



# Legal Professional Privilege: Protecting LPP when providing material to third parties

*Common Interest Privilege, Joint Privilege & Limited Waiver*

## Quick Guide

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### Key points

- “Common interest privilege” is not a true privilege at all, but an exception to the waiver rule. Privilege will survive if the communication is disclosed to a third party who shares a sufficient “common interest” with the privilege holder.
- Exercise caution in relying on common interest privilege.
- Joint privilege exists where two or more persons jointly seek legal advice or services.
- Limited waiver (disclosure that avoids waiver as against the whole world) can be achieved if a document is shared with a third party for a limited and specific purpose on terms that require confidentiality.
- Waiver of privilege is a risk in disclosing any privileged communication, and there are steps you should take to try to minimise that risk if the disclosure itself cannot be avoided.

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### Recap on legal professional privilege

As outlined in our quick guides on [Claiming Legal Professional Privilege](#) and [Waiver of 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.

LPP can be *waived* (that is, lost) if you act in a way that is inconsistent with the privileged document or communication remaining confidential. Privilege may be waived if you provide the document or communication to a third party, but there are certain circumstances in which you can share LPP material with a third party and maintain privilege as against everyone else. We discuss these circumstances in this Quick Guide. If you can show that LPP applies to a document (or part thereof), you are generally not required to disclose that document or part, including in response to a regulatory notice or demand, or in court proceedings.

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### What is common interest privilege?

**Common interest privilege** is an exception to the usual rules of waiver. It allows for LPP to be maintained over a privileged document or



communication when it is disclosed to another person, extinguishing confidentially as regards that other person, so long as that other person has a sufficient “common interest”.

## When does common interest privilege arise?

LPP must already apply to the document or communication under either legal advice privilege or litigation privilege.

At the time the privileged document or communication is shared, on a confidential basis, the sharing party and the recipient must have a common interest in the legal advice or litigation or anticipated litigation in relation to which the document is shared.

“**Common interest**” is not rigidly defined, and each case must be considered on the facts. Some examples of parties who have or have not been found to have a common interest are set out below. These are examples only and do not represent defined categories of parties who will share a common interest.

You should be cautious about relying on common interest privilege – its application outside of litigation is less certain at common law, and it is not available under the Evidence Acts (Cth, NSW, VIC, ACT, NT, TAS) outside of litigation or anticipated litigation.

### Examples

| “Common interest” may be found between:  | Circumstances where “Common interest” has not been found:  |
|--|--|
| <ul style="list-style-type: none"> <li>• Neighbours in opposing a proposed development in a residential area</li> </ul>  | <ul style="list-style-type: none"> <li>• Between debtor and creditor</li> </ul>  |
| <ul style="list-style-type: none"> <li>• Liquidator and creditors</li> </ul>   | <ul style="list-style-type: none"> <li>• Where a potential purchaser of shares gains access to legal advice obtained by the company or vendor of the shares</li> </ul> |
| <ul style="list-style-type: none"> <li>• Insurer and insured when coverage is or will be granted under a policy</li> </ul>   | <ul style="list-style-type: none"> <li>• If individual interests are selfish and potentially adverse to each other</li> </ul>  |
| <ul style="list-style-type: none"> <li>• Co-tenants</li> </ul>   |  |
| <ul style="list-style-type: none"> <li>• Partners and joint-venture participants</li> </ul>  |  |
| <ul style="list-style-type: none"> <li>• Litigation funder and litigant</li> </ul>   |  |
| <ul style="list-style-type: none"> <li>• The final version of a witness statement or affidavit</li> </ul>  |  |
| <ul style="list-style-type: none"> <li>• Working notes created unilaterally by an expert in preparing an expert’s report for use in court proceedings</li> </ul>                                     |  |
| <ul style="list-style-type: none"> <li>• An email from the client or lawyer instructing a consulting firm to undertake a factual investigation for the purpose of understanding what went</li> </ul> |  |



**“Common interest” may be found between:**

wrong and fixing the client’s systems/processes

**Circumstances where “Common interest” has not been found:**

## How to protect common interest privilege?

It is not always necessary for all holders of common interest privilege to agree to the action that caused waiver, for LPP in the document to be waived.

In some cases, fairness can require that waiver by one holder of common interest privilege has the effect of waiver by all. This may arise, for example, where LPP is waived by one party in prosecuting the interest for the benefit of each party. That waiver by one party may mean that is unfair for the other parties with a common interest to maintain the privilege.

Generally, the risk of waiver may be minimised by including on any privileged document, or in a covering letter, a statement as to the privileged nature of that document, and that it has been provided to a particular party on a strictly confidential basis, for a limited purpose, and without any intention to waive LPP (see further “Limited Waiver”, below).

In some instances, the parties asserting common interest privilege might sign a common interest privilege agreement.

Common interest privilege agreements are not conclusive evidence that a common interest exists, and parties will still have to satisfy the requirements set out above to successfully claim that privilege in shared material has not been waived.

## What is joint privilege?

**Joint privilege** may arise where two or more persons join in communicating with a legal adviser for the purpose of retaining that legal adviser’s services or obtaining that legal adviser’s advice.

Common interest privilege and joint privilege can co-exist, but there is one key distinction – the ‘joint’ nature of joint privilege means that all holders of the joint privilege must concur to waiving it. The same is usually true of holders of common interest privilege, but there is the exception mentioned above that fairness can require that disclosure by one holder of common interest privilege can effectively waive privilege for all.

## Examples of joint privilege

- Joint privilege may arise where two persons for their mutual benefit state a case for the opinion of counsel
- Joint privilege can be held by members of a class in class actions
- Joint privilege may arise between two parties who engage an independent expert for a report obtained for the dominant purpose of the parties obtaining legal advice, or use in litigation.

## What is limited waiver?

**Limited waiver** is where a privileged document may be shared with a third party, for a limited and specific purpose on terms that the third party will treat the information disclosed as confidential. A limited waiver allows the



disclosing party to retain LPP over the document generally. It is an important and useful principle.

For there to be only a limited waiver, the party sharing the document must retain full control as to the further dissemination of the document. In this way, the party sharing the document is not acting in a way that is inconsistent with the privileged document remaining confidential as against the world more generally (see our quick guide on [Waiver of Legal Professional Privilege](#)). It follows that the party does not waive privilege in the document.

Fundamental to the disclosing party retaining control as to the further dissemination of the document are the two limitations on the party receiving the documents. First, they must only use the document for a specific and limited purpose, and so have no freedom to use the document in any way beyond that purpose. Second, they must treat the information in the document as confidential, and so may not disclose the information in the document to others.

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## When does limited waiver arise?

Limited waiver may arise in circumstances where you want to share a privileged document with a specific party for a limited and specific purpose, for example, to a counterparty in litigation, auditors, regulators, or to a counterparty in a transaction (eg in the context of due diligence).

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## How to protect privilege with limited waiver?

When sharing a privileged document with a third party, there is a risk of express or implied waiver of LPP over the document generally. This risk can be minimised by taking steps to ensure that there is only a limited waiver of privilege. Prior to disclosure of the privileged document, the disclosing party should agree with the third party, preferably in writing, that the privileged document is provided:

- 1 for a strictly limited and specific purpose, with that purpose described clearly in the agreement;
- 2 on terms that the recipient will treat the information disclosed as confidential; and
- 3 explicitly on the basis that the providing party has no intention of waiving LPP in the document generally

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

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