

### WHAT IS LEGAL PROFESSIONAL PRIVILEGE?<sup>1</sup>

Common law doctrine of legal professional privilege, more accurately *client privilege*, effectively protects certain documents and information so they do not have to be disclosed even if they are relevant to another party to litigation.

- The High Court of Australia describes privilege as a fundamental civil right that should not be treated lightly.
- Privilege is justified on public policy grounds, since it assists the administration of justice by encouraging people to provide full and frank instructions to a legal adviser; thus enabling the legal adviser to give fully informed legal advice; and knowing that neither the instructions nor the advice may be disclosed to any other person other than in very limited exceptions.
- Privilege belongs to the client not the solicitor and the solicitor has no right to waive the client's privilege.
- The onus of establishing privilege rests on the person claiming privilege.
- Privilege continues indefinitely, beyond the end of the retainer and even beyond the client's death.
- Privilege may be overridden expressly by statute, although for public policy reasons this is rare.
- Privilege may be overridden in limited circumstances by opposing public policy arguments.
- Privilege may be waived expressly, for example by tendering a document into evidence.
- Privilege may be waived impliedly, for example by putting the substance of the communications into issue.

There are two primary limbs of privilege; litigation privilege and advice privilege.

#### Litigation Privilege

- It applies where there are actual or anticipated proceedings. It can cover communications between the lawyer and third parties, as well as between lawyer and client.

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## Advice Privilege

- It applies in Australia to communications between lawyer and client for the dominant purpose of seeking or giving legal advice.
- It will generally only apply to communications with third parties where the third party is the client's agent for the purpose of the communication.
- **Exceptions.** Some lawyer-client communications will not usually attract privilege. For example communications made for the purpose of facilitating a crime or fraud; a client's name; or the fact that a client sought legal advice. However obligations of confidentiality may still apply to the non-privileged.

## When will privilege be waived by implication?

A client's conduct that is inconsistent with confidentiality will tend to mean privilege has been waived. The High Court has said:

*At common law, a person who would otherwise be entitled to the benefit of legal professional privilege may waive the privilege. It has been observed that "waiver" is a vague term, used in many senses, and that it often requires further definition according to the context.*

*Legal professional privilege exists to protect the confidentiality of communications between lawyer and client. It is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement. It is inconsistency between the conduct of the client and maintenance of the confidentiality which affects a waiver of the privilege.*

*Examples include disclosure by a client of the client's version of a communication with a lawyer, which entitles the lawyer to give his or her account of the communication, or the institution of proceedings for professional negligence against a lawyer, in which the lawyer's evidence as to advice given to the client will be received.*

For the same reason, case law confirms that privilege may be waived by disclosing the effect of legal advice rather than the advice itself. Even if the lawyer's reasoning is not disclosed, the revealing of the advice is inconsistent with confidentiality which is fundamental to legal professional privilege.

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