

AUSTRALIAN GOVERNMENT IN-HOUSE COUNSEL WEBINAR SERIES 2020

**Professional Development and Networking for
the In-House Legal Community**

Legal Professional Privilege

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What are we talking about?

- Legal professional privilege, the basics
- Protecting your client's legal professional privilege
- Legal professional privilege in the Administrative Appeals Tribunal

Legal professional privilege is...

- “a bulwark against tyranny and oppression”
- “of great importance to the protection and preservation of the rights, dignity and freedom of the ordinary citizen under the law and to the administration of justice and law”
- “a substantive general principle of the common law and not a mere rule of evidence”
 - *Attorney-General (NT) v Maurice* (1986) 161 CLR 475

Legal professional privilege...

- “promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by their legal advisors”
 - *Grant v Downs* [1976] HCA 63
- Is a balance between “the public policy reflected in the privilege itself, and the public policy that, in the administration of justice and investigative procedures there should be unfettered access to relevant information”
 - *Esso Australia Resources Limited v Commissioner of Taxation* [1999] HCA 67

Legal professional privilege is...

- “a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal [confidential] communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings.”
 - *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49

Legal professional privilege?

- Privilege held by client, not by lawyer
- “The privilege is commonly described as legal professional privilege, which is unfortunate, because it suggests that the privilege is that of the members of the legal profession, which it is not. It is the client's privilege, so that it may be waived by the client, but not by the lawyer.”
 - *Baker v Campbell* [1983] HCA 39, Murphy J
- *Evidence Act 1995* (Cth) – Client legal privilege

“a rule of substantive law”

- “As a matter of principle or practice it does not seem to me to matter whether the compulsion is at the hands of the executive or at the hands of the judiciary if what is placed in jeopardy is the right to seek guidance in the processes of the law without fear of harm as a consequence.”
 - *Baker v Campbell* [1983] HCA 39, Dawson J
- Rule of evidence – see *Evidence Act 1995 (Cth)*, Part 3.10

Immunity against production

- ‘resist the giving of information or the production of documents’
- Shield, not a sword - the privilege cannot be used to support other remedies concerning the use of confidential legal documents – “The privilege is only an immunity from the exercise of powers which would otherwise compel the disclosure of privileged communications ...”
 - *Glencore International AG v Commissioner of Taxation* [2019] HCA 26

Protection for confidential communications

- Privilege applies to communications, but vests in documents because they record or constitute a communication prepared, given or received for the purpose of obtaining legal advice or assistance
 - *Esso Australia Resources Limited v Commissioner of Taxation* [1999] HCA 67
- Confidentiality – waiver of the privilege occurs if the holder “performs an act which is inconsistent with the confidence preserved by it”
 - *Mann v Carnell* [1999] HCA 66

Protection for confidential communications

- Communications ...
 - between the client and the legal advisor
 - between legal advisors
 - between legal advisors and third parties
 - between the client and a third party

Protection for confidential communications

- Communications ...
 - any document that records a confidential communication (but only to the extent that it does) (legal advices, memoranda, minutes, file notes etc)
 - documents prepared with a view to being used as a confidential communication (i.e. draft documents)
 - documents prepared with a view to obtaining legal advice or to conduct litigation

What purposes?

- Not all communications between a lawyer and client are privileged
- Giving or obtaining legal advice, or
- Representation in actual or anticipated legal proceedings
 - "there must be a real prospect of litigation, as distinct from a mere possibility, but it does not have to be more likely than not"
 - *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority* [2002] VSCA 59

Dominant purpose test

- Dominant purpose that document brought into existence, not sole purpose
 - *Esso Australia Resources Limited v Commissioner of Taxation* [1999] HCA 67
- Paramount purpose (“clear paramountcy”) or “ruling, prevailing, or most influential purpose”
 - *Tommy on behalf of the Yinhawangka Gobawarrarah v State of Western Australia (No 2)* [2019] FCA 1551
- If other purposes that document brought into existence, to be determined as a question of fact whether one was the dominant purpose

Protecting your client's privilege

- Be aware which communications / documents attract privilege
- Apply appropriate markers to privileged documents
- If disclosed to third parties (at request of client), inform third party that disclosure is made confidentially and should not be further disclosed
- Protect the security of privileged documents – physical security and security of electronic records
 - including appropriate restrictions on internal access to legal documents

Protecting your client's privilege

- If seeking information from a third party (e.g. expert report)
 - identify the legal purpose in the instructions to the third party – such as, that the report is required for current or anticipated legal proceedings, or to provide legal advice
- If confidentiality is breached, address the breach as quickly as possible
 - inform the recipient that documents are privileged – Recall – Request that documents be deleted and destroyed

LPP and Tribunal Documents

- Paragraph 37(1)(b) of the AAT Act: obligation to lodge a copy of every document that is in the person's possession or under the person's control and is **relevant to the review of the decision by the Tribunal**.
- Subsection 37(1AE): obligation to give a copy of the documents to each other party to the proceeding unless directed otherwise by the Tribunal.
- Subsection 37(3): section 37 has effect notwithstanding any rule of law relating to privilege or the public interest in relation to the production of documents.

Are privileged documents 'relevant'?

- **Yes**, a document that is subject to LPP may be relevant to the Tribunal's review, provided that:
 - the document was relied upon by the decision maker in making the decision under review (regardless of whether they adopted or acted on any advice)
 - there have been no changes to the applicable law since the advice was prepared

Production to other parties

- The decision maker may apply for a confidentiality order under section 35 of the AAT Act, to restrict the publication or disclosure of a document which is both relevant and privileged
- Such orders will not be made ‘as a matter of course’ (although there is limited guidance as to when they might not be made)
- Refer to the Tribunal’s Practice Direction *Lodgement of Documents under Sections 37 and 38AA of the AAT Act* for the procedure to follow when making such an application

Section 38AA of the AAT Act

- An ongoing obligation to lodge relevant documents that come into the possession of the decision maker after the Tribunal documents have been lodged and before the Tribunal determines the review
- Section 38AA is not intended to be read as incorporating all of the obligations under section 37 – decision makers need not lodge copies of privileged documents that come into their possession *after* the Tribunal documents have been lodged (see *Bolton and Australian Securities and Investments Commission* [2018] AATA 4640)

LPP during Tribunal proceedings

Legal professional privilege applies in the Tribunal – including in respect of documents created for the dominant purpose of providing legal services in connection with Tribunal proceedings – unless there is a clearly expressed abrogation of the privilege in the legislation governing the application

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