THE LAW SOCIETY
OF NEW SOUTH WALES

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Dr James Popple
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Dear Dr Popple,

GUIDANCE NOTE FOR THE LEGAL PROFESSION ON CLIENT LEGAL PRIVILEGE AND FEDERAL REGULATORS

The Law Society is grateful for the opportunity to provide feedback on the Law Council's draft Guidance Note, *Client legal Privilege and Federal Regulators*. The Litigation Law and Practice, Public Law, Business Law and In-house Corporate Lawyers Committees contributed to this submission.

General comments

The Law Society commends the Law Council for its work in developing guidance to provide practical support to the legal profession when dealing with federal regulators on matters of client legal privilege (**CLP**). We acknowledge that the draft Guidance Note is intended to address concerns raised by federal regulators of purported intentional misuse of CLP while aligning with the Law Council's call on behalf of the profession for commitment to promote understanding of CLP across Government and to ensure the preservation of CLP.

The Law Society would also support further professional education on the principles, and practical application, of CLP, which has been identified as a priority need by our members. While the draft Guidance Note provides valuable detailed commentary and best practice direction, a deeper understanding of CLP responsibilities and better compliance outcomes may be gained by supplementing this resource with education focused on the application of fundamental concepts.

Detailed comments

We provide additional detailed comments in relation to particular paragraphs in the draft Guidance Note as follows.

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INTRODUCTION

Paragraph 2

The first sentence in this paragraph states that a legal practitioner "has a professional duty to protect their client's privileged information". However, in our view, the relevant professional obligation is the duty to maintain confidentiality. This duty is enshrined in common law principles and encapsulated in the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (**ASCR**).[1] The privilege itself is a right held by the client, not a duty the lawyer owes to the client. We suggest the professional duty referenced in this paragraph would be more properly characterised as a duty of confidentiality.

Paragraphs 3 and 4

We note that in reading [3] and [4] together, the "PwC tax leaks controversy" and the proceedings in *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 appear to have been conflated. The latter was in fact not "related litigation" in respect of the former. While we do not disagree that there were "thousands" of CLP claims asserted in that case and that the Federal Court found many of the claims to be "inadequately supported", these statements may cause a reader to conclude that the Court found that many of the "thousands" of claims were inadequately supported. Rather, 61 out of a sample of 116 documents were found not to be privileged and there was no finding of impropriety.

PART 1: UNDERSTANDING CLP

The purpose of CLP

Paragraph 11

In this paragraph, the decision in *Grant v Downs* (1976) 135 CLR 674 is cited as articulating the rationale for CLP. We suggest, for your consideration, another very helpful and clearly expressed example which can be found in *Cantor v Audi Australia Pty Ltd* [2016] FCA 1391 where the Court held,

> Privilege is a substantive general principle or right, and a basic doctrine of the common law, reflecting a careful balance between competing public interests. There is a public interest in full disclosure of all available and relevant information in aid of the administration of justice, including in furthering the objectives of scrutiny and accountability. There is a contradictory public interest in maintaining confidentiality in communications which assist and advance the administration of justice by encouraging and supporting the obtaining of legal advice and assistance, including the candid giving of instructions. The balance between these competing public interests is struck by protecting communications from disclosure only to the extent necessary to meet the second public interest. The test for achieving that is to confine protection to confidential communications made for the dominant purpose of giving or obtaining (including preparation for obtaining) legal advice or the provision of legal services, including representation in court.

[1] *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (**ASCR**), 9.1 and 9.2.

Paragraph 13

The lawyer's duty to the court is expressed in this paragraph as being a "primary" duty. We suggest that the better way to describe the duty is by reference to the ASCR where the duty to the court is defined as a "paramount" duty.[2]

Statutory and common law basis of CLP

Paragraph 15

In relation to the common law "advice privilege" limb of CLP described in this paragraph, we suggest the inclusion of additional guidance that the concept of *giving* legal advice may be interpreted widely to include, "advice as to what a client should prudently or sensibly do in the legal context in which it arises".[3]

Paragraph 16

We suggest this paragraph would benefit from the addition of further guidance as to the scope of the "dominant purpose" test. In particular, it may be helpful to provide clarifying commentary that privilege may extend to,

> a document brought into existence for the purposes of a client being provided with legal professional legal services *notwithstanding that some ancillary or subsidiary use of the documents was contemplated at the time* (emphasis added)[4]

Paragraph 18

As currently drafted, this paragraph may be interpreted to mean that privilege will extend to communications or documents that would disclose or allow an inference as to the content or substance of legal advice sought or given only where such documents are created by the lawyer or client. We suggest a revision to clarify that the extension of privilege in these circumstances may include communications or documents created by persons other than the lawyer or client so long as they were created for the dominant purpose of giving or obtaining legal advice or legal services related to anticipated or actual litigation.

Paragraph 19

We suggest it may be helpful to include additional commentary under this paragraph to clarify that a professional lawyer/client relationship can arise outside of a formal engagement/retainer between the client and lawyer provided there is consent of the lawyer.[5]

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[2] ASCR, 3.1.
[3] *Cantor v Audi Australia Pty Ltd* [2016] FCA 1391 at [62].
[4] *Commissioner of Taxation (Cth) v Pratt Holdings Pty Ltd* [2005] FCA 1247 at [30] citing *Esso Australia Resources Limited v The Commissioner of Taxation* [1999] HCA 67.
[5] *Apple v Wily* [2002] NSWSC 855 at [11]

CLP's scope and limitations in regulatory contexts

Waiver in exceptional circumstances

Paragraph 23

The first sentence under this paragraph states that certain professional conduct rules explicitly contemplate exceptions to privilege. However, the rules cited relate to the obligation not to disclose client confidential information. Notwithstanding that all privileged communications will be confidential, confidentiality is not the same as CLP. It may be appropriate to revise the sentence to make this distinction.

Other documents and information to which CLP does not attach

Paragraph 24

This paragraph lists a number of documents/information to which CLP does not attach. We note the second dot point refers to "factual observations made by a legal adviser during the course of a retainer". However, we suggest that it is the facts to which privilege does not attach, not the observations. It may be better to use the words "facts which the lawyer observes while acting in the course of the retainer".[6] By way of guidance, privilege would not usually attach to observable facts, such as the time and date of a meeting.

Paragraph 25

This paragraph provides guidance on when privilege may attach to communications/documents that contain both legal and non-legal advice and states that "the portion containing legal advice will be privileged and the non-legal advice will not be". It may be helpful to include additional commentary in line with the decision in *Waterford v Commonwealth (1987)* 163 CLR 64 which makes it clear that the privileged material must be in "one distinct part" of the communication/document and to clarify that, if differentiation is not possible, the ordinary "dominant purpose" rule will apply.[7]

Waiver of CLP

Paragraph 27

This paragraph provides guidance on when CLP may be waived. In relation to implied waiver it states,

[6] *Z v New South Wales Crime Commission* (2007) 231 CLR 75 at [35] per Hayne and Crennan JJ citing *Brown v Foster* (1857) 1 H & N 736 [156 ER 1397].
[7] "If privileged material was contained in one distinct part of a document and non-privileged material was contained in another, protection of the confidentiality of the privileged part of the document would not, as the Act itself recognizes (see, e.g., ss. 22, 33(3), 33A(3), 34(3), 35(3), 36(4), 58(2), 64(2) and (4)), ordinarily require that that part which was not covered by privilege should also be immune from production: see, e.g., *Ainsworth v. Wilding* [1900] 2 Ch. 315; *Great Atlantic Insurance Co. v. Home Insurance Co*. [1981] 1 WLR 529, at p. 534; [1981] 2 All ER 485, at pp. 488-489; *Brambles Holdings Ltd. v. Trade Practices Commission* [No. 3] (1981) 58 FLR 452, at pp. 459, 462. If it were not possible to classify the contents of the document into distinct parts, it would be necessary to determine whether the contents as a whole were outside the protection of legal professional privilege for the reason that, notwithstanding the professional legal advice, they did not satisfy what has conveniently, if somewhat loosely, been referred to as "the sole purpose" test: see *Grant v. Downs* (1976) 135 CLR 164" at [85] per Brennan J.

> **Implied waiver** arises where the client's conduct is inconsistent with maintaining the confidentiality of the privileged communication. For example, this can occur where the content of a privileged document is disclosed to the extent that its substance is revealed. Notably, an implied waiver may occur even without any intention to waive privilege.

While we agree with the first and third sentences in the above passage, we propose that the example provided in the second sentence is extended to acknowledge that the courts will be informed by considerations of fairness, where necessary, on whether there is inconsistency between the conduct of the client and maintenance of confidentiality.[8] Therefore, we suggest the following revision for completeness,

> For example, this can occur where the substance of a privileged communication is disclosed in a non-confidential communication or in a manner that is inconsistent with maintaining confidentiality where, if necessary, informed by considerations of fairness, it is inappropriate to allow the claim of privilege.

Paragraphs 28 and 29

We note these paragraphs provide guidance to prevent inadvertent disclosure and highlight the professional responsibilities of legal practitioners when responding to regulatory notices and in relation to document production. In our view, it may be helpful for the guidance to observe that the tight timelines sometimes imposed by regulators, and the volume of documents to be reviewed, may mean that errors can occur. An incorrect privilege claim which is subsequently withdrawn or modified by a client should not, without more, draw an inference of misconduct. In our view, practitioners and their clients should be encouraged to make corrections without fear of such criticism (see also paragraph 108 below).

Paragraph 30

We suggest consideration is given to including a reference in this paragraph (and at paragraph 40 - see below) to Rule 31 of the ASCR. This rule imposes a positive obligation upon a legal practitioner who becomes aware that they have inadvertently received confidential information belonging to another person, to cease to read the material and to return, destroy or delete the material immediately upon becoming aware that disclosure was inadvertent.

<u>Case law guidance on waiver and loss of privilege</u>

Paragraph 40

See paragraph 30 (above).

[8] As acknowledged in the Draft Guidance Note at [30] citing *Mann v Carnell* [1999] HCA 66.

PART 2: OBLIGATIONS ON THE LEGAL PROFESSION

Key obligations

Paragraphs 41

This paragraph refers to legal practitioners having an obligation to maintain CLP. See the discussion under paragraph 2 and footnote 1 above regarding the source of this obligation and the duty of confidentiality.

Paragraph 43

Guidance is provided in this paragraph in relation to asserting CLP where information is sought by a regulator. We suggest additional commentary outlining that:

- the assertion of CLP must be on instructions from the client, unless the client cannot be contacted; and
- the lawyer's entitlement to assert the privilege on behalf of the client continues, even if the retainer has ended, or has been terminated, in circumstances when it is reasonable to infer that the client does not know of his or her right to claim privilege.[9]

In-house counsel

Paragraph 49

We note this paragraph refers to core duties to identify, preserve and assert privilege. See the discussion under paragraph 2 and footnote 1 above regarding the source of this obligation and the duty of confidentiality.

For completeness, we also suggest the addition of the following words (in italics) to the end of the sentence at the last dot point:

- taking proactive steps to protect privileged material from regulator access unless a valid waiver or legal exception applies *or the client has instructed that it does not wish to assert CLP and so the privileged material should be produced*.

Paragraph 53

This paragraph describes steps which in-house lawyers "must" take to maintain their professional obligations and reinforce privilege claims including hold a practising certificate, adhere to professional conduct rules and ensure their legal practice remains functionally independent within the organisation. While we do not disagree with the general proposition outlined, we note privilege claims can sometimes be successful even if these steps are not taken.[10]

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[9] *Body Corporate No 413424R v Sheppard* [2007] VSC 179 at [9] per Pagone J.
[10] For example, in *Racing New South Wales v Racing Victoria Ltd (No 2)* [2024] NSWSC 312 at [13] Rees J noted that, "indicia of independence of an in-house lawyer, such as a practising certificate or a separate legal team within the organisational structure, may indicate that the dominant purpose of a communication was providing legal advice, *but are neither essential nor determinative"* (emphasis added).

Paragraph 55

We agree with the steps outlined in this paragraph to maintain the confidentiality of privileged communications including labelling privileged documents appropriately with the example "Privileged and Confidential". We suggest it may be instructive to also note that the mere labelling of communications or documents in this way is not sufficient to establish CLP.[11]

Multidisciplinary Practices

Distinguishing legal advice from other professional services

Paragraph 65

See the comments under paragraph 55 above regarding the labelling of documents.

Paragraph 67

We do not agree that *Rich v Harrington* is authority for the statement in this paragraph that disclosure to a non-lawyer in a multidisciplinary practice (**MDP**) not assisting with legal advice, may constitute a waiver of privilege. In our view, the risk may derive from the limitations on disclosure of confidential client information in Rule 9.1 of the ASCR.

Maintaining professional independence

Paragraph 70

This paragraph provides guidance on using written engagement terms to identify the scope of legal services. We note that reference to Rule 70 of the ASCR may also be appropriate as this provision imposes an obligation to "take all reasonable steps" to ensure that the client is clearly informed about the nature of legal and non-legal services provided.

Comparative summary: MDP vs in-house lawyers

Paragraph 73

We note this paragraph highlights the complexities of navigating environments where legal and non-legal services are integrated and that the decision in *Archer Capital 4A Pty Ltd v Sage Group plc* [2015] SASC 173 is cited in relation to mixed communications in MDPs. However, we understand this case did not involve an MDP but, rather, dealt with communications between Archer Capital and its in-house legal counsel.

[11] Australian Government Solicitor, *Legal professional privilege and the Government – Legal Briefing 117*, 30 June 2021, online, https://www.ags.gov.au/legal-briefing-no-117.

PART 3: RESPONDING TO REQUESTS FROM FEDERAL REGULATORS

Balancing tensions between regulatory powers and CLP

Paragraph 77

It appears there is a typographical error in footnote 80 which incorrectly refers to "*Legal Profession Uniform Law (NSW)* s 419(1)(c)". We also suggest clarifying the commentary in the final bullet point to make it clear that the CLP claim is the client's, and so the lawyer should have instructions to claim CLP unless the client cannot be contacted, in which case a 'protective' claim of CLP may be made.

Technology, volume, and the rising complexity of privilege claims

Expansion of data volumes and regulatory reach

Paragraph 83

We note the reference to "AI assisted filtering" as a privilege review tool to assist in managing the challenges posed by the increasing scale of information requests. Given that use of AI in the legal context is a contentious topic, with diverging views as to its efficacy and reliability, it may be prudent to use a more generic term. Regarding technology assisted review, generally, it is important to consider whether client documents are capable of being uploaded to large language models which are not closed systems without breaching confidentiality obligations. Notably, inadvertent waiver can occur without manual review.

We also suggest clarifying the comment in the last dot point under this paragraph as it is unclear what is intended by both the reference to "practical alternatives" in response to regulator requests and the reference to "third party review" as an option.

Practical tips for responding to regulator information requests

Managing privilege claims

Paragraph 99

We acknowledge the guidance in the last dot point appropriately cautions against selectively disclosing privileged material without the client's clear instructions. It is suggested, for completeness, that practitioners should also be alerted to the potential risk of express waiver resulting in the client having to disclose other related material concerning the same issue. This is to prevent parties unfairly "cherry picking" privileged material. We suggest including additional commentary at the end of the last dot point under this paragraph in line with the following (in italics),

> **Avoid waiver risks**: Do not selectively disclose privileged material unless the client waives privilege knowingly and voluntarily, and with clear documentation. *The client should be advised that waiving privilege over one communication may result in waiver of privilege over all other communications dealing*

with the same subject matter[12] *and will almost certainly do so if the first communication cannot properly be understood without recourse to the other communications*.[13]

Disputed privilege claims

Paragraph 108

We agree with the steps set out under this paragraph for practitioner engagement with regulators to clarify the basis of a claim. It is important to remind parties that, in an age of voluminous productions required to be processed under time pressure, inadvertent errors can occur. Legal practitioners should reasonably be permitted to reconsider or amend CLP claims without fear of prosecution by a regulator unless the claim was knowingly false or reckless (see also paragraphs 28 and 29 above).

Best practice for practitioners

Paragraph 110

Clarification may be required to the third dot point under this paragraph. It is not clear how "asserting privilege too broadly or reflexively" leads to a risk of inadvertent waiver.

Thank you for the opportunity to comment. Questions at first instance may be directed to Sonja Hewison, Policy Lawyer, at (02) 9926 0219 or sonja.hewison@lawsociety.com.au.

Yours sincerely,

Jennifer Ball

Jennifer Ball
President

[12] *AWB Ltd v Cole (No 5) 12* [2006] 155 FCR 30 at [167] per Young J.
[13] *British American Tobacco Australia Services Ltd v Cowell* [2002] VSCA 197; [2002] 7 VR 524 at [121] (Victorian Court of Appeal).