Office of the President

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Mr Kazuhiro Nakamoto
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Japan Federation of Bar Associations
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Dear Mr Nakamoto

Comments on reviewing the surcharge system

Thank you for your letter of 2 June 2017 asking for the Law Council's response to questions about attorney-client privilege. In the Australian legal system this privilege is known as either *legal professional privilege* or more correctly, *client legal privilege*. In my comments I will refer to the privilege as Attorney-client privilege (ACP) because this is the term used in Japan.

Does Australia respect ACP and, if so, what are the purposes behind ACP?

Australia does respect ACP. ACP is a very long-standing and respected feature of legal systems such as Australia's, which developed from the common law of England. In countries that did not develop their legal systems from English common law – for example European countries – a similar form of ACP exists, and is usually referred to *professional secrecy*.

ACP protects communications and legal advice between a client and his lawyer from compulsory disclosure to a court (this is known as the *litigation privilege*) or from compulsory disclosure before court proceedings (this is known as the *advice* privilege).

ACP (the *litigation privilege*) was developed by the courts, which recognised that clients need to be able to obtain comprehensive legal advice from their lawyers in order to pursue their legal rights or defend themselves in litigation – i.e. in judicial or quasi-judicial proceedings. For this to happen, clients must be able to fully and frankly disclose all relevant information and circumstances to their lawyer, so that the lawyer can provide the client comprehensive legal advice and effectively represent the client in any actual or anticipated proceedings.

The basic problem that ACP (the *litigation privilege*) addresses is that clients will not be willing to fully and frankly disclose all relevant information and circumstances to their lawyer to obtain proper legal advice, or to be fully represented in court if what is disclosed and discussed between the client and the lawyer does not remain confidential, but is forced to be revealed during court proceedings.

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ACP (the *litigation privilege*) is said to represent a public policy choice – that it is more important for the administration of justice to allow communications and legal advice between a client and a lawyer to remain confidential than it is to compel those communications and advice to be disclosed in court.

The concept of ACP (the *litigation privilege*) developed by the common law is one element of the broader law of evidence, which has been codified in various pieces of legislation in Australia. The federal *Evidence Act 1995* for example codifies the law (or rules) of evidence that apply to proceedings in federal courts, and specifically preserves from disclosure confidential communications and documents prepared between clients and lawyers where this is for the dominant purpose of lawyers providing legal advice to clients. The States and Territories have, to varying degrees adopted the federal legislation to apply to evidence in proceedings before State and Territory courts.

ACP (the *advice privilege*) is similar to the ACP (the *litigation privilege*) - to protect from disclosure confidential communications between a client and a lawyer made for the dominant purpose of obtaining legal advice. The ACP (the *advice privilege*) applies outside of judicial or quasi-judicial proceedings to protect from disclosure confidential information and legal advice in pre-trial or investigative processes such as applications for discovery, the giving of testimony or during investigations by administrative agencies.

The rationale underpinning the ACP (the *advice privilege*) is the same as the rationale underpinning the ACP (the *litigation privilege*) – that a greater public interest is served by protecting confidential communications between a client and solicitor for the purpose of giving legal advice than would be served by compelling disclosure as part of investigations or evidence gathering.

ACP (both the *litigation privilege and the advice privilege*) is not a blanket protection for all communications and legal advice that flows between a client and his lawyer. The privilege does not apply where, for example, the information provided by the client to the lawyer is done to further or facilitate a crime or a fraud. Also, the privilege only applies to communications, information and documents related to obtaining and giving legal advice - it does not apply to other usual business and financial records of the client.

Finally, because ACP (both the *litigation privilege* and the *advice privilege*) developed under common law, parliaments can, through legislation, abrogate those common law privileges. However, in Australia the preference has not been to abrogate ACP except in rare circumstances. For example, while many federal agencies have coercive information-gathering powers (such as the Australian Taxation Office under our taxation laws, and our financial intelligence and law enforcement agencies under our Anti-Money Laundering and Counter-Terrorism Financing laws) those laws do not confer powers to require the production of documents subject to ACP. Also, many Australian laws specifically state that the law relating client legal privilege is not abrogated or affected. In the very small number of laws where the disclosure of information or documents subject to ACP is compellable, there are protections against the admissibility of that information or documents in judicial proceedings, except in very limited circumstances.

Do you foresee disadvantages to clients if ACP is not recognized?

In Australia, client confidentiality is a corner-stone of the relationship between a lawyer and his or her client. Confidentiality fosters trust and candour between lawyers and clients. The disadvantage we see to clients is that if they are denied the right to confidentiality of their communications, is that they will not be willing to provide their lawyers with all of the relevant information their lawyers need to provide them proper legal advice or to properly represent them in judicial proceedings. As mentioned above, Australia regards the public policy benefit of confidentiality of communications between lawyers and clients as more important than the public policy benefit of requiring complete disclosure of information, communications and documents to government agencies, except in very limited circumstances.

Would the purposes of ACP be achieved if communications are not guaranteed and are only to be "taken care of", which means it may be subject to the discretion of the [JFTC] authority?

No. As mentioned above, while there are a large number of federal government agencies in Australia that have coercive information-gathering powers, they do not have the power to compel the production of privileged information. That does not mean that all business and financial records of a client are privileged from disclosure, it is only communications, information and documents related to obtaining and giving legal advice that are privileged. But we find it difficult to reconcile the idea that a government agency can compel disclosure of ACP communications while at the same time being able to ensure that those communications will be "taken care of", unless that means that any ACP communications are not admissible as evidence in judicial proceedings. In Australia this situation exists only rarely.

Does your jurisdiction permit the attendance of attorneys, recording and/or videotaping during the deposition (i.e. the investigatory interview) procedure and if so, what is the rationale and how is it carried out in practice?

It is a basic right under criminal law in Australia that a person under arrest is entitled, if they so wish, to have a lawyer of their choice present during any questioning by an investigating official. Further, it is usually the case that any such interview is either recorded or videotaped. The rationale for having a lawyer (or another support person) present during a police interview is the basic premise of our criminal justice system that an accused person has the right to remain silent and to not be compelled to answer questions at a police interview. Our criminal justice system protects accused persons by allowing the benefit of legal advice during police interviews.

For matters that are not criminally-related, government agencies undertaking interviews as part of their coercive information gathering powers will generally respect the right of the person being interviewed to have a lawyer of their choice present if they so wish.

We would have serious reservations about a situation where a person was not allowed to have a lawyer present during the actual questioning. The reason for this is that answers provided during interviews may be used as evidence in any court proceedings. There is a serious risk that a person without legal knowledge might, without a lawyer actually present during the deposition process, provide information that the person is not legally obligated to provide.

I hope the above information is helpful.

Yours sincerely

Fiona McLeod SC
President