

AUSTRALIAN GOVERNMENT IN-HOUSE COUNSEL WEBINAR SERIES 2022

Professional Development and Networking for
the In-House Legal Community

Session 6 - Legal professional privilege

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Acknowledgement of Country

In the spirit of reconciliation, HWL Ebsworth Lawyers acknowledges the Traditional Custodians of country throughout Australia and their connections to land, sea and community.

We pay our respect to their Elders past and present, and extend that respect to all Aboriginal and Torres Strait Islander peoples today.



What we will cover?

1. What is it?
2. Rationale for rule and the counter-argument
3. What is required to make out a claim for LPP?
4. Waiver of LPP
5. Scenarios

1. What is legal professional privilege (LPP)?

1. A doctrine that prevents the disclosure of confidential communications and documents passing between lawyers, clients and third parties.
2. Client's privilege, not the lawyer's.
3. Common law rules and statute (Evidence Acts).
4. Shield not a sword – arises in context of disclosure or subpoena applications.
5. Applies in circumstances where compulsory disclosure would otherwise be required.

Breadth of Application

‘...there is no reason to suppose that’ the application of LPP ‘in a non-judicial context is any less appropriate than the application of the many other rules of law which must frequently be applied in proceedings other than judicial proceedings... In my view, the doctrine of legal professional privilege is, in the absence of some legislative provision restricting its application, **applicable to all forms of compulsory disclosure of evidence.**’

Baker v Campbell (1983) 153 CLR 52, 132 per Dawson J

Breadth of Application

- Some exceptions:
 - *Ombudsman Act 1976* (Cth) s 9(4)(ab)(ii)
 - *Crimes Act 1914* (Cth) s 3ZZGE(1)(d)(ii)
 - *Crimes Act* (Cth) s 15HV
 - *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 96(5)
 - *Inspector-General of Intelligence and Security Act 1986* (Cth) s 18
- Whilst these laws abrogate legal professional privilege they provide that the privileged material is not admissible against the person.

Rationale for rule

- Encourages compliance with the law
- Discourages litigation and encourages settlement
- Promotes the efficient operation of the adversarial system
- Protects the individual's right to privacy
- Right to consult a lawyer

Baker v Campbell (1983) 153 CLR 52

- The defendant in executing a search warrant attempted to seize documents of the plaintiff held by his solicitors. The documents had been brought into existence for the purpose of obtaining or giving legal advice.
- The High Court decided that the doctrine of legal professional privilege was, in the absence of some legislative provision restricting its application, applicable to all forms of compulsory disclosure of evidence.

“The client's legal privilege is **essential** for the **orderly and dignified** conduct of individual affairs in a social atmosphere which is being **poisoned by official and unofficial eavesdropping and other invasions of privacy**. The individual should be able to seek and obtain legal advice and legal assistance for innocent purposes, without the fear that what has been prepared solely for that advice or assistance may be searched or seized under warrant. Denying the privilege against a search warrant would have a minimal effect in securing convictions but a major damaging effect on the relationship between the legal profession and its clients.”

Baker v Campbell (1983) 153 CLR 52

The counter-argument

‘The privilege is an **impediment**, not an inducement, to **frank** testimony, and it **detracts from the fairness** of the trial by denying a party access to relevant documents or at least subjecting him to surprise’

Majority in *Grant v Downs* (1976) 135 CLR 674

Mason J in O'Reilly v Commissioners of the State Bank of Victoria (1982) 44 ALR 27

“A more persuasive reason for confining it is that it is impossible to assess how significantly the privilege advances the policy which it is supposed to serve. The strength of this public interest is open to question. **It may be doubted whether it does very much to promote candour on the part of the client to his legal adviser.** ... And, even if the existence of the privilege does encourage the client to make full disclosure to his legal adviser, is that public interest so much stronger than the public interest in having litigation determined in **the light of the entirety of the relevant materials?**”

The existence of the privilege is too well entrenched to be abolished by a flourish of the judicial pen. But the nature of the public interest which it serves and the comments which I have made indicate that it should be **closely confined**”

What is required to make out a claim for LPP?

- **Advice privilege:** confidential communications made between a lawyer and a client where such communications were made for the dominant purpose of the lawyer providing (or the client receiving) legal advice.
- **Litigation privilege:** confidential communications made between:
 - a lawyer and a client for the dominant purpose of use in, or in relation to, existing or anticipated legal proceedings; or
 - a lawyer, client and a third party for the dominant purpose of use in, or in relation to, existing or anticipated legal proceedings.

Lets unpack this: key elements of test

- Confidential communications
- Solicitor client relationship
- Dominant purpose

Documents and Confidential Communications

- Documents
- Communications
 - Includes oral, written or recorded communications
 - Examples:
 - Email to lawyer from client, voice recordings, notes, memoranda
- Confidentiality
 - not confidential if disclosed to certain third parties

Legal Adviser and Client

- Meaning of legal adviser
 - solicitor
 - in-house lawyer
 - counsel
 - agent of the legal adviser
- Meaning of client
 - client's agent
 - corporate context:
 - only members of corporation authorised to obtain legal advice will be the client

LPP and in-house counsel

- For in-house counsel to be afforded LPP:
 - arises as a result of the employer consulting the employee in a professional capacity;
 - be in relation to a professional matter;
 - be made in confidence;
 - arise from the relationship of lawyer and client; and
 - satisfies one of the tests in *Grant v Downs* (NB now - *dominant purpose*).

Australian Hospital Care v Duggan [1999] VSC 96

Dominant Purpose

- Purpose
 - The ‘reason the communication came into existence’
 - Initial, eventual use is immaterial
 - Look at:
 - the circumstances in which the communication was made
 - intention of the person making it
 - the nature of any previous dealings between the parties
- Dominant
 - ‘dominant’ given its ordinary meaning
 - Ruling, prevailing or most influential purpose
 - What about material that has multiple purposes?



Sole purpose (*Grant
v Downs*)



Dominant purpose
test (*Esso Australia
Resources Ltd v
Commissioner of
Taxation*)

“The existence of legal professional privilege is not established merely by the **use of verbal formula** ... Nor is a claim of privilege established by **mere assertion that privilege applies to particular communications or that communications are undertaken for the purpose of obtaining or giving ‘legal advice’** ... If assertions of that kind are received in evidence in support of the privilege claim, their **conclusionary nature** can leave unclear what advice was really being sought. There will be cases in which a claim of privilege will not be sustainable in the **absence of evidence identifying the circumstances in which the relevant communication took place and the topics to which the instructions or advice were directed** ... “

Young J in *AWB Ltd v Cole (No 5)*

Advice Privilege

- Dividing line between commercial and legal advice
- Broad interpretation within the solicitor/client retainer (DSE (Holdings) Pty Ltd v Intertan Inc and Another (2003) 203 ALR 348)
- Advice privilege at common law extends to advice from third party

Litigation Privilege

- Existing or anticipated litigation
- Real prospect of litigation, as distinct from a mere possibility
- Litigation extends to quasi-judicial proceedings and arbitration
- Communications with third parties

Communication with third parties

- Common interest privilege
- Communications passing between the party's solicitor and a third party (experts and witnesses) for purposes of the litigation
- Communications between client and third person at request of client's solicitor
- Even without any such request, if made for the purpose advice or litigation

Pratt Holdings v Commissioner of Taxation (2003) 195 ALR 717

“Extending legal professional privilege to protect communications made for the dominant purpose of obtaining legal advice does not require all communications between legal adviser and client to be protected. If, however, **the policy implicit in the rationale for legal professional privilege is not to be subverted**, the **dominant purpose** criterion must be applied recognising that the situations in which people need legal advice are increasingly complex and that the client may need the assistance of third party experts if he or she is to be able to instruct the legal adviser appropriately”

Waiver of LPP

- Waiver can be express or implied
- Express waiver occurs where the privilege holder intentionally waives privilege e.g. annexing legal advice to affidavit filed in court proceedings
- Implied waiver occurs where the privilege holder acts in a manner inconsistent with the maintenance of confidentiality
 - Fairness considered but is not the test
 - Privilege holder does not need to intend to waive privilege

Implied waiver of LPP

Actions giving rise to waiver:

1. Bringing a case (or raising a defence) which puts the advice at issue (*Commissioner of Taxation v Rio Tinto Ltd* (2006) 151 FCR 341)
2. Disclosing the substance or gist of advice (*Perth Airport Pty Ltd v Qantas Airways Ltd (No 2)* [2021] WASC 342)
3. Filing or disclosing expert advice may waive privilege in associated materials

Situations which may not amount to waiver

- Inadvertent disclosure (*Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCA 46)
 - Solicitors have obligations where materials are inadvertently disclosed (Rule 31 of the Australian Solicitors' Conduct Rules)
 - Privilege holder must act promptly upon becoming aware of inadvertent disclosure

Situations which may not amount to waiver (cont)

- Production under compulsion of law (*Australian Competition & Consumer Commission v George Weston Foods Ltd* (2003) 198 ALR 592)
- Complying with a Legal Services Direction or providing document relating to Commonwealth legal work to the Attorney-General (*Judiciary Act 1903 (Cth) s 55ZH*)

Example scenarios: *Rio Tinto*

Commissioner of Taxation v Rio Tinto Ltd (2006) 229 ALR 304

- Rio Tinto appealed a decision made by the Commissioner.
- In the appeal proceeding, Rio Tinto requested: “the usual particulars of all the matters, things, circumstances or events taken into consideration” in making the decision.
- The Commissioner responded that the “matters, things circumstances and events taken into consideration” were “evidenced by” a list of documents some of which were claimed to be privileged.
- Did the Commissioner waive privilege in the advice listed?

- *“...has the commissioner (being the privilege holder) made an assertion as part of his or her case in the litigation that lays open the privileged documents to scrutiny, with the consequence that an inconsistency arises between the making of the assertion and the maintenance of the privilege?”*
- *“The commissioner could have identified his bases for satisfaction and exercises of discretion by listing the matters he took into account in each case, but he did not do so. Instead, he identified his bases for satisfaction and exercises of discretion as the matters evidenced in the scheduled documents.”*
- Held: issue waiver

Example scenarios: *ASIC v ANZ*

ASIC v Australia and New Zealand Banking Group Ltd (No 2)
[2020] FCA 1013

- In 2016, ANZ wrote to ASIC in relation to an issue with fees it had charged saying: “The issue was identified and reported to ASIC in February 2014 following a review of ANZ’s terms and conditions.”
- In 2018, ANZ informed ASIC that the statement was incorrect as “.. there had been advice provided to ANZ by external lawyers in 2011, in the context of the exception fees class action, which touched on this issue.”
- Did ANZ waive privilege in the external advice received in 2011?

- *“The fineness of the distinctions involved is apparent: there is a waiver if one states: “I have legal advice. Its substance is.” But there is no waiver if a party says what he or she believes and legal advice may be seen to be relevant to it. **One must state the substance or gist or conclusion of the advice.**”*
- In this case, the letter revealed the subject matter of the advice but not its contents.
- Held: No waiver

Example scenarios: *Perth Airport*

Perth Airport Pty Ltd v Qantas Airways Ltd (No 2) [2021] WASC 342

- During negotiations, Perth Airport provided airlines, including Qantas with a paper which included:

'Perth Airport's advisers have undertaken an analysis of the asset betas of listed airport companies globally and conclude a range for the sample of 0.64 to 0.7 depending on the sampling period.'

- Perth Airport argued that it had not deployed the advice for a forensic or commercial advantage and so there was no waiver in the advice.

- *“PAPL employed the statement that its advisers had concluded a range of 0.64 to 0.74 asset beta as a factor in support of its contention that an asset beta of 0.7 be adopted for the purposes of pricing its aeronautical services. **It is inconsistent for PAPL to employ its advisers’ conclusion as to asset beta in support of its pricing proposal and to maintain confidentiality in the basis of and reasons for its advisers concluding that beta range.**”*
- *“PAPL must produce to Qantas for inspection any documents which record the analysis of the asset betas of listed airport companies globally which concludes a range for the sample of 0.64 to 0.7. That might require PAPL to produce documents which are necessary to understand that analysis.”*
- Held: Waiver

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