

LEGAL PROFESSIONAL PRIVILEGE: IN-HOUSE COUNSEL

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Legal Briefings - By **Andrew Eastwood, Mark Pavli and Anitha Reddy**

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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

- **Legal professional privilege (LPP)** can apply to communications with or documents prepared by in-house legal counsel.
- As the clients of in-house legal counsel are also their employers, courts have tended to be more cautious in upholding claims of LPP where the relevant legal adviser is an in-house lawyer.
- To assist in supporting a claim for LPP, in-house legal counsel should be able to demonstrate that:

- they were consulted in their professional capacity in relation to a professional matter and the communications were made in confidence and arose from the relationship of lawyer and client;
 - they were qualified to practise law.
 - There is a suggestion in some cases that there may be a separate requirement for in-house lawyers of "independence". However, the better view is that there is no separate independence requirement.
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WHICH HAT IS THE IN-HOUSE LAWYER WEARING?

- In the in-house context there is greater scope for individuals to mix legal and non-legal roles, muddying the waters as to the capacity in which an in-house lawyer was acting at a given moment.
 - It is especially important to determine the capacity in which an in-house lawyer is acting. Privilege will only be available where an in-house lawyer is acting in a legal rather than, for example, an executive or commercial capacity.¹
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DOMINANT PURPOSE

- Courts may more rigorously test issues of dominant purpose with in-house counsel as the nature of in-house roles may involve providing advice on commercial and operational issues in addition to legal issues.
- Dominant purpose means the **ruling, prevailing or most influential** purpose.

- The purpose in existence at the time the communication was made or the document was brought into existence is determinative.
- It may be more difficult for an in-house counsel to satisfy and establish the dominant purpose test if they have a number of duties, including giving commercial advice.²
- LPP will **not** cover purely commercial (or other non-legal) advice, even where it is given by a lawyer. anticipated litigation.

EXAMPLES

LPP unlikely to apply	LPP may apply
An email chain between compliance and a client copying in-house counsel for information only.	A file note recording a conversation between a client seeking legal advice and in-house counsel.
A board paper from an in-house counsel (who also holds an executive role) providing commercial advice.	A draft legal memorandum sent to a client for comments.
An email from a non-legal adviser to a third party attaching a press release and copying in-house counsel.	Minutes of a board meeting recording legal advice provided by an in-house lawyer.
A letter from in-house counsel to a regulatory agency.	Emails between two in-house counsel discussing legal advice to be provided to a client.

BEST PRACTICE TIPS

- the legal advice of in-house lawyers should not be subject to direction or alteration by non-lawyers, or by lawyers who are acting in a non-legal capacity;
- a management structure where lawyers are supervised by other lawyers, as opposed to non-lawyers, is desirable;

- lawyers should be clearly identified as such by their job title;
- documents and communications that are prepared by or sent to lawyers for the dominant purpose of legal advice or litigation should state that the document or communication is confidential and privileged;
- keep communications made for the dominant purpose of legal advice or litigation separate from communications relating to non-legal or administrative matters, where that is feasible;
- in-house lawyers should be provided with opportunities for continuing legal education;
- the particular ethical standards expected of lawyers should be made clear to both legal and non-legal staff;
- legal and non-legal duties carried out by lawyers should be clearly delineated (for example, by keeping separate files or denoting documents, including emails, with legal advice with a heading such as 'Confidential and Privileged' or 'Prepared for the purpose of giving/obtaining legal advice'); and
- these requirements should be explicitly set out in corporate policy documents and be the subject of training for in-house lawyers and management.

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