

Privilege Principles - when will a communication be privileged?

The privilege challenge

Determining when a document or communication is privileged can be a challenge. For in-house counsel, questions can arise about the context in which advice was given and, in particular, questions regarding their independence and whether they were acting in a legal or commercial role at the time of providing the advice. These guidelines provide assistance on how to determine when a document or communication is privileged.

Key questions to consider

In *AWB v Cole & Anor (No. 5)*ⁱ, Justice Young outlined 12 principles to help determine whether legal professional privilege (**LPP**) attaches to a communication or document. The 12 general principles were confirmed by Justice Bromberg in *Kirby v Centro Properties Limited (No. 2)*ⁱⁱ and more recently by Justice Murphy in *Domain Paper (Australia) Pty Ltd v Galloway*ⁱⁱⁱ.

From Justice Young's list of general principles, there are a number of questions that can be asked to establish whether a court is likely to decide that privilege attaches to a particular communication or document.

Who bears the onus?

The party claiming privilege bears the onus of proving the document or communication is privileged.

What test will a court will use?

The dominant purpose test

In order to determine whether a document or communication is privileged, a court will consider whether the dominant purpose leading to the communication being undertaken, or the document being brought into existence, was to give or obtain legal advice.

What is a 'dominant purpose'?

A 'dominant purpose' is one that predominates over other purposes. In short, it is the prevailing--or dominant--purpose. An appropriate starting point when applying the dominant purpose test is to determine the intended use, or uses, of the document that accounted for it being brought into existence. If there are several purposes of roughly similar weight, then there is no prevailing purpose and a document and will not be privileged.

Is the test objective or subjective?

The purpose for which a document was brought into existence is a question of fact that must be determined objectively. Evidence of the intention of the document's maker, or of the person who authorised or procured it, is not necessarily conclusive. It may be



necessary to examine evidence of the purposes of others involved in the decision-making hierarchy that lead to the creation of the document and its subsequent communication.

Can LPP be established by the mere assertion that privilege applies?

No, and nor can it be established merely by assertions that privilege applies to particular communications, or that communications were undertaken for the purpose of obtaining or giving 'legal advice'.

The authorities emphasise the need for focused and specific evidence in order to ground a claim for LPP.^{iv} This may be done by way of an affidavit identifying the documents over which privilege is claimed and by setting out: the circumstances and context in which the documents were brought into existence; the purposes of the person who made the communication or authored the documents or procured its creation; or the nature of the documents supported by arguments or submissions.^v

Where communications take place between a client and their independent legal adviser, or between a client's in-house lawyer and that legal adviser, is it appropriate to assume that legitimate legal advice was being sought?

Yes, provided there are no contrary indications.

How broadly can the concept of legal advice be construed?

The concept of legal advice is fairly wide. It extends to professional advice on what a party should prudently or sensibly do in the relevant legal context. However, the concept of legal advice does not extend to advice that is purely commercial or of a public relations character.

What sorts of documents are covered by legal professional privilege?

Documents the lawyer creates

Legal professional privilege protects the disclosure of documents that record legal work carried out by the lawyer for the benefit of the client, such as: research memoranda, collations and summaries of documents, chronologies, etc. These documents do not have to be actually provided to the client.

Documents created by officers or employees of the client

Subject to the dominant purpose test, legal professional privilege extends to: notes, memoranda, and other documents made by officers or employees of the client that relate to information sought by the client's legal adviser for the purpose of enabling them to advise.

Communications between a salaried legal adviser and their employer

Legal professional privilege can attach to communications between a salaried legal adviser and their employer, provided that the legal adviser is consulted in a professional

capacity in relation to a professional matter, and the communications are made in confidence and arise from the relationship of lawyer and client.

Can legal professional privilege attach to non-privileged documents?

Legal professional privilege protects communications, rather than documents, because the test for privilege is anchored to the purpose for which the document was brought into existence. Consequently, legal professional privilege can attach to copies of non-privileged documents if the purpose of bringing the copy into existence satisfies the dominant purpose test.

If the court examines documents to decide whether they are privileged, will it take into account the context in which they were generated?

No. If a court examines documents over which legal professional privilege is claimed, it will not have the benefit of submissions or evidence that might place the document in its proper context. The essential purpose of such an inspection is to determine whether, on its face, the nature and content of the document supports the claim for legal professional privilege.

Does your organisation need strategic advice or training on issues relating to legal professional privilege?

Some practical tips on steps in-house lawyers can take to maintain privilege over their internal communications and documents are available at: [*In-house counsel and privilege: 10 tips to help your protect your internal communications.*](#)

For further information and advice on privilege and risk management for your organisation, contact Susan Bennett, Principal, on +61 2 8226 8682 or email susan.bennett@sibenco.com.

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ⁱ [2006] FCA 1234

ⁱⁱ [2012] FCA 70

ⁱⁱⁱ [2014] FCA 936

^{iv} *Barnes v Federal Commissioner of Taxation* [2007] FCACF 88 at [18] per Tamberlin, Stone and Siopis JJ

^v [2014] FCA 936 at [50]