

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

**Treatment of legally privileged information in competition proceedings – Note by
Australia**

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This document reproduces a written contribution from Australia submitted for Item 2 of the 128th Working Party 3 meeting on 26 November 2018.

More documents related to this discussion can be found at

www.oecd.org/daf/competition/treatment-of-legally-privileged-information-in-competition-proceedings.htm

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Australia

1. Scope of legal professional privilege in Australia

1. In Australia, legal professional privilege (LPP) protects communications between clients and their legal advisors if those communications were confidential and made for the dominant purpose either of giving or receiving legal advice, or for use in existing or anticipated litigation.¹ It protects those communications from any compulsory disclosure including subpoenas, search warrants (dawn raids) and document requests from agencies like the ACCC.² It is both a substantive common law right and enshrined in various pieces of legislation at the Federal and State level – most notably the various jurisdictions’ evidence acts.³

2. Privilege applies to both oral communication⁴ and documents (including written communication like email) but this paper, like competition investigations, is more concerned with LPP claims relating to documents. The key question to determine if privilege protects a document is whether the document was brought into existence for the dominant purpose of giving or receiving legal advice, or for use in existing or anticipated litigation (the dominant purpose test).⁵ The test for LPP is a question of fact to be determined on an objective standard.⁶ It is applied based on the time a document is brought into being rather than some later date.⁷ A document will not be protected by privilege merely because at some date after it was created it was supplied to a legal advisor if it was not brought into existence for that purpose.

3. In Australia, LPP generally extends to advice provided by in-house and employed lawyers as long as the lawyer in question is acting in their professional capacity as a lawyer.⁸ This would not include an in-house lawyer providing commercial or operational advice but may include strategic legal advice as to what the company should prudently and sensibly be doing in the relevant legal framework or in relation to a legal issue.⁹ However

¹ *Esso Australia Resources Ltd v FCT* [1999] HCA 67 [61].

² *Daniels Corporation International Pty Ltd v ACCC* [2002] HCA 49 [37] determined that the ACCC’s power to compel the production of documents via section 155(1)(b) of the *Competition and Consumer Act 2010* (Cth) did not override the protection of legal professional privilege.

³ See, for example: Evidence Act 1995 (Cth) ss 117 – 126.

⁴ *Tuckiar v R* (1934) 52 CLR 335, 346 (Gavan Duffy CJ, Dixon, Evatt and McTiernan JJ), 354 (Starke J).

⁵ *Esso Australia Resources Ltd v FCT* [1999] HCA 67 [80].

⁶ *AWB Ltd v Cole (No 5)* (2006) 155 FCR 30 at [44].

⁷ *Commissioner of Taxation (Cth) v Pratt Holdings Pty Ltd* [2005] FCA 1247 [30].

⁸ *Archer Capital 4A as trustee for the Archer Capital Trust 4A v Sage Group plc (No 2)* [2013] FCA 1098 [73]. Incidentally, LPP also extends to advice provided to clients by barristers.

⁹ *DSE (Holdings) Pty Ltd v InterTAN Inc* [2003] FCA 1191 [21].

because of the closer connection between the lawyer and the client, these claims of privilege may attract scrutiny.

4. The question of whether the records of internal competition audits or investigations are protected by LPP will depend upon the particular circumstances of each document in question. Records of internal investigations have previously been held to be privileged where they were generated for the purpose of giving legal advice on the subject matter of the investigation. For example the records of two internal investigations into whether an Australian wheat exporter had breached UN resolutions banning payments to Iraq were held to be privileged.¹⁰ Conversely, records of a transaction will generally not be privileged, even if that transaction is later investigated.

5. In Australia, LPP will protect the advice of foreign lawyers provided that the dominant purpose test and other requirements to sustain privilege under Australian law are satisfied.¹¹

6. There are a number of important exceptions to legal professional privilege which are beyond the scope of this paper. One important exception is that legal professional privilege is not available if a client seeks advice in order to facilitate the commission of a crime or contravention of the law, whether the advisor knows of the unlawful purpose or not, or where the confidential communication is made to further an illegal purpose.¹²

2. Waivers of legal professional privilege

7. A person will be deemed to have waived LPP if they act in a way which is inconsistent with the confidentiality that privilege is supposed to protect.¹³ A waiver may occur either explicitly or implicitly and can be general or in respect of particular issues or parts of a document. Examples of an implicit waiver include disclosing the advice itself to a third party or a court and disclosing the general conclusion of the legal advice, including by recording it in board minutes.¹⁴ It is possible for a limited waiver of privilege in favour of only certain parties.¹⁵

8. The test for implicit waiver of privilege described above has also been applied by Australian courts to the disclosure of advice in other jurisdictions.

9. Overseas disclosure was recently considered by Australia's Federal Court in *Cantor v Audi*.¹⁶ Australian class action plaintiffs attempted to access LPP documents Volkswagen

¹⁰ *AWB Ltd v Cole (No 5)* [2006] FCA 1234.

¹¹ *Kennedy v Wallace* [2004] FCAFC 337.

¹² See *Evidence Act 1995* (Cth) section 125 and *AWB Limited v Honourable Terence Roderic Hudson Cole (No 5)* [2006] FCA 1234 at [211].

¹³ *Mann v Carnell* (1999) 201 CLR 1, 13 (Gleeson CJ, Gaudron, Gummow and Callinan JJ).

¹⁴ See *Mann v Carnell* [1999] HCA 66 at [15] and *Seven Network Ltd v News Ltd (No 12)* [2006] FCA 1131.

¹⁵ See *Goldberg v Ng Hnago Holdings Pty Ltd* [1995] HCA 39 and *Mann v Carnell* [1999] HCA 66 [30].

¹⁶ *Cantor v Audi Australia Pty Ltd* [2016] FCA 1391.

AG (VW) had supplied to a German motor transport regulator, the Kraftfahrt-Bundesamt (KBA). The KBA had been investigating whether VW had installed ‘defeat devices’ in their diesel vehicles, which was also the subject of the Australian class action. As part of the KBA’s investigation, VW provided the KBA with legal advice that it had obtained from its German lawyers. The Australian class action plaintiffs claimed this disclosure meant VW had waived privilege over the advice. However the court ultimately decided that privilege had not been waived because of the particular circumstances of the disclosure. The advice had been provided to the KBA confidentially and therefore privilege had only been waived on a limited basis in favour of the KBA but not the whole world.¹⁷ Whether a LPP document disclosed in another jurisdiction will be taken to have had its privilege waived in Australia will therefore depend on the particular facts of the disclosure in each case.

10. The ACCC does not require (and could not require) parties to waive LPP or provide documents subject to LPP as part of either its voluntary merger review process or its Cartel Immunity process.¹⁸ The ACCC’s Cartel Immunity Policy requires parties to fully cooperate but this does not extend to waiving LPP. Having said this, when making a proffer to obtain immunity a party may choose to voluntarily waive privilege over documents that serve to advance its position.

3. Privilege and Competition Investigations

11. The ACCC may apply to a Magistrate for a search warrant that authorises it to enter a premises to search for evidence (referred to in many jurisdictions as a dawn raid). The ACCC’s powers to conduct search warrants and subsequently make copies of documents and information do not override the protection of LPP. Accordingly, the execution and post-execution of ACCC search warrants takes into account and accommodates the preservation of LPP.

12. Occupiers of premises upon which a search warrant is conducted have the statutory right to observe the search and can object if ACCC officers are inspecting a document they believe to be protected by LPP.¹⁹ If the question of LPP cannot be agreed between the parties at the time, the ACCC’s policy is that those documents the status of which are still in dispute will be delivered to an agreed third party. This is to give the party asserting LPP over the documents time to re-consider the claim for LPP and potentially narrow its scope, as well as potentially apply to a court for an order that documents are LPP and therefore not subject to the search warrant.

13. Special procedures exist for dealing with electronic evidence identified during a search warrant that may be privileged. The ACCC’s policy is that a third party computer forensics supplier will hold the copied files until the owner of the files has time to make an

¹⁷ *Cantor v Audi Australia Pty Ltd* [2016] FCA 1391 [139].

¹⁸ See the ACCC’s immunity and cooperation policy for cartel conduct <https://www.accc.gov.au/publications/accc-immunity-cooperation-policy-for-cartel-conduct> and Informal Merger Review Process Guidelines <https://www.accc.gov.au/publications/informal-merger-review-process-guidelines-2013>.

¹⁹ *Competition and Consumer Act 2010* (Cth) s 154P.

application to a court asserting LPP. Following this, the third party provider will forward only those files not subject to dispute to the ACCC.

14. There are also special procedures that have been previously agreed between the legal profession and Australian law enforcement agencies for executing search warrants on lawyers' premises, law societies and similar institutions.²⁰

4. Disputes about legal professional privilege

15. The starting point for assertions of LPP in Australia is for the parties to attempt to reach agreement between themselves. In the ACCC's experience the majority of assertions of LPP are uncontroversial or resolved by negotiation. Where there is disagreement over LPP claims in competition investigations, the ACCC does not have the power to declare or decide whether particular documents are privileged or not.

16. Where the ACCC has compelled production via a statutory notice, or by executing a search warrant, the ultimate authority for deciding LPP claims will be a court. For example the ACCC could apply for a court order for a company or individual to comply with a notice to produce a particular document, at which point the party asserting privilege would have the chance to put their case to the court as to why the document was privileged and protected from production.

5. International co-operation

17. The ACCC has not previously encountered difficulties when accessing documents caused by differing privilege protections in different jurisdictions. Generally the ACCC does not and would not seek access to documents held by international regulators that were protected by LPP as it applies under Australian law. When accessing any type of confidential information held by an international regulator, the ACCC will comply with restrictions or conditions on the use of that information. Complying with these restrictions can occasionally be challenging, particularly in criminal cartel prosecutions where the ACCC is required to disclose to the accused all information it holds relating to their case, unless the ACCC is able to assert privilege from disclosure either by way of LPP or more commonly public interest privilege.

18. The ACCC is party to several international cooperation agreements with other competition regulators. In general, these agreements will not explicitly state the terms under which privileged information or documents can be exchanged. However, they can refer to statutory information gateways that enable confidential information to be shared, usually on the basis of certain conditions. In the case of Australia that information gateway is contained in section 155AAA of the Competition and Consumer Act 2010 (Cth).

²⁰ *General Guidelines between the Australian Federal Police and the Law Council of Australia as to the Execution of Search Warrants on Lawyer's Premises, Law Societies and Like Institutions in Circumstances where a Claim of Legal Professional Privilege is Made*, 3 March 1997 <https://www.lawsociety.com.au/sites/default/files/2018-03/Search%20Warrants%20Law%20Council.pdf>.

19. Where the ACCC is party to an international cooperation agreement that envisages use of an information gateway allowing the exchange of confidential information, there will be scope within the agreement for the ACCC to nevertheless refuse to disclose information in certain circumstances.²¹

20. Although the ACCC endeavours to provide assistance to our partner agencies, it is not always possible. Relevant considerations the ACCC takes into account include whether the requesting agency has the legal capacity to keep the information confidential, a track record of reliability in this regard and the circumstances in which the ACCC obtained the information (which may cause us to require compliance with certain conditions to protect the interests of parties with an interest in the confidential information).

21. There are several ways competition agencies can overcome challenges associated with cross-border information sharing. One method the ACCC relies on is to engage with parties who have provided confidential information, and seek their permission (in the form of a confidentiality waiver) to share information with partner agencies. As an example, we have had success with this in several merger reviews involving multinational companies, where there is a mutual interest between regulators and merger parties in conducting the review as efficiently as possible. In these cases, the ACCC will always obtain written confirmation from the partner agency that it will keep the information confidential to the extent possible. Waivers have also been successfully used in cartel investigations.

22. Cooperation can also be facilitated by legislation. For example, by incorporating information gateway provisions into national competition law, competition authorities can more easily exchange information. An example of this is section 155AAA of The *Competition and Consumer Act 2010* (Cth). This provision allows the ACCC to disclose 'protected information' it has been provided in certain circumstances.²² In addition to these specific competition enforcement arrangements, Australia also has more general legislation such as the *Mutual Assistance in Business Regulation Act 1992* (MABRA) and *Mutual Assistance in Criminal Matters Act 1987* (MACMA) to facilitate requests for assistance from foreign regulators. These are supported or complemented by bilateral arrangements such as cooperation agreements with the Japan Fair Trade Commission and the New Zealand Commerce Commission.

23. Where the ACCC discloses protected information under section 155AAA, conditions will usually be imposed on that disclosure, including limits on the further

²¹ For example, the 1999 *US/Australia agreement on mutual antitrust enforcement assistance* that applies to both Australia and the United States' antitrust authorities, provides for the disclosure of confidential information in Article VI subject to conditions. However, Article II Paragraph I. states that '*Nothing in this Agreement compels a person to provide antitrust evidence in violation of any legally applicable right or privilege*'. Article IV further limit assistance obligations for several reasons, including if providing assistance is not authorised by domestic laws, or is contrary to the public interest of the provider.

<https://www.accc.gov.au/system/files/Australia-United%20States%20treaty%20on%20antitrust%20enforcement%20assistance.pdf>

²² s155AAA of the CCA requires the ACCC to protect certain information it receives. But it also enables that information to be disclosed to third parties in certain circumstances. However, the disclosure of protected information under s155AAA involves an administrative decision which can impact the interests of the party who originally provided the information to the ACCC, as well as other parties. The ACCC therefore must have regard to natural justice when making a decision to disclose information, and this obligation is not excluded by s155AAA.

dealing with the protected information. The particular conditions that will be imposed depend upon the purpose for which the other agency needs the information, any conditions the ACCC is subject to in dealing with the information and any specific risks relevant to the matter. Conditions can include requirements to: notify the ACCC of any third party requests relating to the information; notify the ACCC of any proposed use of the information in court proceedings; and not disclosing the information without the ACCC's prior written consent, unless required by law, in which case the recipient agency will use best endeavours to meet the requirement.

24. Effective cooperation between competition regulators relies on strong relationships with high levels of trust. Sharing confidential information across international borders carries high levels of risk due to the loss of control and the potential for inappropriate or unintended disclosure that goes against the confidentiality requests of the requested party. A formal information sharing arrangement in the absence of an established positive relationship is unlikely to facilitate productive information sharing because the lack of trust will stymie the free flow of information. Therefore efforts to increase information sharing depend heavily on strong inter agency relationships, which includes informal cooperation and person to person and team to team connections and collaboration at a range of levels between agencies.