Global Attorney-Client Privilege Guide - Australia

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# 01 - Discovery

## What disclosure/discovery is required in litigation?

Parties to litigation will normally be required to give either general discovery or discovery by categories, the purpose in each case being to enable a proper examination of the matters in dispute. In some courts in Australia, there has been a recent change toward discovery being provided after rather than before the service of evidence, and to courts requiring the parties to explain why discovery is necessary in a particular case rather than it being assumed that discovery will occur.

If an order for general discovery is made, each party will be required to produce a list of the documents relevant to the issues in dispute, which will include the following:

Documents on which a party relies

Documents that adversely affect the party’s own case

Documents that adversely affect another party’s case

Documents that support another party’s case

Parties will frequently be ordered to give discovery by reference to categories of documents identified as relevant to a matter in dispute. In such cases, if a document falls within the description of the category, it must be discovered.

“Document” is very broadly defined and includes virtually any record of information (e.g., letters, notes, computer files, emails and minutes of meetings). Within the parameters of either general discovery or discovery by categories, parties will be required to produce all documents within their possession, custody or power. This may include documents held by third parties, such as a party’s agents, solicitors and accountants.

Parties are not generally required to discover privileged documents. However, privileged documents must be separately identified as privileged. It is not uncommon for a party to request a list of another party’s privileged documents for the purposes of assessing whether privilege has been properly claimed and whether it can be challenged.

That a document is confidential or commercially sensitive is not in itself a ground for withholding it from production. All discovered documents are protected by an implied undertaking that they may only be used for the purposes of the proceedings in which they have been discovered and must not be used for any collateral purpose. Additional protective measures may be agreed for confidential documents, such as a regime to restrict access only to certain people involved in the litigation.

Parties must not withhold or destroy discoverable documents, and severe penalties apply if this occurs, including, in some jurisdictions, the possibility of criminal penalties. Parties must disclose in their list of documents any documents that are no longer in their power, custody or control and explain what has become of those documents.

Parties to proceedings may also use other compulsory court processes to obtain documents from third parties, for example, by issuing a subpoena. Production of documents pursuant to a subpoena may be challenged where production would be oppressive or when the classes of documents sought by the subpoena are not sufficiently defined. All documents answering the terms of the subpoena, including privileged documents, must be produced to the court. Privileged documents must be produced in a separate sealed envelope marked “privileged.”

# 02 - Type of privilege

## Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

Legal professional privilege (sometimes referred to as “client legal privilege”) is a common law doctrine recognized in Australia that permits the holder of the privilege to prevent the disclosure of documents or communications to which the privilege attaches. The Evidence Act 1995 (Cth) and equivalent legislation in certain Australian states and territories protects privileged documents or communications from being adduced as evidence in court.

There are two types of legal professional privilege recognized in Australia.

**Advice privilege** protects: (i) confidential communications passing between a client and a lawyer, or two or more lawyers acting for the client; or (ii) the contents of a confidential document prepared by the client, lawyer or another person, where the communication was made or the document was prepared for the dominant purpose of the lawyer or lawyers providing legal advice to the client.

**Litigation privilege** protects: (i) confidential communications passing between a client and another person, or a lawyer acting for the client and another person; or (ii) the contents of a confidential document, where the communication was made or the document was prepared for the dominant purpose of providing the client with professional legal services in relation to an actual or anticipated Australian or overseas proceeding in which the client is, may be, was or might have been a party.

Both types of privilege can protect a confidential document prepared by a client or another person even if it was not in fact delivered to the lawyer, as long as the document was prepared for the dominant purpose of obtaining legal advice or services.

The “dominant purpose” must be the clear paramount purpose, but need not be the only purpose for which the document was prepared. The onus of establishing the dominant purpose is on the party who asserts the privilege. A heading such as “Privileged & Confidential” can be helpful, but will not be determinative. In the case of a corporation, the dominant purpose is that of the company and not that of the employee who instructed the preparation of the communication. Board minutes are the best record of corporate intention.

# 03 - Scope of privilege

## Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

Under Australian law, privilege is a right of the client rather than an obligation or right of the lawyer. As a result, the privilege applies equally to copies of privileged communications held by the client and those held by the lawyer.

## Are in-house lawyers treated in the same way as external lawyers for determining privilege?

In-house lawyers are entitled to claim privilege on behalf of their employer; however, a claim for privilege in these circumstances will be subject to particular scrutiny. Demonstrating independence and the dominant purpose of the communication or document will be crucial. Factors that will be relevant in determining whether an in-house lawyer is sufficiently independent to claim privilege on behalf of his or her employer are as follows:

Whether the in-house lawyer holds a current practicing certificate with consequential professional obligations to the court

While there is authority that it is not essential for an in-house lawyer to hold a current practicing certificate in order to claim privilege, it has been held that a failure to have a practicing certificate would carry substantial weight on the question of lack of independence. In New South Wales, section 38 of the Legal Profession Uniform Law 2015 (NSW) clarifies that professional privileges (including client legal privilege) are not excluded or otherwise affected because an Australian legal practitioner (defined as an Australian lawyer holding a current practicing certificate) was acting in the capacity of a corporate legal practitioner.

To whom the in-house lawyer reports in the organization and with whom the in-house lawyer shares draft advice in the organization (in particular, whether draft advice is shared with someone from the business only to ensure that the facts are correct, or to seek the approval of the business as to the conclusion of the advice)

The advice of in-house lawyers should not be subject to direction or alteration by nonlawyers, or lawyers acting in a nonlegal capacity.

Whether the in-house lawyer holds other nonlegal roles within the business

If an in-house lawyer holds other roles, such as being a director, the risk is increased that they will be found not to be sufficiently independent for privilege to be claimed in relation to their documents and/or that it may not be possible to determine whether the dominant purpose of a particular communication was to provide legal advice rather than to provide business advice.

Whether the in-house lawyer participates in remuneration schemes, whether in the form of cash bonuses or share or option entitlements, that are related to the financial success of the business

## Does privilege extend to internal communications between in-house lawyers?

Privilege can extend to confidential internal communications between two or more in-house lawyers acting for the same client, or clients with a common interest privilege claim, provided the client(s) can meet the usual requirements for making a claim for privilege. As in-house counsel, any claim for privilege will face greater scrutiny as discussed above.

## Are foreign lawyers recognized for the purposes of privilege?

Under the uniform Evidence Acts in New South Wales, the Australian Capital Territory, Victoria, Tasmania and at the Commonwealth level, an Australian-registered foreign lawyer, an overseas-registered foreign lawyer, or a natural person who, under the law of the foreign country, is permitted to engage in legal practice, will be recognized in Australia for the purposes of legal professional privilege.

For the remainder of the jurisdictions (Northern Territory, Western Australia, Queensland and South Australia), the common law applies, and it is likely that privilege also attaches to legal advice given by solicitors duly qualified and authorized to practice within that foreign jurisdiction. This has been confirmed in a decision of the Queensland Supreme Court, whereby the Court found that privilege may attach to communications involving a qualified lawyer who, though not admitted in Australia, is admitted elsewhere.

## Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

Privilege will generally not extend to nonlegal professionals who advise on legal issues. There is an exception in those jurisdictions using the uniform evidence law, where employees or agents of those falling within the definition of “lawyer” will be recognized as lawyers for the purposes of assessing privilege claims.

# 04 - Sharing documents with third parties

## In what circumstances (if any) can a document be given to a third party without losing protection?

Conduct inconsistent with the continued confidentiality of the communication will result in a waiver of the privilege. This will arise, in particular, when the client knowingly and voluntarily discloses the substance of the evidence publicly or to another person, or the substance of the evidence is disclosed with the express or implied consent of a client. The test is concerned with the behavior of the holder of the privilege, not their intention.

Where a reference is made in a communication to the gist, conclusion or substance of legal advice, this can potentially result in a waiver in respect of the whole advice and other documents reasonably necessary to understand that advice. Particular caution should be exercised when referring to advice in correspondence with another party, or in publicly available documents such as financial reports, ASX announcements and takeover documents.

There are a number of exceptions to the doctrine of waiver, including the following:

**Compulsion of law**: Disclosure in accordance with a legal obligation to disclose is not a waiver. This will include situations where a regulator has the power to compel the production of privileged documents. However, a regulator will not ordinarily have the power to compel the production of privileged documents, and if in those cases otherwise-privileged documents are provided voluntarily to a regulator, then privilege is likely to be waived.

**Common interest**: A document may be disclosed to another without waiving privilege where the parties’ interests are aligned. Individual interests must not be selfish or potentially adverse. Companies in the same corporate group will not automatically share a common interest. It will be a question of fact in each case.

**Limited purpose waiver**: Where a document has been confidentially disclosed for a limited and specific purpose (for example, to conduct due diligence), then privilege will not be waived if the circumstances are not inconsistent with maintaining the privilege. The original holder of the document must retain control of the document and take steps to limit its disclosure and otherwise maintain confidentiality.

**Inadvertent waiver**: Where a privileged document is disclosed by mistake, it is possible to assert that there has been no waiver of privilege. However, it is important to take steps to recover the document as soon as the inadvertent waiver is discovered.

# 05 - Investigations

## Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

In Australia, the ultimate question to determine whether privilege applies is the dominant purpose test, which is whether the confidential communication was created for the dominant purpose of giving legal advice to a client, or to provide legal services for actual or anticipated litigation.

Privilege is not available if a client seeks legal advice in order to facilitate the commission of a crime, fraud or civil offense, regardless of whether the adviser knows of the unlawful purpose. Privilege is available where legal advice is sought for a past crime, fraud or civil offense.

Generally, there is no difference in how privilege operates in Australia. Privilege can be claimed in civil or criminal proceedings, during the course of a trial and in non-judicial proceedings. Privilege may also be claimed in relation to production of documents under a subpoena, a police search warrant, a search by taxation authorities, or an inquiry by a statutory body such as ASIC. There is jurisprudence which provides that a section 155 notice issued by the Australian Competition and Consumer Commission (ACCC) does not abrogate legal professional privilege which is recognized as an important common law right that can only be abrogated expressly or by necessary implication.

There are only a few instances when privilege is not a protection for persons to avoid providing information or documents (for example, sections 3ZZGE, 3ZQR and 15HV of the Crimes Act 1914 (Cth), section 9(4) of the Ombudsman Act 1976 (Cth), section 96(5) of the Law Enforcement Integrity Commissioner Act 2006 (Cth), section 18 of the Inspector-General of Intelligence and Security Act 1986 (Cth) or section 202 of the Proceeds of Crime Act 2002 (Cth)). The purpose is to compel individuals to produce evidence or information to government oversight bodies to allow for open government and accountability in decision making. However, the laws that abrogate privilege generally provide that the privileged material disclosed is not admissible in proceedings against that person.

## Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

Privilege protects the contents of confidential documents prepared by a client or lawyer for the dominant purpose of the lawyer providing legal advice to the client. Confidential notes, memoranda, minutes, copies and other documents made by the client and lawyer relating to communications, which if disclosed would reveal privileged communications, are also privileged. Such material is protected as the existence of the confidential material is directly attributable to the making of the privileged communication.

Section 118 of the Evidence Act 1995 (Cth) extends privilege to include documents prepared by a client or lawyer in their own right regardless of whether they are client-lawyer communications. Section 118 also extends to documents prepared by another person (i.e., not the client or lawyer). Oral communications from third parties made for the purposes of a lawyer giving advice fall outside the scope of privilege under section 118.

The Australian courts have not yet followed the UK’s approach in *The RBS Rights Issue Litigation* on determining the “client” for the purpose of privilege. Rather, section 117 of the Evidence Act 1995 (Cth) defines a client to include an employee or agent of a client, and the Australian position remains based on the “dominant purpose” test and therefore the purpose for which the document was created will remain the key consideration.

# 06 - Regulatory investigations

## Can governmental regulators require a privileged document to be provided to them?

Generally, a regulator does not have the power to compel the production of privileged documents; however, it depends on the particular statute from which the regulator obtains its powers. For example, in New South Wales, privilege has been abrogated by statute in relation to certain matters concerning the investigation into the James Hardie Group. A number of statutes expressly abrogate the entitlement to claim privilege against self-incrimination.

It should be noted that there are additional considerations which parties may have to weigh up when it comes to deciding whether or not to disclose privileged materials to a regulator. For example, in situations where a party has obtained conditional immunity from prosecution from a regulator, although the regulator may not have the power to compel the production of privileged documents, there is a risk that the party will lose their conditional immunity should a condition of their immunity be a requirement to provide full, frank and truthful disclosure and cooperation with the regulator (including by withholding nothing of relevance).

# 07 - Recent issues

## What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

Privilege has been an issue in many recent investigations being carried out by regulators, particularly those investigations being conducted by the Australian Taxation Office and the ACCC. Two examples of this are *Commissioner of Taxation v. PricewaterhouseCoopers & ors* [2022] FCA 278 and *Commonwealth Director of Public Prosecutions v. Citigroup Global Markets Australia Pty Ltd* [2021] FCA 511. In both cases, the regulator contested claims of privilege over documents to which the regulator was seeking access as part of their investigation, and the court, in both cases, found that privilege could not be upheld for all documents over which it was claimed.

The regulators have also made clear that they will particularly scrutinize claims for privilege from multidisciplinary firms such as the large accountancy firms where particularly documents relating to tax advice can raise issues as to whether they are covered by legal privilege.

# 08 - Authors

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