



UNIVERSITY
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AUSTRALIA

Joint Review of the use of Legal Professional Privilege (LPP) in Commonwealth Investigations

**AN INVITED SUBMISSION TO THE ATTORNEY-GENERAL'S
DEPARTMENT**

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5 SEPTEMBER, 2024

Executive Summary

1. This submission respectfully urges the AG's Inquiry to recommend that **big audit be prohibited from owning legal practices**.

Introduction

2. The author thanks the Attorney General's Department for the opportunity to support the AG's Inquiry into the misuse of legal professional privilege (LPP).
3. The **misuse of LPP is a serious matter**, to which it is right and proper that the AG's Department turn its attention:
 - 3.1. It has the effect of undermining the authority of the Australian Taxation Office (ATO), and with that the Australian government's capacity to collect taxes; it obstructs justice; undermines the rule of law; and diminishes the confidence that the community places in government, and the institutions of government.
4. Recent revelations, regarding PriceWaterhouseCoopers' (PwC) monetisation of confidential Treasury information into the construction of a multi-national anti-avoidance law (MAAL) tax regime, has demonstrated the extent of this problem.
5. However, the problem is more widespread than the misconduct perpetrated by PwC in respect of the MAAL regime. Indeed, misuse of LPP by PwC has a **history of almost 20 years**.¹
6. The misuse of LPP is, in turn, an indispensable component **of a wider business model**, not confined to Australia: the monetisation of advice, the purpose of which is to facilitate tax evasion. There is evidence that PwC, and others of the big four audit firms, have engaged in the promotion of tax evasion schemes nationally, and internationally. To that end, twelve years ago, The House of Commons noted:

*The four firms [EY, Deloitte, KPMG and PwC] insisted that they no longer sell the type of very aggressive avoidance schemes that they sold ten years ago. While this may be the case, we believe they have simply moved to advising on other forms of tax avoidance which are profitable for their clients; such as the complex operating models they offer to major corporate clients to minimise tax by exploiting the lowest international tax rates. The four firms have developed internal guidelines on where the line between tax planning and aggressive avoidance lies, but these principles do not stop them selling schemes with as little as a 50% chance of succeeding if challenged in court.*²

¹ See for example: *The Commissioner of Taxation of the Commonwealth of Australia v Pratt Holdings Pty Ltd* [2005] FCA 1247, § 66 ff, available at: <<https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2005/1247.html>> .

² House of Commons, Committee of Public Accounts, (26 April, 2013), *Tax avoidance: the role of large accountancy firms*, Forty-fourth Report of Session 2012–13, HC 870, at 3, available at: <<https://publications.parliament.uk/pa/cm201213/cmselect/cmpubacc/870/870.pdf>>.

Nonetheless, if I just back up to the whole base erosion and profit-shifting program and multinational tax avoidance, as you remember, there was a whole OECD/G20 program on it. There was wide-ranging consultation, both at a public and a private level. In Australia, that involved the Treasury, the ATO and firms. It does appear to us that the communications from PwC Australia to PwC internationally **blended issues around the private and the public consultation** so that the firm could internationally have a **significant influence on the shape and size of the base erosion and profit-shifting reforms that were being led by the G20 and the OECD**.³ [Emphasis added].

7. For this business model to succeed, it is imperative that both PwC and its clients be protected from prosecution or exposure. To achieve this, advice that facilitates tax evasion must, of necessity, be **kept behind a cloak of LPP**.⁴

As a generally [sic] rule JBS like to have Australian tax advice prepared as a legal service so that the work is covered by Legal Professional Privilege in Australia. We have always been able to accommodate this through ensuring that we set up the engagement in the correct way at the outset.⁵

Evidence to date of the misuse of LPP

8. It has long been alleged that *big audit* has misused the establishment of law firms, as departments within their audit and assurance practices (so-called “multi-disciplinary practices” / MDPs), in order to **abuse LPP**. These allegations are **not confined to Australia**.⁶

However, [Former ATO deputy commissioner Mark Konza] said the misuse of legal privilege was an issue of long-standing concern... The latest tranche of PwC emails, released last week, show that LPP was routinely applied to all internal discussions on how to exploit information provided by its former head of international tax, Peter Collins, through his role as an adviser to the government.⁷

Suzanne McNicol, QC, appearing for the commissioner, accused PwC of calling in its legal services arm on communications and advice largely produced by non-lawyers, so those documents were then protected by LPP... Dr McNicol suggested the inclusion of legal services to clients who typically needed work completed largely by tax advisers or consultants was a

³ Proof Committee Hansard, (Wednesday 14 February, 2024), Senate Economics Legislation Committee, *Estimates*, Commonwealth of Australia, at 90, available at: https://parlinfo.aph.gov.au/parlInfo/download/committees/commint/28189/toc_pdf/Corporations%20and%20Financial%20Services%20Joint%20Committee_2024_08_02.pdf;fileType=application%2Fpdf.

⁴ See for example: *Prudential Plc & Anor, R (on the application of) v Special Commissioner of Income Tax & Anor* [2009] EWHC 2494 (Admin) (14 October 2009), available at: <http://www.bailii.org/ew/cases/EWHC/Admin/2009/2494.html>.

⁵ *Commissioner of Taxation v PricewaterhouseCoopers & ors* [2022] FCA 278, at § 122, available at: <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2022/278.html>.

⁶ In the UK these issues have been enlivened in, among others: *Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd* [2018] EWCA Civ 2006; *The Financial Reporting Council Ltd v Sports Direct International Plc* [2018] EWHC 2284 (Ch); *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21. See further: Clare Arthurs, (13 December, 2018), “Exorcising the Ghost of Privilege Past - Another Petrifying Blow?” Penningtons Manches Cooper LLP, in ‘News & publications,’ available at: <https://www.penningtonslaw.com/news-publications/latest-news/2018/exorcising-the-ghost-of-privilege-past-another-petrifying-blow>.

⁷ Michael Pelly, (7 May, 2023), “Former ATO deputy flays ‘abuse’ of legal privilege,” *Australian Financial Review*, in ‘Companies, Professional Services,’ available at: <https://www.afr.com/companies/professional-services/former-ato-deputy-flays-abuse-of-legal-privilege-20230507-p5d6em>.



“premium” service intended to ensure swaths of documents could be privileged even if they were not predominantly related to legal advice...⁸

During 2021–22, our focus will continue to be specialist large market advisors who promote and run tax avoidance schemes, and engage in uncooperative, misleading and obstructive behaviour. This includes the misuse of legal professional privilege (LPP) during our reviews and audits.⁹

9. Allegations included **use of junior lawyers** in meetings, or in correspondence, so as to **“apply a cloak of privilege”** over advice which, would otherwise, be actionable as a scheme to facilitate tax evasion.¹⁰

In JBS’ case, for example, she said the “heavy lifting” of the tax advice was given by non-lawyers, but then a “relatively inexperienced lawyer” – legal partner Glenn Russell – was included in communications “to apply a cloak of privilege”.¹¹

10. In *Commissioner of Taxation v PricewaterhouseCoopers & ors* [2022] FCA 278, Mr ML Robertson QC for the respondents stated that it was “unimaginable” that a pure law firm would face claims that its communications with clients were not privileged.¹² To this author’s mind **that is the point**, exactly.

- 10.1. In that case, David Batt QC, acting as an *Amici Curiae* to the court stated that:

... applying “orthodox” privilege rules to multidisciplinary firms’ work was “at best, awkward” and offered “a very different context” to that which applied to pure legal work...¹³

11. In that case PwC claimed LPP over a staggering 44,000 documents. His Honour, Mr Justice Moshinsky, reviewed a sample of 116 documents. Of those, His Honour determined that **only 42 per cent were covered by LPP, and that 58 per cent were either not covered by LPP (53 per cent), or only partly covered by LPP (five per cent).**¹⁴

- 11.1. While LPP is a matter of interpretation, and while it may be expected that one, two, or possibly as many as five per cent of documents over which LPP is claimed may be interpreted by a court as having been incorrectly deemed to be covered by LPP, when the percentage is just below 60 per cent, in this writer’s view, what that indicates is a **systematic abuse of LPP**.

⁸ Hannah Wootton, (7 September, 2021), “PwC accused of misusing legal privilege to stop ATO scrutiny of clients,” *Australian Financial Review*, in ‘Companies, Professional Services,’ available at: <<https://www.afr.com/companies/professional-services/pwc-accused-of-misusing-legal-privilege-to-stop-ato-scrutiny-of-clients-20210906-p58p5h>>.

⁹ Australian Government, Australian Taxation Office, (8 September, 2021), *Tax Avoidance Taskforce highlights 2020-21*, Tax avoidance taskforce, at p 7, available at: <<https://www.ato.gov.au/misc/downloads/pdf/qc52477.pdf>>.

¹⁰ Hannah Wootton, (7 September, 2021), op cit.

¹¹ Ibid.

¹² Reported by Hannah Wootton, (8 September, 2021), “‘Horse has bolted’ on PwC rescinding legal privilege: JBS,” *Australian Financial Review*, in ‘Companies, Professional Services,’ available at: <<https://www.afr.com/companies/professional-services/horse-has-bolted-on-pwc-rescinding-legal-privilege-jbs-20210908-p58pvp>>.

¹³ Reported by: Hannah Wootton, (13 September, 2021), “Big four should not claim the same legal privilege as law firms, court hears,” *Australian Financial Review*, in ‘Companies, Professional Services, Courts,’ available at: <<https://www.afr.com/companies/professional-services/big-four-should-not-claim-the-same-legal-privilege-as-law-firms-court-hears-20210913-p58r9h>>.

¹⁴ *Commissioner of Taxation v PricewaterhouseCoopers & ors* [2022] op cit., at § 22.

Remember, we're only seeing the tiniest fraction of the communications in this heist because the firm has carefully constructed an artifice whereby all of its tax advice to clients is subject to legal professional privilege. PwC is quite cynically using legal privilege as an encrypted communications device, like the ANOM system preferred by outlaw motorcycle gangs.¹⁵

11.2. To that end His Honour stated;

I have concluded that the communication does not satisfy the dominant purpose test, that is, I have concluded that the document is not (and does not record) a communication made for the dominant purpose of giving or receiving legal advice.¹⁶

12. In this respect, not just *big audit*, but indeed PwC, in particular, has form. In 2009 PwC was accused of facilitating tax evasion by Prudential Plc in the **United Kingdom**. At the time PwC and Prudential attempted to hide behind LPP. This was challenged in the High Court of Justice, and PwC and Prudential's claims to LPP were rejected.¹⁷

13. In their assessments, Austin Mitchell MP, and Professor Prem Sikka (now Baron Sikka, The Lord Kingswood), state as follows:

There is nothing inevitable about the tax dodging industry. It flourishes because governments permit it to. The following steps would help to check the predatory practices of major accountancy firms... The principle of legal professional privilege should not be extended to the tax avoidance industry as major accountancy firms have a history of lying and cheating.¹⁸

14. There is a growing body of **evidence** that, in Australia, the big four audit firms have been **misusing LPP to disrupt the activities of the ATO**:

The ATO has previously said dozens of audits of major multinationals had been interrupted by privilege claims in recent years...¹⁹

15. In a speech delivered in 2021, then Commissioner of Taxation, Mr C Jordan, stated:

...we're concerned when baseless and reckless LPP claims are made in an attempt to withhold information from us during our investigations.²⁰

16. Evidence provided by the **ATO** indicates that it had begun **notifying PwC** of its concerns about their misuse of LPP at least **eight years ago**:

The ATO issued 15 notices to PwC between October 2016 and April 2021 seeking more information, "including client information withheld due to disputed legal professional

¹⁵ Joe Aston, (9 May, 2023), "Tom Seymour, PwC's fall guy," *Australian Financial Review*, in 'Rear Window,' available at: <<https://www.afr.com/rear-window/tom-seymour-pwc-s-fall-guy-20230509-p5d73c>>.

¹⁶ *Commissioner of Taxation v PricewaterhouseCoopers & ors* [2022], op cit., at § 23.

¹⁷ *Prudential Plc & Anor, R (on the application of) v Special Commissioner of Income Tax & Anor* [2009], op cit.

¹⁸ Austin Mitchell & Prem Sikka, (2011), "The Pin-Stripe Mafia: How Accountancy Firms Destroy Societies," *Association for Accountancy & Business Affairs*, at pp. 70-71, available at: <https://www.publishwhatyoupay.no/sites/default/files/import/PIN_STRIPE_MAFIA_ACCOUNTANCY_FIRMS.pdf>.

¹⁹ Hannah Wootton, (25 March, 2022), "PwC wrongly claimed legal privilege over work demanded by ATO: court," *Australian Financial Review*, in 'Companies, Professional Services,' available at: <<https://www.afr.com/companies/professional-services/pwc-wrongly-claimed-legal-privilege-over-work-demanded-by-ato-court-20220325-p5a7tw>>.

²⁰ The Australian Government in its Australian Taxation Office, (21 October, 2021), "Commissioner's address to the Tax Institute's Tax Summit 2021," in 'Media Centre,' available at: <<https://www.ato.gov.au/media-centre/commissioner-s-address-to-the-tax-institute-s-tax-summit-2021>>.



privilege”... The ATO considered many of these claims were “baseless” and requested advice from the commonwealth director of public prosecutions (CDPP) about possible prosecutions for non-compliance.²¹

17. Moreover, in testimony before the Joint Parliamentary Inquiry in August 2024, former PwC Australia general counsel, Meredith Beattie, testified that she had been aware of concerns, raised by the ATO into the misuse of LPP, as far back as 2018:

I was the one rattling the can in ‘18 saying, ‘This is an issue, and I’m worried about it.’ I add to that at the same time and a little earlier, because I sat back and listened to what the ATO were saying, and I thought, ‘Why is there this level of agitation about legal professional privilege?’²²

18. We may conclude, therefore, that allegations of the misuse of LPP did not come as a surprise to PwC. They **knew about the problem, ignored it, and persisted** in their abuse of LPP. Indeed, it is likely that had the decision by the Tax Practitioners’ Board (regarding Peter John Collins) not featured in the media, had *AFR* journalists Messrs Tadros and Chenoweth not pursued their investigations, and had those investigations not precipitated a firestorm of scandal and Parliamentary enquiry, PwC’s persistent misuse of LPP would not have been brought to the public’s attention. Had that been the case, there is nothing to suggest that PwC would today be doing anything other than that which they had been doing for at least the past eight years: **concealing, behind a cloak of LPP**, advice, the purpose of which was to facilitate the commission of the crime of **tax evasion**.

Integral to the services offered

19. By asserting LPP, *big audit* has facilitated advice to multi-national firms, including ones which are internationally notorious as tax evaders – the so-called “**dirty 34**” – the world’s 34 worst tax-evading multi-nationals.²³

²¹ Belot, Henry, (8 August, 2023), “PwC scandal: Australian Tax Office tried to get federal police to investigate in 2018,” *The Guardian* (Australian edition), available at: <<https://www.theguardian.com/australia-news/2023/aug/08/pwc-scandal-australias-tax-office-tried-to-get-federal-police-to-investigate-in-2018>>. For the full time-line provided by the ATO, of its concerns surrounding the conduct of PwC Australia, see: Parliament of Australia, The Senate, Finance and Public Administration References Committee, (June 2023), *PwC: A calculated breach of trust*, Appendix 1, ‘Timeline of events relevant to the committee’s inquiry into the PwC matter,’ at 21, available at: <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/RB000169/toc_pdf/PwCAcalculatedbreachoftrust.pdf>.

²² Proof Committee Hansard, (Friday 2 August, 2024), Parliamentary Joint Committee on Corporations and Financial Services, *Ethics and Professional Accountability: Structural Challenges in the Audit, Assurance and Consultancy Industry*, Commonwealth of Australia, at 38, available at: <https://parlinfo.aph.gov.au/parlInfo/download/committees/commint/28189/toc_pdf/Corporations%20and%20Financial%20Services%20Joint%20Committee_2024_08_02.pdf;fileType=application%2Fpdf>.

²³ Kruger, Colin, (7 May, 2023), “The ‘dirty 34’ and PwC’s global tax dodge,” *The Sydney Morning Herald*, in ‘Business, The economy, Tax avoidance,’ available at: <<https://www.smh.com.au/business/the-economy/the-dirty-34-and-pwc-s-global-tax-dodge-20230503-p5d5b6.html>>.

20. In the matter of *ATO v PwC*, evidence was cited by the court to the effect that **PwC specifically facilitated the use of LPP as a cloak**, by which to conceal its tax advice to (multinational Brazilian meat-packing firm, and now Australia's largest meat-packing company²⁴) JBS:

*As a generally [sic] rule JBS like to have Australian tax advice prepared as a legal service so that the work is covered by Legal Professional Privilege in Australia. We have always been able to accommodate this through ensuring that we set up the engagement in the correct way at the outset.*²⁵

21. This follows a trend, internationally. In 2012 The House of Commons Committee of Public Accounts²⁶ heard testimony from PwC UK about the misuse of LPP (legal advice privilege / LAP as it is styled in the UK). At the time, PwC UK complained to the Commons Committee that the prohibition on accountants providing legal advice, protected by LAP, was not a "fair playing field". **Within a year of providing that testimony, PwC UK had acquired an in-house law firm.**

*This is most evident in the UK following the introduction of the Legal Services Act in 2007, which allowed licenced bodies to launch an 'alternative business structure' to offer legal services. PwC was the first of the Big 4 to take advantage of this in 2014 with the launch of PwC legal, but since then all of the Big 4 have their own legal services offering...*²⁷

- 21.1. In the **same year PwC Australia** established its own **law firm**.²⁸

- 21.2. Providing an insight into why *big audit* began acquiring law firms, KPMG's then Global Head of Legal Services stated as follows:

*"Our approach is different. We're not a traditional law firm, and we're not copying the approach of a traditional law firm. We focus on offering our clients integrated legal advice..."*²⁹

which underscores the nature of these law firms: they are **not designed to be law firms in the traditional sense**. They are designed to complement the services offered by the parent firm; which is to say that they are designed to **facilitate the parent firm's activities**. It is this **conflicted relationship** which gives rise to conflicts of interest, not just in the provision of advice, but in the use – and **misuse** – of **LPP**.

22. To be clear, this submission raises no objection to the existence of LPP. What it does do is **object to the misuse** of LPP. It is here that a practical **distinction must be drawn**. To assert that all those who raise LPP are the same, and should be treated the same, is to be blinded to a practical reality: **law firms and accounting firms are not the same animal** and to treat them equally is a false equivalence.

²⁴ JBS, (2024), "JBS Foods Australia," in 'Our Business,' available at: <<https://jbsfoodsgroup.com/businesses/jbs-foods-australia#:~:text=JBS%20Foods%20Australia-,JBS%20Foods%20Australia%20is%20the%20country's%20largest%20meat%20and%20food,and%20case%20ready%20production%20facility.>>>.

²⁵ *Commissioner of Taxation v PricewaterhouseCoopers & ors* [2022], op cit., at § 122.

²⁶ House of Commons, Committee of Public Accounts, (26 April, 2013), op cit., Ev 22 ff, at Q217 ff.

²⁷ Sutton, Jaysen, (undated), "The Rise Of The Big 4," The Corporate Law Academy blog, available at: <<https://www.thecorporatelawacademy.com/knowledge/rise-of-the-big-4/>>>.

²⁸ Anonymous, (18 August, 2014), "PwC launches Australian legal services arm," The Global Legal Post blog, available at: <[>](https://www.globallegalpost.com/news/pwc-launches-australian-legal-services-arm-20317869)>.

²⁹ Sutton, Jaysen, (undated), op cit.



22.1. **Law firms** provide **legal** advice and nothing else. **Accounting firms** provide **all manner** of advice, in which legal advice is a *bolt-on*, and by no means their primary service.

22.2. Moreover, practical experience indicates a **systemic misuse** of the provision of legal advice by accounting firms, specifically to **facilitate tax evasion**.

What ought to inform the AG's approach?

23. It is respectfully submitted that the Attorney General's Department ought to be guided by what approach will best serve and **uphold the public good**.

23.1. That is to say, what approach will best support: the ATO in exercising its authority; the Commonwealth government, in its capacity to collect taxes; the mitigation of the obstruction of justice; upholding the rule of law; and reinforcing in the minds of the public their confidence in government and the institutions of government.

24. Respectfully, this author contends that what ought **not to occupy the mind of the Attorney General's Department** – at least to the extent that it may conflict with those aforementioned priorities – are the **interests and convenience of big audit**.

25. So, while it may be expected that firms such as PwC will argue that it is necessary for them to operate their own law firms, in order to service their clients; that to require them to divest themselves of their legal divisions will be inconvenient for them and their clients; will be detrimental to their profitability; or even that such strictures would be detrimental to the economy, this author nonetheless respectfully argues that avoiding such detriments should **never take primacy over the public good**.

26. Moreover, counter-arguments to be expected from *big audit*, to the proposal that they divest themselves of their law firms, lack credibility. Specifically:

26.1. *While we recognise the potential for conflicts of interest to arise in MDPs, such as ours, we are nonetheless capable of managing those conflicts*: evidence is now overwhelming that, despite repeated warnings, stretching back at least eight years, despite significant adverse findings by various courts, and despite repeated assurances that the misuse of LPP was under control, *big audit* has demonstrated **it cannot** manage conflicts of interest.

26.2. *Give us another chance, we are fixing the problem*: in light of at least eight years of failures in Australia, and in excess of a decade in the UK, this assertion begs the question: **how many more chances**, and for **how many more years**, should the problem of the misuse of LPP, and the detriment which that causes – tax evasion by multi-national companies that operate in Australia and earn, in some cases, billions of dollars in revenue – be allowed to continue?

26.3. *We cannot operate sustainably without an in-house law firm*: KPMG announced in July of this year that it will close its legal division.³⁰ This would indicate that the provision of legal services is not a vital component for the remaining firms, EY, Deloitte and PwC.

Conclusion

27. The abuse of legal professional privilege constitutes, in this author's view, an **attack on the principles of justice, transparency of justice, and the rule of law**. It is a debilitating practice which undermines good government and does sustained and **deep damage to the public good**. It represents a perversion of legal protections, and scandalises the administration of justice. It is an assault on the jurisdiction of properly constituted regulatory authorities and, as such, is contemptuous of their legitimacy and the manner in which that legitimacy is derived: government agencies invested with authority by the democratically elected representatives of *we the people*. As such it is also an attack on the institutions of government, and an affront to democracy and public sensibilities. When misused for the provision of tax advice, it will promote the creation of a more inequitable society.
28. The persistent misuse of LPP by *big audit* must therefore necessitate structural reforms. As such this submission respectfully urges the Inquiry to recommend that ***big audit* be prohibited from owning legal practices**, and be required to divest themselves of those functions. Put differently, the **persistent abuse of a privilege** should mandate the **withdrawal of that privilege**.

³⁰ Bell, Matt, (16 July, 2024), "KPMG Australia to cut 30 jobs and shut commercial law practice amid fresh restructure," *The Australian*, available at: <<https://www.theaustralian.com.au/business/companies/kpmg-australia-to-cut-30-jobs-and-shut-commercial-law-practice-amid-fresh-restructure/news-story/d6975e6387a4bdb978491144819bd480#>>.

