

LEGAL PROFESSIONAL PRIVILEGE: BOARD MINUTES AND PAPERS

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Legal Briefings - By **Andrew Eastwood and Brendan Donohue**

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This article is part of our [Legal Professional Privilege in Australia](#) series where our regulatory and disputes specialists have developed a suite of resources to provide practical guidance on common questions and scenarios when dealing with LPP in Australia.

KEY POINTS

- It is, of course, entirely appropriate for a company's board to seek and receive legal advice. Indeed, in some circumstances, it will be necessary for the directors to do so.
- When that occurs, issues can arise in relation to legal professional privilege.
- This short note concerns board papers. It dispels some myths about legal professional privilege in board papers. It also sets out some practical advice on handling legal advice in board materials.

SEVEN PRACTICAL POINTS CONCERNING BOARD PAPERS AND MINUTES

1. **Boards need to receive legal advice:** it is appropriate for the board to receive legal advice in written form. The mere provision of legal advice to a board does not constitute a waiver of privilege in that advice.
2. **The need for clarity:** when providing advice to a board, be very clear about which communications are a legal communication and which are non-legal (eg commercial) communications. Keep legal and non-legal communications separate.
3. **Best practice:** annex legal advice to the board papers as a separate document. Clearly label that separate document as “confidential and subject to legal professional privilege”. Of course, the author of the relevant board paper should be a lawyer.
4. **Next best:** have a separate section of the board paper which contains the legal advice and is clearly titled “confidential and subject to legal professional privilege”.
5. **Minutes:**
 - If there is a need to record legal advice in board minutes, the relevant section of the minutes should be titled “confidential and subject to legal professional privilege”. You will need to assess how much of the privileged information should be recorded. In some circumstances, it may be sufficient to merely note in the minutes that the board considered legal advice when making a certain decision. In other cases, it may be appropriate to record the content of the advice (for example, when the advice is a key integer in the board’s decision).
 - The mere recording of legal advice in the minutes will not constitute a waiver of privilege in that advice. However, you should be cognisant that privilege can be lost if the communication or advice, or part of it, ceases to be confidential. For example, if the gist or conclusion of legal advice is disclosed to persons that are not board members or intended recipients of the minutes, privilege may be lost over the entire advice that is referenced. As a consequence, minutes should be kept secure and confidential. To avoid waiving privilege, minutes containing privileged information should not be disclosed to third parties without first taking appropriate legal advice.

1. **Doubts?** If you have doubts about how to handle legal advice given to the board, contact your legal advisers.
2. **What if the papers are sought in a regulatory investigation or in litigation?** You should contact your legal advisers. In short, the privileged material should be redacted before it is produced in the investigation or litigation.

Please reach out to your usual Herbert Smith Freehills contacts with any queries you might have on Legal Professional Privilege.

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