

EPA's approach to legal professional privilege and the privilege against self-incrimination

Policy



Publication number 1474 June 2012

Authorised and published by EPA Victoria, 200 Victoria Street, Carlton

1 Issue dealt with by this policy

This policy sets out EPA's approach to what should occur when a person objects to the production of documents to EPA on the basis of legal professional privilege (client legal privilege) or the privilege against self-incrimination.

An essential part of EPA's compliance and enforcement role relies on the investigation of alleged contraventions of the *Environment Protection Act 1970* (Vic) (EP Act) and *Pollution of Waters by Oils and Noxious Substances Act 1986* (POWBONS Act), and the associated subordinate legislation under these Acts. In the course of investigation activities, sections of the EP Act and POWBONS Act empower EPA to compel certain persons to produce information. EPA is committed to exercising these powers in a fair and lawful way, and accepts that most of its powers can be subject to claims of privilege.

There is a need for EPA to ensure transparency, consistency and clarity by stating in this policy how EPA will approach claims of these types of privilege.

2 Relevant legislation and guidelines

2.1 Scope - Legal professional privilege (client legal privilege)

What is legal professional privilege (client legal privilege)?

Legal professional privilege (otherwise known as client legal privilege¹) is a ground on which a person may object to the disclosure or inspection of documents. The privilege attaches to:

- confidential communications between a person (client) and his/her legal advisor (and in some cases, third parties)
- documents prepared by the client, lawyer or another person

but only if the communications/documents were made for the dominant purpose of:

- enabling the client to obtain or the advisor to give legal advice
- litigation that is actually taking place or was in the contemplation of the client².

A person who is not legally represented may also claim the privilege, provided the confidential communications or documents concerned are made with the dominant purpose of preparing for, or conducting the proceeding³.

General principles

A claim of legal professional privilege may be made by all legal persons (whether natural person or corporate body)⁴.

It is inappropriate however to make a blanket claim for privilege as claims for privilege apply to particular documents individually.

In addition privilege does not apply to communications made:

- before the client contemplated obtaining or the legal advisor contemplated giving legal advice or
- to facilitate the commission of a fraud, crime, or other illegal purpose.⁵

Further, where documents that would not ordinarily be subject to privilege are lodged with a legal advisor for the attempted purpose of obtaining immunity from production, no privilege will be attached to the documents simply because they are in a solicitor's possession.

Because the privilege is that of the person claiming it and not that of the legal advisor, the privilege can only be waived by the person seeking to claim it. Waiver may be express or implied.⁶

Statutory provisions

For the purpose of legal professional privilege, this policy applies to those sections of the EP Act and the POWBONS Act that empower EPA to require the production of information. For example, section 55 of the EP Act empowers an authorised officer to issue notices requiring a person to produce documents.

2.2 Scope - Privilege against self - incrimination

What is the privilege against self - incrimination?

The privilege against self-incrimination provides an immunity from an obligation to provide information that may prove that person's own guilt.

General / common law principles

It is generally accepted under common law principles that all natural persons have a right not to incriminate themselves, unless that right is expressly overridden by statute.

A claim of the privilege against self-incrimination is only available to a natural person and not to a corporate entity.⁷ This is to be distinguished from a claim of legal professional privilege, which is available to all legal persons (whether natural persons or corporate entities).

Statutory provisions

For the purposes of the privilege against self-incrimination, this policy applies to those sections of the EP Act and the POWBONS Act that empower EPA to require the production of information, in particular sections 54 and 55 of the EP Act.

This policy also applies in particular to section 24(1)(m) of the POWBONS Act.

2.3 Evidence Act 2008 (Vic)

Part 3.10 of the *Evidence Act 2008* (Vic) (the Evidence Act) makes provision for privileges, including client legal privilege⁸ (otherwise known as legal professional privilege), and the privilege against self-incrimination.⁹

⁵ See *Evidence Act 2008* (Vic), s.125.

⁶ See *Evidence Act 2008* (Vic), s.122.

⁷ *Evidence Act 2008* (Vic), s.187; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

⁸ See *Evidence Act 2008* (Vic), part 3.10, division 1.

⁹ See *Evidence Act 2008* (Vic), part 3.10, division 2.

¹ See *Evidence Act 2008* (Vic), part 3.10, division 1.

² See *Evidence Act 2008* (Vic), s.118 & s.119.

³ See *Evidence Act 2008* (Vic), s.120.

⁴ See *Evidence Act 2008* (Vic), s.117.

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2.4 EPA's Compliance and Enforcement Policy

EPA's *Compliance and Enforcement Policy* (C&E Policy) articulates EPA's approach, method and priorities in ensuring compliance with the EP Act, POWBONS Act, and the associated subordinate legislation under both these Acts, and exercising its compliance and enforcement powers.

This is a supplementary policy to the C&E Policy and should be read in the context of, and subject to the C&E Policy.

As with all supplementary policies this policy:

- is consistent with and supports the principles and aims of the C&E Policy
- will be reviewed to ensure its ongoing effectiveness and relevance and may be modified by EPA at any time.

For copies of EPA's C&E Policy and other supplementary policies see www.epa.vic.gov.au.

2.5 Victorian Government's Model Litigant Guidelines

The Victorian Government's *Model Litigant Guidelines* are policy guidelines that set standards for how all government departments, agencies and their lawyers should behave as a party to legal proceedings.

Broadly, the guidelines provide that the State should act fairly and consistently, avoid litigation where possible, pay legitimate claims without litigation and keep litigation costs to a minimum.

For a copy of the *Model Litigant Guidelines*, see www.justice.vic.gov.au.

3 EPA's policy position

For claims of both legal professional privilege and the privilege against self-incrimination, EPA will seek legal advice to ascertain if the privilege has been appropriately claimed. It is a matter for the relevant court to ultimately determine whether evidence is, or is not, to be adduced on the grounds of the objection.

Legal professional privilege

EPA acknowledges that any legal person (natural person or corporate entity) may be entitled where there are appropriate grounds, to make a claim of legal professional privilege as an objection to complying with an EPA request to produce information.

Privilege against self-incrimination

EPA acknowledges that any natural person (but not a corporate entity) may be entitled, where there are appropriate grounds and statute has not excluded application of the privilege, to make a claim of the privilege against self-incrimination as an objection to complying with an EPA request to produce information.

EPA is of the view that the circumstances under the legislation it administers where the privilege has been totally excluded by statute, are those in which a natural person is required to:

- provide information under any notice issued under sections 55(3D), 55(3DA) or 55(3DB) of the EP Act¹⁰
- answer questions under section 24(1)(m), that relate to ascertaining compliance with, or contravention of, the POWBONS Act or Regulations, as described in section 24(1)(a) and (b)¹¹.

EPA is of the view that the circumstances under the legislation it administers where the privilege has been eroded, but not entirely excluded by statute, include the following:

- Section 54 of the EP Act empowers EPA to serve on an occupier or previous occupier of industrial premises a notice requiring the production of information about the industrial process and any associated waste discharges or noise emissions. Failure to comply with any requirement of such a notice is an offence.¹² However section 54(3) states that any information provided to EPA under section 54(1) will not be admissible as evidence in any proceedings against the person providing it¹³, if that person, at the time of providing it, objects to doing so on the ground that it might incriminate him/her.
- Section 45ZI of the EP Act empowers a litter enforcement officer¹⁴ in certain circumstances¹⁵ to issue a notice requiring a person to provide information concerning litter. Failure to comply with the requirements of such a notice is an offence.¹⁶ However section 45ZI(8) states that any information¹⁷ given by a person in response to a notice under s.45ZI is not admissible in any prosecution against the person if, before giving the information, the person objected to doing so on the ground that it might incriminate him/her.

Accordingly, EPA will not use information provided under sections 54(1)¹⁸ or 45ZI¹⁹ as evidence against a person if the person makes a legitimate claim of the privilege against self-incrimination under section 54(3) or 45ZI(8) at the time of providing the information.

4 How EPA will apply the policy

With regard to the process for claims of both legal professional privilege and the privilege against self-incrimination, the onus is on the person concerned to claim the privilege.

In applying this policy, for claims of both legal professional privilege and the privilege against self-incrimination, EPA will seek legal advice to ascertain if the privilege has been appropriately claimed.

It is a matter for the relevant court to ultimately determine whether evidence is, or is not, to be adduced on the grounds of the objection.

In applying this policy EPA will:

1. apply the *Prosecution Guidelines* referred to above to all duty-holders
2. apply the *Prosecution Guidelines* in the context of EPA's principles of compliance and enforcement, as set out in the C&E Policy
3. undertake prosecution proceedings in a manner that avoids unnecessary public expenditure
4. act in accordance with the Victorian Government's *Model Litigant Guidelines*.

¹⁰ See: *Environment Protection Act 1970* (Vic), s.54(2).

¹¹ Except if that information is false or misleading, in which case s.45ZI(8) doesn't apply. See: *Environment Protection Act 1970* (Vic), s.45ZI(8).

¹² For definition of 'Litter Enforcement Officer', see: *Environment Protection Act 1970* (Vic), section 4.

¹³ For the circumstances to which this power applies see: *Environment Protection Act 1970* (Vic), s.45ZI(1).

¹⁴ See: *Environment Protection Act 1970* (Vic), section 45ZI(7).

¹⁵ Except if that information is false or misleading, in which case s.45ZI(8) doesn't apply. See: *Environment Protection Act 1970* (Vic), s.45ZI(8).

¹⁶ Except for the purposes of the offence of contravening any requirement of the notice. See: *Environment Protection Act 1970* (Vic), s.54(3).

¹⁷ Except if the information provided is false or misleading. See: *Environment Protection Act 1970* (Vic), s.45ZI(8).

¹⁰ See: *Environment Protection Act 1970* (Vic), s.55(3E).

¹¹ See the purposes of the section described in *Pollution of Waters by Oil and Noxious Substances Act 1986* (Vic), s.24(1)(a)-(b)