Global Privilege and Professional Secrecy Guide - Australia

03 - Scope of privilege

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# 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 their 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 or company secretary, 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 jurisdiction, 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.

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