

LEGAL PROFESSIONAL PRIVILEGE: WAIVER

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Legal Briefings - By **Graeme Johnson, Danielle Briers and Mungo Skyring**

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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

- Waiver occurs when the holder of the privilege acts in a way that is inconsistent with the communication remaining confidential.
 - Waiver can be intentional, unintentional or implied.
 - Waiver is a fact-specific area but there are some typical waiver scenarios you should be aware of and key practical steps you can take to avoid waiver.
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RECAP ON LEGAL PROFESSIONAL PRIVILEGE

As outlined in our quick guide on [Claiming Legal Professional Privilege](#), where legal professional privilege (**LPP**) applies to a communication or document, you are generally not required to disclose it, including in response to a regulatory notice or in Court proceedings.

Two categories of LPP are:

- legal advice privilege; and
 - litigation privilege.
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WHEN IS PRIVILEGE LOST?

LPP can be waived (that is, lost) if you act in a way that is inconsistent with the privileged communication or document remaining confidential. This may arise when there is:

- **intentional** disclosure
- **unintentional** disclosure, such as an accidental disclosure; or
- **implied waiver**, which may involve:
 - "disclosure waiver" - waiver over the whole advice where the substance, gist or conclusion is disclosed;
 - "issue waiver" - waiver over privileged information forming the basis of a case brought or assertion made; or

- "associated material waiver" - waiver of material relevant to the same issue or subject matter as a disclosed document.

The test is whether the privilege holder has acted in a way that is plainly inconsistent with maintaining confidentiality, such that it manifests an objective intention to abandon the privilege (regardless of the privilege holder's actual intention).

As privilege is a right belonging to the lawyer's client, only the client or someone authorised by them is capable of waiving privilege.

EXAMPLES

Privilege will often be waived where:

- the gist, substance or conclusion of the privileged communication is published or communicated to a third party, for example:
 - you inform a third party that you have obtained legal advice that the company has not breached any laws;
 - you issue a media release or ASX announcement stating that you have received advice that you are likely to succeed in litigation;
- a document is produced (eg in court proceedings, to a regulatory body, or in a due diligence) that discloses the gist, substance or conclusion of the privileged communication;
- a witness refreshes their memory using a privileged document; or
- the holder of the privilege puts the content of privileged communications in issue in legal proceedings (eg by asserting a certain state of mind in relation to the party's legal rights).

Privilege will generally not be waived where:

- legal advice is shared within a company, between companies in the same corporate group, or across government agencies, preferably on a ‘need to know’ basis;
 - you disclose that you have received legal advice without disclosing (expressly or impliedly) the substance of the advice;
 - you disclose legal advice to a third party with whom you share a sufficient common interest (see further our quick guide on [Protecting LPP when providing material to third parties: common interest privilege, joint privilege and limited waiver](#));
 - you inadvertently disclose privileged material and take reasonable steps to protect its confidentiality once this is detected; or
 - you produce privileged material in response to a compulsory order (eg to a regulator) under terms of confidentiality (provided the material does in fact remain confidential).
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PRACTICAL STEPS TO PREVENT WAIVER

As waiver is a fact-specific area, comparisons to past cases are often unhelpful. The important thing to remember is that it is critical to maintain the confidentiality of the communication or document.

You can help ensure this confidentiality is maintained:

- Don’t comment on legal advice publicly or in documents that may be produced (eg board papers) or widely circulated, except to acknowledge the advice’s existence.
- Only share legal advice on a ‘need-to-know’ basis, and on express terms of confidentiality.
- Think critically about the effect on privilege of relying on documents and evidence in court proceedings.
- If privileged material is inadvertently disclosed, promptly take steps to remedy the mistake and protect the material’s confidentiality to the extent possible.

If in doubt on whether or how to refer to or share legal advice, contact your legal adviser. A cautious approach is warranted, given that privilege cannot be regained once it is lost.

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

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KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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