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LEGAL PROFESSIONAL PRIVILEGE: COMMUNICATING WITH OPPONENTS WHILE PRESERVING PRIVILEGE

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Legal Briefings – By **Graeme Johnson, Jedda Elliott and Danielle Briers**

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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.

PRACTICAL TIPS

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 privileged communication or document.

You can help ensure this confidentiality is maintained by doing the following:

1. Don't comment on legal advice externally, beyond acknowledging the advice's existence (only if necessary to do so).

2. If privileged material is inadvertently disclosed, promptly take steps to remedy the mistake and protect the material's confidentiality to the extent possible.

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

WHEN IS PRIVILEGE LOST?

Legal professional privilege (**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.

REFERRING TO LEGAL ADVICE

If not managed carefully, referring to legal advice in communications with opponents may give rise to issues of implied waiver. Issues of implied waiver will most commonly arise where the conclusions of legal advice are disclosed, even though the legal reasoning is not. The subjective intention of the privilege holder will be irrelevant to whether the holder's acts manifest an objective intention to abandon the privilege.

However, referring to the seeking or obtaining of legal advice is not of itself inconsistent with the maintenance of the privilege. Indeed, noting the relevance of an advice or that it contributed to a decision may also not constitute waiver. There is some suggestion that noting a decision was based on advice may also not constitute waiver provided that the party does not go further to deploy or disclose the substance of the advice, however this is contentious and each case will turn upon its own facts.

It is important to also be careful where a party's state of mind may be put into issue in proceedings, for example by pleadings or evidence. Where a party raises a positive case that brings the party's state of mind (eg knowledge or intention) into issue, and the state of mind was or may have been affected by legal advice, that behaviour may be considered inconsistent with the maintenance of privilege. However, there is no general principle that privilege will be waived in these cases. The question will be "has [the party] effectively put its state of mind in issue such that it could be said to be inconsistent to seek to maintain the confidentiality of the privilege?" (*Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd (No 2)* [2020] FCA 1013 at [36], Allsop CJ).

Privilege will often be waived where:

- the gist, substance or conclusion of the privileged communication is published or communicated to an opponent or other third party, for example:
    - you inform a third party or opponent 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; or

- the holder of the privilege puts the content of privileged communications in issue in legal proceedings (e.g. by asserting a certain state of mind in relation to the party's legal rights) whether as part of a claim or by way or defence.

Privilege will generally not be waived where:

- you disclose that you have received legal advice without disclosing (expressly or impliedly) the substance of the advice; or
- you inadvertently disclose privileged material and take reasonable steps to protect its confidentiality once this is detected.

POTENTIAL FORMULATION TO PRESERVE PRIVILEGE

A potential formulation for mentioning legal advice while preserving privilege can be gleaned from the judgment of Rolfe J in *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1996) 40 NSWLR 12.

In a disclosure document, Ampolex stated:

"The views set out below have regard to the pleadings, the evidence available to Ampolex and the advice of the barristers and solicitors engaged by Ampolex of the litigation, as at 1 May 1996. Ampolex considers that… [Ampolex proceeded to set out its opinion as to the likely outcome of the litigation]."

Justice Rolfe found that the words were a statement of Ampolex's view of the likely outcome of the litigation and *not* a statement of the substance or effect of the advice.

While the advice played a part in forming Ampolex's view, Justice Rolfe stated that "the question is whether the statement of Ampolex's view, albeit based on the material to which Ampolex refers, **is a disclosure of Ampolex's view or a disclosure of the material on which that view was based**" (emphasis added). Here, the statement did not rise above a statement of Ampolex's view and did not purport to state the advice, or its substance or effect. It therefore did not amount to a disclosure of the advice.

The result will be different where the gist of the advice is disclosed. In *Ampolex*, waiver was found in another part of the disclosure document, which said: "There is a dispute about the conversion ratio. Ampolex maintains that the correct ratio is 1:1 and has legal advice supporting this position." Justice Rolfe found that these words disclosed the substance of the legal advice and therefore amounted to a waiver of the privilege.

In *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited* (No 2) [2020] FCA 1013, Allsop CJ has expressed the fineness of the distinction in a slightly different way:

"There is a waiver if one states 'I have legal advice. Its substance is [X].' But there is no waiver if a party says what he or she believes and legal advice may be seen to be relevant to it. One must state the substance or gist or conclusion of the advice [for the statement to amount to waiver]."

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

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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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