Common interest privilege in Australia

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Common interest privilege (**CIP**) is an extension of legal professional privilege (**LPP**) and applies to the sharing of privileged information between parties with a mutual interest in the outcome of litigation or legal matters. The privilege allows parties to communicate without waiving their respective claims to confidentiality over documents or communications.

This privilege has grown in significance in modern legal practices due to the increasing complexity of litigation and the tendency for multiple parties to be involved in the same or closely related legal proceedings.

Basis of common interest privilege

Legal professional privilege (LPP), sometimes referred to as client legal privilege, is the foundation upon which common interest privilege rests. In Australia, LPP protects confidential communications between a lawyer and their client, made for the dominant purpose of providing legal advice or services.

It also extends to documents prepared for use in litigation. LPP can, however, be lost if the privileged information is disclosed to a third party unless there is a recognised exception. Common interest privilege is one such exception.

Common interest privilege applies when two or more parties share a common legal interest in the subject matter of a proceeding and exchange privileged communications in furtherance of that interest. This enables them to share advice or documents that are otherwise subject to LPP without waiving the privilege.

The privilege recognises that parties with aligned legal interests should be able to share information to facilitate the conduct of their case or defence without the risk of waiving confidentiality.

Application of common interest privilege

Common interest privilege in Australia is most commonly invoked in the context of litigation, but it also applies in non-litigious situations where parties share a legal interest. The privilege can apply between co-defendants, insurers and insureds, joint venture partners, or even parties with separate legal representation who are working towards a common legal outcome.

CIP in a litigation context

In the litigation context, common interest privilege is frequently relied upon when two or more parties collaborate on legal strategy or share documents in preparing their respective defences.

For instance, co-defendants in a case may have separate legal representation but may wish to share legal advice or expert reports. Without CIP, sharing such information could risk waiver of LPP (the privilege that exists directly between a lawyer and client), allowing the opposing party access to the shared documents. However, under CIP, the privilege remains intact because the information is exchanged to further a mutual legal interest.

One key consideration in this context is that the parties must share a “common legal interest,” which can extend beyond a purely commercial interest. A shared financial or business interest alone is not sufficient to invoke common interest privilege; the interest must be in the legal outcome of the matter.

CIP in a non-litigation context

In non-litigation contexts, common interest privilege can still apply. For example, parties to a joint venture agreement or merger negotiation may share privileged legal advice relating to regulatory approvals or compliance issues. Similarly, insurers and insured parties often invoke common interest privilege when sharing legal advice about potential claims or liabilities.

The challenge in non-litigation contexts lies in demonstrating that the shared communications were made for the dominant purpose of advancing a legal, rather than a commercial, interest. Courts will carefully scrutinise the nature of the common interest and the purpose for which the communications were exchanged.

Limits and requirements for common interest privilege

While common interest privilege is a valuable tool, its application is not automatic. Courts will examine several factors to determine whether the privilege applies:

1. **Common legal interest**: The parties must share a legal interest, not merely a commercial or strategic one. This requirement ensures that CIP is not used to shield communications that are primarily commercial in nature.
2. **Dominant purpose**: The communication must have been made for the dominant purpose of advancing the common legal interest. If the purpose of the communication is primarily to advance a business interest, common interest privilege will not apply.
3. **Non-adversarial relationship**: The parties asserting common interest privilege must not be adversaries. CIP cannot be claimed between parties with conflicting legal interests, even if they have a shared financial interest.
4. **Confidentiality**: The communication must be confidential. If the information is shared too broadly or with parties who do not share the common interest, the privilege may be waived.

Waiver of privilege

One of the risks of invoking common interest privilege is the potential for inadvertent waiver. If a party shares privileged information with someone who does not share the same legal interest, the privilege may be lost. Courts have been strict in maintaining that privilege can only be preserved if the sharing of information is strictly limited to parties with a genuine common legal interest.

Conclusion

Common interest privilege remains an important aspect of Australian legal practice, particularly in complex litigation and commercial contexts where multiple parties share aligned legal interests. Its development through case law has clarified its boundaries and application, ensuring that parties can cooperate effectively while preserving the confidentiality of their communications.

However, the privilege is not without its challenges. Courts will closely scrutinise claims of CIP to ensure that it is not being used improperly to shield communications that do not genuinely advance a shared legal interest. As the law continues to evolve, practitioners and clients alike must remain vigilant in applying CIP appropriately, ensuring that the communications they seek to protect are genuinely covered by the privilege.

Gilshenan &Luton has the experience and strong technical knowledge to advise on protecting and maintaining legal professional privilege and identifying when common interest privilege applies. We appreciate the importance of common interest privilege in protecting legal and commercial relationships. Get in contact with us with any questions or concerns about common interest privilege.

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