

28 February 2025

The Attorney General's Department
The Treasury

Email: evidence@ag.gov.au

Dear Sirs,

RE: Discussion Paper: Review of the Use of Legal Professional Privilege in Commonwealth Investigations (Discussion Paper)

Who we are

A national membership association, Governance Institute of Australia (Governance Institute) advocates for governance and risk management professionals, providing community and support to over 7,500 members.

As an Institute of Higher Education, the Governance Academy provides practical training and expert insights, equipping professionals with the tools to excel in their roles and drive better decision-making in their organisations.

Our members have primary responsibility for developing and implementing governance frameworks in public listed, unlisted, and private companies, as well as the public sector and not-for-profit organisations. They have a thorough working knowledge of the operations of the markets and the needs of investors. We regularly contribute to the formation of public policy through our interactions with Treasury, ASIC, APRA, ACCC, ASX, ACNC and the ATO. We are a founding member of the ASX Corporate Governance Council. We are also a member of the ASIC Business Advisory Committee, the ASX Business Committee and the ACNC Sector Users Group.

Many of our members work as company secretaries or in dual roles as company secretary/general counsel and are frequently the first point of contact in an organisation for notices from Commonwealth agencies and regulators seeking information.

This Submission does not comment on all aspects of the Discussion Paper but focuses on the issues of interest and concern to our members.

Preliminary comments

Our members endorse the statements in the Discussion Paper about the importance of Legal professional Privilege (LPP) as a long-standing principle supporting access to justice and the rule of law. It exists to enable individuals and organisations to get frank and fearless advice from their legal advisers. They do not support any weakening of the protection LPP affords and caution against interfering with the current legal framework.

However, they consider there are areas where the way in which LPP operates in practice could be improved.

Our members note the references in several part of the Discussion Paper to the improper use of LPP or 'bad actors'. While the PwC matter has been widely publicised, our members are not aware of the

systemic misuse of LLP by companies and their legal advisers and would welcome more detail about instances of misuse to better inform comments and recommendations regarding possible reform options.

The changing operating environment

Our members endorse the comments in the Discussion Paper about the significant changes to the operating environment, particularly evident since the COVID-19 pandemic. Many organisations have moved away from hard copy documentation and maintain records electronically. This has led to an exponential increase in the amount of material potentially within scope of requests. Our members report that even with the use of the sorts of technology available to legal advisers, sifting through this material is a time consuming and expensive exercise. They also acknowledge the increase in multi-disciplinary practices which as the Discussion Paper notes has the potential to complicate claims of LPP. Many of our members have dual roles as both company secretary and legal counsel, and they acknowledge that this can be challenging when considering the issue of LPP. Our members consider that increased education and training for lawyers working in multi-disciplinary practices or in dual roles would be beneficial.

Governance Institute recommends Government work with key stakeholders to develop appropriate guidance for lawyers working in multi-disciplinary practices or in dual roles.

More consistent approach needed across Commonwealth agencies and regulators

While the Australian Securities and Investments Commission, the Australian Taxation Office and the Australian Competition and Consumer Commission have published protocols in relation to LPP, this is not the case for all regulators and agencies.

The sheer number of Commonwealth agencies and the inconsistency between Commonwealth agencies are long-standing issues. The Australian Law Reform Commission (ALRC) noted when it released its 2008 Report *Privilege in Perspective*:

The ALRC's research identified over 40 federal bodies with coercive information-gathering powers (as well as Royal Commissions established from time to time) and many more than 40 statutes that addressed the powers of these bodies. Many of these statutes are silent on the issue of privilege, and where privilege is addressed, there is no consistency of approach.

In the Privilege in Perspective report, the ALRC made a number of recommendations to improve existing laws and procedures. The key recommendations focused on achieving greater consistency in the application of privilege within the context of federal investigations, and improving processes for making claims of privilege and resolving disputes over claims of privilege.¹

Our members also report there are inconsistencies across Commonwealth legislation on the length of time for the retention of data and consider there is an opportunity for alignment of these requirements. Our members consider that there is an opportunity for Commonwealth agencies and regulators to harmonise their approach to LPP, making it considerably easier for organisations receiving requests for information to respond promptly. One output of the current review could be harmonised and consistent protocols/guidance and data retention periods for all Commonwealth agencies and regulators.

Governance Institute recommends the development of harmonised and consistent protocols/guidance and data retention periods relating to LPP for all Commonwealth agencies and regulators.

¹ See [Privilege In Perspective](#), Australian Law Reform Commission, February 2008.

LPP Claim Phase – scope of requests

Members consulted in connection with this Submission almost universally commented on the ‘breadth’ of the requests received from regulators and agencies. Those with experience of responding to these requests all reported having received extremely broad requests for information and documents and the need for agencies and regulators to make more ‘targeted requests’. This is particularly the case now that almost all communication takes place electronically.

One member working in a small to medium size listed company reported that Notices from a regulator covering a two- and half-year period extended to every person in the organisation, including former non-executive directors and employees. The response uncovered more than 120,000 largely electronic documents which all had to be reviewed as the member concerned was both company secretary and legal counsel. Legal fees in connection with responding to these Notices exceeded \$1M, a significant expense for an organisation of that size. Emails in particular created difficulties because they were frequently copied to multiple individuals in the organisation, thereby creating ‘chains’ of potentially repetitive material.

Our members endorse the comment in the Discussion Paper (page 9) that ‘there may be opportunities for Commonwealth agencies to work more collaboratively with a person and their lawyers to clarify what information they are seeking or identify categories of communications during the LPP Claim Phase. The development of cross agency guidance would be a useful step.

Governance Institute recommends greater collaboration between Commonwealth agencies and regulators and recipients of requests and their lawyers about information and communications being achieved through the development of cross agency guidance.

Dispute Resolution Phase

Our members endorse the comments in the Discussion Paper about the length and cost of existing processes for resolving disputes about LPP claims. They note the 2008 ALRC Report recommended the development and publication of procedures for resolution of disputed claims, which should ‘as far as practicable, be uniform’. The ALRC also recommended the establishment of an independent review process.² As the Discussion Paper notes in some cases an independent third party is used to resolve disputes; however, this is noted as having limitations relating to the capacity of the reviewer to assess the volume of material produced and the potential cost. Our members consider the proposal to adopt court-appointed LPP examiners referred to in the Discussion Paper, subject to a right of appeal to the Federal Court, warrants further investigation.

Governance Institute recommends Government investigate the feasibility of court-appointed LPP examiners to resolve LPP disputes, subject to a right of appeal to the Federal Court.

If you have any questions in connection with this Submission, please contact me or Catherine Maxwell, General Manager, Policy and Advocacy.

Yours faithfully,

(Sgd) Megan Motto, CEO

² See Footnote 1 Recommendations 8-12 and 8-14.