



PRACTICE GUIDELINE 2

LEGAL PROFESSIONAL PRIVILEGE

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1. Where a person¹ is required to produce a document under s 2 of the *Royal Commissions Act* 1902 (Cth) (“the Act”), the procedure for making a claim of legal professional privilege in respect of any such document is contained in s 6AA(1) of the Act.
2. This Practice Guideline sets out the way in which the Royal Commission (“the Commission”) will receive and consider a claim of legal professional privilege made under s 6AA(1) of the Act.²
3. The effect of s 6AA(1) of the Act is that an assertion that a document is subject to legal professional privilege will not be a “reasonable excuse” for refusing or failing to produce the document for the purposes of sub-ss 3(2B) or (5) of the Act, unless:
 - a. a court has found the document (or the relevant part of the document) to be subject to legal professional privilege; or
 - b. a claim that the document (or the relevant part of the document) is subject to legal professional privilege has been made to the Commissioner within the following timeframes as applicable:
 - i. within the time that the Commissioner, in requiring production of the document, allowed for its production; or
 - ii. within such further time as the Commissioner allowed for production of the document.
4. If a person is seeking to rely on sub-pars 3(a) or (b) above as the basis for not producing a document, the person, or the legal practitioner acting on the person’s behalf, must do the following, as applicable:
 - a. in respect of sub-par 3(a), inform the Solicitor Assisting the Commission of the intention to claim privilege, as soon as practicable, and provide the Solicitor Assisting the Commission with a copy of the judgment or order recording the

¹ A reference to a “person” in this Guideline includes a body politic or corporate as well as an individual.

² For the technical requirements for electronic production of documents over which a claim of legal professional privilege is made, refer to the Document Management Protocol.



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finding that is relied upon and any relevant evidence to confirm that there has been no waiver or loss of privilege since the finding was made; or

- b. in respect of sub-par 3(b), provide written notice of the claim to the Solicitor Assisting the Commission within the time provided under sub-par 3(b)(i) or (ii) above, as relevant, together with any evidence and written submissions relied on in support of the claim.
5. If a person satisfies sub-par 3(a) above, and the Commissioner is yet to determine whether legal professional privilege has been waived:
- a. where the whole document has been found by a court to be subject to legal professional privilege, that document does not need to be produced to the Commission in the first instance;
 - b. where part or parts of the document have been found by a court to be subject to legal professional privilege, those parts of the document should be redacted, and the document should be produced to the Commission in redacted form in the first instance.
6. If a person satisfies sub-par 3(b) above, and the Commissioner is yet to determine the claim:
- a. where the claim is made over the whole document, that document does not need to be produced to the Commission in the first instance;
 - b. where the claim is made over part or parts of the document, those parts of the document should be redacted, and the document should be produced to the Commission in redacted form in the first instance.
7. If a document is produced to the Commission in redacted form (in accordance with sub-pars 5(b) or 6(b) above), the original unredacted version of the document must be retained in case of any call for production in accordance with sub-par 8(a) below.
8. For the purpose of deciding whether to accept or reject a claim of legal professional privilege made in accordance with sub-par 3(b) above, the Commissioner may:



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- a. by written notice served on a person, require the person to produce the document the subject of the claim for inspection;³ and
 - b. exercise his powers to summon witnesses and take evidence under s 2 of the Act.⁴
9. Where a document has been produced for inspection in accordance with sub-par 8(a) above:
- a. if the Commissioner decides to accept the claim, the Commissioner will return the document to the person and will disregard the whole, or the relevant part, of the document for the purposes of any report or decision that the Commission makes;⁵ and
 - b. if the Commissioner decides to reject the claim, the Commissioner may retain the document and use it for the purposes of the inquiry.⁶
10. A person will commit an offence⁷ under the Act in respect of a claim of legal professional privilege in the following circumstances:
- a. under s 6AB(1) of the Act, where the person had refused or failed to produce a document required to be produced by a summons or notice issued under s 2 of the Act, and the Commissioner has decided under s 6AA(2) of the Act to reject a claim of legal professional privilege (in respect of the whole or the relevant part of the document), and, after that decision, the person refuses or fails to produce the document as the Commissioner requires under s 2 of the Act; and
 - b. under s 6AB(2) of the Act, if the person refuses or fails to produce a document that the person was required, under s 6AA(3) of the Act, to produce for inspection.

Kenneth Hayne

Commissioner

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³ See s 6AA(3) of the Act.

⁴ See s 6AA(6) of the Act.

⁵ See s 6AA(4) of the Act.

⁶ See s 6AA(5) of the Act.

⁷ The offences are ones of strict liability (s 6AB(3) of the Act). The provisions relevant to the defences to these offences are variously contained in s 6AB(4) to (7) of the Act.