

28 February 2025

Attorney-General Mark Dreyfus KC
Department of the Attorney-General

Submitted via AGD Consultation Hub, <https://consultations.ag.gov.au/legal-system/lpp-review/>

Re: Comments on Australian Government Attorney-General and Treasury, “Review of the Use of Legal Professional Privilege in Commonwealth Investigations,” Discussion Paper

Dear Attorney-General:

The Association of Corporate Counsel (ACC) is the leading global bar association that promotes the common professional and business interests of in-house counsel through information, education, networking opportunities, and advocacy initiatives. ACC maintains a worldwide network of legal professionals who work for companies, associations and other organizations comprising more than 47,000 members, employed by more than 10,000 organizations, and spanning more than 100 countries. ACC’s Australian chapter, ACC Australia, has more than 3,000 members. ACC has long sought to assist regulators, legislatures, courts, and other law or policy making bodies in legal issues from the unique perspective of in-house counsel.

ACC appreciated being included in stakeholder conversations with the Attorney-General’s Department (AGD) and Treasury and submits these written comments as an extension of those conversations. The written comments below are organized by the Discussion Questions posed in the Discussion Paper.

Responses to Discussion Questions

1. Do you agree with the key issues identified in this paper? Are there other key issues you think should be considered in relation to the use of LPP claims in Commonwealth investigations?

ACC agrees that the AGD and Treasury have correctly identified four key issues concerning LPP claims in Commonwealth investigations: 1) LPP is fundamental to our legal system; 2) Commonwealth investigations underpin trust in our systems; 3) LPP claims can be made in Commonwealth investigations; and 4) There are concerns about some LPP claims in Commonwealth investigations. ACC has not identified any further issues that should be considered.

ACC strongly agrees that legal professional privilege (LPP) is fundamental to a well-functioning legal system. As the AGD and Treasury note, LPP “encourag[es] clients to make full and frank

disclosures to their lawyers, ensuring there is a relationship of confidence between the parties to support the effective provision of legal representation and advice.” Discussion Paper, p. 4. Australia’s perspective on the importance of LPP is mirrored in other jurisdictions. The United States Supreme Court has long recognized that LPP “is the oldest of the privileges for confidential communications known to the common law...The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

Outside of the common law legal systems, the confidential nature of lawyer-client communications is also recognised. Article Eight of the European Convention on Human Rights protects the confidentiality of all correspondence, and European courts have held that this provision “affords strengthened protection to exchanges between lawyers and their clients. This is justified by the fact that lawyers are assigned a fundamental role in a democratic society, that of defending litigants.” *See, e.g., Michaud v France*, case n° 12323/11, § 119 (2012).

ACC is gratified that the AGD and Treasury explicitly voice their recognition that LPP claims have an important place in Commonwealth investigations, and that a person may claim privilege in all but a few discretely defined circumstances.

ACC believes that the Commonwealth is best served when investigations are transparent, consistent, and ensure the fair administration of law. While ACC cannot speak to the number or frequency of improper LPP claims, ACC agrees that recent developments, such as the increased use of technology in communications, have significantly expanded the number of documents for which LPP can be claimed, thereby creating more opportunities for concern.

ACC likewise encourages the AGD and Treasury to examine whether regulations and/or their implementation may be creating concerns with adjudicating LPP claims. Overly broad information-gathering orders, extended timeframes for collection, and requests for information outside the scope of review all serve to exacerbate the number of documents that must be considered and privilege determinations that must be resolved.

2. Are there options for reform that you think should be considered in relation to the use of LPP claims in Commonwealth investigations? For example, options for reform related to guidance and training, LPP claim processes, dispute resolution, or remedies and/or penalties.

At the outset, ACC notes that, like lawyers in private practice, in-house lawyers are very much aware of their professional and ethical obligations derived from their duties as officers of the court. Both in-house and private practice lawyers have varying degrees of expertise in addressing or identifying LPP issues. ACC urges the AGD and Treasury to recognize that the overwhelming majority of in-house lawyers go above and beyond to ensure their organizations comply with legal and ethical obligations. Any proposed reforms should be considered through this perspective.

ACC does not consider that the fundamental principles of LPP need reform (as they apply in Commonwealth investigations or otherwise). Instead, the AGD and Treasury should focus their efforts on education and guidance. Education and guidance ensure that all legal practitioners, both in-house and in private practice, have the tools they need to properly comprehend and navigate often challenging and complex issues brought on by changing technology and other developments. This is particularly important for those in-house lawyers who do not regularly have a need to navigate difficult LPP issues, especially in the context of Commonwealth investigations which can involve many thousands of documents.

ACC maintains extensive educational resources on legal privilege, ethics, and other professional conduct obligations. For example, ACC Australia is in the process of updating the ACC Ethics Handbook, which includes a section on LPP. ACC also facilitates regular training for its members. ACC welcomes an opportunity to collaborate with the Commonwealth to develop additional educational resources and programs designed for in-house lawyers. For example, the AGD and Treasury may instruct regulators to issue guidance notes and/or regular training sessions with specialist legal practitioners (consistent with established legal principles).

Additionally, ACC would also support the introduction of a more collaborative process between regulators and the recipients of compulsory information-gathering orders to ensure that document production is targeted and avoids excessive cost and time delays.

With regard to penalties or other punitive remedies, ACC reminds the AGD and Treasury that legal practitioners are already subject to oversight by the law society in each jurisdiction to which relevant complaints can be made and disciplinary proceedings commenced. As such, the law societies and the courts should be the sole sources of penalties for any noncompliance. It would be a conflict of interest for Commonwealth agencies or prosecutors to have any such powers vested in them (other than complaint / referral).

Another concern with penalties is that the presence of a new penalty regime could adversely impact lawyer-client communications, which would hinder the provision of quality legal advice and lead to further delay when adjudicating LPP disputes.

ACC encourages the AGD and Treasury to maintain ongoing discussions with stakeholders to identify improvements to the processes used to determine privilege disputes.

3. Are there approaches in other jurisdictions that you think AGD and Treasury should consider?

ACC applauds the AGD and Treasury for seeking out best practices in other jurisdictions. As a global organization, ACC has access to a wealth of resources from a number of jurisdictions on these issues. One recent example of an effort to address LPP disputes comes from the United States. The body that sets court practices and procedures has asked the U.S. Supreme Court to adopt amendments to the U.S. Federal Rules of Civil Procedure that are designed to ease the burden of adjudicating LPP claims. The proposed changes would require parties to identify a process for designating privileged material at the early stages of the litigation. The hope is that if parties specify the methods they will use to identify privileged material before discovery begins,

they can avoid protracted disagreements later. The amendments would also permit courts to rule on timing and process selection as well.

In the US, parties often use a privilege log, which traditionally is a list privileged and non-privileged documents relevant to the case. However, some parties now use categorical privilege logs, which list categories of documents instead of the documents themselves. While the categorical privilege log can save time and resources, it can also serve to privilege too much or too little information, based on how the category is developed. The proposed amendments to the Federal Rules of Civil Procedure would require parties to make determinations of privilege log formats upfront to reduce confusion and opportunities for dispute.

England and Wales have also sought to streamline the discovery, or “disclosure” process as a means to more efficiently and affordably litigate matters. In 2019, the Business and Property Courts launched a pilot program, which was adopted on a permanent basis in 2022 as Practice Direction (PD) 57AD, “Disclosure in the Business and Property Courts.” The PD offers a variety of options to parties with an emphasis on employing technology, such as technology-assisted review, to more quickly and efficiently identify relevant documents. The PD also asserts protections for privileged materials. As with the U.S. amendments, there are mechanisms in place to encourage parties to address upfront how potentially privileged documents will be identified and handled.

4. What risks should the government consider when evaluating options for reforms to the operation of LPP processes in Commonwealth investigations?

As the government considers reforms to LPP processes, ACC urges the AGD and Treasury to not lose sight of the critically important role LPP plays in the administration of justice. Reforms should not be entertained if they degrade protections for privileged information. Some options for reform may cause clients to be less forthcoming if they believe their confidential communications will be disclosed. The AGD and Treasury can avoid this outcome by focusing on reform options that emphasize consistent, transparent processes and collaboration with regulators that lead to fair and acceptable results.

5. Do you have any other views you wish to share at this time (noting that there will be a further opportunity to provide comment on possible options for reform in 2025)?

As the AGD and Treasury prepare their proposal, ACC encourages coordination across all Commonwealth agencies to ensure a consistent approach, avoid confusion, and ease implementation of any new processes or procedures.

ACC encourages the AGD and Treasury to consider whether the appointment of third-party adjudicators would be an appropriate additional mechanism to resolve disputes over LPP claims.

Thank you for the opportunity to participate in this discussion. ACC is pleased to continue the dialogue with the AGD and Treasury. Please contact Amy Chai (a.chai@acc.com) or Chris Drummer (c.drummer@acc.com) with any questions or for additional information.

Sincerely,

/s/Susanna McDonald

Susanna McDonald
VP and Chief Legal Officer

cc: The Honorable Dr Jim Chalmers MP
The Department of the Treasury