

Corporate Alert

ASIC claims of legal professional privilege

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ASIC has recently released an Information Sheet (165) that seeks to clarify the uncertainty surrounding the requirements for the production of documents, specifically privileged documents, as a result of a compulsory ASIC production notice.

Investigative powers

As Australia's corporate, markets, financial services and consumer credit regulator, ASIC is given a broad range of compulsory information-gathering powers. ASIC has utilised these powers, with increasing frequency, to regulate and compel the production of documents in order to carry out their surveillance and investigative functions.

Production of documents

A notice for the production of documents must be complied with within the specified time period determined by ASIC, unless there is a good reason.

It must be noted that if ASIC serves you with a notice, it does not necessarily mean that ASIC suspects that your company has breached the law or has committed an offence. It may be that your company is in possession of documents or information that is relevant to a matter that ASIC is looking into or officially investigating. For example the documents requested may relate to an individual or entity that your company has dealt with.

A valid claim of legal professional privilege (**LPP**) will be an exception to the compulsory requirement to produce documents or information to ASIC. However, ASIC clearly warns in the Information Sheet that it will review and challenge the validity of any asserted LPP claim should it consider that LPP does not apply. A baseless claim of LPP may attract a penalty, so careful consideration needs to be given before any claim for LPP is asserted.

The Information Sheet importantly provides a mechanism to assist with the voluntary and early disclosure of the LPP documents or information on a limited and confidential basis. This is achieved through a 'Voluntary Confidential Legal Professional Privilege Disclosure Agreement' (**LPP Agreement**), which is intended to preserve privilege. The mechanism for doing this is set out below.

What does it mean to voluntarily disclose privileged documents?

If your company enters into the LPP Agreement with ASIC, this means that both parties agree that the disclosure of the document/information is not a waiver of any privilege. This however will not prevent third parties from asserting that privilege has been waived. The law is not clear on this issue, so the production to ASIC, even under a LPP Agreement, could constitute a waiver which may allow a third party later to obtain the document or information. You should seek legal advice before voluntarily providing LPP documents or information to ASIC or entering into the LPP Agreement.

Under the Agreement, ASIC will generally treat the information as confidential and will not seek the admission of the disclosed information as evidence in any

proceedings. This is subject to a few exceptions such as to challenge the validity of the LPP claim or in a criminal proceeding in respect of the falsity of a statement made by the privilege holder.

Benefits of voluntary and early disclosure

ASIC believes that early disclosure of privileged information will assist with the effective and efficient conclusion of ASIC's investigation and determination of consequential steps. This is especially so where disclosure will not be detrimental to your company or where your company is not the focus of ASIC's attention.

In some circumstances it may be advantageous to produce a document that may be technically protected by LPP. In the event that your company is under investigation, early voluntary disclosure of LPP documents may assist you and your advisors to identify efficiently, and with precision, the critical issues to be addressed in an investigation or allow you to explain to ASIC certain conduct.

Claiming privilege

For LPP claims over information in documents, ASIC require a schedule to be prepared to individually identify the documents. The schedule needs to contain the following details:

- the names of all authors and recipients of the document together with their positions and employer (if any);
- the date of the document;
- the type of document;
- the category of LPP claimed (advice or litigation privilege) and the basis on which the privilege is claimed;
- the name of all persons who claim the right to assert the privilege (including any third parties on whose behalf the privilege claim is made);
- whether the form of the document is electronic or hard copy;
- the address of the premises where the document is kept; and
- whether privilege is claimed over the whole or part of the document.

A sample schedule can be found in the [LPP Agreement](#).

For LPP claims over oral information during a compulsory examination, ASIC requires you to provide, during the examination or at a later specified date, the following details:

- the name of all parties who communicated the information or to whom the information has been communicated, together with their positions and employer (if any);
- the date of the communication;
- the category of LPP claimed (advice or litigation privilege) and the basis on which the privilege is claimed;
- the name of all persons who claim the right to assert the privilege; and
- whether the information has been recorded in part or in whole in a tangible form.

What should you do when you receive a notice from ASIC?

If you or your company receives a notice, it should be dealt with promptly. Legal advice should be sought as to whether a claim for LPP exists over a document (or information), whether LPP should be asserted or whether production of documents or the provision of information should be disclosed under a voluntary LPP agreement. You may also need legal assistance to accurately complete the document schedule as required by ASIC.

Please note that if you make a claim of LPP, you must still comply with the production of all non-privileged information to ASIC by the date specified. If only part of a document is protected by LPP, an appropriately masked document must be produced. Failure to comply with an ASIC notice will be a breach of the *Australian Securities and Investments Commission Act 2001* (Cth) and may be a criminal offence.

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