

# The Anti-Money Laundering and Counter-Terrorism Financing Legal Professional Privilege Guidelines 2026

## Minister's foreword

The Anti-Money Laundering and Counter-Terrorism Financing Legal Professional Privilege Guidelines 2026 (the Guidelines) are made recognising the inherent tension between occasions where the AUSTRAC CEO may exercise statutory powers to compel the production of documents and information, or enter premises to search and copy information and documents for regulatory monitoring or enforcement purposes, and the doctrine of legal professional privilege (LPP).

Resolution of disputes about claims of LPP can be complex, time consuming and costly processes. These Guidelines intend to support claimants and the AUSTRAC CEO to efficiently and effectively resolve LPP disputes by setting out streamlined and simplified processes for resolving disputes about LPP, as an alternative to court proceedings.

The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the Act) aims to balance reporting entities' reporting obligations and AUSTRAC's information gathering powers necessary to detect, deter and disrupt financial crime with the important purpose of the doctrine of LPP. One example of the Act striking this balance is section 242 of the Act, which:

- Affirms that nothing in the Act affects the right of a person to refuse to give information (including answering a question) or produce a document if the information or document would be privileged from being given on the ground of LPP; and
- Grants enhanced protection of information and documents subject to LPP by expressly providing that 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 LPP does not, of itself, amount to a waiver of privilege.

These Guidelines represent my intention for both the AML/CTF and LPP legal frameworks to individually, and together, achieve their respective outcomes which are essential to a safe, fair and free society.

My Department will review these Guidelines to monitor how they are used, their effectiveness on the quality of LPP claims and the impact on reporting entities, privilege holders and AUSTRAC. Any material revisions to the Guidelines will be made on an 'as necessary' basis and will be informed by any feedback and legal developments

In that context, I am pleased to make the Guidelines under subsection 242A(1) of the AML/CTF Act.

Tony Burke

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## Glossary

**AUSTRAC authorised officer:** Authorised officer means the AUSTRAC CEO; or a person for whom an appointment as an authorised officer is in force under section 145 of the Act.

**LPP form:** As defined under section 5 of the Act, in relation to information or a document, means a written notice that:

- a. is in an approved form, and
- b. specifies the basis on which the information or document is privileged from being given or produced on the ground of legal professional privilege, and
- c. contains any other information required by the approved form, and
- d. is accompanied by any documents required by the approved form.

**SMR:** Suspicious Matter Report.

**Tipping off:** As defined under section 123 of the Act, an offence to disclose information that would or could reasonably be expected to prejudice an investigation to another person who is not an AUSTRAC entrusted person.

**Third party LPP:** Information or documents held by a reporting entity that are subject to legal professional privilege belonging to a person other than the reporting entity, including privileged communications between a client and a legal practitioner, and material prepared for the dominant purpose of giving or obtaining legal advice or for use in existing or anticipated litigation.

**TTR:** Threshold Transaction Report.

**Financial intelligence unit or FIU:** A Financial Intelligence Unit (FIU) is a government agency responsible for receiving, analysing, and disseminating financial information relating to suspected money laundering, terrorism financing, and other serious financial crime. In Australia, AUSTRAC is the FIU as well as the AML/CTF regulator.

**Reporting entity:** As defined under section 5 of the Act, means a person who provides a designated service, or the lead entity of a reporting group.

## Legal professional privilege and the AML/CTF Act

1. As Australia's AML/CTF regulator and financial intelligence unit, AUSTRAC has a range of compulsory information-gathering powers required to enable effective monitoring, investigation and enforcement of AML/CTF compliance obligations, and to detect, deter and disrupt financial crime. The compulsory information-gathering powers under the Act include:
  - a. notices under Part 1A, Part 3 and Part 14, and
  - b. monitoring warrants under Part 13
2. AUSTRAC uses compulsory information-gathering powers in two broad areas:
  - regulatory activity, such as surveillances in respect of compliance with the law, and investigations of suspected breaches of the law.
  - financial intelligence unit activity, such as obtaining or analysing information to identifying trends, patterns, threats or vulnerabilities associated with money laundering, terrorism financing, proliferation financing or other serious crimes, or obtaining or analysing information to support efforts to combat money laundering, terrorism financing, proliferation financing or other serious crimes.
3. Additionally, a reporting entity may have reporting obligations under sections 41 and 43 of the Act for example, which require them to give the AUSTRAC CEO a report about a suspicious matter or transactions involving \$10,000 or more of physical currency.
4. When 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.
5. It is part of AUSTRAC's role as regulator to decide whether or not to review or challenge an LPP claim that has been made in response to reporting requirements or a formal notice for production of information and documents.
6. These Guidelines prescribe a range of policies and processes for AUSTRAC and claimants to follow when reviewing assertions of LPP, and to help inform any decisions to challenge such assertions.
7. A purpose of these Guidelines is to set out what claimants can expect when they are dealing with AUSTRAC. Under existing mechanisms, if AUSTRAC is not able to make an informed decision based on the information available, and following further engagement with the claimant, it may commence:
  - a. Federal Court proceedings to enforce the underlying statutory obligation, such as the originating notice obligation or reporting obligation, or
  - b. declaratory proceedings.
8. These proceedings are burdensome and costly for all parties involved. The purpose of these Guidelines is to set out the approach AUSTRAC and claimants can take to facilitate disputes about LPP outside of the traditional court system in a faster, more cost-effective, and less adversarial manner.

9. These Guidelines may be followed by agencies other than AUSTRAC who are authorised to exercise information-gathering powers under the Act.<sup>1</sup> In those circumstances, references to AUSTRAC in these Guidelines can be substituted with the relevant authorised agency.

## The nature and purpose of LPP

10. LPP protects certain communications (written and verbal) between legal practitioners and their clients. Its purpose is to ensure that people (whether individuals or corporations) disclose all relevant information about their affairs when seeking legal advice or services. This right is fundamental to helping lawyers properly pursue and defend their clients' rights.<sup>2</sup>
11. The right to LPP is a common law immunity also encoded in statute which may be relied upon to resist all forms of compulsory disclosure, including in judicial or quasijudicial proceedings and in the context of non-judicial investigatory procedures.<sup>3</sup>
12. Legal practitioners have professional duties to maintain privilege unless a client expressly or impliedly authorises disclosure, or the privilege is abrogated by statute.

## What LPP covers

13. There are two limbs of LPP which are dealt with in both statute and common law. These are:
- advice privilege, which applies to confidential communications brought into existence for the dominant purpose of giving or obtaining legal advice, and
  - litigation privilege, which applies to confidential communications brought into existence for the dominant purpose of a client being provided with professional legal services in relation to actual or anticipated legal proceedings involving the client as a party.
14. Whether LPP applies will depend on the dominant purpose for which a communication was made. This is an objective question of fact, based on the purpose at the time the communication was made. Where a document has been made for multiple purposes, LPP will only apply where the privileged purpose is the 'ruling, prevailing, or most influential purpose'.<sup>4</sup>

## Limitations on LPP

15. The nature of privilege as an immunity means there are limits. Importantly, common law and statutory privilege is not extended to communications made for a purpose that is contrary to the public interest; that is, where the communication is made in furtherance of an illegal or improper purpose. The illegal or improper purpose principle covers all forms of fraud or dishonesty, including fraudulent breach of trust, fraudulent conspiracy, trickery and 'sham' contrivances, as well as cases of fraud by third parties. For the purposes of the illegal or improper purpose principle, the relevant distinction is between a communication made in furtherance of an illegal or improper purpose, which is non-privileged

<sup>1</sup> See subsections 49(1) and 202(1) of the Act.

<sup>2</sup> See *Grant v Downs* (1976) 135 CLR 674

<sup>3</sup> *Baker v Campbell* (1983) 153 CLR 52 (Baker), 61

<sup>4</sup> *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority* [2002] VSCA 59, [10]

communication, as compared with a communication made for the purpose of seeking advice in relation to a criminal or other matter at law, which may be privileged.

16. Key categories of information which are usually not privileged include:
- a. facts that the legal practitioner observes while acting for the client.<sup>5</sup>
  - b. documents or communications made for or involving the participation in a fraud or an illegal or otherwise improper purpose. This includes communications furthering a fraudulent activity or other improper conduct by a client or third party, regardless of the lawyer's involvement.<sup>6</sup>
  - c. communication made or the contents of a document prepared by a client or legal practitioner (or both) in furtherance of the commission of an act that renders a person liable to a civil penalty.
  - d. original documents which constitute or evidence transactions, e.g., contracts, conveyances, declarations of trust, offers or receipts, partnership agreements even if they are delivered to a legal practitioner for advice or used in litigation.
  - e. accounting, financial or banking records, invoices, company minutes, etc.
  - f. internal reports and memoranda, such as board minutes and presentations that do not convey or record privileged communications and advices. Legal advice can, and at times should, be conveyed to a board and might be reflected in internal reports and memoranda (and redactions should be made for that legal advice rather than claiming privilege over the entirety of the document).
  - g. advice which is purely commercial or of a public relations character.<sup>7</sup>
  - h. communications made to and from a legal practitioner, whether internal or external who had multiple roles and who was not acting in the lawyer capacity, e.g., executive, management or policy decisions.
  - i. documents brought into existence for more than one purpose and the claimant is unable to prove that the dominant purpose of the communication was the giving or receiving of legal advice or for use in litigation taking place or reasonably anticipated.
  - j. communications made before the client contemplated obtaining legal advice on the matter.
  - k. file notes and minutes of meetings with third parties in a non-confidential setting;
  - l. documents lodged with or provided to a legal practitioner simply for the purpose of obtaining immunity from production.
  - m. non-privileged documents lodged with or provided to a bank or other third party for safe keeping.
  - n. a legal practitioner's bill of costs except to the extent that the contents of the bill of costs discloses the content of the advice sought by the client and/or provided by the legal practitioner.
  - o. documents which would otherwise satisfy the requirements of privilege, but which were not intended to be confidential when made.

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<sup>5</sup> Grant v Downs (1976) 135 CLR 674, 678 (Barwick CJ); Baker v Campbell (1983) 153 CLR 52, 86-87 and 122-123; O'Reilly v State Bank of Victoria Commissioners (1983) 153 CLR 1, 27

<sup>6</sup> Carbotech-Australia Pty Ltd v Yates [2008] NSWSC 1151, [21-22].

<sup>7</sup> See Cole (No 5), [44(7)]; See also Waterford v Commonwealth (1987) 163 CLR 54, 73, 75.

- p. lists of clients or associates.
  - q. solicitor's trust account records and client lists.
  - r. time sheets except to the extent that disclosure of the contents of the time entries would disclose the content of the advice sought by the client and/or provided by the legal practitioner.
  - s. performance appraisals except to the extent that disclosure of the contents of the appraisal would disclose the content of advice sought by the client and/or provided by the legal practitioner.
  - t. a written communication directing a legal practitioner to send money to a third party.
  - u. data demonstrating when communications were sent or received (for example, fax books recording faxes sent), to the extent that they do not disclose the actual advice.
17. Legal practitioners have professional and ethical obligations to keep client information confidential. However, not all client confidential information attracts LPP. Client confidentiality, unlike LPP, can be overridden by disclosure obligations under the Act.

### Waiver of LPP

18. Waiver is an intentional act, undertaken with knowledge, by which a person relinquishes a right or privilege through conduct that is inconsistent with maintaining that right or privilege. It may be express or implied.
- a. Express waiver occurs where the client, or the client's legal representative acting on their instructions, clearly indicates an intention to waive privilege, usually in writing.
  - b. Implied waiver arises where there is an inconsistency between a party's conduct in disclosing a privileged communication and the continued maintenance of the confidentiality that the privilege is designed to protect. Implied waiver may arise regardless of whether there was a subjective intention to waive privilege. This may occur where the substance of a privileged communication is disclosed in a non-confidential setting, or otherwise in a manner inconsistent with preserving confidentiality. For example, where the privilege holder places the contents of the privileged document or communication in issue when advancing a right or claim.
19. Importantly, when the Act was amended in 2024, Parliament intentionally inserted a statutory protection in subsection 242(2). Accordingly, in the AML/CTF context, providing a description of information or documents that may be or are subject to LPP, does not, of itself, amount to a waiver of privilege. The expectation is that this statutory protection will enable claimants and AUSTRAC to resolve questions of whether LPP has been appropriately claimed in an efficient and effective manner.

### What to expect from AUSTRAC

20. The Act does not affect a person's right to refuse to give information that would be privileged from being given or produced on the grounds of LPP.
21. LPP, or any element required to establish it, is not established or proven merely by its assertion. Similarly, merely marking a document as privileged when it does not satisfy the elements to be a privileged document does not transform an otherwise unprivileged

- document into a privileged one. While an assertion or claim is a necessary starting point, the party asserting privilege bears the burden of establishing the factual basis for the claim.
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.
23. If AUSTRAC decides more information is needed to support an LPP claim, it will:
- a. specify what further information is required, and
  - b. specify a timeframe for the claimant to provide the information and forms.
24. AUSTRAC will take a proactive approach to managing LPP disputes by:
- a. seeking to identify the issues in dispute and resolve them as early and fairly as possible,
  - b. considering the cost of managing the dispute for both parties, and
  - c. negotiating disputes in a courteous manner.
25. AUSTRAC will:
- a. use open and transparent dialogue to ensure it has a shared understanding of the issues and relevant facts of the matter,
  - b. request only the information it needs to make a decision, and explain why it is needed,
  - c. explain its view, listen to the claimant's views, and consider any issues or alternative views the claimant put forward,
  - d. identify issues parties agree on and work with the claimant to identify and resolve any issues in dispute,
  - e. when possible, accept information in a different format if the claimant is unable to give it in the format requested,
  - f. engage claimants early and regularly for cases that are larger or more complex, such as large business and cross-jurisdictional issues,
  - g. follow through on any issues in a prompt manner to seek their resolution, and
  - h. have senior officers available to settle disagreements when a claimant asks for an issue to be escalated.
26. AUSTRAC has an obligation to act as a model litigant in handling claims and litigation brought by or against it.<sup>8</sup> This includes endeavouring to avoid or prevent legal proceedings wherever possibly including by giving consideration to, and participating in, alternative dispute resolution.<sup>9</sup>
27. In handling claims, AUSTRAC officers and lawyers are to act with complete propriety and fairness and in accordance with the highest professional standards. AUSTRAC is not to start legal proceedings unless they are satisfied litigation is the most suitable method to resolve a dispute.<sup>10</sup>

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<sup>8</sup> *Legal Services Directions 2025*, section 40.

<sup>9</sup> *Legal Services Directions 2025*, section 41(e).

<sup>10</sup> *Legal Services Directions 2025*, section 40(b).

## How to engage with AUSTRAC

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,
  - c. clearly explain the reasons why requested information can't be provided – and offer alternative information when possible,
  - d. let AUSTRAC know as soon as possible if you consider that the information requested would not resolve the issue at hand – and advise alternate information the claimant considers will assist instead,
  - 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,
  - f. let AUSTRAC know as soon as possible if you think it has misunderstood something or made a mistake, and
  - 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.

## Making LPP claims

### Reporting and compulsory notices

29. 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. This assists the party asserting privilege to discharge its obligation of establishing the factual basis for the LPP claim. Proper 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.
30. Where LPP forms under the Act are properly completed, AUSTRAC would generally have the information it needs to be able to determine what, if any, steps to take next.
31. However, proper completion of LPP forms does not mean AUSTRAC will never have concerns about LPP claims or challenge LPP claims. In these types of cases, AUSTRAC will be able to more readily identify what concerns it has and ask specific questions about those concerns. For example, AUSTRAC may have concerns that:
- the requisite legal practitioner/client relationship is not established, or
  - the information or documents appear to be those described in Paragraph 16.
32. 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.

33. The submission of an LPP form accompanying a SMR, TTR or compulsory notice does not mean that the LPP claim will necessarily be assessed by AUSTRAC. Any assessment, 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.

## Examinations

34. If, during a compulsory examination conducted by AUSTRAC, a person seeks to claim LPP over information responsive to an Examiner's question, some or all of the details specified below during the examination or at such later date may be requested by AUSTRAC:
- the names of all parties who communicated the information or to whom the information has been communicated, together with their positions and employer (if any),
  - the date of the communication,
  - the category of LPP claimed (advice privilege or litigation privilege) and the basis on which the privilege is claimed,
  - 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), and
  - whether the information has been recorded in part or in whole in a tangible form (e.g. electronic or hard copy).
35. In the case of a third-party LPP claim, some or all of the following details in respect of the information may also be requested by AUSTRAC:
- the identity of the privilege holder,
  - the last known contact details of the privilege holder, and
  - an explanation of the circumstances by which the information came to be known by you.

## AUSTRAC's access powers

36. The Act provides that AUSTRAC may enter a reporting entity's business premises to monitor compliance with the Act, the Anti-Money Laundering and Counter-Terrorism Financing (Prescribed Foreign Countries) Regulations 2018 (the Regulations) and the Anti-Money Laundering and Counter-Terrorism Financing Rules 2025 (the Rules).<sup>11</sup>
37. While accessing a reporting entity's business premises, AUSTRAC may:<sup>12</sup>
- search for, inspect and examine any record, material or thing relevant to AML/CTF obligations, including data stored electronically or in software,
  - produce copies records or parts of records, or transfer copies of electronic records to a storage device and take away copies for further review, and
  - observe how work is being carried out if it relates to AML/CTF obligations.
38. AUSTRAC's access powers are available for the purpose of determining whether the Act, the Rules or the Regulations have been complied with.

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<sup>11</sup> See section 147 of the Act.

<sup>12</sup> See section 148 of the Act.

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 scenarios:
- a. 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
  - b. where the reporting entity claims LPP over its own information, whether in relation to AML/CTF obligations or other laws.
40. In recognition of the distinct features of exercising access powers at a law firm, these Guidelines set out a detailed approach for AUSTRAC to follow at these premises, and a more streamlined approach for AUSTRAC to take at non-law firm premises.

## LPP claim procedures for access powers being exercised on premises of a law firm

41. When inspecting a law firm's premises by consent or during the execution of a monitoring warrant at a law firm, an AUSTRAC authorised officer must not inspect any record identified as potentially within the scope of the warrant or otherwise relevant to the matters under investigation until the law firm has been given the opportunity to claim LPP in respect of any of the records identified.
42. Where a claim of LPP is made by the law firm during the execution of a monitoring warrant, no AUSTRAC authorised officer will inspect, examine or copy any record that is the subject of the claim until either:
- a. the LPP claim is resolved,
  - b. the LPP claim is abandoned, or
  - c. the LPP claim is dismissed by a court.

## Where the law firm co-operates with the monitoring warrant or consents to access

43. Where the law firm agrees to co-operate with the AUSTRAC authorised officers to execute the monitoring warrant or consents for AUSTRAC authorised officers to enter the premises, the procedures set out below are to be followed:
- b. in respect of all records identified by the law firm or AUSTRAC authorised officers as potentially within the scope of the monitoring warrant or otherwise relevant to the matters under investigation, the AUSTRAC authorised officer should, before proceeding to further execute the warrant (by inspection or otherwise), give the law firm the opportunity to claim LPP in respect of any of those records,
  - c. if the law firm asserts a claim of LPP in relation to any of those records then the law firm should be prepared to indicate to the AUSTRAC authorised officer the grounds upon which the claim is made and in whose name the claim is made,
  - d. with the co-operation of the law firm, the AUSTRAC authorised officer must take reasonable steps to identify and isolate the material the subject of the LPP claim,
  - e. the AUSTRAC authorised officer may obtain and create a forensically sound copies of disputed material responsive to the inspection to store in a manner that is not be

- examined, accessed, reviewed, or analysed by AUSTRAC authorised officers or other AUSTRAC personnel pending determination of the LPP claim,
- f. when dealing with electronic records, if it is not possible to take a forensic copy of the material subject to a claim of LPP, the AUSTRAC authorised officer may take a forensically sound copy of all of the stored information on the storage device,
  - g. all copies of records which the law firm claims are subject to LPP shall, under the supervision of the AUSTRAC authorised officer, be placed by the law firm into a container which shall then be sealed ('privileged material container'),
  - h. the AUSTRAC authorised officer, in co-operation with the law firm will prepare a list of the copied records (LPP Schedule) will be prepared by the AUSTRAC authorised officers in co-operation with the law firm. The schedule will include a description of the nature of the records,
  - i. once the LPP schedule is completed, the following statement will be agreed, completed and signed by the law firm and the AUSTRAC authorised officer:

‘The records identified in the attached schedule have been identified as material over which legal professional privilege (LPP) is claimed. Pending resolution of the LPP claim, AUSTRAC has not accessed, examined, reviewed or analysed the records identified in the attached schedule. Copies of the records have been sealed in the privileged material container for preservation purposes only and are not to be accessed, examined, reviewed or analysed by AUSTRAC officers pending determination of any application relating to LPP’, and

- j. The sealed privileged material container is to be stored by a custodian agreed between AUSTRAC and the law firm. The custodian must not permit access to, examination of, or disclosure of the records pending resolution of any dispute or determination relating to LPP, except with the written agreement of the parties or an order of a court.

*Where the law firm does not co-operate with the monitoring warrant with regards to LPP*

44. Where a law firm refuses to co-operate with the AUSTRAC authorised officers executing the monitoring warrant, the AUSTRAC authorised officer should advise that the search will proceed in any event (where the warrant is issued by a magistrate) and that, because the search team is not familiar with the office systems of the law firm, the AUSTRAC authorised officers may need to undertake broader examination of records and systems to identify material potentially within the scope of the warrant. In these circumstances, AUSTRAC authorised officers will follow the procedures outlined below in relation to monitoring warrants executed on non-law firm premises.

## LPP claim procedures for monitoring warrants being executed on non-law firm premises

45. The following procedures apply where entry by consent or a monitoring warrant is being executed by AUSTRAC authorised officers on reporting entity premises other than a law firm's records covered by LPP are stored at the premises:

- a. while 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,<sup>13</sup>
  - b. if an AUSTRAC authorised officer decides that the record is not relevant to the matters under investigation they should return it to the reporting entity and proceed with the remainder of the search. Similarly, if the AUSTRAC authorised officer is satisfied, based on a brief examination, that the record is clearly covered by LPP, they should return it to the reporting entity and proceed with the remainder of the search,
  - c. if an AUSTRAC authorised officer decides that the record appears to be relevant to the matters under investigation, but cannot form a view on whether or not the record is covered by LPP, the officer can ask the reporting entity if they are prepared to agree to follow the procedure set out below so that the claim for LPP can be resolved,
  - d. if the AUSTRAC authorised officer decides that the record appears relevant to the matters under investigation and forms the view, on the basis of a brief examination, that the record may not be covered by LPP, the AUSTRAC authorised officer may seek to obtain and create a forensically sound copy of the disputed material for preservation purposes only. Any such copy must not be examined, accessed, reviewed, or analysed by AUSTRAC authorised officers or other AUSTRAC personnel pending determination of the LPP claim, and
  - e. when dealing with electronic documents, if it is not possible to take a forensic copy of the material subject to a claim of LPP, the executing officer should take a forensic copy of all of the stored information on the storage device limited to the material only within scope of the investigation.
46. 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').
47. A list of the copied records ('LPP schedule') will be prepared by the AUSTRAC authorised officers in co-operation with the reporting entity. The LPP schedule will hold general information as to the nature of the documents.
48. Once the LPP schedule is completed, the following statement will be agreed, completed and signed by the reporting entity and the lead AUSTRAC authorised officer:

'The records identified in the attached schedule have been identified as material over which legal professional privilege (LPP) is claimed. Pending resolution of the LPP claim, AUSTRAC has not accessed, examined, reviewed or analysed the records identified in the attached schedule. Copies of the records have been sealed in the privileged material container for preservation purposes only and are not to be

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<sup>13</sup> In *JMA Accounting Pty Ltd v CoFT* [2004] 211 ALR 380 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.

accessed, examined, reviewed or analysed by AUSTRAC officers pending determination of any application relating to LPP.’

The sealed privileged material container is to be stored by a custodian agreed between AUSTRAC and the law firm. The custodian must not permit access to, examination of, or disclosure of the records pending resolution of any dispute or determination relating to LPP, except with the written agreement of the parties or an order of a court.

#### Particularising LPP claims where records held in privileged material container

49. When a reporting entity asserts a claim of LPP over material that has been forensically copied and held in a privileged material container, the reporting entity is to complete an LPP form to particularise their claim. If it is not possible to complete the form during the execution of the monitoring warrant, the form is to be completed within 14 days of asserting the LPP claim. Where necessary and practicable, AUSTRAC will accept a reporting entity’s request to particularise the LPP claim in a format other than the LPP form.

## If AUSTRAC does not accept an LPP claim

50. 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 (e.g. because AUSTRAC believes privilege has been waived or the information was unlikely to have ever been privileged).

## Direct engagement

51. In the first instance, AUSTRAC is to work collaboratively with parties to review LPP claims where it has questions or requires more information, with the objective of resolving those concerns without resorting to further formal processes. Recognising that whether LPP applies is often a question of law where sometimes reasonable minds can differ, AUSTRAC and the claimant should communicate about the issues transparently and without prejudice.

## Alternate agreed approach

52. Where requested and possible, AUSTRAC will work with claimants to agree on a procedure for resolving LPP claims if the claimant wants to depart from the direct engagement approach outlined above. If an agreement is reached, AUSTRAC will give the claimant a written statement of what was verbally agreed and ask the claimant to sign it.
53. AUSTRAC and a claimant may agree to use an inspection process to resolve claims for LPP. Under this approach, each party nominates a person to inspect the documents or alternatively an independent expert will be appointed to consider the claims for LPP.

## Where agreement can't be reached

54. 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.
55. If arbitration is agreed to, AUSTRAC will propose an independent arbitrator with relevant experience, expertise and accreditation from a relevant professional body.
56. 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.
57. Other alternative dispute resolution mechanism methods, such as mediation, may be used as circumstances require. The appointment of a mediator or otherwise will follow the process described above.

## Court proceedings as avenue of last resort

58. Where a claimant makes no attempt to engage in the processes above with AUSTRAC, or resolution has been genuinely attempted but no agreement found should AUSTRAC commence court proceedings seeking:
  - a. to enforce the underlying statutory obligation, such as the originating notice obligation or reporting obligation, or
  - b. declaratory proceedings on the LPP claim.
59. If appropriate in the circumstances, AUSTRAC will seek recovery of its costs in any court proceedings.