **2025 Submission**), which we have attached to this submission.

7. This submission is informed by, and builds upon, our 2025 Submission.

Preliminary comments

8. We are grateful to the Department for developing these Draft Guidelines, which will, once complete, comprise an important element of the AML/CTF framework. Before discussing our views on the Draft Guidelines, we would like to take this opportunity to raise the following related matters.

Joint review

9. As you know, the Attorney General's Department and Treasury are in the process of carrying out a review of the use of CLP in Commonwealth investigations (**Joint Review**). As discussed in our 2025 Submission,[1] the subject matter of the Joint Review is highly relevant to the Draft Guidelines and it may be prudent to wait until the Joint Review is completed before proceeding to finalise these Guidelines.

LPP forms

10. We note that these Draft Guidelines were made available for comment without accompanying draft LPP form/s.

11. The LPP form/s are an integral part of the process established by the Draft Guidelines, and their absence makes it very difficult—if not impossible—to comment on whether the processes proposed in the Draft Guidelines are appropriate and compatible with CLP. Without sighting the forms, we also cannot comment on whether it is possible for claimants to complete the form '*properly'* without inadvertently waiving privilege—which is a serious concern given that paragraph 29 states that '*[p]roper completion and provision of LPP forms is required by the Act and may be enforced through infringement notice provisions or civil penalty proceedings if not complied with*'.[2]

12. We urge you to release draft LPP form/s for public consultation as soon as possible. As to their content, we reiterate the recommendations made in our 2025 Submission—specifically, the LPP forms must:[3]

    - be tailored to accommodate circumstances where a form is being completed by a person who is asserting privilege on behalf of another and who is subject to the tipping-off offence;
    - not solicit any information that risks CLP being inadvertently disclosed, including information on the legal issue that is the subject of the privilege, and the title or subject line of any written communications;[4]
    - encourage people filling them out on their own behalf to seek legal advice; and
    - impose a proportionate administrative burden on claimants (specifically, they should not require the provision of unnecessary, resource intensive details).[5]

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1 Law Council of Australia, *Draft AML/CTF Legal Professional Privilege Guidelines and Forms* (Submission to the Department of Home Affairs, 22 August 2025) [7] (**2025 LPP Submission**).
2 Department of Home Affairs, '*The Anti-Money Laundering and Counter-Terrorism Financing Legal Professional Privilege Guidelines 2026'* (Guidelines, 2026) [29]-[30] (**Draft Guidelines**).
3 Law Council of Australia, 2025 LPP Submission, [133], [139], [142].
4 Ibid, [142].
5 Ibid, [143].

LPP claim timeframes

13. Finally, while we understand that this matter relates to the AML/CTF Act and not the Draft Guidelines, we would like to take this opportunity to express our concern with the timeframes in the AML/CTF Act for claiming CLP in the context of the Part 3 reporting and notice obligations.

14. As we have previously expressed in other submissions to the Department,[6] five business days will not always be enough time for claimants to review documents and information to make a determination as to whether CLP applies (and, if needed, to obtain external advice), and then make a report to AUSTRAC—especially if the matter involves a large quantity of potentially privileged information.

15. Our preferred position is that the AML/CTF Act is amended to provide more time for claimants to consider whether CLP applies—and, if so, the extent it which applies—in relation to the reporting and notice obligations in Part 3.

16. If this cannot be done, or until such a time that such amendments are made, it would be very helpful if flexibility regarding the timelines for the provision of information and documents over which a CLP assertion is made could be provided in the Draft Guidelines, to the extent possible.

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[6] See, e.g., Law Council of Australia, *Proposed 2026 amendments to the AML/CTF Act* (Submission to the Department of Home Affairs, 27 January 2026) 11-12, [59]-[60].

Key concerns

17. We support the development of Guidelines under section 242A of the AML/CTF Act, and we thank the Department for its sustained work in preparing them. We note that some of the concerns raised in our 2025 Submission have been addressed in this updated draft, and we acknowledge, and welcome, the substance of the Minister's forward.

18. However, the most significant issue raised in our 2025 Submission has not been addressed, and we have identified a new issue of significant concern with this updated draft.

19. Our most significant concerns, which we discuss below, concern the following:

    - **Third-party claimants**: The Draft Guidelines do not adequately recognise or reflect the fundamental distinction that exists between circumstances where a claimant is asserting CLP on their own behalf, and circumstances where a third-party is asserting CLP on another's behalf; and
    - **Access powers**: The Draft Guidelines establish processes that are not responsive to legal professionals' ethical duties and professional obligations, including that they *cannot,* without a warrant, consent to AUSTRAC entering their premises and accessing a client's legally privileged documents.

Processes are largely inapplicable to Third-Party Claimants

20. In our August 2025 submission, we expressed concern that the Draft Guidelines sought to establish a universal process applicable to third parties asserting privilege on another's behalf (**Third-Party Claimants**) and privilege holders directly asserting privilege on their own behalf (**Direct Claimants**).

21. We explained that this approach would be manifestly unfair and unworkable for Third-Party Claimants and that it would cause substantial injustice, because the circumstances of Direct Claimants and Third-Party Claimants are different in ways that are relevant to their respective ability to engage in the Draft Guidelines' processes. Notably, unlike Direct Claimants, Third-Party Claimants that are subject to the tipping-off offence in section 123 may not be able to access the information required to make an accurate assessment of whether privilege exists, and they will not be able to obtain instructions from the privilege holder. Third-Party Claimants also cannot consent to disclosure or agree to any form of negotiated disclosure on their client's behalf owing to their obligation to assert privilege in lieu of client instructions.

22. For these reasons, we recommended that the Draft Guidelines either include specific processes applicable to Third-Party Claimants, or that specific guidelines need to be created for Third-Party Claimants.

23. We are disappointed to note that this updated version of the Draft Guidelines largely fails to recognise or articulate tailored processes for Third-Party Claimants . (While we acknowledge that the Draft Guidelines do include a definition of *'third party LPP'* and outline a specific process for third-party claims in the examination context, on the

whole, they remain largely inapplicable to the circumstances of Third-Party Claimants.)

24. For example, paragraph 25 states that AUSTRAC will '*explain its view, listen to the claimant's views, and consider any issues or alternative views the claimant put forward'*. As explained above, Third-Party Claimants, who cannot obtain instructions, likely will not be able to obtain the information needed to respond to AUSTRAC's views without violating section 123.

25. It is equally difficult to understand how a Third-Party Claimant can comply with paragraphs 28a., 28b., 28e., and 28g., which provide:

> *28. To resolve disagreements before they become more formal disputes, LPP claimants are to:*
>
> *a. give AUSTRAC all relevant information so it can make correct and timely decisions,*
>
> *b. respond promptly and accurately if AUSTRAC asks you for information or clarification about something,*
>
> *…*
>
> *e. where the claimant considers it would help, give AUSTRAC the claimant's view on how the relevant laws apply to the claimant's circumstances,*
>
> *…*
>
> *g. ensure that representatives are prepared, willing and appropriately skilled to work with AUSTRAC to resolve a disagreement and have the authority to do so*

26. Paragraph 28.g is particularly problematic given that it would be very difficult, if not impossible, for a legal practitioner to give AUSTRAC an assurance that they have the authority to act on behalf of their client to resolve disagreements regarding CLP given the tipping-off offence.

27. We also refer to paragraph 34.d., which provides that a person seeking to claim CLP over information in response to a question during a compulsory examination must provide, on request, '*the name of all persons who claim the right to assert the privilege (including any third parties on whose behalf the privilege claim is made*)' to AUSTRAC. Again, it is difficult to see how such information could be provided given the tipping off prohibition.

28. The same is true in relation to the section '*If AUSTRAC does not accept an LPP claim'*, which outlines the process for resolving disputes regarding CLP. Notably, for example, we refer to the following paragraphs:

- paragraph 51, which states that '*AUSTRAC and the claimant should communicate about the issues transparently and without prejudice;*
- paragraph 52, which allows AUSTRAC to work with the claimant on a procedure to resolve CLP claims;
- paragraph 53, which allows for document inspection by an independent expert;
- paragraph 54, which states that '*[i]f direct engagement or an alternative agreed approach with the claimant fails to resolve the LPP matter, arbitration is the preferred alternative dispute resolution mechanism*'; and

- paragraph 56, which provides that '*AUSTRAC will seek agreement from the claimant to have any determination made by the selected arbitrator to be legally binding to facilitate a clear and final resolution of the dispute*'.

29. These paragraphs are simply not applicable to Third-Party Claimants bound by section 123. Such claimants will not be able to participate in direct engagement, negotiate an alternate agreed approach, or consent to arbitration, because they cannot contact the privilege holder or obtain instructions, nor can they concede or negotiate any degree of disclosure as they remain duty-bound to maintain the claim in the absence of instructions.

30. For these reasons, imposing this process on Third-Party Claimants will simply force them to participate, at their own expense and without recourse to the client, in a dispute process they cannot meaningfully conduct or resolve, in defence of a privilege that is not theirs to waive—while the person best placed to give instructions about the privilege, the client, may know nothing of the dispute. As outlined above, this will produce substantial injustice and create a serious risk that privilege may be inadvertently compromised.

31. We reiterate that specific guidelines need to be created for Third-Party Claimants that articulate tailored processes that reflect the practical implications flowing from the that the claimant will be subject to the tipping-off offence.[7]

32. Our 2025 Submission provides detailed recommendations as to what these processes should entail. In particular, we refer to and reiterate paragraphs 84–116 in relation to processes relevant to Direct Claimants, and paragraphs 117–132 in relation to Third-Party Claimants.

AUSTRAC's access powers

Processes

33. It appears to the Law Council that the Draft Guidelines seek to establish two separate processes for managing CLP claims in the exercise of AUSTRAC's access powers, which depend on whether the premises subject to the exercise of the powers is a law firm or is not a law firm.

34. Paragraph 39 explains that the first process applies where access powers are exercised in circumstances where the '*reporting entity's business is to provide legal services to clients (i.e. it is a law firm) and as such holds vast volumes of third party LPP information'*, and that the second process applies when '*the reporting entity claims LPP over its own information, whether in relation to AML/CTF obligations or other laws*'.[8]

35. Paragraph 40 explains that these separate processes have been created '*in recognition of the distinct features of exercising access powers at a law firm'*, to allow a more detailed process to be followed at law firm premises, and a 'more streamlined' process for non-law firm premises.

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7 Law Council of Australia, 2025 LPP Submission, [2]-[6], [78].
8 Draft Guidelines, [39].

36. If this understanding is correct, we support creating and applying a more detailed process specific to law firm premises for the reasons mentioned in paragraph 40.

37. However, we have serious concerns about how the two processes are defined, developed, and applied in the Draft Guidelines.

Different processes based on co-operation

38. As discussed above, paragraphs 39 and 40 appear to state that the Draft Guidelines contain two distinct processes regulating the exercise of AUSTRAC's access powers, which apply depending on whether or not the premises being accessed are those of a law firm.

39. However, the subsequent content of the Draft Guidelines defines processes that apply, or do not apply, by reference to the other considerations, such that the question of which process applies is not actually determined by reference to whether or not the premises being accessed are those of a law firm. Rather, the question is also determined by reference to whether the law firm consents to AUSTRAC accessing their premises or cooperates with the officers executing a monitoring warrant.[9]

40. As a result, the question of which processes will apply to a law firm depends on whether they consent to access or 'cooperate' with the execution of a warrant, or whether they '[refuse] to cooperate' with the officers executing the warrant. In the former case, the process applicable to law firms in paragraph 43 will apply; in the latter, the process applicable to non-law firm premises in paragraphs 45–49 will apply.

41. We have several serious concerns with this proposed approach.

42. First, it introduces avoidable confusion and unnecessary complexity into the Draft Guidelines by deviating from the processes established in paragraph 39 without acknowledging that it is doing so, or explaining why.

43. Secondly, it is not clear what is meant by '*refuses to cooperate'*: no explanation or definition of this is provided, no threshold criteria are included, no explanation is given about how a refusal to cooperate would be determined—or by whom, there are no requirements that such a determination is made by a suitably qualified authorised officer assessment, there is no requirement that reasons for the determination be articulated and recorded, and there is no mechanism for review. Notably, for example, it is not clear whether this determination would be engaged in circumstances where a firm asserts claims over broad categories of files, seeks its own legal advice before permitting officers to proceed, disputes the scope of the warrant, or whose principal is absent (for example, at court) such that no person on site has authority to engage. We are thus concerned that this approach could unfairly penalise legal practitioners asserting legitimate opposition to the execution of a warrant in any way, by denying them the protections that are otherwise afforded when warrants are executed on law firm premises.

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[9] Draft Guidelines, [44].

44. Thirdly, it is not clear why non-cooperation would justify the application of less detailed processes: the firm's consent—or lack thereof—is irrelevant to the question of whether the premises in question hold vast volumes of third-party CLP information, which is the basis for the adoption of 'distinct features of exercising access powers' at a law firm's premises, as opposed to non-law firm premises outlined in paragraph 40. The attempt to apply the non-law firm premises processes to a law firm also subverts the rationale for creating two separate processes in paragraph 40.

45. Fourthly, seeking to define which process applies by reference to whether the law firm consents to access is problematic because it implies that legal practitioners can consent to access in the absence of a warrant. While they may do so if the matter relates to the legal practitioners' own compliance with Regime and where access is restricted to the legal practitioner's own documents, it would never be appropriate for a legal practitioner to consent to access in relation to their client's documents. Granting access in such circumstances (without a warrant) would violate legal professionals' ethical duties and professional obligations, and would place them at risk of serious professional sanction.

46. Finally, it is unnecessary to apply a different procedure to law firms that refuse to cooperate with a monitoring warrant: AUSTRAC has better, more effective tools for securing compliance through the relevant offences contained in the AML/CTF Act. Notably, a failure to answer any questions, or produce any document, required under section 150(2) is an offence under the AML/CTF Act.

47. For these reasons, we oppose this approach and recommend that the question of which process applies should depend on whether or not the premises being accessed are those of a law firm—subject to the minor caveat outlined in paragraphs 48 and 49 below.

Other considerations

48. We note that reporting entities other than law firms—including, for example, auditors and insolvency practitioners—may hold client documents that are subject to CLP, in respect of which they may need to assert CLP as a Third-Party Claimant. While these entities may not hold 'vast' quantities of such documents, the rationale described in paragraph 40 would still be relevant to the exercise of access powers in relation to premises occupied by such non-legal profession reporting entities.

49. Accordingly, we recommend that the Draft Guidelines allow for the process applicable to law firm premises to be applied to non-law firm premises where it is likely that third-party LPP information is held on those premises.

Review of documents

50. Paragraph 45.a of the Draft Guidelines, which concerns the CLP claim procedures to exercised in executing monitoring warrants on non-law firm premises, states that:

> *[W]hile carrying out searches, AUSTRAC authorised officers may look at each record briefly, and without reading the contents, to determine the general nature of the record and to assess whether the record appears to be relevant to the matters under investigation and whether it appears likely that the record contains privileged material.*

51. Cited in support of this position is the case *JMA Accounting Pty Ltd v CofT* [2004] FCAFC 274 (**JMA Accounting**), which is accompanied by a comment that '*the Full Federal Court ruled that it is not a breach of LPP for an investigator to look at a privileged document for these purposes*.'

52. In JMA Accounting, the Full Federal Court outlined that the legal position relating to the inspection of records that are privileged or over which privilege is claimed is as follows:[10]

> *[T]here will be circumstances in which it will be proper for the officer exercising the s 263 power to look at a privileged document, including a document for which privilege is claimed, for the purpose of determining whether it might be covered by the privilege. The document should not be looked at closely; merely enough to enable the officer to decide whether the document may be copied.*
>
> *In Allitt v Sullivan [1988] VicRp 65; [1988] VR 621 Brooking J referred to this as a "lawful violation" of the privilege. The circumstances in which an officer will be entitled to undertake a bona fide examination of a document for this limited purpose will include cases where no one is present to claim the privilege and when there is a blanket claim for privilege and it is reasonably apparent that the claim is not sustainable.*
>
> *The cases also establish three broad propositions concerning the conduct of a search and seizure, each of which is relevant to the outcome of this appeal. First, a person exercising a power to search and seize … is only entitled to seize those documents which he is authorised to seize by the relevant power …Second, both the search and the seizure must reasonably be carried out … Third, the repository of the power must do no more than is reasonably necessary to satisfy himself that he has the documents which he is entitled to seize.*

53. The Full Federal Court further found that where privileged documents might be found in the premises of a search, the occupier must be afforded an opportunity to make a claim for CLP before they are examined, and a 'reasonable' proposal for protecting any claimed privilege must exist. In the circumstances of the case, this involved all material being scanned or copied onto discs that would be duplicated, with one copy being given to the occupier and one to the Australian Government Solicitor (**AGS**) subject to an undertaking that the material would not be accessed for a period of 14 days, to allow any CLP claim to be made.[11] Then, in the conduct of the search, '*documents at both offices would not be closely read, although they might be glanced at to determine their relevance'*.

54. To reflect the legal position, paragraph 45.a should be amended to read:

> *[W]hile carrying out searches, AUSTRAC authorised officers may look at each record briefly, and without reading the contents, ~~to determine the general nature of the record and to assess whether the record appears to be relevant to the matters~~ under ~~investigation and whether it appears likely that the record contains privileged material.~~ for the purpose of assessing whether the record might be covered by legal professional privilege. The record will not be looked at closely, but merely enough to enable the officer to decide whether the record may be relevant to the investigation.*

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[10] *JMA Accounting Pty Ltd v Michael Carmody, Commissioner of Taxation* [2004] FCAFC 274 [14]-[16].
[11] Ibid, [18]-[20].

Clarity

55. Assuming that we are correct in our understanding that the Draft Guidelines have sought to establish two processes for managing CLP in the exercise of the access powers (which depend on whether or not the premises being accessed are those of a law firm), we offer the following comments and recommendations to clarify this section of the Draft Guidelines.

56. First, the definition of the second process in paragraph 39.b is confusing and incongruent with the subsequent content of the Draft Guidelines. Unlike paragraph 39.a, paragraph 39.b does not describe a physical location but rather describes the nature of the CLP claim being asserted, and the description is not necessarily mutually exclusive with paragraph 39.a. Further, subsequent descriptions of the second process refer to it as the process applicable to '*non-law firm premises*' (see, e.g., paragraph 40 and the heading '*LPP claim procedures for monitoring warrants being executed on non-law firm premises*')—however, the description in paragraph 39.b. is not clearly related to the concept of non-law firm premises.

57. We recommend that paragraph 39 be amended to make this clearer. By way of example, it could simply read:

> *39. AUSTRAC may encounter information and documents subject to LPP in the course of exercising its access powers. These Guidelines establish the process for managing LPP claims in two situations:*
>
> *a. where the powers are exercised in relation to 'law firm premises'; and*
>
> *b. where the powers are exercised in relation to 'non-law firm premises'.*

58. If this approach is adopted, we further recommend that:

- definitions/explanations of both terms should be provided; and
- paragraph 40 be amended to articulate the rationale for the creation of the separate process, for example:

> *40. These Guidelines set out a detailed approach for AUSTRAC to follow in relation to law firm premises, in recognition of the distinct features of exercising access powers at a law firm, and a more streamlined approach for AUSTRAC to take at non-law firm premises.*

Definition of 'law firm premises' and 'non-law firm premises'

59. Further to the above, we recommend that definitions of the terms '*law firm premises*' and '*non-law firm premises'* are included in the Glossary.

60. As to the definition of '*law firm premises*', we would support a definition that is consistent with the current language of paragraph 39.a., such that it would be defined as a reporting entity business premises at which it conducts the business of providing legal services to clients (or similar).

61. We also recommend that the Guidance specify whether the following fall within the definition of '*law firm premises'*:

- 'mixed' practices, by which we mean a business premises at which legal services and non-legal services are provided (for example, a law firm with a consulting arm); and
- premises that are not business premises, such as a reporting entity's home, out of which a reporting entity conducts the business of providing legal services.

62. We think that both of these examples should be considered to be '*law firm premises'* because both will be a location at which vast volumes of third-party LPP information will be held, which is the rationale for the existence of the separate law firm premises process.

63. As to the definition of '*non-law firm premises*', we suggest the term could simply be defined as any reporting entity business premises that are not law firm premises.

Additional concerns

Process related issues

AUSTRAC's role in assessing claims

64. Paragraph 5 states that '*It is part of AUSTRAC's role … to decide whether or not to review or challenge an LPP claim'* made in relation to information or documents required to be provided to AUSTRAC under the AML/CTF Act.

65. However, much of the subsequent content of the Draft Guidelines describes AUSTRAC's role in the process as determining the '*validity'* of claims.[12]

66. For example, paragraph 32 in the section '*Reporting and compulsory notices'* states:

> *Where LPP forms are completed with insufficient detail, AUSTRAC is more likely to ask for further information using a compulsory notice in order to determine whether it can accept the claims. (Emphasis added).*

67. Other examples include:

- paragraph 33, which ends with the sentence '*A lack of assessment or challenge does not indicate acceptance of the claim'*; and
- paragraph 50, which states '*AUSTRAC may not accept a claim of LPP where in AUSTRAC's opinion the claim is …not substantiated by the information provided in the LPP form, or … otherwise not valid'.*

68. In our August 2025 submission, we expressed concern that the Draft Guidelines would establish a process in which AUSTRAC would assess and determine the '*validity'* of claims, and we stated that the final guidelines must not establish a process that would have AUSTRAC determining, or asserting that it has determined, CLP claims.[13]

69. We reiterate that, while AUSTRAC can receive and administratively process CLP claims, it does not have the legal power to adjudicate or determine—including to accept or reject—the validity (or invalidity) of a CLP claim in the way that a court can. AUSTRAC's role is procedural, not determinative, and the language used in the final version of the Guidelines must be carefully drafted to reflect this.

70. We recommend that the language in the Draft Guidelines be amended to ensure it does not state or imply that AUSTRAC has the power to determine the validity of CLP claims.

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[12] Law Council of Australia, *Draft AML/CTF Legal Professional Privilege Guidelines and Forms* (Submission, 22 August 2025) [100].

[13] Law Council of Australia, *Draft AML/CTF Legal Professional Privilege Guidelines and Forms* (Submission, 22 August 2025) [100].

Arbitration

71. We note that paragraph 54 of the Draft Guidelines states that '*If direct engagement or an alternative agreed approach with the claimant fails to resolve the LPP matter, arbitration is the preferred alternative dispute resolution mechanism*'.

72. As outlined in our August 2025 submission, we do not support arbitration being included in the Draft Guidelines as the preferred alternative dispute resolution process for engaging with reporting entities for the following reasons:[14]

    - there is no basis for this in the legislation;
    - the proposal to prefer arbitration in preference to other forms of dispute resolution has not been justified or explained;
    - arbitration can be very costly and time consuming, and no clarity has been provided as to how arbitrators would be paid;
    - it is not clear whether arbitrators would need to be legally qualified. Given the complexity of the laws of evidence and the importance of CLP to the administration of justice and the rule of law, it is critical that any appointed dispute resolution professional is an expert in CLP;

73. Further—and critically—arbitration will be inappropriate and unworkable in circumstances where a third-party is required to defend privilege on behalf of a client or former client for the reasons set out in paragraph 21 above.

74. We recommend that:

    - paragraph 54 be amended to read '*If direct engagement or an alternative agreed approach with the claimant fails to resolve the LPP matter, the parties may agree to engage in alternative dispute resolution or may proceed to have the matter determined by a court'*;
    - paragraph 55 be amended to read '*The parties will agree to appoint an independent person with relevant experience, expertise, and accreditation, and specific expertise in LPP'*; and
    - paragraph 57 be deleted.

Legally binding determinations

75. We are very concerned by, and object to, paragraph 56, which provides that '*AUSTRAC will seek agreement from the claimant to have any determination made by the selected arbitrator to be legally binding to facilitate a clear and final resolution of the dispute*'.

76. For the reasons discussed above, this will not be possible for Third-Party Claimants subject to the tipping-off offence: such claimants have no authority to submit the client's privilege to a binding private determination. It is also not clear how an arbitral determination could bind a privilege holder who is not a party to the process and has not had an opportunity to give instructions or be heard.

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[14] Ibid, [115]-[116].

77. It is equally untenable and unsupportable in circumstances involving Direct Claimants. We are very concerned that this paragraph will result in Direct Claimants feeling pressured to agree to a legally binding outcome, which is made more likely by the substantial power, resourcing, and bargaining imbalance between the parties—especially as the claimant may not be legally represented or aware of their rights. This will create unfairness and gives rise to a very serious and real risk that the process will result in the inadvertent waiver or loss of privilege.

78. As explained in our August 2025 Submission, the power to make Draft Guidelines in section 242A is not unconstrained: its scope must be interpreted in accordance with its text and context, including surrounding provisions and the broader AML/CTF Act. Accordingly, it must be construed in light of section 242, which affords explicit protection to CLP, and in accordance with the underlying purpose of the provisions, as explained in the Explanatory Memorandum:[15]

> *The policy intent of the [provisions] … is that the AML/CTF Act would not require the disclosure of information or a document as part of any reporting and information disclosure obligations where the reporting entity or notice recipient reasonably believes that the information or document is subject to legal professional privilege*.

79. We also note the statement in Explanatory Memorandum that '*for clarity, the ultimate arbiter of any disputes over assertions of legal professional privilege that arise would be the court*'.

80. We do not think that the power to make Draft Guidelines under section 242A can extend to include the creation of a process that undermines or compromises CLP, which we consider that this paragraph would do.

81. We submit that this paragraph must be deleted.

Cost of engaging in dispute resolution

82. We are concerned that the Draft Guidelines assume that claimants will have the resources and ability to participate in the dispute resolution process, which may not be the case: many legal practitioners asserting privilege on behalf of a client or former client will have neither the ability nor the resources to engage in the process described.

83. As explained above in paragraph 21, practitioners in this position will not be able to engage in the dispute resolution process as they will not be able to concede or negotiate any degree of disclosure, and will remain duty-bound to maintain the claim in the absence of instructions.

84. As to the cost of engaging in the process, we think that a substantial portion of the profession will lack the resources to participate.

85. We note that, to make a claim, practitioners will likely have to review files, assess the dominant purpose of communications, and complete and particularise the LPP form—potentially within a short period of time, if the material is held in a privileged material container. These tasks are inherently complex and time-consuming, but will

[15] Explanatory Memorandum, 90 [405].

be even more so where a claim is made on behalf of a client or former client who cannot be contacted due to the tipping-off provisions. Further, as the requirement to provide an LPP form may be enforced through infringement notices or civil penalty proceedings, practitioners may feel obliged to obtain independent advice, which will also entail cost. If the matter proceeds and a practitioner is required to respond to requests for further information and/or engage in dispute resolution, the costs will further escalate, particularly if the matter proceeds to arbitration or to court. There will also very likely be an opportunity cost incurred as time spent on an unfunded privilege dispute is time taken away from fee-earning work, and in a sole practice there may be no one else available to absorb that burden.

86. Sole practitioners and small practices comprise over 90 percent of the private legal profession,[16] and many of these practices operate on small margins—particularly in rural, regional, and remote locations. For example, a 2025 report published by the Law Institute of Victoria reported that managing cash flow was the key financial and strategic challenge reported by sole practitioners, particularly in regional areas.[17] It is far from clear how such practitioners and practices will be able to bear the cost of engaging in the processes in the Draft Guidelines, and the Draft Guidelines do not answer this important question.

87. For these reasons, in our 2025 Submission we recommended that, if AUSTRAC intends to challenge a privilege claim made by a third-party claimant (including solicitors), it should engage with the privilege owner directly. We recognise that this will mean that the privilege owner will need to be notified of the CLP claim, but we consider it necessary if the process to have any potential to bear fruit as it may result in an agreement to concede or negotiate disclosure. Another benefit of this approach is that it would avoid the issue of effectively forcing a practitioner who cannot afford to participate to engage in the dispute resolution process.

88. If AUSTRAC does not accept this recommendation, we recommend that, in circumstances where AUSTRAC seeks to resolve disputes regarding privilege with a third-party that is constrained by the tipping-off provisions, it commences proceedings. This is necessary to allow relevant information and documents to be lodged with the court; for appropriate confidentiality orders to be obtained; and, critically, for the issue of privilege to be finally determined in accordance with the law.

89. We are of the view AUSTRAC should bear the costs of making such a challenge, and that this should be specified in the Guidelines. We say this because third-party legal practitioners will have no choice but to assert privilege in lieu of instructions owing to their obligation to uphold the client's interest in maintaining privilege, and because they may have been prevented from accessing relevant information owing to the tipping-off provisions. We also consider that a mechanism ought to be included in the Draft Guidelines by which reasonable compliance costs incurred by a third-party claimant, including the cost of obtaining independent legal advice where reasonably necessary, can be met or recovered from AUSTRAC.

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[16] Urbis, *2024 National Profile of Solicitors* (Report, 13 June 2025) 2, 28.

[17] Law Institute of Victoria, *Benchmarking the Costs and Challenges of Running a Legal Practice in Victoria in 2025* (Report, 2025), 25.

Cost recovery

90. Further to the above, we object to the inclusion of paragraph 59 in the Draft Guidelines and recommend that it be deleted.

91. It would be unfair and unreasonable to expose third-party claimants to an adverse costs order in circumstances where they are not advancing a claim for their own benefit; where they have been obliged to assert and maintain privilege in the absence of instructions; where they cannot negotiate a compromise, concede disclosure, or take other steps to resolve the issue; and where they have been prevented by the tipping-off provisions from making enquiries relevant to the merits of the claim—especially in light of the fact that they cannot charge the client for the work involved in defending the privilege, and will have to bear the costs personally.

Tailored processes for certain claimants

92. In the 2025 Consultation, the Attorney-General's Department invited views on the kind of claimants that may require more tailored or lenient expectations in terms of standard of claim.

93. Our submission expressed the view that several kinds of Tranche 2 reporting entities, including sole practitioners and small legal practices, barristers, lay people and reporting entities responding on their own behalf, and legal practitioners making claims on behalf of clients/former clients who cannot be contacted, should be afforded accommodations in the form of tailored and reduced requirements in relation to the CLP claim process. Specifically, we proposed that the Guidelines should make it possible for AUSTRAC to offer tailored processes or accommodations to these kinds of claimants, such as providing additional time to particularise claims; affording claimants the ability to make provisional claims in urgent matters; allowing claimants to use batch descriptions and agreed review methodologies; and to accept existing documents, such as in-house CLP logs or privilege registers, in place of the prescribed forms.

94. Apart from the statement in paragraph 49 that AUSTRAC may accept information in an alternative format where necessary and practicable, these important accommodations do not appear in the Draft Guidelines.

95. We reiterate our recommendation that the Draft Guidelines explicitly provide that AUSTRAC may afford accommodations in the form of tailored and reduced requirements in relation to the LPP claim process for claimants that may experience difficulty in complying with the standard process, including sole practitioners and small legal practices, barristers, lay people and reporting entities responding on their own behalf, and legal practitioners making claims on behalf of clients/former clients who cannot be contacted.

Clarity

Legal professional privilege and the AML/CTF Act—paragraph 4

96. Paragraph 4 states that '*[w]hen 'a person provides a report, or responds to a compulsory notice issued by AUSTRAC, the person must provide all required information except for information that may be subject to LPP*'.

97. We recommend that this paragraph be amended to note the effect of section 41(2A) of the AML/CTF Act—that is, that a reporting entity may refuse to provide a suspicious matter report if the reporting entity reasonably believes that all of the information comprising the grounds on which the reporting entity holds the relevant suspicion is privileged from being given on the ground of CLP.

Nature and purpose of LPP—paragraphs 10–12

98. This section of the Draft Guidelines should be amended to more clearly explain the nature of CLP.

99. First, we recommend that paragraph 10 be amended to provide a more accurate summary of what CLP applies to. It is not strictly correct to say that CLP '*protects certain communications (written and verbal) between legal practitioners and their clients'* ; CLP can apply to a broader class of information or documents. For example, third-party communications that are not made between a lawyer and their client can be privileged, including copies of documents created by third parties.[18]

100. We suggest referring more closely to the legal formulation of the concept, such as: CLP *'applies to information or documents that reveal communications between a client and their lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings'*.[19]

101. Secondly, we recommend that paragraph 12 be amended to include the following important, relevant information about CLP:

- that CLP is held by the client, not by the lawyer that provides the advice;
- that, in normal circumstances, a lawyer may consult their client in relation to privileged documents, including whether to waive privilege where it exists, but that such consultations may not be undertaken with respect to suspicious matter reports, and notices under ss 49 and 49B of the AML/CTF Act, where that would constitute tipping off; and
- that providing privileged client documents to AUSTRAC without claiming privilege over them may result in a waiver of the privilege (particularly as AUSTRAC may share documents with a very large number of other agencies).

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[18] *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501.

[19] *Daniels Corporation International Pty Ltd v Australian Competition & Consumer Commission* (2002) 213 CLR 543 [9], citing *Attorney-General (NT) v Maurice* (1986) 161 CLR 475.

CLP ethical duties and professional obligations

102. In our August 2025 Submission, we recommended that the Draft Guidelines include a statement recognising legal professionals' professional and ethical obligations, to the following effect (adapted from the Australian Taxation Office's 'Compliance with formal notices—claiming legal professional privilege in response to formal notices Legal professional privilege protocol'):[20]

> *We recognise and expect that legal practitioners must comply with their ethical duties and professional obligations to maintain client privilege and confidential information. Importantly, we do not expect legal practitioners to breach their ethical and professional obligations if a conflict arises between those obligations and the recommendations outlined in this Protocol.*

103. While we welcome the inclusion of paragraph 12 in this updated version of the Draft Guidelines, which acknowledges that *'[l]egal practitioners have professional duties to maintain privilege unless a client expressly or impliedly authorises disclosure, or the privilege is abrogated by statute'*, this paragraph does not make it sufficiently clear that AUSTRAC does not expect practitioners to breach their obligations where a conflict arises between the Guidelines and a practitioner's professional duties.

104. We recommend that the Draft Guidelines include a paragraph to the effect of the above statement.

105. We also recommend that this part of the Draft Guidelines address and explain the specific difficulties for Third-Party Claimants asserting CLP on behalf of a client in lieu instructions and subject to the tipping-off offence.

Section 242(2)—paragraph 19

106. While we welcome the inclusion of information about circumstances where privilege is waived, we do not think that the Draft Guideline explains with sufficient clarity the scope of the protection afforded by section 242(2), as recommended in our 2025 Submission.[21]

107. Further, we are concerned that paragraph 19 may, by stating that section 242(2) will assist claims to be resolved in an efficient and effective manner, mislead claimants into disclosures that may inadvertently result in waiving privilege by providing descriptions that disclose the substance of the privileged communication and compromise the privilege.

108. We recommend that paragraph 19 be amended to explain the scope of the protection afforded by section 242(2), including a statement to the effect that, while providing a description of information or documents that may be privileged does not of itself amount to a waiver of privilege, waiver may still arise from the content of the description itself, particularly where the description reveals the substance, effect or conclusion of privileged advice. A new paragraph should also be inserted explaining that claimants should describe privileged material at a level of generality sufficient to

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[20] Australian Taxation Office, '*Compliance with formal notices – claiming legal professional privilege in response to formal notices Legal professional privilege (LPP) protocol*' (June 2022).

[21] See paragraph [96].

identify the nature of the claim, without disclosing the substance of the privileged communication.

When LPP Forms are not required

109. As stated in our 2025 Submission, the Draft Guidelines do not reference or explain circumstances in which an LPP form is not required, and, again, do not suggest that there are any circumstances in which an LPP Form is not required.

110. For example, paragraph 29 states that:

> *The Act provides that LPP forms are to accompany SMR and TTR reports given to AUSTRAC under the Act, and responses to compulsory notices where the right to LPP is being asserted and relied upon.*

111. Section 41 of the AML/CTF Act indicates that an LPP form is only required to be provided to AUSTRAC where the reporting entity reasonably believes that some (but not all) of the information required to be contained in a relevant report is subject to LPP. AUSTRAC's guidance on LPP also indicates that an LPP form is only required where part of the information required to be produced is subject to LPP.

112. As emphasised in our August 2025 submission, the process detailed in the Draft Guidelines must clarify when an LPP Form is not required to be provided.[22] In particular, the Guidelines must specify that neither an SMR nor an LPP Form are required to be provided where all relevant information is privileged.

Categories of information

113. In our August 2025 Submission, we explained that including a list of information and documents that do not usually attract privilege in the Draft Guidelines is not especially helpful and that it would be preferable to instead provide a clear, detailed explanation of CLP, its exceptions, and circumstances in which it is waived.

114. We appreciate that the Draft Guidelines now include an explanation of CLP, its exceptions, and circumstances in which it is waived, but reiterate that the list of documents provided in paragraph 16 is not particularly helpful.

115. If it is to be retained, we recommend that:

- a note be included before the list explaining that the question of whether or not something is privileged is a matter of law that is determined by the courts;
- examples of information and documents that are usually privileged be included in the section '*What LPP covers'*; and
- paragraph 16.b. be rephrased to clarify that communications with lawyers by clients seeking advice on the legality of a particular course of action (i.e., whether it would amount to fraud) are *not* captured; we suggest that it would be more appropriate to refer simply to '*documents or communications made in furtherance of participation in a fraud'*; and

[22] Law Council of Australia, 2025 Submission, [100]. [9], [19].

- paragraphs c, d, f, g, h, l, j, k, l, n, o, s and t be removed as the documents referenced are not unequivocal examples and may lead to misunderstandings about the scope of privilege.

Timeframes

AUSTRAC timeframes—paragraph 33

116. In our August 2025 submission, we noted with concern that the prior version of the Draft Guidelines did not specify a time-period within which AUSTRAC may challenge a CLP claim or a timeframe for seeking more information in relation to a claim.[23]

117. We explained that the provision of defined, reasonable timeframes in the final Guidelines was critical to both provide certainty to claimants regarding the status of their claim, and to avoid the potentially insurmountable difficulties that may arise if a lengthy period elapses between the making of a claim and AUSTRAC's action. We explained that relevant documents or information may be lost or destroyed or may no longer be available if AUSTRAC were to challenge a claim months or years later. This is a particular risk in circumstances where a claim is made by a third-party legal practitioner on behalf of a client. This is because legal professional obligations and ethical duties will require them to cease acting for the client after submitting an SMR,[24] which in turn necessitates the return of the former client's documents to them or their new legal advisor. This means that the practitioner may no longer have access to the information required to satisfy AUSTRAC and will be unable to obtain instructions or access further information that may be required to substantiate a claim. For these reasons, we expressed the view that a separate claim process was needed for Third-Party Claimants, and that this process—and the process for Direct Claimants—should specify a defined, reasonable period within which AUSTRAC may challenge a CLP assertion or seek further information.

118. Disappointingly, this new version of the Draft Guidelines does not specify timeframes within which AUSTRAC is to assess a claim, request further information, or indicate whether they intend to challenge a claim. Instead, paragraph 33 states:

> *Any assessment [of a claim], if undertaken, may not occur until the underlying report or material obtained under the notice is subject to analysis, which may be some time later. A lack of assessment or challenge does not indicate acceptance of the claim*' (emphasis added).

119. For the reasons outlined above, this position will create significant, and potentially insurmountable, difficulties for Third-Party Claimants, and may undermine the efficacy of the process. This, in turn, underscores the inadvisability of attempting to create a single, universal process applicable to both Direct Claimants and Third-Party Claimants.

120. We reiterate our recommendation that the Draft Guidelines include a tailored CLP claim process for Third-Party Claimants that accommodates their unique circumstances. This process must specify a defined, reasonable timeframe within which AUSTRAC may challenge a CLP claim or a timeframe for seeking more

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[23] Law Council of Australia, 2025 Submission, [24].
[24] Australian Solicitors Conduct Rules, r 13.

information, and must accommodate circumstances involving Third-Party Claimants who are legal professionals asserting privilege on behalf of a client, who will need to cease acting in the matter in the very near future and who thus may not have access to relevant information and documents that AUSTRAC may require.

121. We also recommend that the process for Direct Claimants should also specify a defined, reasonable timeframe within which AUSTRAC may challenge a CLP claim or a timeframe for seeking more information.

For claimants—paragraph 23

122. We refer to paragraph 23.b., which provides that '*If AUSTRAC decides more information is needed to support an LPP claim, it will … specify a timeframe for the claimant to provide the information and form*'; and paragraph 28.b., which provides that '*LPP claimants are to … respond promptly and accurately if AUSTRAC asks you for information or clarification about something*'.

123. Responding to such requests may involve timely manual work which, for larger productions, will involve material cost and expense. We suggest that the Draft Guidelines specify that any timeframes within which a claimant is required to provide information to AUSTRAC be '*reasonable'* in all the circumstances. It could also be helpful to specify that AUSTRAC will work with reporting entities to try and limit the volume of documents sought where appropriate and possible.

LPP Form timeframe—paragraph 49

124. Paragraph 49 requires reporting entities asserting a CLP claim '*over material that has been forensically copied and held in a privileged material container'* to complete an LPP form to particularise their claim which '*is to be completed within 14 days of asserting the LPP claim'.*

125. We are concerned that 14 days may be unrealistic and unworkable for many Third-Party Claimants, particularly sole practitioners, small legal practices, regional practices, and barristers—especially where the circumstances involve a warrant executed at the practitioner's premises and/or a substantial volume of material, or if the practitioner wishes to obtain independent advice. We recommend that consideration be given to granting reporting entities more time to complete the form.

Access powers

Where the law firm co-operates with the monitoring warrant or consents to access—Paragraph 43

126. Apart from the issue discussed in paragraphs 38–47 above, we support the creation of a process specific to the exercise of access powers at law firm premises.

127. In general, we support the process described in paragraph 43, save for the following:

- paragraph 43.h should be amended to be clarify that the description accompanying the CLP Schedule should be only very general in nature to avoid an implied waiver of CLP.

128. We further recommend that the process described in paragraph 43 should be expanded to include additional elements, which will vary depending on whether the powers are being exercised by consent, or pursuant to a warrant.

129. Where powers are being exercised by consent (where consent is ethically available) in circumstances where no monitoring warrant has been obtained, the process in paragraph 43 should include the following additional points:

- authorised officers should only seek to access law firm premises during normal working hours;
- the team executing the powers should be kept to the lowest number of persons reasonably necessary;
- authorised officers must inform the reporting entity that they may refuse consent, that consent must be voluntary, and can be limited and/or withdrawn (section 152);
- authorised officers must inform the reporting entity that AUSTRAC authorised officers are required to leave the premises if the occupier asks them to leave (section 147(3));
- the reporting entity should be offered the opportunity to obtain legal advice prior to deciding whether to consent or not;
- AUSTRAC should not exercise their access powers until the law firm has been given a reasonable opportunity to claim CLP;
- authorised officers must explain to the reporting entity the nature of the powers they intend to, or may, exercise under sections 148 and 150(1) of the AML/CTF Act if they are permitted to access the premises;
- authorised officers must explain to the reporting entity that they may ask the reporting entity to answer questions or produce documents, but that the reporting entity is not required to answer any questions, or produce any documents, in accordance with section 150(1);
- authorised officers must explain to the reporting entity the effect of section 149 (about tampering or interfering with things secured in the exercise of monitoring powers);
- authorised officers must explain to the reporting entity the effect of section 156, (about compensation for damage to electronic equipment); and
- the reporting entity may take copies of any documents provided to AUSTRAC before they are sealed.

130. Where powers are being exercised pursuant to a monitoring warrant, we recommend that the Guidelines specify that the process in paragraph 43 applies, supplemented by the following additional points:

- authorised officers should endeavour to access law firm premises during normal working hours where possible;
- the team executing the powers should be kept to the lowest number of persons reasonably necessary;
- authorised officers must announce themselves prior to entry under section 153;
- authorised officers must explain the purpose of the search, their powers under sections 148 and 150 of the AML/CTF Act, the effect of section 149 of the AML/CTF Act, and the reporting entity's obligations under section 150

- authorised officers must explain the occupier's rights and responsibilities under sections 157 and 158, and the effect of section 156, compensation for damage to electronic equipment;
- AUSTRAC should not exercise their access powers until the law firm has been given a reasonable opportunity to claim CLP;
- if no solicitor is present, if practicable, the premises or part thereof should be sealed and execution of the access powers deferred for a period which the AUSTRAC authorised officer, in their discretion, considers reasonable in all the circumstances to enable the principal or the responsible solicitor to attend or to enable arrangements for another suitable person to attend to supervise; and
- the reporting entity may take copies of any documents provided to AUSTRAC before they are sealed.

Safe custody of documents—Paragraphs 43–44

131. In relation to the process outlined in paragraphs 43–44, the Draft Guidelines specify that the sealed privileged material container is to be stored by a custodian agreed between AUSTRAC and the law practice.

132. However, this is not specified in relation to the process outlined in paragraphs 45–49, which applies to claims procedures for monitoring warrants being executed on non-law firm premises; instead, paragraph 46 states that:

> *All copies of records identified under paragraph 45 c and d above will, under the supervision of the lead AUSTRAC authorised officer, be placed by reporting entity in a container which shall then be sealed ('privileged material container').*

133. If the privileged material container is also to be stored by a custodian in the context of this procedure, we recommend that this be specified.

134. We also query whether the Draft Guidelines should allow claimants to keep safe possession of disputed material themselves, which we would support. Many law practices have license and services agreements with their clients which require the practice to notify the clients if their confidential information is to be stored by a third party, and it is unclear how these obligations would interact with the tipping-off provisions.

135. We are also concerned about the potential risk of a data breach in the event that documents are held by a custodian, and would like to know what, if any, obligations AUSTRAC will require of third-party custodians to protect the disputed material.

Identity of the custodian—paragraph 45.j

136. We suggest consideration be given to including a paragraph identifying a tie-breaker custodian that will be appointed in the event that no agreement can be reached. We would welcome the opportunity to discuss potential options for such a custodian with you.

Technical comments

Limitations on LPP

Paragraph 15

137. We recommend inserting a reference to an appropriate authority in support of the claim made in paragraph 15: for example, *AWB Limited v Honourable Terence Rhoderic Hudson Cole (No 5) (with Corrigendum dated 25 October 2006)* (2006) 155 FCR 304, [210]–[219].

Paragraphs 16–19

138. We recommend including references to supporting authorities for the descriptions of CLP outlined in paragraphs 16–19.

What to expect from AUSTRAC

Paragraph 22

139. Paragraph 22 provides that:

> *22. AUSTRAC will consider claims for LPP against supporting material and decide whether to:*
>
> *a. ask for more information in support of the claim,*
>
> *b. challenge the claim, or*
>
> *c. negotiate any disputed issues with the claimant*

140. We suggest including an additional option: '*take no action*'.

What to expect from AUSTRAC

Paragraph 25.b

141. We recommend that paragraph 25.b be amended to specify that the decision being contemplated is '*a decision to review or challenge an LPP claim*'.

How to engage with AUSTRAC

Paragraph 28.a

142. Paragraph 28.a provides that

> *28. To resolve disagreements before they become more formal disputes, LPP claimants are to:*
>
> *a. give AUSTRAC all relevant information so it can make correct and timely decisions*

143. This should be amended to include the words '*that is not privileged*' after the words '*all relevant information*'.

Paragraph 28.d

144. We suggest that paragraph 28.d. be amended to clarify that alternative information is only to be provided to AUSTRAC where it is not subject to privilege and the claimant considers the information will assist.

Reporting and compulsory notices

Paragraph 34.c

145. Paragraph 34.c. provides that, in addition to the category of CLP claimed, the person seeking to claim privilege may also be asked to provide '*the basis for which the privilege is claimed'*. We would be grateful if examples could be provided to clarify the type of information this question is intended to capture.

Paragraph 34.d

146. We recommend that paragraph 34.d be amended to include the words '*known to the person being examined*' after the opening words '*the name of all persons …*', for clarity.

Paragraph 43.e

147. We query whether the word '*copies'* should be '*copy'*, and note that there appears to be a '*to'* missing between the words '*in a manner that is not'* and *'be examined'*.

Paragraph 44.h

148. We suggest that the words '*will be prepared by the AUSTRAC authorised officers'* can be deleted.

AUSTRAC's access powers

Paragraph 51

149. Paragraph 51 states that '*whether LPP applies is often a question of law'*, which we recommend amending to remove the word '*often'*.

Court proceedings as avenue of last resort

Paragraph 58

150. Paragraph 58 appears to include a minor typographical error: the inclusion of the word '*should'* after '*no agreement found'*.

About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its constituent bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice, and general improvement of the law.

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- the Australian Capital Territory Bar Association;
- the Law Society of the Australian Capital Territory;
- the New South Wales Bar Association;
- the Law Society of New South Wales;
- the Northern Territory Bar Association;
- the Law Society Northern Territory;
- the Bar Association of Queensland;
- the Queensland Law Society
- the South Australian Bar Association;
- the Law Society of South Australia;
- the Tasmanian Bar;
- the Law Society of Tasmania;
- the Victorian Bar Incorporated;
- the Law Institute of Victoria;
- the Western Australian Bar Association;
- the Law Society of Western Australia; and
- Law Firms Australia.

Through these bodies, the Law Council represents more than 110,000 Australian lawyers.

The Law Council is governed by a board of 23 Directors: one from each of the constituent bodies, and six Executive members elected by Directors. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President. In 2026, the Law Council Executive comprises:

- Ms Tania Wolff, President
- Ms Elizabeth Shearer, President-elect
- Mr Lachlan Molesworth, Treasurer
- Ms Jennifer Ball, Executive Member
- Mr Justin Stewart-Rattray, Executive Member
- Mr Ante Golem, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple.

The Law Council's Secretariat is based in Canberra. Its website is www.lawcouncil.au.

Law Council
OF AUSTRALIA

Draft AML/CTF Legal Professional Privilege Guidelines and Forms

Department of Home Affairs

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- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 107,000 Australian lawyers.

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The members of the Law Council Executive for 2025 are:

- Ms Juliana Warner, President
- Ms Tania Wolff, President-elect
- Ms Elizabeth Shearer, Treasurer
- Mr Lachlan Molesworth, Executive Member
- Mr Justin Stewart-Rattray, Executive Member
- Mr Ante Golem, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

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- Queensland Law Society
- Law Society of South Australia
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Law Firms Australia

The Law Council is grateful to all those who contributed for their assistance in preparing this submission.

Executive summary

Comments on the Draft LPP Guidelines

1. We support the development of Draft Guidelines under section 242A. Although we have concerns regarding their content, we acknowledge the significant effort that has gone into preparing the Draft Guidelines and the constraints within which the Department is working.

Concerns with the proposed process

2. Having carefully considered the Draft Guidelines and, in particular, how they will apply in circumstances involving third parties asserting privilege on another's behalf (hereafter, '**third party claimants**'), we have formed the view that the processes proposed are untenable—at least insofar as they are proposed to apply third-party claimants.

3. Our concerns stem from the fact that they seek to establish a universal process that would apply to both direct claimants and third-party claimants, which results in a manifestly unfair and unworkable process when applied to the context of third-party claimants. This is because the circumstances of privilege holders and third-party claimants are very different, particularly in relation to identification of privileged information, the capacity to engage in dispute resolution processes, and the bearing of costs (both in relation to making a claim and, if necessary, engaging in dispute resolution). Of particular concern, third-party claimants are not well positioned to engage in a process like that established in the Draft LPP Guidelines owing to the various secrecy provisions in the AML Act, which will prevent third parties from accessing all relevant information and/or seeking instructions. Further, they cannot consent to disclosure or agree to any form of negotiated disclosure owing to their obligation to assert privilege in lieu of client instructions. We thus consider that specific guidance needs to be created for claimants asserting privilege on their own behalf (**direct claimants**), and for third party claimants.

4. Accordingly, it is our firm view that specific guidelines need to be created for third-party claimants that articulate a tailored process applicable to circumstances involving third-party claimants. In particular, such guidelines must adequately accommodate circumstances in which a third-party is prohibited from obtaining information regarding the substance of a CLP claim from the privilege holder.

5. In recommending that specific guidelines be created for third-party claimants, we are not necessarily calling for the creation of two sets of guidelines—though this is an option. It could equally be achieved by creating a single set of LPP Guidelines with discrete sections that outline processes applicable to direct claimants, and processes applicable to third-party claimants.

6. This submission proceeds to offer comments on the content of the Draft LPP Guidelines on the assumption that tailored guidelines will be made for claimants asserting privilege on their own behalf *and* for third-party claimants, and we make recommendations regarding the content of specific guidelines for claimants asserting privilege on their own behalf (**Direct Claimant LPP Guidelines**), and for third-party claimants (**Third-Party Claimant LPP Guidelines**).

Content of guidelines—Direct Claimant LPP Guidelines

General comments

7. **Timing**: We note the ongoing and highly relevant joint review of the use of legal privilege in Commonwealth investigations, being conducted by the Attorney General's Department and Treasury. It may be prudent to wait until the Joint Review is completed before proceeding with the development of the Draft LPP Guidelines, although it is equally very important that they be finalised well in advance of the commencement of the AML Act. We thus suggest that serious consideration be given to delaying the commencement of the obligations in the AML Act relevant to CLP until 1 July 2027.

8. **Underlying assumption:** The Draft Guidelines appear to be premised on an assumption that CLP is being routinely abused and that legal professionals advising clients about CLP claims are engaging in improper behaviour in relation to such claims, which not supported by evidence. We recommend that that the Direct Claimant LPP Guidelines be carefully reviewed and redesigned to produce a process that appropriately manages the tension between ensuring the efficacy of relevant AUSTRAC powers and ensuring that CLP is afforded strong protection. In particular, we recommend that the paragraph under the heading '*Procedure for information provided to AUSTRAC*' on page 3 be amended for clarity and accuracy, and to limit the extent to which the paragraph implies that AUSTRAC is asserting that legally incorrect CLP claims will be deliberately made.

9. **Clarity:** The Direct Claimant LPP Guidelines need to clarify the following matters:

- **LLP Forms**: clarity must be provided on when an LPP Form is **not** required to be provided. In particular, they must specify that neither an SMR nor an LPP Form are required to be provided where all relevant information is privileged.
- **Section 242(2):** a clear description of the scope of section 242(2) must be provided; in particular, it needs to be explained that it does not operate to prevent a waiver of CLP in describing a document subject to a CLP claim irrespective of the level of detail and information in the description.
- **Procedure where a warrant is issued**: the sub-section on 'Procedure where a warrant is issued' should be amended to clarify that the process also applies where access to premises is given with the occupier's consent.

10. **Recognition of professional and ethical obligations:** The Direct Claimant LPP Guidelines should include a statement recognising legal professionals' professional and ethical obligations, to the following effect:

> *We recognise and expect that legal practitioners must comply with their ethical duties and professional obligations to maintain client privilege and confidential information. Importantly, we do not expect legal practitioners to breach their ethical and professional obligations if a conflict arises between them and the recommendations outlined in this Protocol.*

Comments regarding the claim assessment process

11. The Direct Claimant LPP Guidelines must ensure that any CLP process proposed does not risk undermining CLP, but rather, provides it strong protection. This means, at a minimum, they must not establish a process that would have AUSTRAC seeking to determine, or assert that it has determined, CLP claims. It also means that the nature and volume of information requested to be provided in support of a claim should be reduced.

12. **Comments regarding categories of document that do not attract privilege**: The Direct Claimant LPP Guidelines should provide a clear, detailed explanation of CLP, its exceptions, and circumstances in which it is waived, to contextualise the list of documents that do not attract privilege—including a list of documents that do usually attract privilege.

Comments regarding the proposed dispute resolution process

13. **Timeframe**: The Direct Claimant LPP Guidelines must specify the time-period within which AUSTRAC may challenge a CLP claim, and a timeframe for seeking more information should also be specified.

14. **AUSTRAC declaration and providing documents to AUSTRAC**: It is fundamentally inappropriate to propose that AUSTRAC be empowered to issue privilege declarations, and for the guidelines to advise claimants to hand documents over to AUSTRAC. AUSTRAC cannot be empowered to issue such declarations, and if a process is to be created whereby CLP documents are to be sealed and provided to a third party to the dispute, they should be provided to a court.

15. **Informal resolution:** Direct Claimant LPP Guidelines should specify that informal resolution may not be the optimum outcome in all instances because the best outcome will vary depending on the circumstances. For example, it could be amended to read: '*[t]he informal resolution of disputes regarding LPP is often preferable'*.

16. **Arbitration**: We do not agree that arbitration should be proposed as the preferred process for engaging with reporting entities over other ADR methods.

Content of guidelines—Third-Party Claimant LPP Guidelines

General comments

17. **Timing**: It may be prudent to wait until the Joint Review is completed before proceeding to develop Third-Party Claimant LPP Guidelines; we recommend that that consideration be given to delaying the commencement of the obligations in the AML Act relevant to CLP until 1 July 2027.

18. **Recognition of professional and ethical obligations:** The Third-Party Claimant LPP Guidelines should include a statement recognising legal professionals professional and ethical obligations, to the following effect:

> *We recognise and expect that legal practitioners must comply with their ethical duties and professional obligations to maintain client privilege and confidential information. Importantly, we do not expect legal practitioners to breach their ethical and professional obligations if a conflict arises between them and the recommendations outlined in this Protocol.*

19. In addition, we further recommend that the Third-Party Claimant LPP Guidelines:

- produce a process that appropriately manages the tension between ensuring the efficacy of relevant AUSTRAC powers, and ensuring that CLP is afforded strong protection, and not establish any processes that pose a risk to CLP, and should not solicit information that risks CLP being inadvertently waived;
- clarify when an LPP Form is required and when it is *not* required;
- clarify the operation of section 242(2) of the AML Act; and
- provide that procedures applicable to circumstances where a warrant is issued also apply where access to premises is given with the occupier's consent.

Comments regarding the claim assessment process

20. **General process**: Any claim assessment process outlined in Third-Party Claimant LPP Guidelines must not undermine or compromise CLP, but rather, should ensure that CLP is afforded *stronger* protection that which currently exists under the AML Act. It must not establish a process that would have AUSTRAC seeking to determine, or assert that it has determined, CLP claims. Further, the nature and volume of information requested to be provided in support of a claim should be reduced.

21. **Categories of document that do not attract privilege:** If such a list is included in Third-Party Claimant LPP Guidelines, a clear, detailed explanation of CLP, its exceptions, and circumstances in which it is waived, also should be provided, along with a list of documents that *do* usually attract privilege should also provided. Further, items d., f., k, l, and m. need to be removed from the list.

Comments regarding dispute resolution process

22. **General process**: Any dispute resolution process established by Third-Party Claimant LPP Guidelines must accommodate circumstances involving third-party claimants where the tipping off provisions. If AUSTRAC intends to challenge a privilege claim made by a third-party claimant (including solicitors), it should engage with the privilege owner directly. If that is not acceptable to AUSTRAC, AUSTRAC should commence proceedings in a court.

23. **Costs**: Third-Party Claimant LPP Guidelines should specify that the 'loser pays' principle will not apply in circumstances where CLP is being claimed by a legal practitioner on behalf of a client, where their capacity to make enquiries regarding the status of privilege is limited by the application of the tipping off provisions.

24. **Timeframe**: A timeframe for the making of a challenge by AUSTRAC in the context of third-party claimants needs to be specified, as should a timeframe for seeking more information.

Comments on the Draft Forms

25. The nature and volume of information requested in the schedules for the Draft Forms is unreasonable, unduly onerous, and poses an unacceptable risk to CLP. The Draft Forms must be reviewed to ensure they are practical and impose a proportionate administrative burden on reporting entities, but most importantly, that they are protective of CLP. They must not solicit any information that risks material covered by CLP being inadvertently disclosed, and they should encourage people filling them out on their own behalf to seek legal advice.

Sheet 1—Attestation

26. We recommend that the attestation be amended to reflect that the nature of communications should be determined in accordance with the law of LPP not the Draft Guidelines, as should the review and determination of the status of each communication. Further, it should be tailored to accommodate the fact that it will likely be completed by a practitioner asserting privilege on behalf of their client.

27. We thus recommend that the bullet-points be amended as follows:

> *By making this claim, you confirm that you reasonably believe that the information or document is subject to legal professional privilege, and that:*

- *having regard to the fact that you have not been able to obtain instructions from your client/former client, you have endeavoured to consider the nature of the communications and endeavoured to complete this Form in accordance with the law of LPP; and*
- *having regard to the fact that you have not been able to obtain instructions from your client/former client, you have endeavoured to review and determine the status of each communication in accordance with the law of LPP, including whether –to the extent known—privilege has been waived.*

Sheet 2—Nature of the information being requested

28. We do not object to the inclusion of column a. 'Name of privilege holder' and column e. 'dominant purpose for which the communication was made'.

29. However, we strenuously object to columns f and g, which respectively require reporting entities to provide information on 'the legal issue being advised upon for which the advice is being sought…' and 'if the communication is written, the title or subject line of the communication…' because they may require information to be provided that could disclose material protected by CLP.

30. We also object to columns b. 'date the document was prepared or communication made', column c. 'form of communication', and column h. 'identity and role of each person between whom the document or communication is made' because the provision of such unnecessary details will be resource intensive.

Sheet 3—Identity and declaration

Declaration

31. Because the Draft Forms may need to be completed by a legal practitioner without instructions from their client, we recommend modifying the declaration to include words to the effect: '*the information contained in this LPP form is true and correct to the best of my knowledge and belief …having regard to the fact that I have not been able to obtain instructions from my client/former client*'.

Consultation questions

Question 1—Which kinds of claimants will require more tailored or lenient expectations in terms of standard of claim?

32. The following kinds of Tranche 2 reporting entities should be afforded special accommodations in the form of tailored and reduced requirements in relation to the 'Particulars' section of the Draft Forms:

    - sole practitioners and small legal practices—particularly those in rural, regional, and remote areas;
    - barristers;
    - lay people and reporting entities responding on their own behalf; and
    - legal practitioners making claims on behalf of clients/former clients who cannot be contacted.

Question 2—What kinds of reasonable concessions would be most valuable in reducing administrative burden on claimants?

33. We suggest the Department consider the following specific reasonable concessions:

    - tailored/limited reviews;

- affording additional time:
- accepting provisional claims in urgent matters;
- allowing batch descriptions:
- agreeing upon review methodology; and
- allowing existing documents (including in-house LPP logs or privilege registers) to be provided in lieu of the LPP Form.

Question 3—Does industry have preferred ADR approaches and how do these preferences change under certain circumstances?

34. In the context of direct claimants, we support a tiered approach to dispute resolution in wherein disputes are to be resolved informally in the first instance. If this fails, we support ADR *in appropriate circumstances*—namely, where the claimant is capable of engaging in dispute resolution (i.e., they are asserting privilege on their own behalf and the tipping off provisions do not apply); they are made fully aware of their options (i.e., informed that they may proceed via ADR (including the range of methods) or directly to court for judicial resolution; and they consent. If ADR is not available (because it is inappropriate), not engaged in, or if it fails, disputes will proceed for judicial determination.

35. In the context of third-party claimants, we support the adoption of a tiered approach to dispute resolution in Third-Party Claimant LPP Guidelines —subject to the caveat that ADR will not be an available approach in circumstances where the tipping off provisions apply—wherein disputes are to be resolved informally in the first instance. If this fails, ADR may be available if, and only if, the claimant is capable of engaging in dispute resolution (i.e., the tipping off provisions do not apply); they are made fully aware of their options; and they consent. If ADR is not available (because it is inappropriate), not engaged in, or if it fails, disputes will proceed for judicial determination.

Introduction

36. The Law Council welcomes the opportunity to provide this submission to the Department of Home Affairs (**Department**) regarding its consultation on Draft Anti-Money Laundering and Counter-Terrorism Financing Legal Professional Privilege Legal Professional Privilege (**LPP**) Guidelines and Forms (together, the **Draft Guidelines**).

37. The consultation comprises the following three documents:

- Draft LPP Guidelines;
- Draft LPP Reporting Form (Reporting Obligations); and
- Draft Legal Professional Privilege Reporting Form (Responding to Notices).

38. The Draft LPP Guidelines detail proposed arrangements for asserting privilege in relation to documents and/or information sought by the Australian Transaction Reports and Analysis Centre (**AUSTRAC**) under its information gathering powers in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth). They also specify the proposed process by which AUSTRAC will assess privilege claims, and the procedure that will apply when AUSTRAC wishes to challenge a claim.

39. We understand that they are intended to inform the development of a draft notifiable instrument to be made under new section 242A of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), and that further consultation on the draft instrument will occur in late 2025. The timeframe for the making of the final notifiable instrument is not yet clear.

40. This submission first provides comments on the Draft LPP Guidelines, before commenting on the Draft LPP Reporting form (Reporting Obligations), and the Draft LPP Reporting form (Responding to Notices). Finally, it responds to the consultation's consultation questions.

41. For ease of reference, in this submission we refer to:

- the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth) and the *Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2024* (Cth) as the **AML Act**;
- the Draft LPP Reporting form (Reporting Obligations) and Draft LPP Reporting form (Responding to Notices) as, together, the **Draft Forms**; and
- the Second Exposure Draft Anti-Money Laundering and Counter-Terrorism Financing Rules 2024 as the **Draft Rules**.

42. Finally, we note that it is the Law Council's preference to use the term 'client legal privilege' (**CLP**), rather than LPP, when discussing issues relating to this species of legal privilege. We do so to emphasise that the relevant privilege belongs to the *client*, not the legal practitioner, and by extension, that privileged communications may only be disclosed by a practitioner in very limited circumstances. Accordingly, in this submission we use the term CLP to refer to the privilege that the Department refers to as LPP in the Draft Guidelines.

Legal framework

43. The AML Act affords AUSTRAC extensive information gathering powers (see, e.g., sections 26Q, 49, 49B, 50, 75N, 76Q, 150, 161, 162, 167, 172A, 202) and imposes obligations on reporting entities to report certain information to AUSTRAC (see, e.g., in relation to suspicious matters under section 41, and in relation to other matters

under sections 43, 45, 47, 53, 54). There are also secrecy provisions in section 59A and sections 120—134 of Part 11. Notably, section 123, *Offence of tipping off,* makes it an offence for a person to disclose information required to be provided under certain sections—including section 41, 49, and 49B—or to disclose to another person that the information has been provided. In this way, the AML Act establishes a legal framework that will interact with information subject to CLP.

44. Accordingly, the AML Act includes provisions regulating how CLP will be dealt with in the context of the AML Regime. In the context of the newly amended legal framework, provisions of particular importance are new sections 242 and 242A, which will take effect on 1 July 2026.

45. New section 242, *Legal professional privilege*, affords explicit protection to CLP in the context of the AML Regime, providing that:

> *(1) Nothing in this Act affects the right of a person to refuse to give information (including by answering a question) or produce a document if:*
>
> > *(a) the information would be privileged from being given on the ground of legal professional privilege; or*
> >
> > *(b) the document would be privileged from being produced on the ground of legal professional privilege.*
>
> *(2) The fact that a person has provided a description of information or documents that may be or are privileged from being given or produced on the ground of legal professional privilege does not, of itself, amount to a waiver of the privilege.*

46. New section 242A, *Guidelines in relation to legal professional privilege*, empowers the Minister to, by notifiable instrument, make guidelines in relation to making or dealing with claims or assertions of LPP in relation to information or documents required to be given under or for the purposes of the AML Act. It provides that such guidelines may deal with arrangements for making or dealing with claims or assertions of LPP in relation to the exercise of other powers under the AML Act, including the use of LPP forms, and facilitating the resolution of disputes in relation to LPP.

47. These new sections were introduced by the *Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2024* (Cth) to replace the prior version of section 242, which very simply provided that '*This Act does not affect the law relating to legal professional privilege*'.

48. The purpose of these new provisions is explained in the Explanatory Memorandum to the Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024 (Cth) (**Explanatory Memorandum**) as follows:[1]

> *[t]hese amendments* ***preserve the core intention of the doctrine of [LPP]*** *… in both common law and statute, and ensure that regulated entities who handle client information that is subject to [LPP] … can comply with their reporting and information disclosure obligations under the … Act.* [Emphasis added]

[1] Explanatory Memorandum, Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024 (Cth) 4 [17] ('**Explanatory Memorandum**').

49. As to new section 242, the Explanatory Memorandum specifically explains that:[2]

> *Existing section 242 already provides that the AML/CTF Act does not affect the law relating to [LPP].* ***The Bill provides stronger protections for the disclosure of information or documents subject to [LPP] once legal practitioners are brought into the AML/CTF regime****, in response to stakeholder feedback.* [Emphasis added]

50. In relation to new section 242A, it is explained that:[3]

> *It is intended that* ***the guidelines on [LPP] would recommend an approach which will best assist AUSTRAC in deciding whether to accept, review or challenge a [LPP] claim, processes to be undertaken relating to privilege when warrants are executed, and dispute resolution processes to review or challenge claims of privilege****. The guidelines will contain information relevant to legal practitioners and non-legal practitioners generally, and to all claims of privilege regardless of the business structure of the reporting entity. Noting that informal resolution of review or challenges of privilege is preferable to all parties involved, the guidelines will emphasise alternative dispute pathways, with the option of progressing disputes to court to be an avenue of last resort.* [Emphasis added]

[2] Explanatory Memorandum, 4, [16], 49 [171], 61 [241].
[3] Ibid, 98-99 [461].

Comments on the Draft LPP Guidelines

Preliminary comments

51. As a preliminary comment, we express support for the development of Draft Guidelines under section 242A. Although we have concerns regarding their content (which we elaborate on below), we acknowledge the significant effort that has gone into preparing the Draft Guidelines and recognise the constraints within which the Department is working.

Concerns with the proposed process

52. The Draft LPP Guidelines set out proposed provisions as to how a claim for CLP (**CLP claim**) is to be made and the claim assessment process (i.e., the process AUSTRAC will follow in deciding whether to accept, review, or challenge a CLP claim), and regarding dispute resolution.

53. Having carefully considered the Draft Guidelines and, in particular, how they will apply in circumstances involving third parties asserting privilege on another's behalf (hereafter, '**third party claimants**'), we have formed the view that the processes proposed (i.e., the CLP claim process, the claim assessment process, and the dispute resolution process) are untenable—at least insofar as they are proposed to apply third-party claimants.

54. Our concerns with the Draft LPP Guidelines stem from the fact that they seek to establish a universal process that would apply to both direct claimants and third-party claimants. For the reasons outlined below, we are of the view that this results in a manifestly unfair and unworkable process when applied to the context of third-party claimants that will result in substantial injustice. We thus consider that specific guidance needs to be created for claimants asserting privilege on their own behalf (**direct claimants**), and for third party claimants.

55. Our views, as outlined below, are influenced by specific consideration of the circumstances of legal practitioners who have been required to file a suspicious matter report (**SMR**). However, we note that other professionals could be third-party claimants—for example, accountants who have obtained a client's privileged documents (for example, for audit purposes). Further, similar considerations may arise in relation to other reporting obligations or information gathering powers.

Process needs to be tailored

56. As mentioned above, the Draft LPP Guidelines establish a process that will apply to all reporting entities (or other persons who are served with a notice). As such, they will apply to:

- privilege holders, i.e., reporting entities (or other persons) who are directly asserting, on their own behalf, the existence of CLP in relation to information required to be provided to AUSTRAC; and
- third-party claimants, i.e., reporting entities who are required to assert, on a another's (i.e., the privilege holder) behalf, the existence of CLP in relation to information required to be provided to AUSTRAC.

57. However, the circumstances of privilege holders and third-party claimants are not the same. Indeed, they are very different, particularly in relation to identification of privileged information, the capacity to engage in dispute resolution processes, and

the bearing of costs (both in relation to making a claim and, if necessary, engaging in dispute resolution).

58. Notably, privilege holders will have access to all relevant information regarding potentially privileged information, and by extension, regarding the viability or appropriateness of asserting privilege in relation to that information. Further, they (and likely, they alone) will have access to information relevant to the prospects of success of defending a challenged CLP claim. Privilege owners are also the only people who can decide if they are open to consenting to disclosure or not, or to negotiating a degree of disclosure. Accordingly, privilege holders are well positioned to engage in a process like that established in the Draft LPP Guidelines.

59. In stark contrast, third-party claimants are not well positioned to engage in a process like that established in the Draft LPP Guidelines—indeed, they are extremely poorly positioned to engage in such a process. Owing to the various secrecy provisions in the AML Act, third-party claimants will not be able to access to all relevant information regarding potentially privileged information, and by extension, the viability or appropriateness of asserting privilege in relation to that information, because they will not be able to seek instructions. In the case of legal practitioners, they will not have access to information relevant to the prospects of success of defending a challenged CLP claim—but will be forced to engage in it regardless, owing to their professional obligations and ethical duties. In the context of dispute resolution, third-party claimants cannot consent to disclosure or agree to any form of negotiated disclosure owing to their obligation to assert privilege in lieu of client instructions.

60. Specifically, the processes established by the Draft LPP Guidelines would require third-party claimants to:

- attempt to identify the dominant purpose of documents without instructions;
- assert privilege without instructions, and without full information as to relevant facts;
- engage in a dispute resolution process without instructions;
- bear the cost of making a privilege claim themselves without recourse to the client and without the ability to waive a claim or negotiate an outcome;
- bear the cost of engaging in a dispute resolution process without recourse to the client;
- bear exposure to an adverse cost order; and
- seek (and pay for) legal advice for themselves.

61. To illustrate the extent of the incompatibility of the Draft Guidelines with the circumstances of third-party claimants, we outline below in detail the application of the dispute resolution process in circumstances involving third-party claimants.

Illustration—proposed dispute resolution process

The process

62. Pages 5—7 of the Draft Guidelines, commencing under the sub-heading *'[p]rocedure for accepting or challenging LPP claims*' outlines the proposed dispute resolution process in relation to CLP claims.

63. In summary, where AUSTRAC is not satisfied after an LPP Form is submitted, it can choose to seek more information about the CLP claim and/or challenge it (noting that no timeframe is proposed for the making of a challenge, and that nothing is said in relation to a timing requirement for seeking more information). If AUSTRAC *'challenges or does not accept a claim of LPP'*, reporting entities may either withdraw the claim and provide the materials to AUSTRAC; engage in an alternative dispute resolution process; or seek a declaration of privilege from the court—or from AUSTRAC.

64. In relation to documents or information in relation to which a CLP claim has been made, it is proposed that claimants may choose to either provide the information to AUSTRAC (digitally or in a sealed envelope, as appropriate, marked as LPP and with a copy of the AUSTRAC notice attached), *or* they may withhold the information from AUSTRAC and keep it safely in their custody or control. If the information is provided to AUSTRAC, the Draft Guidelines state that '*at the conclusion of the matter those documents will generally be returned to the party …*'. The same options are proposed for third-party claimants, though it is specified that if a third-party is requested to (or, presumably, required to) relinquish the information or documents, they are required to give AUSTRAC reasonable notice of the request *prior* to relinquishing it.

65. The Draft Guidelines then propose that, if AUSTRAC notifies a reporting entity that they intend to challenge a CLP claim and the claim is not withdrawn, either party may initiate an ADR process. While AUSTRAC will first seek to informally resolve the matter, the Draft Guidelines will '*propose arbitration as the preferred [ADR] process'* for resolving disputes—though '*[o]ther ADR methods may be available based on the circumstances of the case'*. Arbitration is proposed to be preferred as *'[it] affords a less expensive, more expeditious avenue to resolution than court, whereby both parties negotiate a level of disclosure that is satisfactory to them, and legal professional privilege can be maintained'*.

66. Finally, if a resolution cannot be reached, *'[the] parties will still have the option to apply to the court to seek a decision*'.

Law Council concerns

67. In the usual course, where a legal practitioner is subject to an obligation to provide, or receives a request to produce, privileged documents or communications, they must seek their client's instructions as to whether they wish to assert privilege or whether they agree to a waiver. This is because CLP is a privilege owned by the client; legal practitioners have no right to waive privilege on the part of a client or former client without express instructions. Accordingly, if a solicitor cannot, or is unable to, contact their client, they are obliged to claim privilege without instructions.

68. The tipping off provisions will operate to prevent a solicitor who is required to submit an SMR in relation to a client from notifying the client and/or obtaining instructions regarding any privileged material. Because the solicitor cannot contact their client, they must assert privilege in lieu of instructions owing to their obligation to uphold the client's interest in maintaining privilege by submitting an LPP Form.

69. Accordingly, if AUSTRAC challenges a CLP claim made by a solicitor made on behalf of a client (or former client), the combined effect of the architecture of the AML Act and solicitors' professional obligations and ethical duties will demand that—at their own expense, and without being able to seek instructions from the client—they engage in a potentially protracted process with AUSTRAC in defence of a client's (or former client's) interest in maintaining privilege.

70. This is obviously completely unworkable for the following reasons.

71. First, solicitors, as third-party claimants, cannot sensibly or productively engage in dispute resolution regarding a privilege claim made on behalf of a client or former client in circumstances where they are prevented from obtaining instructions and/or making appropriate enquiries of the client, as they will lack the information needed to deal with the substance of any issues raised, which may be of fundamental significance to the merits of the claim. Consider, for example, the absurdity of a solicitor being required to defend an assertion of privilege via dispute resolution in circumstances where they cannot ask the privilege holder whether they would have agreed to a waiver, or indeed, whether the privilege has already been waived.

72. Secondly, the process is unworkable because it very likely will be futile: solicitors engaging in any process will not be able make any concession or reach any negotiated outcome as to disclosure as their obligation to defend privilege will be absolute. Accordingly, engaging in dispute resolution in these circumstances will only result in avoidable expense to both parties.

73. Thirdly, the process is unworkable because it is completely unreasonable to establish a dispute resolution process that would rely on solicitors defending the privilege of a former client in circumstances where they cannot obtain the information necessary to ascertain whether the claim is well-founded or not, without payment.

74. Fourthly, it is entirely conceivable that the solicitor may not be able to afford to engage in a dispute resolution process. What is supposed to happen then?

75. Fifthly, while legal practitioners have duties to protect CLP, that might not be the case with other third-party claimants—who also may not have the requisite training and expertise to be able to properly identify privileged material, or to understand the consequences of inappropriate disclosure. Creating circumstances in which a third-party claimant potentially lacking sufficient appreciation for, and/or knowledge of, CLP, is exposed to potential expense and administrative burden will inevitably result in CLP claims not being made and/or defended properly, which may result in inadvertent disclosure and a compromise to CLP.

76. It is therefore quite obvious that substantial injustice is likely to occur as a result of this process because the person who knows the most about the CLP—the holder of the CLP—will not know anything about the situation. It also needs to be borne in mind that the threshold for an SMR obligation is extremely low and the client may well have done nothing at all wrong.

Concluding comments

77. We trust that the above clearly illustrates the extent to which the processes outlined in the Draft LPP Guidelines are manifestly unfair and unworkable, at least insofar as it would apply to third-party claimants. We are also deeply concerned that, in this context, the process creates a serious risk that CLP will be inadvertently compromised.

78. Accordingly, it is our firm view that specific guidelines need to be created for third-party claimants that articulate a tailored LPP process applicable to circumstances involving third-party claimants. In particular, such guidelines must adequately accommodate circumstances in which a third-party is prohibited from obtaining information regarding the substance of a CLP claim from the privilege holder.

79. To be clear, in recommending that specific guidelines be created for third-party claimants, we are not necessarily calling for the creation of two sets of guidelines—though this is, of course, an option. Our essential concern is with ensuring that any LPP Guidelines created suitably accommodate the distinct circumstances of third-party claimants. This could equally be achieved by creating a single set of LPP Guidelines with discrete sections that outline processes applicable to direct claimants, and processes applicable to third-party claimants. Accordingly, for clarity, where we refer to 'tailored guidance' in the following sub-sections of this submission, we are not making specific recommendations as to the format of the guidance.

80. In the following section, proceeding on the assumption that tailored guidelines will be made for claimants asserting privilege on their own behalf *and* for third-party claimants, we make recommendations regarding the content of specific guidelines for claimants asserting privilege on their own behalf (**Direct Claimant LPP Guidelines**), and for third-party claimants (**Third-Party Claimant LPP Guidelines**).

Content of guidelines—Direct Claimant LPP Guidelines

General comments

Timing—the Joint Review

81. Before discussing our views on the content of Direct Claimant LPP Guidelines, we wish to raise the ongoing joint review of the use of legal privilege in Commonwealth investigations, being conducted by the Attorney General's Department and Treasury (**Joint Review**) in March 2025.

82. The Joint Review is highly relevant in terms of subject matter to the development of the Draft Guidelines, and will—once finalised—present options for reform to the use of CLP in the context of Commonwealth investigations, meaning that its final report will likely be relevant to the designing of CLP processes in the context of the AML Act.

83. It may thus be prudent to wait until the Joint Review is completed before proceeding with the development of the Draft Guidelines. At the same time, we recognise that is very important that the Draft Guidelines be finalised well in advance of the commencement of the AML Act to ensure that reporting entities have a reasonable opportunity to familiarise themselves with them before relevant obligations—and penalty provisions—come into force. Accordingly, we suggest that serious consideration be given to delaying the commencement of the obligations in the AML Act relevant to CLP until 1 July 2027.

Underlying assumption

84. Insofar as they apply to claimants asserting CLP on their own behalf, we submit that the Draft Guidelines appear to be premised on an assumption that CLP is being routinely abused and that legal professionals advising clients about it are engaging in improper behaviour in relation to it. For example, we refer to the following:

- the fourth item in the list on page three, which states that '[i]f AUSTRAC determines that *information is being withheld* or that a claim of LPP contains

insufficient detail, they may engage in further inquiries or commence alternative dispute resolution processes';

- on page four, the statement that 'The LPP guidelines will outline approaches that will not generally be accepted, for example … *making 'blanket claims' across bundles of unreviewed documents or entire individual documents consisting of both privileged and unprivileged information*, and using assumptions or pre-determined judgements to assess if LPP applies without regard to the merits of a claim in each circumstance';
- on page five, item 'I. Documents or communications made for or involving the participation in a fraud or an illegal or otherwise improper purpose' in the list of documents that 'do not usually attract privilege';
- also on page five, the statement that *'…making blanket or unmeritorious LPP claims could result in such claims being challenged by AUSTRAC, including in court'*; and
- the Draft Form's attestation, which requires individuals filling them out to attest that they have '*[c]onsidered the nature of the communications in accordance with the AGD's Guidelines on Legal Professional Privilege; and [r]eviewed and determined the status of each communication in accordance with the law of LPP and the AGD Guidelines, including whether you have waived privilege'*.

85. Any assertion that CLP is routinely abused by legal practitioners is not supported by evidence, as detailed in our submission to the Joint Review in March 2025 (available here). No pattern of systemic conduct within the legal profession of making improper CLP claims in order to frustrate Commonwealth investigations has been established, and thus allowing such an assumption to influence the drafting of the Draft Guidelines will only result in the production of a CLP process designed to address a problem that does not exist to the extent imagined, and which is thus unfit for purpose.

86. Direct Claimant LPP Guidelines should be designed to produce a process that appropriately manages the tension between ensuring the efficacy of relevant AUSTRAC powers and ensuring that CLP is afforded strong protection. The latter objective is critically important and cannot be overlooked in the development of the Draft Guidelines. As acknowledged in the Explanatory Memorandum, CLP is:[4]

> *… a fundamental principle of common law … that serves the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers. It enables a person to resist the giving of information or production of documents that would reveal the content of communications between a client and their lawyer for the dominant purpose of giving or obtaining legal advice or the provision of legal services.*

87. Legal practitioners have professional obligations and ethical duties to protect the confidentiality of their client's information, including privileged communications, from disclosure (subject to exceptions and to waiver), which also cannot be overlooked in the development of Direct Claimant LPP Guidelines (notwithstanding that they may have the effect of hindering or frustrating an AUSTRAC investigations).

88. We thus recommend that the Draft Guidelines in general be carefully reviewed and redesigned to produce, within Direct Claimant LPP Guidelines, a process that appropriately manages the tension between ensuring the efficacy of relevant AUSTRAC powers and ensuring that CLP is afforded strong protection. They must not establish any processes that pose a risk to CLP and should not solicit information that risks CLP being inadvertently waived.

[4] Explanatory Memorandum, 20 [49].

89. In particular, we recommend that the paragraph under the heading '*Procedure for information provided to AUSTRAC*' on page 3 be amended for clarity and accuracy, and to limit the extent to which the paragraph implies that AUSTRAC is asserting that legally incorrect CLP claims will be deliberately made, in the Direct Claimant LPP Guidelines. We suggest the following re-phrasing:

> *AGD proposes the following procedures where a person or a reporting entity is claiming LPP:*
>
> 1. *Assessment by the person or reporting entity of whether LPP applies (including obtaining their own legal advice if required) and, if so, whether the information should be withheld or redacted.*
>
> 2. *In relation to SMRs, if LPP applies to all the information that would otherwise be provided to AUSTRAC, the person or entity is not required to prepare or submit an LPP form to AUSTRAC. If LPP applies to only some information that would otherwise be provided to AUSTRAC, the person or entity must claim LPP applies using the approved LPP form within the reporting timeframes under the AML/CTF Act, or specified in an AUSTRAC notice (whichever is applicable), and is expected to use the claim process set out below.*
>
> 3. *Following the claim, if responses to AUSTRAC notices are insufficient, AUSTRAC may request further information.*
>
> 4. *If AUSTRAC ~~determines that information is being withheld or~~ considers that a claim of LPP contains insufficient detail, they may ~~engage in further inquiries~~ seek further clarification or commence alternative dispute resolution processes.*

Clarity

90. The clarity of the Draft Guidelines needs to be improved in relation to some important matters, detailed below.

LLP Forms

91. Section 242A(2)(2) states that the Draft Guidelines may deal with *'arrangements for making or dealing with claims or assertions of [LPP] in relation to the exercise of other powers under this Act, **including the use of LPP forms'**.*

92. While the Draft Guidelines do clarify when an LPP Form is required, no guidance is provided on when they are *not*. Indeed, nothing in the Draft Guidelines currently suggests that there are any circumstances in which an LPP Form is *not* required; on the contrary, on several occasions the Draft Guidelines refer to the requirement to provide an LPP form as if it applies universally:

- on page two, under the sub-heading '1. *AUSTRAC reporting and information disclosure obligations'*, paragraph five states that *'… material that attracts LPP does not have to be provided to AUSTRAC **where it is accompanied by an approved LPP form claiming the privilege'***;
- on page three, under the sub-heading 'Procedure for information provided to AUSTRAC', it is stated that '*If LPP applies to information that would otherwise be provided to AUSTRAC, **the person or entity must claim LPP using the approved LPP form** …'*;
- also on page three under the same sub-heading, it says: '*A LPP form will be … provided in lieu of any relevant information or document that may be subject to LPP*'; and

- on page four, under the sub-heading 'LPP claim process', it states *'[t]he approach outlined above is coupled with the **mandatory requirement to submit an approved LPP form'***. [Emphasis added]

93. This is of serious concern to the Law Council because AUSTRAC has previously advised that LPP Forms will not be required where all the relevant information required to be provided to AUSTRAC is subject to CLP. For example, page 144 of AUSTRAC's Draft Guidance, Batch II states that:

> *You can refuse to submit a SMR if you reasonably believe that all of the information about your suspicion is protected by [LPP]…. You are not required to give the AUSTRAC CEO a LPP form in this case.*
>
> *If you only reasonably believe that <u>some</u> of the information in a SMR is subject to LPP, and you intend to withhold this information, you must submit:*
>
> - *an LPP form to AUSTRAC on the information being withheld under LPP, and*
> - *a SMR containing the information that is not subject to LPP.*

94. The Direct Claimant LPP Guidelines <u>must</u> clarify the circumstances in which an LPP Form is *not* required to be provided. In particular, they must specify that neither an SMR nor an LPP Form are required to be provided where all relevant information is privileged. Clarity also needs to be provided on whether an LPP Form is, or is not, required to be provided in circumstances where all relevant information is privileged in the context of other reporting obligations and AUSTRAC's information gathering powers.

95. Though this may be beyond the purview of the Draft Guidelines, it is also imperative that clarity is provided on how reporting entities are to implement reporting obligations, and/or react in response to AUSTRAC information gathering powers, where all relevant information is privileged. While such clarity is available in relation to SMRs by section 41(2A), the AML Act does not clarify whether reporting entities are required to make other kinds of reports, or respond to AUSTRAC information gathering powers, where all relevant information is privileged.

<u>Section 242(2) of the AML Act</u>

96. The Draft Guidelines refer to section 242(2) of the AML Act, but do not provide a clear description of the scope of the section. The Direct Claimant LPP Guidelines need to do so; in particular, it needs to be explained that it does not operate to prevent a waiver of CLP in describing a document subject to a CLP claim regardless of the level of detail and information in the description. Without adequate detail on this subsection, references to it create a real risk that reporting entities may misunderstand this provision and form the mistaken view that they can voluntarily share privileged information about the document in the description, without a waiver risk (i.e., necessary to prevent inadvertent disclosure).

<u>Procedure where a warrant is issued</u>

97. In the Direct Claimant LPP Guidelines, we recommend that the sub-section on 'Procedure where a warrant is issued' clarify that the process also applies where access to premises is given with the occupier's consent.

Recognition of professional and ethical obligations

98. The Direct Claimant LPP Guidelines should include a statement recognising legal professionals professional and ethical obligations, to the following effect:

We recognise and expect that legal practitioners must comply with their ethical duties and professional obligations to maintain client privilege and confidential information. Importantly, we do not expect legal practitioners to breach their ethical and professional obligations if a conflict arises between them and the recommendations outlined in this Protocol.

99. This statement is adapted from the Australian Taxation Office's 'Compliance with formal notices—claiming legal professional privilege in response to formal notices Legal professional privilege (LPP) protocol'[5] in developing the Direct Claimant LPP Guidelines, though similar statements exist in other comparable Commonwealth agency LPP protocols.

Comments regarding the claim assessment process

100. The Draft Guidelines propose a CLP process where AUSTRAC will play a role reviewing and determining the validity of CLP claims.[6] Of most concern, we refer to the sub-section on page 6 'AUSTRAC considerations in assessing claims' which outlines the considerations and principles AUSTRAC will consider when assessing CLP claims. It states that:

> *It is proposed that AUSTRAC considerations [in assessing assertions of CLP] will align with Australian common law principles in determining whether information is subject to LPP, which requires a consideration of:*
>
> - *whether there is or was a legal adviser-client relationship*
> - *whether the communication was for the dominant purpose of giving or receiving legal advice, or for use in connection with actual or anticipated litigation*
> - *whether the advice given is independent, and*
> - *whether the advice given is confidential.*

101. By seeking to establish a CLP process in which AUSTRAC would assess CLP claims to determine whether information is subject to CLP or not with reference to common law principles, we are concerned that the Draft Guidelines pose a very serious, real risk to CLP. Specifically, by envisaging that AUSTRAC would assess CLP claims with reference to whether the information was made for the dominant purpose of giving or

[5] Australian Taxation Office, '*Compliance with formal notices – claiming legal professional privilege in response to formal notices Legal professional privilege (LPP) protocol*' (June 2022).

[6] For example:

- on page two, under the heading 'AUSTRAC reporting and information disclosure obligations', it states that '*AUSTRAC, as the AML/CTF regulator, requires full access to facts to determine what supervisory or enforcement action to take with respect to reporting entities' obligations under the AML/CTF Act. Part of that role is to assess LPP claims'*;
- on page four, under the sub-heading 'LPP claim process', it states that: '*AUSTRAC may narrow the scope of documents required for review or agree upon a streamlined methodology for the claimant to assess LPP documents'*;
- on page five, it states that *'[t]he LPP guidelines will outline how reporting entities should explain or particularise their LPP claims'*;
- on page five, it states that *'[p]roviding the level of detail outlined in the LPP form will allow AUSTRAC to understand the LPP claim and decide more quickly whether to accept, review or challenge a claim'*;
- On page six, it states *'[t]he LPP guidelines will outline the actions that AUSTRAC will take based on the outcome of claims'*;
- On page six, it states '*AUSTRAC may challenge any claims where the information provided suggests there may not be a genuine claim for LPP or where the claim has not been substantiated by the reporting entity*';
- On page seven, it states that '*AUSTRAC may request reporting entities to provide additional details in support of an LPP claim. For example, further details may be sought where reporting entities have not provided sufficient information for AUSTRAC to assess the LPP claim or where the information provided suggests that there may not be a genuine claim for LPP in the circumstances'*;

receiving legal advice or for use in connection with actual or anticipated litigation, whether it was independent, and whether it was confidential, would inevitably require reporting entities to provide a level of detail regarding privileged information that effectively discloses the substance of the privileged information.

102. We do not agree that the Minister has the power to create LPP Guidelines that would result in the disclosure of privileged information.

103. We say this because the power to make Draft Guidelines in section 242A is not unconstrained—its scope must be interpreted in accordance with its text and context, including surrounding provisions and the broader AML Act. This means it must be construed in light of section 242, which affords **explicit** protection to CLP. Further, it should be construed in accordance with the underlying purpose of the provisions, as explained in the Explanatory Memorandum:[7]

> *The policy intent of the [provisions] … is that the AML/CTF Act would not require the disclosure of information or a document as part of any reporting and information disclosure obligations where the reporting entity or notice recipient reasonably believes that the information or document is subject to legal professional privilege*.

104. In short, the power to make Draft Guidelines under section 242A cannot extend to empower the making of Draft Guidelines that create a process that undermines or compromises CLP but rather should ensure that CLP is afforded *stronger* protection that which currently exists under the AML Act.

105. Accordingly, the Direct Claimant LPP Guidelines must ensure that any CLP process proposed does not risk undermining CLP, but rather, provides it strong protection. This means, at a minimum, they must not establish a process that would have AUSTRAC seeking to determine, or assert that it has determined, CLP claims. It also means that the nature and volume of information requested to be provided in support of a claim should be drastically reduced, which we discuss further at paragraphs 140—142.

Comments regarding categories of document that do not attract privilege

106. Page 5 of the Draft LPP Guidelines sets out an extensive list of categories of documents '*which do not usually attract privilege…unless they are copies provided to a lawyer for the dominant purpose of receiving legal advice or use in litigation'*.

107. It would be much more helpful if, in the Direct Claimant LPP Guidelines, a clear, detailed explanation of CLP, its exceptions, and circumstances in which it is waived, is provided to contextualise the list. We also suggest that a list of documents that *do* usually attract privilege be provided.

Comments regarding the proposed dispute resolution process

108. We have several serious concerns about the proposed dispute resolution process outlined in the Draft Guidelines, namely:

- **timeframe**: the absence of a timeframe for the making of a challenge by AUSTRAC, and that lack of information regarding a timeframe for seeking more information;
- **AUSTRAC declaration**: the proposal to empower AUSTRAC to seek a declaration of privilege;

[7] Explanatory Memorandum, 90 [405].

- **providing documents to AUSTRAC:** the proposal to suggest that claimants may choose to provide privileged information to AUSTRAC (digitally or in a sealed envelope, as appropriate, marked as LPP and with a copy of the AUSTRAC notice attached);
- **informal resolution:** the statement that *'[i]nformal resolution is always the most desirable outcome [to a CLP dispute] …*'; and
- **arbitration:** the proposal that arbitration be the preferred ADR process.

Timeframe

109. We recommend that the Direct Claimant LPP Guidelines specify a timeframe for the making of a challenge by AUSTRAC, as it is critical that certainty is provided to reporting entities as to whether an assertion of CLP has been accepted or not. We also recommend that a timeframe for seeking more information should be specified.

AUSTRAC declaration and providing documents to AUSTRAC

110. It is fundamentally inappropriate to propose that AUSTRAC be empowered to issue privilege declarations, or for the Draft Guidelines to advise claimants to hand documents over to AUSTRAC—a regulatory investigatory agency. These aspects of the Draft Guidance should not feature in Direct Claimant LPP Guidelines. If a process is to be created whereby CLP documents are to be sealed and provided to a third party to the dispute in the Direct Claimant LPP Guidelines, they should be provided to a court.

111. We also have serious concern about the inclusion of the word 'generally' at in the sentence '*At the conclusion of the matter those documents will generally be returned to the party who provided them to AUSTRAC'*. We are not aware of any circumstances in which AUSTRAC would be permitted to retain sealed, privileged documents.

Informal resolution

112. The second paragraph under the ADR sub-heading on page seven states that *'[i]nformal resolution is always the most desirable outcome [to a CLP dispute]…*'.

113. This is a significant overstatement and may suggest that reporting entities are obliged to resolve disputes with AUSTRAC informally. There are many perfectly legitimate reasons why informal resolution of a dispute may not be a desirable outcome (yet alone *the* most desirable outcome) in a given situation for either or both parties; for example, for the sake of transparency in a matter of public interest, or where an important point of legal principle could be determined.

114. Accordingly, we recommend that the Direct Claimant LPP Guidelines make it clear that informal resolution may not be the optimum outcome in all instances because the best outcome will vary depending on the circumstances. We suggest, for example, that it could be amended to read: '*[t]he informal resolution of disputes regarding LPP is often preferable'*.

Arbitration

115. We do not agree that arbitration should be proposed as the preferred process for engaging with reporting entities over other ADR methods. There is no basis for such an assertion under the legislation, and it would be inappropriate in many circumstances—including, for example, where a solicitor is required to defend

privilege on behalf of a former client. In those circumstances, court proceedings would be the most appropriate avenue.

116. In any case, the proposal to prefer arbitration in preference to other forms of dispute resolution is not satisfactorily justified. Arbitration can be very expensive, and no clarity has been provided as to:

- how arbitrators would be paid for (discussed further in the following sub-section);
- how they would be chosen; and
- whether they would need to be legally qualified, given the complexity of the laws of evidence and the importance of LPP to the administration of justice and the rule of law.

Content of guidelines—Third-Party Claimant LPP Guidelines

General comments

Timing

117. As outlined above, it may be prudent to wait until the Joint Review is completed before proceeding to develop Third-Party Claimant LPP Guidelines, and thus we recommend that that consideration be given to delaying the commencement of the obligations in the AML Act relevant to CLP until 1 July 2027.

Recognition of professional and ethical obligations

118. The Third-Party Claimant LPP Guidelines should include a statement recognising legal professionals professional and ethical obligations, to the following effect:

> *We recognise and expect that legal practitioners must comply with their ethical duties and professional obligations to maintain client privilege and confidential information. Importantly, we do not expect legal practitioners to breach their ethical and professional obligations if a conflict arises between them and the recommendations outlined in this Protocol.*

119. As noted above, this statement is adapted from the Australian Taxation Office's 'Compliance with formal notices—claiming legal professional privilege in response to formal notices Legal professional privilege (LPP) protocol'.

Clarity and certainty

120. We further recommend that Third-Party Claimant LPP Guidelines :

- produce a process that appropriately manages the tension between ensuring the efficacy of relevant AUSTRAC powers, and ensuring that CLP is afforded strong protection, and not establish any processes that pose a risk to CLP, and should not solicit information that risks CLP being inadvertently waived;
- clarify when an LPP Form is required and when it is *not* required;
- clarify the operation of section 242(2) of the AML Act; and
- provide that procures applicable to circumstances where a warrant is issued also apply where access to premises is given with the occupier's consent.

Comments regarding the claim assessment process

121. As outlined above in paragraphs 98—103, any claim assessment process outlined in Third-Party Claimant LPP Guidelines must not undermine or compromise, but rather,

should ensure that CLP is afforded *stronger* protection that which currently exists under the AML Act. This means, at a minimum, they must not establish a process that would have AUSTRAC seeking to determine, or assert that it has determined, CLP claims. It also means that the nature and volume of information requested to be provided in support of a claim should be drastically reduced, as discussed at paragraphs 140—142.

Categories of document that do not attract privilege

122. Page 5 of the LPP Guidelines sets out an extensive list of categories of documents '*which do not usually attract privilege…unless they are copies provided to a lawyer for the dominant purpose of receiving legal advice or use in litigation'*.

123. If such a list is included in Third-Party Claimant LPP Guidelines, we also recommend that a clear, detailed explanation of CLP, its exceptions, and circumstances in which it is waived, is provided to contextualise the list. A list of documents that *do* usually attract privilege should also be provided.

124. Further, several items included require specific knowledge of the privilege holder that may not be within the knowledge of a third-party claimant and thus should be removed, including:

- item d., 'Documents lodged with or provided to a lawyer for the purpose of obtaining immunity from production';
- item f., 'Documents lodged with or provided to a lawyer for the purpose of obtaining immunity from production';
- item k., 'Documents which would otherwise satisfy the requirements of privilege, but which were not intended to be confidential when made';
- item l., 'Documents or communications made for or involving the participation in a fraud or an illegal or otherwise improper purpose; and
- item m., 'Documents or communications designed to obscure or hinder AUSTRAC's understanding of a transaction'.

Proposed dispute resolution process

125. For the reasons outlined above in paragraphs 62—68, the dispute resolution process in the Draft LPP Guidelines is not apt for circumstances involving third-party claimants where the tipping off provisions apply as they cannot notify or obtain instructions from the privilege holder and must assert privilege in lieu of instructions owing to their obligation to uphold the client's interest in maintaining privilege by submitting an LPP Form. Any dispute resolution process established by Third-Party Claimant LPP Guidelines must accommodate these circumstances.

126. As occurs in other contexts where solicitors are served with a compulsory process in relation to former clients, in these circumstances, we consider that if AUSTRAC intends to challenge a privilege claim made by a third-party claimant (including solicitors), it should engage with the privilege owner directly. This will mean that the privilege owner will need to be notified of the CLP claim, and they will need to be afforded the capacity to defend their own interest in maintaining privilege.

127. If that is not acceptable to AUSTRAC, we think that there will be no alternative but for AUSTRAC to commence proceedings in circumstances where it seeks to resolve disputes regarding privilege with a third-party claimant constrained by the tipping off provisions. This will allow the documents to be lodged with the court, appropriate confidentiality orders to be obtained, and the issue of privilege to be determined in

accordance with the law. AUSTRAC should bear the costs of making such a challenge.

Additional considerations

128. In addition to the above, Third-Party Claimant LPP Guidelines need to address the following matters in any dispute resolution process created.

Costs

129. While we do not object to the application of the 'loser pays' principle in most circumstances, it cannot be applied universally. In particular, it would be neither fair nor appropriate to apply in circumstances where legal practitioners are asserting privilege in lieu of instructions from their client, and where they may not—and cannot—make enquiries to obtain full access to relevant facts or obtain instructions from their client (including about whether they would agree to waive privilege) owing to the tipping off provisions (or even charge the client for their time).

130. Third-Party Claimant LPP Guidelines should specify that the 'loser pays' principle will not apply in circumstances where CLP is being claimed by a legal practitioner on behalf of a client, where their capacity to make enquiries regarding the status of privilege is limited by the application of the tipping off provisions.

Timeframe

131. Third-Party Claimant LPP Guidelines will need to specify a timeframe for the making of a challenge by AUSTRAC in the context of third-party claimants. This is partly because certainty needs to be provided to reporting entities as to whether an assertion of CLP has been accepted or not, but also because a delay between an LPP Form being lodged and a challenge being made introduces difficulties that may be insurmountable—for example, in the intervening period, relevant information may have been lost or destroyed, or a legal practitioner may have ceased acting in a matter and documents may have been returned the client. The general rule is that, if a solicitor ceases to act in a matter, the former client's documents must be returned to them, or to their new legal advisor. If a solicitor has had to submit an SMR in relation to a client, the likelihood is that they then must cease to act—and then, to return the clients documents to them. There is nothing in the AML Act that changes this position. Accordingly, if AUSTRAC does not make a speedy determination as to whether it intends to challenge an assertion of CLP in circumstances where relevant information has had to be returned to the client, the solicitor may be unable to provide any further information.

132. We also recommend that a timeframe for seeking more information should be specified.

Comments on the Draft Forms

General comments

133. Broadly speaking, we submit that the nature and volume of information requested in the schedules for the Draft Forms is unreasonable, unduly onerous, and poses an unacceptable risk to CLP. We submit that the Draft Forms must be reviewed to ensure they are practical and impose a proportionate administrative burden on reporting entities, but most importantly, that they are protective of CLP. To that end, they must not solicit any information that risks material covered by CLP being inadvertently disclosed, and they should encourage people filling them out on their own behalf to seek legal advice.

134. Specific concerns are outlined below.

Specific comments

Sheet 1—Attestation

135. Both Draft Forms include a section on 'Attestation', which states:

> *Assessing the communication with regard to AGD's Guidelines on Legal Professional Privilege*
> *By making this claim, you have:*
> • *Considered the nature of the communications in accordance with the AGD's Guidelines on Legal Professional Privilege; and*
> • *Reviewed and determined the status of each communication in accordance with the law of LPP and the AGD Guidelines, including whether you have waived privilege.*

136. Reporting entities are required to tick a box either stating that '*Yes, I confirm I have done all the above*', or '*No, I have not followed the LPP Guidelines. I have explained my approach below*'.

137. We have serious concern with the inclusion of this section on the Draft Forms, which we have touched upon above in paragraphs 84—88.

138. Separately to these concerns, we submit that the nature of communications should be determined in accordance with the law of LPP, not the Draft Guidelines, as should the review and determination of the status of each communication. If this attestation ultimately forms a part of any final LPP Forms, it should be amended to reflect this.

139. We also submit that it should be better tailored to accommodate the fact that it may be completed by a practitioner asserting privilege on behalf of their client, including in the absence of instructions and in circumstances where they are not permitted to ask the client due to the tipping off provisions. Legal practitioners may have to provide this form in circumstances where they are not aware whether privilege has been waived by the client or if the client had multiple purposes for a communication such that the dominant purpose test is not satisfied, and they will not be able to ask the client to avoid violating the tipping off provisions.

140. We thus recommend that the bullet-points be amended as follows:

> *By making this claim, you confirm that you reasonably believe that the information or document is subject to legal professional privilege, and that:*

- *having regard to the fact that you have not been able to obtain instructions from your client/former client, you have endeavoured to consider the nature of the communications and endeavoured to complete this Form in accordance with the law of LPP; and*
- *having regard to the fact that you have not been able to obtain instructions from your client/former client, you have endeavoured to review and determine the status of each communication in accordance with the law of LPP, including whether –to the extent known—privilege has been waived.*

Sheet 2—Nature of the information being requested

141. We refer to the second sheet of both Draft Forms, which sets out the particulars that reporting entities are required to provide in support of a CLP claim.

142. For the reasons outlined above in paragraphs 98—103, we do not support the inclusion of any particulars that would require information to be provided that could disclose material protected by CLP. Accordingly, while we do not object to the inclusion of column a. 'Name of privilege holder' and column e. 'dominant purpose for which the communication was made', we strenuously object to columns f and g, which respectively require reporting entities to provide information on 'the legal issue being advised upon for which the advice is being sought…' and 'if the communication is written, the title or subject line of the communication…'. It is extremely difficult to imagine circumstances in which such details could be provided without identifying privileged material, and they should not be required to be provided.

143. We also do not support the inclusion of particulars that would require the provision of unnecessary details that will be resource intensive. For this reason, we object to columns b. 'date the document was prepared or communication made', column c. 'form of communication', and column h. 'identity and role of each person between whom the document or communication is made'. Such information is unnecessary, and providing it will be resource intensive, particularly for sole practitioners and smaller firms (which comprise 93 percent of the private legal profession) who will need to manually input the information. For larger productions, it will be unacceptably costly and not feasible for sole practitioners and/or small practices, especially given that the work would not be chargeable as the client is not instructing it to be undertaken.

Sheet 3—Identity and declaration

Declaration

144. Sheet 3 of the Draft LPP Forms require the individual completing the form to make a declaration, by ticking a box, that information contained in the form is true and correct.

145. The Draft Forms—particularly the Draft LPP Form (Reporting Obligations)—may need to be completed by a legal practitioner without instructions from their client. As explained above in paragraphs 67—69, lawyers asserting CLP on behalf of a client may not be fully apprised of all the facts relevant to the viability of the claim—for example, they may not have been made aware that privilege has been waived, or whether the client had multiple purposes for a communication such that the dominant purpose test is not satisfied—and they will not be able to ask the client.

146. Accordingly, we recommend modifying the declaration to include words to the effect: '*the information contained in this LPP form is true and correct to the best of my knowledge and belief …having regard to the fact that I have not been able to obtain instructions from my client/former client'*.

Consultation questions

Question 1

Which kinds of claimants will require more tailored or lenient expectations in terms of standard of claim?

147. We have interpreted this question as asking what types of claimants may need special accommodations in completing an LPP Form.

148. We welcome that the Department and AUSTRAC will afford a degree of flexibility to reporting entities in certain circumstances to avoid unnecessary administrative burden. We submit that a significant administrative burden could be removed by limiting the amount of information that needs to be provided in the LPP Form, which will also help to ensure that a sufficient degree of protection is afforded to CLP by limiting the risk of privileged information being inadvertently disclosed.

149. Besides this, we submit that there are several kinds of Tranche 2 reporting entities that should be afforded special accommodations in the form of tailored and reduced requirements in relation to the 'Particulars' section of the Draft Forms on the ground that they would face a disproportionate burden under the proposed process. Specifically, we recommend that the Department consider providing special accommodations to the following types of entity:

- **sole practitioners and small legal practices—particularly those in rural, regional, and remote areas:** We fear it may be next to impossible for sole practitioners or small legal practices to dedicate the resources required to consider all information in the timeframe provided, particularly in matters involving larger volumes of documents and/or more complex matters. In particular, we suggest that such entities not be expected to assess documents with the same level of granularity that larger law firms would be able to in the time period provided. We also suggest that such reporting entities be provided additional time to respond to requests and an appropriately tailored process, for example, requiring only certain types of information or documents to be individually assessed.
- **barristers**: Barristers, as sole practitioners, should also be afforded additional time to respond to requests and to an appropriately tailored process in matters involving larger volumes of documents, or more complex matters.
- **lay people and reporting entities responding on their own behalf**: People without legal training may need additional guidance to ensure that they do not inadvertently waive CLP or make unsupportable CLP claims.
- **legal practitioners making claims on behalf of clients/former clients who cannot be contacted:** As we have outlined above, we are of the view that Third-Party Claimant LPP Guidelines need to be developed to accommodate the specific circumstances of third-parties required to assert privilege on behalf of a client who cannot be either contacted (or charged for the work involved in assessing, claiming, or disputing CLP). In the context of making a claim, processes should be designed in recognition of the fact that solicitors have a professional obligation and ethical duty to claim privilege and are duty-bound not to risk waiving it without client consent, and to consume as little time as possible.

Question 2

What kinds of reasonable concessions would be most valuable in reducing administrative burden on claimants?

150. As outlined above, we expect that there will be a heavy resource burden for claimants in completing the Draft Forms and further engaging with AUSTRAC should it seek further information and/or challenge an assertion. We would welcome any reasonable concessions that would reduce the administrative burden in these processes.

151. Specifically, we suggest that the Department consider the following specific reasonable concessions:

- **tailored/limited review**: particularly in circumstances involving large volume of documents, we recommend that the class of documents or materials required to be reviewed should be limited, and/or that context-based inferences may be applied where the content and document history indicates a shared common dominant legal purpose.
- **additional time:** in certain circumstances, including large volumes of documents, and/or matters involving sole practitioners, small firms, and regional, rural, and remote firms, more time should be afforded to respond to information notices and other requests. More generally, additional time should be afforded where it is evident that 24 hours or five business days would not be a sufficient period for a reporting entity to determine, or obtain external advice as to, whether LPP applies.
- **provisional claims:** provisional CLP claims could be accepted in urgent matters with the understanding that further particulars or a further/amended LPP Form will be submitted as soon as possible.
- **batch descriptions:** enable batch descriptions of similar materials, rather than requiring detailed justification for each item.
- **review methodology:** in certain circumstances, AUSTRAC could agree parameters for relevance searches, privilege redactions, and/or the use of electronic tools, with a reporting entity.
- **allow existing documents (including in-house LPP logs or privilege registers) to be provided in lieu of the LPP Form** (provided necessary particulars are provided).

Question 3

Does industry have preferred ADR approaches and how do these preferences change under certain circumstances?

152. The Law Council's views in response to this question vary depending on whether the claimant is a direct claimant or a third-party claimant. As we have outlined above, we are of the view that Direct Claimant LPP Guidelines and Third-Party Claimant LPP Guidelines need to developed.

Direct claimants

153. In the context of direct claimants, we do not have a preferred ADR approach per se—rather, we support the use of any and all (recognised) ADR approaches that are suited to a particular situation.

154. Subject to the above, we support the adoption of a tiered approach to dispute resolution in Direct Claimant LPP Guidelines, as follows:

- **First tier—informal resolution**: In the first instance, we support allowing for questions and/or potential disputes regarding CLP claims to attempt to be resolved informally. At this juncture, informal resolution could include direct engagement between the reporting entity and AUSTRAC, requests for further particulars, or collaborative narrowing of the dispute.
- **Second tier—ADR or Court**: If informal resolution fails, we support ADR being available as a means of resolving a dispute *in appropriate circumstances*—namely, circumstances in which:
  - **capacity to engage**: the person claiming privilege is capable of engaging in dispute resolution—i.e., they are asserting privilege on their own behalf, or the tipping off provisions do not apply such that a third-party is able to consult with their client and seek instructions necessary to appraise themselves of the information and authority required to engage in dispute resolution; and
  - **advised of options**: the claimant is made fully aware of their options—specifically, they are informed that they may now agree to try to resolve the dispute by ADR (and regarding the range of ADR methods available), or by proceeding directly to court for judicial resolution; and
  - **consent**: the claimant consents to engage in ADR.

  As the above makes clear, in relation to ADR we consider that:
  - no single method of ADR should be preferred;
  - it should not be mandatory to engage in ADR prior to going to court—the option of going to court needs to be available because there is no guarantee ADR will be less expensive in circumstances or more expedient where complex legal issues are involved, or where disputes are unlikely to be resolved; and
  - a case-by-case approach should be adopted wherein all resolution methods are available depending on the circumstances at hand.
- **Second tier OR third tier—Court**: If ADR is not available (because it is inappropriate), not engaged in, or if it fails, disputes will proceed for judicial determination.

Third-party claimants

155. In the context of third-party claimants, we support the adoption of a tiered approach to dispute resolution in Third-Party Claimant LPP Guidelines —subject to the caveat that ADR will not be an available approach in circumstances where the tipping off provisions apply. Specifically, we support the following approach:

- **First tier—informal resolution**: In the first instance, we support allowing for questions and/or potential disputes regarding CLP claims to attempt to be resolved informally to the extent possible, considering the operation of the tipping off provisions.
- **Second tier—ADR**: If informal resolution fails, we do not oppose ADR being available *in appropriate circumstances*—namely, where:
  - **capacity to engage**: the third-party is capable of engaging in dispute resolution because the tipping off provisions do not apply, enabling them to consult with their client and seek instructions necessary to appraise themselves of the information and authority required to engage in dispute resolution; and
  - **advised of options**: the third-party is made fully aware of their options—specifically, they are informed that they may now agree to try to resolve the dispute by ADR (and regarding the range of ADR methods available), or by proceeding directly to court for judicial resolution; and
  - **consent**: the privilege holder consents to engage in ADR.

  As the above makes clear, in relation to ADR we consider that:
  - no single method of ADR should be preferred;
  - it should not be mandatory to engage in ADR prior to going to court—the option of going to court needs to be available because there is no guarantee ADR will be less expensive in circumstances or more expedient where complex legal issues are involved, or where disputes are unlikely to be resolved; and
  - a case-by-case approach should be adopted wherein all resolution methods are available depending on the circumstances at hand.
- **Second tier OR third tier—Court**: If ADR is not available (because it is inappropriate), not engaged in, or if it fails, disputes will proceed for judicial determination.