

# Fair Work Ombudsman Legal Professional Privilege Policy

1. This policy explains how the Fair Work Ombudsman (**FWO**) approaches claims of legal professional privilege (**LPP**).

## The FWO’s compulsory information-gathering powers and LPP

1. The *Fair Work Act 2009* provides for a range of compulsory information-gathering powers that can be used in our compliance and enforcement functions. This includes the power of authorised officials to require a person to:

* produce documents or records; or
* provide information or attend an examination to answer questions (**FWO Notice**).

For further information see [Powers of Fair Work Inspectors](https://www.fairwork.gov.au/tools-and-resources/fact-sheets/about-us/powers-of-fair-work-inspectors) and [FWO Notices](https://www.fairwork.gov.au/tools-and-resources/fact-sheets/about-us/fwo-notices).

1. In responding to a compulsory information-gathering power under the *Fair Work Act 2009*, a person must provide all documents or records requested except where doing so would disclose information that is the subject of a valid claim of LPP.
2. In responding to a notice to produce records or documents issued by a Fair Work Inspector, a person may:

* waive privilege and provide the records or documents containing the LPP information to the FWO in response to a notice to produce records or documents;
* if they are the privilege holder, seek to provide the LPP information to the FWO on a limited and confidential basis intended to preserve LPP; or
* not provide the LPP information to the FWO.

1. In providing information, documents or answers to a question under a FWO Notice, a person may:

* waive privilege and provide the information, documents or answers to a question containing the LPP information to the FWO or Senior Executive Service officer specified in the FWO Notice; or
* not provide the LPP information to the FWO or Senior Executive Service officer specified in the FWO Notice.

## Types of LPP

1. Whether information is subject of a valid claim of LPP requires the party claiming LPP to establish that it is confidential information brought into existence for the dominant purpose of:

* giving or obtaining legal advice (this generally comprises confidential communications between a legal adviser acting in a professional capacity and their client or third party) (**Advice Privilege**); or
* use in, or in relation to, existing or reasonably anticipated litigation (**Litigation Privilege**).

## Who can make an LPP claim to the FWO

1. The recipient of a notice to produce records or documents or a FWO Notice may assert an LPP claim over the requested information by providing the detail specified in paragraphs 12 and 13 below to the FWO.
2. LPP may be asserted by:

* the privilege holder; or
* a third-party on behalf of the privilege holder (**Third-Party LPP Claim**).

1. The privilege holder is generally the person who:

* in respect of Advice Privilege, is the client for whom the advice is being given or obtained; or
* in respect of Litigation Privilege, is the client who is involved as a party in actual legal proceedings or who expects to be involved as a party in reasonably anticipated legal proceedings.

## How to make an LPP claim to the FWO

1. Where an LPP claim is made to the FWO, the FWO needs to decide whether to accept or challenge the claim. The FWO requires sufficient information in respect of the claim to make an informed decision. For this reason, the FWO will not usually accept a blanket LPP claim.

*LPP claim over information in documents*

1. The recipient of a notice to produce records or documents or FWO Notice issued by the FWO should make any LPP claims over the requested documents by providing the details outlined in this section:

* within the period specified by the notice to produce records or documents or FWO Notice; or
* by such later date as may be specified by the FWO.

1. In order to make an LPP claim and provide sufficient information for the claim to be assessed promptly, a schedule which identifies the documents over which LPP is claimed should be completed. The schedule should individually itemise each document and provide the following information in respect of each document:

* the names of all authors and recipients of the document together with their positions and employer (if any), except where that information would reveal privileged communications;
* the date of the document;
* the type of document (e.g. email or letter);
* the category of LPP claimed (Advice Privilege 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 third-parties);
* whether the form of the document is electronic or hard copy;
* the address of the premises where the document is kept;
* whether privilege is claimed over the whole or part of the document. Please note that where only a part of the document is subject to a claim of privilege, an appropriately redacted version must be provided to the FWO;
* in the case of a third-party LPP claim, the following should also be provided to the FWO:
  + - * + the identity of the privilege holder;
        + the last known contact details of the privilege holder; and
        + an explanation of the circumstances by which the document came to be in control of the third-party.

*LPP claim over oral information in a FWO Notice Examination*

1. If the claim relates to oral information or answers in response to a FWO notice examination question, the examinee should specify that they are claiming LPP specifically in relation to information responsive to that question.
2. You should provide the FWO with sufficient details to assess the LPP claim during the examination or at such later date as may be specified by the FWO, including at a minimum:

* the category of LPP claim (Advice Privilege or Litigation Privilege) and the basis on which the privilege is claimed; and
* the name of all persons who claim the right to assert the privilege (including third-parties).

## When the FWO may require additional details

1. The FWO may require additional details in support of an LPP claim. For instance, further details may be sought where:

* the only indicia of privilege in the privilege claim schedule provided to the FWO is that a lawyer was a maker or a recipient of a communication. This is because the inclusion of a lawyer in a communication does not of itself satisfy the dominant purpose test required to establish LPP;
* the document over which privilege is claimed was created by a non-lawyer third party and the dominant purpose of its creation is not clear; or
* a person instructs a lawyer to conduct a review of facts and circumstances which fall within the scope of a FWO investigation. The FWO will not accept a claim that the mere occurrence of the lawyer’s review gives rise to a valid LPP claim over information relating to those facts and circumstances. The FWO draws a distinction between documents brought into existence for the purposes of the lawyer’s review, where a valid claim of LPP may be available, and the documents and information that existed prior to the lawyer’s review, where a valid claim of LPP is generally less likely to be available.

## What to do with a document over which LPP is claimed

1. The recipient of a notice to produce records or documents or FWO Notice who is asserting privilege over a document may choose to:

* withhold the LPP document from the FWO and keep it safe in their custody or control. The document must not be destroyed;
* seek to provide the LPP document to the FWO in accordance with the voluntary confidential LPP disclosure agreement discussed below, noting that the FWO retains the discretion to determine whether it will receive an LPP document on this basis; or
* waive LPP and provide the FWO with the relevant document.

1. A Third-Party LPP claimant may withhold the LPP document from the FWO. The third party must keep the LPP document safe for so long as it is under their custody or control. If the third party is requested to relinquish custody or control of the LPP document, reasonable notice should be provided to the FWO prior to relinquishing custody or control of the LPP document.

## Circumstances in which the FWO may accept a voluntary confidential disclosure of LPP information

1. The FWO may at its discretion elect to accept, on a confidential basis, LPP information (or information that is claimed to be privileged) voluntarily by a notice recipient or other disclosing party under a voluntary confidential LPP disclosure agreement. This will be on the following terms:

* the FWO agrees that it will not argue in any proceedings that the disclosure of the information to the FWO under the agreement is a waiver of any privilege existing at the time of the disclosure (Note: Although the agreement prevents the FWO from asserting that the provision of the information amounts to a waiver of privilege in the disclosed information, the agreement does not prevent third parties from asserting that privilege has been waived or a court from determining that privilege has been waived as a result of disclosure to the FWO in this manner. You should consider seeking legal advice in relation to this issue);
* the FWO will generally treat the disclosed information as confidential, but the privilege holder retains responsibility for otherwise safeguarding any privilege, including asserting any privilege where the FWO is compelled by law or considers its statutory functions require it to disclose the information to a third party (such as in the case of a court order for discovery or disclosure to a Minister pursuant to section 718(3) of the *Fair Work Act 2009*);
* the FWO is permitted to review and use the information for the FWO’s investigative purposes;
* the FWO agrees it will not seek the admission of the disclosed information as evidence in any proceeding commenced by the FWO other than:
  + - * + where the privilege holder has consented to its tender as evidence;
        + to challenge the validity of the privilege claim;
        + where privilege has otherwise been waived or it has been determined that the information is not privileged; or
        + for the purposes of a civil or criminal proceeding in respect of the provision of false or misleading information or the falsity of a statement made by the privilege holder;
* the FWO is permitted to use as evidence in any proceeding commenced by the FWO any additional documents or information obtained as a result of its review of the disclosed information or investigative steps taken as a result of the disclosed information.

1. The FWO will only elect to accept LPP information on this basis where:

* the LPP information is identified by privilege holder with sufficient precision to enable FWO to determine it is appropriate to do so; and
* the FWO considers receipt of the information on this basis will significantly assist the FWO to fulfill its statutory functions.

1. The FWO believes that there can be a public benefit in accepting LPP information (or information claimed to be privileged) on this basis, including by assisting parties to clarify critical issues subject to investigation and by promoting the early resolution of matters tracking for litigation. The content of and reliance upon legal advice may also be relevant to whether there is a public interest in commencing proceedings against an alleged wrongdoer.

## Where the FWO does not accept an LPP Claim

1. The FWO is unlikely to accept a claim of LPP where, in the FWO’s opinion, the claim is:

* not substantiated by the information provided in support of the claim; or
* otherwise not valid (e.g. because the FWO believes privilege has been waived or the information was unlikely to have ever been privileged).

1. If the FWO does not accept a claim of LPP, the person asserting LPP can:

* withdraw the claim of LPP and provide the information to the FWO;
* make a request (or the FWO may invite parties) to enter into a voluntary LPP dispute resolution process with the FWO; or
* make an application to the court seeking a declaration that the information is privileged.

1. In circumstances where the FWO:

* is required to make an application to a court seeking a declaration that information over which privilege has been claimed is not privileged, and is successful in obtaining that declaration; or
* is required to commence civil penalty proceedings for failure to comply with a notice to produce records or documents issued by a Fair Work Inspector, and these proceedings determine that the documents which have not been produced on the basis of a privilege claim are not privileged,

the FWO may, in appropriate cases, seek recovery of its costs and/or higher penalties.

## When a party claims LPP over information on which they rely

1. Where information is withheld from the FWO because of a claim of LPP and at the same time the party relies on the information withheld to justify or defend conduct, the FWO will require an explanation as to the basis on which LPP has not been waived by that reliance. If a party withholds information and relies, or intends later to rely, on the information to justify or defend conduct, the party should also consider:

* seeking to provide voluntary confidential disclosure of LPP information to the FWO pursuant to a voluntary confidential LPP disclosure agreement, noting that the FWO retains the discretion to determine whether it will receive LPP information on this basis; and
* the cost of civil penalty proceedings brought by the FWO where the withheld information will have to be disclosed in responding to the claims in those proceedings. Delay in disclosing the withheld information to the FWO may also result in the FWO seeking its costs in civil proceedings even if the other party successfully defend the proceedings by reliance on the withheld information.