



## **PRACTICE GUIDELINE 4**

### **CLAIMING LEGAL PROFESSIONAL PRIVILEGE BEFORE THE ROYAL COMMISSION**

1. This Practice Guideline sets out the way the Commission will receive and consider claims of legal professional privilege with respect to documents and other communications sought under a summons or notice to produce.

#### **PROCEDURE FOR CLAIMING LEGAL PROFESSIONAL PRIVILEGE BEFORE THE COMMISSION**

2. The Commission reserves the right to dispense with or depart from these procedures if it is satisfied that legal professional privilege is abrogated or does not excuse production under the laws of the jurisdiction according to which the document has been summoned.
3. A person may claim legal professional privilege in relation to the whole of a document or one or more parts of a document. The procedure for claiming the privilege varies depending on whether or not a court has already found the document in question to be privileged.
4. If a court has already found the relevant document to be subject to legal professional privilege, and the person to whom the summons was issued seeks to claim the privilege before the Commission, the person or a legal practitioner acting on his or her behalf must, as soon as is reasonably practicable and in any event before the production of the document to the Commission, inform the Solicitor Assisting the Commission of the person's intention to claim the privilege. At the same time, the person or his or her legal practitioner must provide the Solicitor Assisting the Commission with a copy of the judgment or order recording the court's classification of the document as privileged.
5. Where the document has not previously been found by a court to be privileged, the person to whom the summons has been issued may claim legal professional privilege in relation to that document by informing the Solicitor Assisting the Commission, as soon as is reasonably practicable and in any event before the production of the document to the Commission, of the person's intention to claim the privilege. At the

same time, the person or his or her legal practitioner must provide the Solicitor Assisting the Commission with a short submission substantiating their claim (see, for example, *AWB Ltd v Cole (No 5)* (2006) 155 FCR 30, at [44]).

6. The Commission may, by written notice served on a person, require the person to produce a document over which legal professional privilege is claimed for the sole purpose of deciding whether to accept the claim (*Royal Commissions Act 1902* (Cth) s 6AA(3)). Where the Commission so requires and later accepts a claim of legal professional privilege in relation to an inspected document, either in whole or in part, the document will be returned to the person. Such parts of an inspected document as the Commission accepts to be privileged will not be taken into account by the Commission, nor will they form the basis of any finding or recommendation by the Commission (*Royal Commissions Act 1902* (Cth) s 6AA(4)(b)).
7. If the Commission rejects a claim of legal professional privilege in relation to a document which has been produced for inspection, the Commission may retain the document and use it for the purposes of the inquiry (*Royal Commissions Act 1902* (Cth) s 6AA(5)).
8. Parties are advised that it is an offence for a person to refuse or fail to produce a document, or a part of a document, under a summons or notice to produce in respect of which the Commission has rejected a claim of legal professional privilege (*Royal Commissions Act 1902* (Cth) s 6AB).