

AUSTRALIA

Legal privilege global guide



About

Welcome to DLA Piper's Legal Professional Privilege Global Guide, the ultimate guide to legal professional privilege around the world.

Legal professional privilege protects the confidentiality of communications between lawyers and their clients and it has become an exception to the general principle of public policy for full disclosure. It is, in substance, a fundamental human right.

Although the concept of legal professional privilege is universal, its scope and limitation differ between jurisdictions. We are aware that many of our clients operate on a global platform, so it is of critical importance that they are aware of these differences in order to make informed decisions about the countries in which they are active and about how their business interests may be protected.

This global guide is a dynamic resource containing up-to-date details of the varying concepts and scope of legal professional privilege across dozens of jurisdictions globally. New jurisdictions are regularly being added to the guide, so if you cannot find the jurisdiction you are seeking, please let us know.

How to use this guide

Let us provide a few examples:

1. You are a Compliance Director for a listed company located in Country A and you have found that problematic conduct has occurred within your subsidiary in Country B.

Scenario A: You are about to send an e-mail to your in-house colleague in Country B with a legal assessment of the conduct in question. Before you push the button, you think about the scope of legal privilege. You will ask yourself: "Does Country B protect in-house lawyer communications? Or can my e-mail be seized by inspectors or discovered in court?" Our guide provides a first answer.

Scenario B: You plan to forward the legal advice received from DLA Piper to your colleague in Country B. Then you ask yourself the following question: "What is the scope of legal privilege in Country B?" Indeed, virtually all jurisdictions recognize the concept of privilege, but there is a big difference in terms of when privilege applies (e.g. only after the start of an investigation) and how broad is the scope. Again, our guide provides a first answer.

2. You are a freshly appointed Compliance Director for your internationally active company, and no clouds darken your horizon - yet. Before launching a new communications policy, you want to find out about the underlying privilege issues. Our guide provides initial guidance for your strategic legal communications and planning, and will help shape your strategy for sourcing and storing legal advice.

But remember, our Legal Professional Privilege Global Guide **does not constitute legal advice**. While this guide will be essential reading for those who need to find out more about the scope of legal professional privilege around the world, it is imperative that you contact the contributors to the individual chapters for more comprehensive guidance and legal advice in your particular case.

About DLA Piper

DLA Piper is a global law firm with lawyers located in more than 40 countries throughout the Americas, Europe, the Middle East, Africa and Asia Pacific, positioning us to help clients with their legal needs around the world.

For further information visit www.dlapiper.com.



Australia

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Concept of legal professional privilege

Legal professional privilege is derived from the common law and from legislation, such as the *Evidence Act 1995* (Cth), at both a state and federal level. It is important to remember that legal professional privilege (which is often referred to as client privilege) is a fundamental right that vests in the client. Legal professional privilege also applies in the context of criminal investigations and regulatory investigations by authorities such as the competition authority.

Communications that are protected by legal professional privilege include confidential communications between a lawyer and a client, one or more lawyers acting for the client, or lawyers acting for the client and a third person (such as an expert witness), if the dominant purpose of the communication is for providing legal advice or professional legal services, in relation to a current or anticipated legal proceeding.

Legal professional privilege also extends to confidential documents prepared for the purpose of giving or obtaining legal advice and for the purpose of a legal proceeding. Legal professional privilege may be abrogated by some common law exemptions and by the express and/or necessary implication of legislative provisions. For example, if a client seeks legal advice in an attempt to further a crime or fraud, this advice, and related communications, will not be subject to legal professional privilege. Further, a claim of legal professional privilege is unlikely to be able to be maintained if it is being used to frustrate a process of law.

Legal professional privilege in the context of civil litigation

In the context of civil litigation, where the court may order documents to be produced during processes such as discovery, such orders will not require documents that are subject to a claim of legal professional privilege to be produced. However, the documents will need to be identified in a list of documents that is provided to the party seeking discovery.

Legal professional privilege may be claimed when, as a third party, you are subpoenaed by a Court or required by a regulatory authority to produce documents. The process for making such a claim will depend on the court or regulatory authority and advice should be sought.

Scope of legal professional privilege

What is protected by legal professional privilege?

Communications and / or documents must be confidential and have occurred or come into existence for the 'dominant purpose' of obtaining legal advice or in relation to actual or anticipated litigation in order to attract legal professional privilege.

The purpose for which a communication occurs or a document is brought into existence is a question of fact that must be determined objectively. Evidence of the intention of the document's creator, or of the person who authorised or procured it, is not necessarily conclusive.

'Dominant' has been held to mean a 'ruling, prevailing or most influential' purpose. In determining whether the dominant purpose exists, the courts will examine the circumstances of the case objectively, rather than considering the subjective view of the person making the communication.

Typically, legally privileged communications occur between a client and their legal adviser, but can include those between a client and a third party (eg consultant) where the client engages the third party to produce something (eg tax advice) for the purpose of obtaining legal advice.

If the dominant purpose test is met, legal professional privilege may extend to documents such as:

- Notes, memoranda or other documents made by staff of the client, if those documents relate to information sought by the client's legal adviser to enable legal advice to be provided
- A record or summary of legal advice, even if prepared by a non-lawyer, but not to the client's opinions on, or stemming from, the legal advice
- Drafts, notes and other material brought into existence by the client for the purpose of communication to the lawyer, whether or not they are actually communicated to the lawyer, or
- A lawyer's revisions of the client's draft correspondence

Are communications with in-house counsel protected by legal professional privilege?

In Australia, courts have considered whether in-house lawyers are protected by legal professional privilege by assessing whether they are acting in their capacity as a lawyer and have the requisite independence to provide unfettered advice.

To attract legal professional privilege, communications/documents must be made in a lawyer's capacity as a lawyer in order to provide the client (i.e. the company) with legal advice or for the purpose of actual or anticipated litigation.

Communications made by in-house lawyers who act beyond their role as a legal adviser (eg by weighing in on operational matters) will fall outside the scope of legal professional privilege. This is also the case if a communication or document is found to have been made for mixed purposes.

Exercising independent professional judgement is a key factor that will be considered in establishing whether in-house counsel is acting in the capacity of a lawyer. Claims for legal professional privilege have been rejected on the basis that in-house counsel have not acted at sufficient arm's length from their client, such as when documents are produced by in-house lawyers who are subject to the directions of their managers and therefore giving rise to the impression that they lack the necessary independence.

Legal professional privilege has also been denied in relation to communications where in-house lawyers have been involved in the commercial decision-making of a transaction.

Whether an in-house lawyer has a practising certificate has also been considered by courts in Australia when deciding whether legal professional privilege should apply to their advice. While failing to have a current practising certificate is not necessarily fatal to a claim of legal professional privilege, it may lead to a court inferring that the communications made and documents created by the in-house lawyer are not for the purpose of providing legal advice or for the purpose of litigation.

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

Legal professional privilege is available in relation to legal advice from foreign lawyers, provided that the 'dominant purpose' requirement is met.

How is legal professional privilege waived?

A client will be deemed to have waived legal professional privilege if the client acts in a way which is inconsistent with the confidentiality which the legal professional privilege is supposed to protect. Waiver of legal professional privilege may be implied in some circumstances.

It is important to maintain the confidentiality of communications and documents that legal professional privilege attaches to. Legal professional privilege has been deemed to be waived in circumstances where the substance, general essence or conclusion of legal advice has been communicated in a public forum such as a media statement, board papers that have been provided to third parties, through partial disclosure to a regulatory body of the contents of a document or during negotiations.

Legal professional privilege in the context of merger control

Under the *Competition and Consumer Act 2010* (Cth), the Australian Competition and Consumer Commission (**ACCC**) has broad powers to compel the production of documents, including by way of subpoenas and search warrants.

The general principles of privilege (as outlined above) apply to competition or merger control in Australia, and in respect of enforcement action taken by the ACCC.

Whilst it is clear that documents subject to legal professional privilege are protected from compulsory disclosure and requests for production by regulators (such as the ACCC), it is often impossible to ascertain if documents are privileged if the production of the documents is required immediately. If that is the case, the person or company that is the subject of the immediate requirement to produce documents, ought to identify the potentially privileged documents, and reserve the right to assert a claim of privilege. The potentially privileged documents should be produced separately, and in a sealed package, to the regulator. If agreement cannot be reached with the regulator as to whether the documents are privileged, the issue of privilege will be determined by the Court.

Typically, records of internal investigations will be privileged where they were generated for the purpose of providing legal advice on the subject matter of the investigation. On the other hand, records of a transaction will generally not be privileged, even if that transaction is later investigated.

Recent cases and/or other legal developments

Waiver of legal professional privilege

Recent cases have highlighted that parties and practitioners must take care to avoid the unintentional waiver of legal professional privilege.

For example, in *ASIC v Park Trent Properties Group Pty Ltd* [2015] NSWSC 342, the Supreme Court of New South Wales held that the defendant had waived privilege over legal advice provided in the preparation of a compliance manual by voluntarily disclosing the manual to the Australian Securities and Investments Commission (**ASIC**). Key to the Court's finding was that a) the legal advice shaped the substance of the manual, and b) the manual was deployed to obtain an advantage. This decision reaffirms that privilege can be waived by disclosing the effect of the legal advice, regardless of whether the advice itself is disclosed. Accordingly, it reminds parties to think twice before voluntarily disclosing compliance material that has been prepared by lawyers.

The Western Australian Supreme Court found that the privilege in lawyer-client emails may be waived if a third party is copied. In *TEC Hedland Pty Ltd v The Pilbara Infrastructure Pty Ltd* [2018] WASC 300, the central issue was whether the maintenance of the privilege is inconsistent with the use of the relevant communication. TEC had agreed to supply electricity to Pilbara. B&V, the party copied into the emails between TEC and its lawyers, had been engaged to perform a test procedure. The test procedure was one of the issues in dispute. The court referred to the Full Federal Court decision of *Bennett v Chief Executive Officer of the Australian Customs Service* [2004] FCAFC 237 and endorsed the principle that "for a client to deploy the substance or effect of legal advice for forensic or commercial purposes is inconsistent with the maintenance of the confidentiality that attracts legal professional privilege". The court concluded that TEC had waived privilege over the emails with its lawyers by copying B&V. This case confirms the importance of ensuring only essential parties, and not third parties, are copied into privileged communications.

In the related case of *TEC Hedland Pty Ltd v The Pilbara Infrastructure Pty Ltd* [2020] WASC 364, a recent case involving the same parties, the Supreme Court of Western Australia ruled a novel point not previously considered by the courts. The case involved the question of whether an email seeking legal advice that was sent to 10 recipients, only one of whom was a lawyer, would be protected by legal professional privilege. The Court held that, unless the dominant purpose of the communication is to settle instructions to the lawyer, only the copy of the email that is sent to the lawyer will be privileged. If the dominant purpose of the email was to obtain commercial views rather than legal advice, the communication would not be privileged.

Another recent case that considered waiver of privilege in the context of a regulatory investigation is *Commonwealth Director of Public Prosecutions v Citigroup Global Markets Australia Pty Ltd* [2021] FCA 511. This case involved a prosecution of cartel conduct offences, following an investigation by the ACCC into an institutional share placement undertaken by various financial institutions. JP Morgan Australia (**JP Morgan**) had been granted conditional immunity from civil and criminal action in relation to the ACCC's investigation. One of the conditions was that JP Morgan "provide full, frank and truthful disclosure and cooperation to the ACCC and withhold nothing of relevance." JP Morgan later produced redacted copies of various documents to the ACCC, and asserted privilege over the redacted portions. The

ACCC pressed for unredacted copies by way of a subpoena and, eventually, the parties agreed that JP Morgan would give partial disclosure to the prosecutor by reading aloud the portions of redacted documents. JP Morgan who maintained a claim of privilege in the document read out to the ACCC agreed to the partial disclosure because it thought it would risk losing its immunity by not complying with the subpoena. However, the Federal Court ultimately found that the partial disclosure consisted a waiver of any privilege that JP Morgan had over the documents at the time they were created.

Illegality

The principle that legal professional privilege does not apply to communications made for improper and/or illegal purposes is well settled. The Federal Court has applied this principle in circumstances where the lawyers involved were not necessarily aware of the illegality. In *Aucare Dairy Pty Ltd v Huang* [2017] FCA 746, there was evidence to indicate that the defendant, Huang, had moved and/or placed ownership of assets of an insolvent company beyond the reach of Aucare, with whom the insolvent company had previously been in a failed joint venture with. The Court found that Huang's lawyers knew and/or participated in the alleged fraud, despite the plaintiff not having suggested this and there being no direct evidence that this was the case. The Court ordered production of privileged correspondence between Huang and her lawyers. This case emphasises that there is a risk that where there is evidence of illegality and /or improper purpose by a party, that party will not be entitled to legal professional privilege.

Directors

In *Equititrust Ltd (in Liq) (Receivers appointed) (Receivers and Managers Appointed) v Equititrust Ltd (in Liq) (Receiver appointed) (Receivers and Managers Appointed) (No.3)* [2016] FCA 738, the Federal Court held that a director may only claim privilege over documents containing legal advice if it relates in some way to the director in his/her personal capacity, and not merely to the operations of the company. A former director of Equititrust claimed privilege (both joint and common interest) over a range of documents produced by Equititrust that contained legal advice. The Court held that only 11 of the 625 disputed documents were privileged. In relation to joint privilege, the Court found that there was scarce evidence that the director had personal concerns in the matters raised by the documents disputed and clarified that: legal advice addressed to a director or 'the Directors' did not necessarily mean that the advice was provided on the basis of joint privilege; and the fact that a director was involved in procuring the legal advice did not on its own establish joint privilege. In relation to common interest privilege, the Court highlighted that commonality of interest is a prerequisite for the privilege to apply – the mere fact that legal advice was communicated to Equititrust does not mean that its directors had a common interest privilege in that advice; and the fact that a company can only act through its directors does not give rise to a common interest. This case reminds directors of the need to clearly identify legal advice obtained in their personal capacity in order for it to be subject to privilege. It is also important to remember that a director cannot assert legal privilege on behalf of a company once the company is in liquidation.

Trustees

In *Hancock v Rinehart (Privilege)* [2016] NSWSC 12, Gina Rinehart claimed privilege over documents produced by her former lawyer pursuant to a subpoena issued by her daughter, Bianca, as the new trustee of the Hope Margaret Hancock Trust (Gina was the former trustee). The Supreme Court of New South Wales found that there was no evidence to support Gina's claim of privilege. Gina had not adduced any evidence about the circumstances and purposes of the disputed documents, including whether the documents had been created for Gina in her capacity as trustee. The Court noted that if the costs of obtaining legal advice are paid from the trust fund, the suggestion is that advice was obtained on behalf of the trust and not the trustee personally. This case reiterates the position that legal advice obtained by a trustee belongs to the trust and not the trustee personally.

Data privilege

1) Privilege in Investigations

a) Is there a specific legal privilege arising in the context of internal investigations, criminal investigations and/or data protection matters? If yes, what are the elements required for these categories of investigation?

Internal Investigations

Legal professional privilege applies in the context of civil proceedings, criminal investigations and in the context of regulatory investigations by authorities such as the office of the Australian Information Commission (the primary privacy regulator in Australia).

The test for legal professional privilege in each context (internal, criminal and data protection matters) in Australia is the same.

Legal professional privilege is derived from the common law and from legislation, such as the Evidence Act 1995 (Cth), at both a state and federal level. In Australia, legal professional privilege (which is often referred to as client privilege) is a fundamental right that vests in the client – not in or with the lawyer.

The test – in summary

Confidential communications:

between a lawyer and their client, one or more lawyers acting for the client, or lawyers acting for the client and a third person (such as an expert witness);

which are for the dominant purpose of providing legal advice or professional legal services; and

are in relation to a current or pending legal proceeding, are protected by legal professional privilege.

Legal professional privilege also extends to confidential documents prepared for the purpose of giving or obtaining legal advice and for the purpose of a legal proceeding. For example, a report/document prepared by a forensic IT consultant or an internal IT operative that is created to obtain legal advice will normally be privileged.

How is privilege lost?

Legal professional privilege may be abrogated by some common law exemptions and by the express and/or necessary implication of legislative provisions.

For example, if a client seeks legal advice in an attempt to further a crime or fraud, this advice and related communications will not be subject to legal professional privilege. Further, a claim of legal professional privilege is unlikely to be able to be maintained if it is being used to frustrate a process of law.

In the context of civil litigation, where the court may order documents to be produced during processes such as discovery, such orders will not require documents that are subject to a claim of legal professional privilege to be produced. However, the documents will need to be identified in a list of documents that is provided to the party seeking discovery.

b) Are there specific time periods which apply to legal privilege? Do they vary depending on whether the privilege relates to legal advice or litigation?

There is no limitation period placed on legal professional privilege in Australia.

c) Are communications to/by companies and in-house counsel protected by privilege?

In Australia, courts have considered whether in-house lawyers are protected by legal professional privilege by assessing whether they are acting in their capacity as a lawyer and have the requisite independence to provide unfettered advice.

To attract legal professional privilege, communications or documents must be made in a lawyer's capacity as a lawyer in order to provide the client with legal advice or for the purpose of actual or anticipated litigation.

Communications made by in-house lawyers who act beyond their role as a legal advisor (for example by weighing in on operational matters) will fall outside the scope of legal professional privilege. This is also the case if a communication or document is found to have been made for mixed purposes.

Exercising independent professional judgement is a key factor that will be considered in establishing whether in-house counsel is acting in the capacity of a lawyer. Claims for legal professional privilege have been rejected on the basis that in-house counsel have not acted at sufficient arm's length from their client, such as when documents are produced by in-house lawyers who are subject to the directions of their managers and therefore giving rise to the impression that they lack necessary independence.

Legal professional privilege has also been denied in relation to communications where in-house lawyers have been involved in the commercial decision-making of a transaction.

Whether an in-house lawyer has a practising certificate has also been considered by courts in Australia when deciding whether legal professional privilege should apply to their advice. While failing to have a current practicing certificate is not necessarily fatal to a claim of legal professional privilege, it may lead to a court inferring that the communications made and documents created by the in-house lawyer are not for the purpose of providing legal advice or for the purpose of litigation.

In a data breach/cyber incident, it is important that any in-house counsel makes it clear when they are giving legal advice and when they are acting in an operational capacity – for example as an incident response coordinator which may involve giving commercial advice on how to respond to the incident.

d) Are there any specific requirements of a privileged incident response engagement letter?

Yes, it is recommended that external counsel engage any third parties required to assist with a response in order to best set up an ability to claim privilege over the work done.

All third-party engagement letters should include a statement that the third party is being involved for DLA Piper/in-house counsel to advise the affected entity.

b) Documents and Reports

a) Does privilege protect notes or transcripts of employee interviews, third-party expert reports or expert reports prepared or obtained for the purpose of giving legal advice?

Yes.

Communications or documents must be confidential and have occurred or come into existence for the “dominant purpose” of obtaining legal advice or in relation to actual or anticipated litigation to attract legal professional privilege. The term “dominant” has been held to mean a “ruling, prevailing or most influential” purpose.

To avoid any later arguments as to what the dominant purpose of the document, it is recommended that a lawyer (internal or external) prepare the record of the interview if at all possible. If it is not possible for a lawyer to prepare the record of the interview, it should be clearly noted at the commencement of the interview that the purpose of the interview is to enable the affected entity to obtain legal advice.

b) Does it matter whether the documents are located at the premises of the client or the lawyer?

It does not matter whether the documents are located at the client or lawyer's premises.

c) How are seized documents put into evidence in a criminal/civil procedure?

Generally, privileged materials cannot be used in legal proceedings in Australia.

There are extremely limited circumstances where this general rule will not apply.

A party who claims privilege will generally have a right to object to use of privileged material. External counsel should be briefed as a matter of urgency if a government agency or third party attempts to use privileged materials.

3) Waiver of Privilege

a) Are there exceptions to the legal privilege rules in your jurisdiction, such as waiver? If yes, what are the elements required to establish these and are there practical steps that can be taken to ensure that privilege is not lost?

A client will be deemed to have waived legal professional privilege if the client acts in a way that is inconsistent with the confidentiality which the legal professional privilege is supposed to protect.

The waiver of legal professional privilege is available under several circumstances. Firstly, the privilege can be waived by disclosing the effect of the legal advice, regardless of whether the advice itself is disclosed. Accordingly, it reminds parties to think twice before voluntarily disclosing compliance material that has been prepared by lawyers.

Secondly, the privilege may be waived if a third party is copied into the communication. The principle endorsed by the Full Federal Court is that “for a client to deploy the substance or effect of legal advice for forensic or commercial purposes is inconsistent with the maintenance of the confidentiality that attracts legal professional privilege.”

The legal professional privilege will also not apply in circumstances where the communications are made for improper and/or illegal purposes, notwithstanding the fact that the lawyers involved were not necessarily aware of the illegality. The Federal Court in *Aucare Dairy Pty Ltd v Huang* emphasised that there is a risk that where there is evidence of illegality and/or improper purpose by a party, that party will not be entitled to legal professional privilege.

Additionally, legal professional privilege may only be claimed by a company director over documents containing legal advice if the documents are related in some way to the director in their personal capacity and not merely to the operations of the company. The Federal Court found in *Equititrust Ltd (in Liq) (Receivers appointed) (Receivers and Managers Appointed) v Equititrust Ltd (in Liq) (Receiver appointed) (Receivers and Managers Appointed) (No.3)* that the fact documents containing legal advice were addressed to a director or “the Directors,” or procured by a director did not mean that the director had personal concerns in the matters raised by the documents disputed or mean that the advice was provided on the basis of joint privilege.

The Court also held that commonality of interest is a prerequisite for common interest privilege to apply and that the mere fact the legal advice was communicated to Equititrust and that a company can only act through its directors did not mean that its directors had a common interest privilege in that advice.

Legal professional privilege was also dismissed in *Hancock v Rinehart* where the Supreme Court of New South Wales held that legal advice obtained by a trustee belongs to the trust and not the trustee personally. The Court noted that the costs of obtaining the legal advice were paid from the trust fund, and accepted the suggestion that the advice was obtained in behalf of the trust and not the trustee in her personal capacity.

b) In data breach litigation does a company ever need to rely on the findings of internal investigations and if so does that mean privilege has been waived?

It may be possible that a company could wish to rely on a privileged report or documents created during an investigation. In those circumstances it will be necessary to waive privilege.

It may be possible to waive privilege only in that document but care must be taken.

External legal counsel should be engaged in any discussion about a decision to waive privilege as in Australia it is possible, through a concept called “issue waiver” to lose privilege over all materials relating to a particular topic.

c) If reliance means a waiver, does notification to affected individuals of the findings of internal investigations or a sharing of the findings with third parties mean a waiver, too?

It will depend on the scope and nature of the information shared.

Again, care should be taken as to the contents of such notifications so as to not inadvertently waive privilege.

4) Privacy Litigation

a) Were there any data breach privilege cases in your jurisdiction in the last five years? If so, please provide details.

We have not located any decisions on privilege that have arisen in the context of a data breach in the last five years.

b) Are there any rules and or cases in the jurisdiction that deal specifically with privilege in a multi-state/cross-border scenario?

Australia is a federation. There is relevant legislation dealing with privilege at a federal and state level, as well as in the common law.

There are numerous courts cases that consider cross-border privilege issues.

c) Would privileged data outside your jurisdiction be treated as privileged data in your jurisdiction?

Yes, that is the general approach.

d) How is privileged data in your jurisdiction treated in the event of a civil/criminal investigation outside the jurisdiction to ensure privilege is maintained?

The critical element to maintaining privilege in Australia is to ensure that the privileged material remains confidential and that there is no express or implied (through conduct) waiver of that privilege.

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