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LPP and regulatory investigations: The ethics of compliance

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This piece deals with some of the practical considerations, concerning privileged communications, that practitioners might adopt when responding to coercive powers exercised

by Federal regulatory agencies such as the ATO, ASIC and ACCC. Though outside the scope of this article, it is noteworthy that such demands for production, in the context of the upcoming changes to the AML/CTF regime, add another layer to the complexity in developing and maintaining up to date legal practice and risk management procedures and protocols.

Legal professional privilege (LPP), or client legal privilege (as the privilege is held by the client), is one of the most seminal safeguards of the administration of justice. Not merely a rule of substantive law, it is an important common law right, or immunity, that may be '*availed of to resist the giving of information or the production of documents in accordance with investigatory procedures*': *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, -. Evidence legislation variously reflects the common law, however LPP may be subject to statutory modification (requiring clear words or a necessary implication) that shapes, or qualifies, the ability to claim privilege in certain regulatory or investigative contexts. A severe example, in the WA context, is the abrogation of a claim of privilege found in s 139 of the *Criminal Property Confiscation Act 2000* (WA).

The foundational duty

Practitioners have a paramount duty to the Court and the administration of justice. Subject to this foundational duty, practitioners have a duty to act in the best interests of their clients. Relevantly, discharging this duty includes ensuring that a client's LPP claims are protected. While a treatise on how a claim of privilege is established, or the circumstances in which it may be lost, is not dealt with here, it is critically important that practitioners are alive to these obligations and do not inadvertently disclose information or materials that record privileged communications. (For some practical guidance from a Uniform Law jurisdiction, see the NSW Law Society Q&A.)

If a production order is served, or a search and seizure warrant is executed, unless claims of privilege have been abrogated, it is important that practitioners seek instructions, by asking the right questions to ascertain if privilege attaches to any of the communications that would otherwise be caught by these coercive powers exercised by a regulatory body.

Verification and "Knowing the Client"

Getting the right instructions to form an objectively comprehensive view about whether a communication is subject to privilege involves asking not only the right questions, but also asking the right person. This might not be the usual person instructing, as they might not have the best evidence as to why a particular document was brought into existence. It is because of this that practitioners should exercise careful judgement in determining who their client is: by conducting due diligence aimed at understanding the structure of the client's business and the role of the client in the business, particularly in multidisciplinary practice models.

Putting in place practice management measures conducive to risk management, such as non-billable work in progress policies to support the appropriate level of diligence performed, is particularly relevant in modern practice management. This is helpful not only in responding to potential production requests in the future, but also in managing the exposure of firms to risk.

By deciding to proactively adopt such measures, red flags such as a client history of multiple lawyers/firms, inadequate or tardy disposition towards discharging discovery obligations, or search requests, will potentially come to light early on. Such measures are consistent with the enhanced due diligence obligations for affected lawyers under the upcoming AML/CTF regime. One thing is certain; practitioners must be alive to identifying red flags and responding appropriately.

Navigating complexity

Managing tensions between regulatory compliance and client confidentiality, particularly within multidisciplinary or mixed-practice models, is very important. Firms must be alert to instances (such as sophisticated transactions that are likely to attract regulatory interest) where practitioner inexperience could invariably place the client at a forensic disadvantage. A mismatch between a relatively junior practitioner's limited experience, and the sophistication required to adequately assess the dominant purpose of communications, particularly in mixed-purpose scenarios, is not ideal.

Conclusion

Because coercive notices typically impose strict deadlines, it is prudent practice to confer with the regulator when necessary. Depending on the circumstances, negotiating an extension to seek further instructions (and to brief out if needed) can be another vital tool that practitioners use to navigate complex production requests. Open dialogue helps balance the enforcement agency's public-interest need to obtain a comprehensive brief of evidence with the client's right to candid communication with their legal representatives.

Practitioners must remember, however, that even in the absence of statutory modification, this protection is not absolute; the iniquity (crime-fraud) exception will extinguish any claim to LPP (*R v Cox and Railton (1884) 14 QBD 153*). Balancing these duties is pivotal to practitioners' ethical duties as officers of the Court. To this end, it is necessary that practitioners exercise proactive ethical vigilance. For further guidance see: The Law Council of Australia '*Client Legal Privilege and Federal Regulators*' (Guidance Note, December 2025).