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Legal Professional Privilege

PNG Continuing Legal Education Seminar

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1 September 2026

LPP: The Ingredients of Privilege

- LPP protects confidential communications made in the lawyer-client relationship for the required legal purpose. It is conferred for the benefit of the client.
- The ingredients:
  - **Confidentiality** – the communication must have the necessary quality of confidence.
  - **Lawyer client nexus** – the communication must be made within or sufficiently connected to the professional lawyer-client relationship.
  - **Purpose** – the communication must be made for the requisite legal purpose.
- Remember the purpose test: ***Owens v Post & Telecommunications Corporation*** **(1994) N1292**.
  - The communication must be brought into existence **solely** for the purpose of obtaining or giving legal advice or for use in existing or anticipated litigation.
  - The contrast: Australia has moved to the dominant-purpose test, consistent with the approach in the UK.

LPP: Why the Law Protects It

- Privilege protects a public interest, not merely a private preference for secrecy.
- Clients must be able to communicate fully and frankly with their lawyers to obtain proper legal advice.
- That interest competes with another important public interest: courts having access to relevant evidence.
- Because LPP withholds otherwise relevant material from the court, the privilege is important — but confined within strict limits.
- The tension: full and frank legal advice ↔ access to relevant evidence.

Waiver: When Privilege Is Given Away

- Privilege is waived where the client acts inconsistently with maintaining the confidentiality of the privileged communication or document.
- Whether there is inconsistency depends on the context and circumstances, including considerations of fairness.
- Waiver is likely where the substance, gist or conclusion of legal advice is voluntarily disclosed.
- A party does not need to disclose the whole advice. Even a summary of the lawyer's conclusion may be enough.

Watch the wording

- Shareholder statement: "Ampolex maintains that the correct ratio is 1:1 and has legal advice supporting this position". (*Ampolex Ltd v Perpetual Trustee [1996] HCA 15*)
- ASX announcement: "The Board's lawyers have been instructed to vigorously defend the claim and have advised that the plaintiffs' claim will not succeed." (*Switchcorp Pty Ltd v Multiemedia Ltd* [2005] VSC 425)
- Open letter to shareholders in AFR: "TerraCom took allegations that its CEO and CFO had been involved in a scheme relating to the fake analysis of coal samples seriously and an independent forensic investigation was conducted. That investigation found that the allegations against them were unfounded and neither had done anything wrong." (*TerraCom Ltd v Australian Securities and Investments Commission* [2022] FCA 208)

Disclosure: When Privileged Material Escapes

- Unauthorised disclosure does not necessarily destroy LPP or amount to waiver.
- Disclosure is not necessarily the same as loss of confidentiality.
- The critical question: does the communication still retain its confidential character?
- If confidentiality survives, disclosure does not necessarily mean the material can be used.

Wee Shuo Woon v HT S.R.L. **[2017] SGCA 23** — privileged emails were hacked, uploaded to WikiLeaks and later accessed by the opposing party.

Glencore International AG v Commissioner of Taxation of Australia **(2019) 265 CLR 646**— privileged documents were stolen from the lawyers' electronic document system, disseminated as part of the Paradise Papers and obtained by the ATO.

A leak is not necessarily the end of privilege but preserving confidentiality may become critical to restraining further use.

Investigations: Who is the Report Really For?

Medibank Private Limited v McClure [2026] FCAFC 38

- Following a major cyber incident, Medibank commissioned (through external lawyers) a Deloitte review framed as being for legal advice and anticipated litigation.
- But the review also served broader functions: Regulatory response | governance | operational improvement | public accountability.
- Medibank had publicly said the review would “help it learn from this event, strengthen customer safeguards and, where appropriate, share key outcomes.”

Sydney Airports Corporation Ltd v Singapore Airlines Ltd & Qantas Airways Ltd [2005] NSWCA 47

- Following an aerobridge incident, an expert report was commissioned in circumstances where litigation was anticipated.
- The evidence revealed at least four purposes: Litigation | Understand the incident | Address stakeholder concerns | Prevent recurrence.

The question is not whether legal was involved but what the report was really intended to do.

AI: Who Else Is in the Room?

***US v. Heppner* (2026) 25 Cr. 503** (NY Southern District)

- Heppner was charged with securities fraud, wire fraud, conspiracy and falsifying corporate records.
- Heppner used Claude to develop defence strategy and later shared the material with his lawyers. The FBI seized the AI documents under a search warrant and Heppner asserted privilege over them..
- Privilege rejected: No lawyer | No confidentiality | Not directed by counsel.
- Using AI to prepare for a conversation with your lawyer does not make the AI conversation privileged.

But what if the lawyer is using the AI?

The emerging question is whether an AI system used under a lawyer's direction and supervision can be treated as part of the lawyer's privileged working process.

Who is using the AI, why, and on what confidentiality terms?

Practice: Keeping Privilege Intact

1. **Start with purpose.** Be clear why the communication, investigation or report is being created before the work begins.
2. **Separate legal from operational work.** If a report is doing several jobs, consider separate workstreams or deliverables.
3. **Use lawyers deliberately.** Copying legal, routing an engagement through external counsel or labelling a document "privileged" will not create privilege by itself.
4. **Control the audience.** Limit circulation to those who need the advice and be careful when summarising or forwarding.
5. **Be consistent about purpose.** What the organisation tells the public, the market, customers or the board about why a review exists may later matter.
6. **Act quickly if material escapes.** Disclosure does not necessarily mean waiver, but preserving confidentiality may require immediate action.
7. **Be careful with AI.** Before entering sensitive material, understand who receives it, how it is stored and whether confidentiality is preserved.

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