



Law Council
OF AUSTRALIA

Search Warrant Guidelines Between the Law Council of Australia and the Australian Federal Police

Search Warrants Executed on Lawyers' Premises

Dated

CONFIDENTIAL DRAFT

Search Warrant Guidelines Made Between Law Council of Australia and the Australian Federal Police

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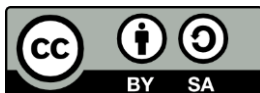
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Table of Contents

Objective	4
Scope.....	4
Limitations	5
Terminology	6
Guidelines	7
1. Application for a Search Warrant on a Lawyer's Premises	7
2. Execution of a Search Warrant on a Lawyer's Premises	7
3. Claims of Client Legal Privilege	8
4. Determination of Relevant Warrant Evidence or Property that may be Subject to a Claim of Client Legal Privilege	11
5. Privilege not Asserted During or After the Execution of the Search Warrant	12
6. Claim of Client Legal Privilege Made After the Completion of a Search Warrant on a Lawyer's Premises	12
7. Process When a Lawyer Asserts CLP Over a Document on Behalf of a Client	13
8. Resolution of a Claim of Client Legal Privilege	14
9. Lawyer's Obligation to Notify Clients Affected by the Execution of a Search Warrant	16
Appendix 1: Hard Copy CLP Privilege Form	18
Documents for which privilege is claimed during the execution of a search warrant on a lawyer's premises	18
Appendix 2: CLP Privilege Form (Forensic Copy)	19
Documents for which privilege is claimed during the execution of a search warrant on a lawyer's premises	19
Appendix 3: List of Relevant Warrant Evidence or Material	20

Objective

These guidelines have been developed between the Law Council of Australia and the Australian Federal Police in consultation with the Federal Court of Australia. The guidelines have been developed to address issues that may arise when a search warrant issued pursuant to the *Crimes Act 1914 (Cth)* (**Crimes Act**) or other Commonwealth legislation is executed by, or with the assistance of, the Australian Federal Police on premises occupied by a lawyer.

The objective of the guidelines is to provide clear protocols in relation to warrant evidence or property, including hard copy documents and forensic copies when:

- An application for a search warrant on a lawyer's premises is made;
- A search warrant is executed on a lawyer's premises;
- A claim for client legal privilege (**CLP**) is raised;
- A determination is sought from the court in relation to CLP.

Scope

The parties acknowledge that the administration of justice requires that the Australian Federal Police is able to investigate possible criminal offending without undue obstruction or delay. Subsection 3F(1) of the Crimes Act, for example, allows for the seizure of certain things found during the execution of a search warrant including anything which is the kind of evidential material specified in the warrant or, in certain circumstances, which an officer believes on reasonable grounds is evidential material in relation to an offence to which the warrant relates or to another indictable offence. Further, it is accepted that making a forensic copy falls within the definition of seize.

Client legal privilege (sometimes also called "legal professional privilege") is a rule of substantive law,¹ which can prevent the otherwise compulsory disclosure of the material to which it attaches, unless specifically abrogated by statute. The Crimes Act, for example, does not abrogate CLP for searches by warrant,² though it does for other procedures not covered by these Guidelines, like notices to produce documents which are obtained by application to a Federal Circuit Court judge.³

The privilege is held by the lawyer's client, as it exists for the benefit of the client. It is the duty of a lawyer to claim privilege on behalf of the client;⁴ only the client has the power to waive privilege. The definition of lawyer in these Guidelines is broad, to encompass the reality that CLP issues arise not just in searches of solicitors' firms but also, for example, barristers' chambers, offices of in-house counsel or home offices of lawyers.

Making a forensic copy or seizure of a document without it being read will not infringe CLP.⁵ The parties acknowledge that the forensic copy of the stored information may

¹ *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543; *Baker v Campbell* (1983) 153 CLR 52; *Commissioner of Australian Federal Police and Another v Propend Finance Pty Limited and Others* (1997) 188 CLR 501.

² See *Crimes Act 1914 (Cth)* s 3ZX.

³ *Ibid* s 3ZQR.

⁴ See *Legal Profession Uniform Conduct (Solicitors Rules) 2015* r 21.2 and *Legal Profession Uniform Conduct (Barristers Rules) 2015* r 61.

⁵ See for example *JMA Accounting Pty Ltd and Anr v Commissioner of Taxation and Ors* [2004] FCAFC 274 [13].

contain inextricably linked material that is subject to a claim of CLP and it is important to implement guidelines that will protect documents that may be subject to a claim of CLP from disclosure.

Therefore, material seized under a search warrant subject to a valid claim of CLP cannot be examined or used by the Australian Federal Police. However, a document that is subject to confidentiality, but is not legally privileged, can be examined and used when seized under authority of a search warrant.⁶

Limitations

These guidelines do not constitute legal advice and Law Council of Australia recommends practitioners exercise their experience and judgement in applying the guidelines to particular matters at hand. The guidelines are not all-encompassing and are not an exhaustive list of every issue that may arise in relevant matters. Practitioners and the Australian Federal Police may need to adapt the guidelines to address individual circumstances. In particular, time periods are provided as a guide only and may be negotiated between the parties depending on the circumstances of the case. If further searches of the forensic copies need to be carried out by the Australian Federal Police and there are documents subject to CLP, the Australian Federal Police will need to consult the holder of the CLP.

These guidelines are not a replacement for legal training or engaging qualified legal practitioners or other professionals. These guidelines are designed to identify and draw attention to some key issues which may arise in matters. The guidelines do not cover:

- Procedures for seizing material other than by search warrant;⁷
- Whether material seized falls within the scope of the warrant;
- The reasonableness of the search and/or seizure;
- Whether the warrant was validly issued; and
- Any other issues dealing with the validity of the warrant itself, or the execution of the warrant.

⁶ While a lawyer has a professional obligation not to disclose any information which is confidential to a client, this is subject to specific exceptions, which may include a search warrant: see *Legal Profession Uniform Conduct (Solicitors Rules) 2015* r 9.

⁷ See for example *Crimes Act 1914* (Cth) s 3ZQR.

Terminology

Client includes a former client

CLP forensic copy means a forensic copy of material over which CLP has been claimed before forensic copying (see guideline 3.3.1)

CLP inspection copy means a second copy of the CLP forensic copy (see guideline 3.3.4)

document means any record of information, and includes:

- (a) anything on which there is writing
- (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;
- (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; and
- (d) a map, plan, drawing or photograph.⁸

evidential material means the evidence or property for which a warrant is issued under the relevant legislation, subject to federal statutory definition

executing officer means the police officer in charge of executing the warrant

forensic copy means an electronic copy of documents stored electronically

full copy means a copy of all the stored information on a storage device (see guideline 3.3.3)

full inspection copy means a copy of the full copy (see guideline 3.3.4)

independent review process includes conciliation, mediation and other alternate dispute resolution options.

lawyer means a person admitted to the Australian legal profession in any Australian jurisdiction or an Australian-registered foreign lawyer

responsible lawyer means a person with responsibility for the matter to which the search warrant pertains

storage device means a device of any kind on which information may be stored

stored electronically means any information that is held in, or accessible from, a computer, computer network or other electronic device that is on the warrant premises.

warrant copy means a separate forensic copy of warrant evidence or material that is not subject to CLP (see Guideline 3.3.2)

⁸ *Acts Interpretation Act 1901* (Cth) s 2B.

Guidelines

1. Application for a Search Warrant on a Lawyer's Premises

- 1.1. Under the Crimes Act, the application for a search warrant on a lawyer's premises must be made to a magistrate or justice of the peace authorised or other person employed in a court of a State or Territory who is authorised to issue search warrants.⁹ Applications for delayed notification search warrants must be made to a judge of the Federal Court of Australia, or Supreme Court of a State or Territory, or a nominated Administrative Appeals Tribunal (AAT) member under Part IAAA of the Crimes Act.¹⁰
- 1.2. When the search warrant relates to documents (including documents stored electronically), the police officer must provide the magistrate with information on the method that will be applied by the police officers executing the warrant,¹¹ to determine whether there is a reasonable suspicion that the document may be warrant evidence or property.¹²
- 1.3. Regardless of whether or not it is mandated by the applicable legislation under which a police officer is applying for a search warrant, the police officer must provide the magistrate, justice of the peace, judge or nominated AAT member (as the case may be) with:
 - 1.3.1. the hours the warrant can be executed, which should generally be limited to normal working hours;¹³ and
 - 1.3.2. information on the process that will be implemented to ensure that, as far as possible, documents to which CLP may attach and/or irrelevant documents will not be forensically copied with other warrant evidence or property.

Example:

A specific police officer will be appointed to liaise with the lawyer over issues relating to material subject to CLP. The police officer will provide information on the search and seizure of hardcopy documents and the forensic copying process. This will include information on whether it is feasible to implement partial forensic copying.

2. Execution of a Search Warrant on a Lawyer's Premises

Upon execution of a search warrant on a lawyer's premises the police officer in charge of executing the search warrant (executing officer) should follow Guidelines 2.1-2.7.

⁹ Crimes Act 1914 (Cth) ss 3C and 3E.

¹⁰ See *ibid* ss 3ZZAC, 3ZZBB and 3ZZBC.

¹¹ Section 3G of the Crimes Act 1914 (Cth) provides for an executing officer to obtain assistance in executing a warrant.

¹² The term "reasonably suspects" means "suspects on grounds that are reasonable in the circumstances": *George v Rockett* (1990) 170 CLR 104, 115-116.

¹³ See Crimes Act 1914 (Cth) s 3E(5) (f).

- 2.1. The executing officer must ensure that any constables assisting with executing the warrant are made aware of and adhere to these Guidelines.¹⁴
- 2.2. If no responsible lawyer is in attendance at the premises, ensure that any material stored electronically is secured and protected before sealing the premises. The execution of the warrant should be deferred for a reasonable period consistent with the prevailing circumstances to allow attendance of a responsible lawyer.¹⁵
- 2.3. Identify themselves, and members of the search team. A copy of the search warrant guidelines should be provided to the lawyer with responsibility for the matter to which the search warrant pertains.
- 2.4. Provide a copy of the search warrant,¹⁶ and advise the occupier of their right to be present and observe the search being conducted.¹⁷
- 2.5. Explain the purpose of the search, including where possible, information about who is suspected of involvement in the matters the subject of the warrant.
- 2.6. A reasonable time, taking into account the circumstances,¹⁸ should be given to allow any responsible lawyer to consult with their client and/or to obtain legal advice.
- 2.7. It is preferable that the forensic copy should be limited to warrant evidence or property. In the case of forensic copies, the executing officer or a person appointed to liaise with the lawyer on CLP issues will provide the responsible lawyer with written information on the process to be used to determine whether stored information is warrant evidence or property. Information on the copying process to be used in relation to documents that are subject to a claim of CLP will also be provided.

3. Claims of Client Legal Privilege

A lawyer has a duty to assert a client's claim of privilege, unless the client has clearly waived their right to claim privilege.¹⁹ The onus rests on the party asserting the privilege to show that the claim is a proper claim. Any claim for privilege must be specific.²⁰

¹⁴ For example, in tax related matters, this may include Australian Taxation Office (ATO) officers, such as ATO computer forensics experts: see e.g.: *Caratti v Commissioner of the Australian Federal Police* (No 2) [2016] FCA 1132.

¹⁵ When deferring the execution of a warrant due to a responsible lawyer not being in attendance, reference should also be had to any relevant provisions of the legislation under which the warrant has been obtained, which may outline specific procedures to be adopted when the execution of a warrant is deferred. For example, s 3J(2) of the *Crimes Act* provides that: "[i]f a warrant in relation to premises is being executed, the executing officer and the constables assisting may, if the warrant is still in force, complete the execution of the warrant after all of them temporarily cease its execution and leave the premises:

(a) for not more than one hour; or

(aa) if there is an emergency situation, for not more than 12 hours or such longer period as allowed by an issuing officer under section 3JA; or

(b) for a longer period if the occupier of the premises consents in writing."

¹⁶ See *Crimes Act 1914* (Cth) s 3H.

¹⁷ See *ibid* s 3P.

¹⁸ For example, it may be appropriate to afford a longer time for a responsible lawyer to contact a regional, rural or remote client than a client based in a metropolitan area.

¹⁹ *Spalding v Radio Canberra Pty Ltd* (2009) 224 FLR 440 [17].

²⁰ *Grant v Downs* (1976) 135 CLR 674, 689.

3.1. HARD COPY DOCUMENTS – CLP claim identified

When a lawyer asserts a claim of CLP over hard copy documents and is able to identify the privileged documents during the course of the execution of the search warrant, the following applies:

- 3.1.1. Complete an Appendix 1 form; a copy of the completed Appendix 1 form should be kept by the Australian Federal Police and the lawyer.
- 3.1.2. Material that is subject to a claim of CLP should be separated and placed in a container. The container should be sealed and signed by the lawyer and the police officer and deposited, along with the Appendix 1 form, with the registry of the Federal Court of Australia in the State or Territory in which the warrant was executed.²¹ The material that may be subject to CLP will not be examined by the Australian Federal Police unless by order of the court.
- 3.1.3. The remainder of the warrant evidence or property (non-privileged material) can be removed from the property and will become part of the warrant evidence or property that can be examined by the Australian Federal Police.²²
- 3.1.4. The relevant process set out in guideline 8 (application to the court for a declaration relating to legally privileged documents) should be followed in relation to documents over which a claim of CLP has been made.

3.2. HARD COPY DOCUMENTS – CLP claim unable to be identified

When a lawyer asserts a claim of CLP over hard copy documents and is unable to identify the privileged documents during the course of the execution of a search warrant, the following applies:

- 3.2.1. During the course of the execution of the search warrant the lawyer should indicate the documents that may be subject to a claim of privilege. These documents should be recorded in a list in general terms (e.g. file or client names, number of pages). This list must be signed by the lawyer and police officer (**potentially privileged document list**).
- 3.2.2. The lawyer should arrange with the police officer to move the material subject to a claim of CLP to a separate container (**privileged material container**). The privileged material container should be sealed and the seal signed by the lawyer and the police officer and lodged, along with the potentially privileged document list, and deposited with the registry of the Federal Court of Australia in the State or Territory in which the warrant was executed.²³ The material in

²¹ See *Commissioner of Australian Federal Police and Another v Propend Finance Pty Limited and Others* (1997) 188 CLR 501; [1997] HCA 3 [229], where the High Court of Australia noted that “[i]n respect of documents for which legal professional privilege was claimed, the police conformed to a practice established by agreement with the Law Council of Australia as to the execution of search warrants on lawyers’ premises. Documents which had been seized and which fell within a claim of legal professional privilege were lodged, ultimately, in the registry of the Federal Court. Undertakings were given by the police not to inspect those documents until the resolution of all of the respondents’ legal challenges. Relevantly, those challenges claimed a return to the solicitor of the documents in respect of which legal professional privilege was claimed by him on behalf of his clients”.

²² See for example *Crimes Act 1914* (Cth) s 3K.

²³ See *Commissioner of Australian Federal Police and Another v Propend Finance Pty Limited and Others* (1997) 188 CLR 501; [1997] HCA 3 [229], where the High Court

the privileged material container will not be examined by the Australian Federal Police unless by order of the court.

3.2.3. The Appendix 1 form must be completed within 14 days, or within a longer time if otherwise agreed. The Australian Federal Police must consent to access by the lawyer of the privileged material container required to complete the form or provide a copy of the material.²⁴ The lawyer and the executing officer will be provided with a copy of the completed Appendix 1 form.

3.2.4. The remainder of the warrant evidence or property (**non-privileged material**) can be removed from the property and will become part of the warrant evidence or property that can be examined by the Australian Federal Police.²⁵

3.2.5. The relevant process set out in guideline 8 (application to the court for a declaration relating to legally privileged documents) should be followed in relation to documents over which a claim of CLP has been made.

3.3. ELECTRONIC DOCUMENTS – CLP claim made prior to forensic copying.

When a lawyer asserts a claim of CLP over electronic documents that have not yet been forensically copied, the police officer will:

3.3.1. If possible, take a forensic copy of those documents over which a claim of CLP is asserted (**CLP forensic copy**); and

3.3.2. Take a separate forensic copy of the remaining electronic documents that are not subject to a claim of CLP (**warrant copy**); or

3.3.3. If it is not possible to take a separate CLP forensic copy and a warrant copy, the police officer should take a forensic copy of all of the stored information on the storage device (**full copy**). Any communications between a lawyer and a client who is not the subject of the search warrant which are stored on the storage device cannot be examined or copied.

3.3.4. If a request is made by the lawyer, make a second copy of the CLP forensic copy for the lawyer (**CLP inspection copy**) or a copy of the full copy (**full inspection copy**).²⁶

3.3.5. The lawyer should complete an Appendix 2 form. If it is not possible to complete the Appendix 2 form during the execution of the search warrant, the

of Australia noted that "[i]n respect of documents for which legal professional privilege was claimed, the police conformed to a practice established by agreement with the Law Council of Australia as to the execution of search warrants on lawyers' premises. Documents which had been seized and which fell within a claim of legal professional privilege were lodged, ultimately, in the registry of the Federal Court. Undertakings were given by the police not to inspect those documents until the resolution of all of the respondents' legal challenges. Relevantly, those challenges claimed a return to the solicitor of the documents in respect of which legal professional privilege was claimed by him on behalf of his clients".

²⁴ Crimes Act 1914 (Cth) s 3N.

²⁵ The warrant material or property that is not subject to CLP can still be examined: see Crimes Act 1914 (Cth) s 3K.

²⁶ The Australian Federal Police may require the lawyer to provide a storage device. For requests for copies of warrant material, see Crimes Act 1914 (Cth) s 3N.

form must be completed within 14 days, or within a longer time if otherwise agreed.

3.3.6. The device storing the CLP forensic copy or full copy will be placed in a container (**privileged material container**) and sealed, and the seal signed by the lawyer and the police officer. The privileged material container, along with the Appendix 2 form, if completed, must then be deposited with the registry of the Federal Court of Australia in the State or Territory in which the warrant is executed.²⁷ The AFP must not review either the CLP forensic copy or the full copy over which a claim of privilege is maintained which has not yet been resolved in accordance with these Guidelines or by order of the Court.

3.3.7. If a warrant copy was made a police officer may examine the warrant copy.

3.3.8. The relevant process set out in guideline 8 (application to the court for a declaration relating to legally privileged documents) should be followed in relation to documents over which a claim of CLP has been made.

3.4. ELECTRONIC DOCUMENTS – CLP claim made after the forensic copying of material

When a lawyer asserts a claim of CLP over material that has been forensically copied, the lawyer will:

3.4.1. Complete an Appendix 2 form. If it is not possible to complete the Appendix 2 form during the execution of the search warrant, the form must be completed within 14 days, or within a longer time if otherwise agreed.

3.4.2. If a request is made by the lawyer, the Australian Federal Police should make a second copy of the forensic copy.²⁸

3.4.3. During the 14 days, or longer time if otherwise agreed, the Australian Federal Police will not examine the forensic copy.

3.4.4. The relevant process set out in guideline 8 (application to the court for a declaration relating to legally privileged documents) should be followed in relation to documents over which a claim of CLP has been made.

4. Determination of Relevant Warrant Evidence or Property that may be Subject to a Claim of Client Legal Privilege

4.1. Where a forensic copy has been made and the lawyer and the Australian Federal Police agree:

²⁷ See *Commissioner of Australian Federal Police and Another v Propend Finance Pty Limited and Others* (1997) 188 CLR 501; [1997] HCA 3 [229], where the High Court of Australia noted that “[i]n respect of documents for which legal professional privilege was claimed, the police conformed to a practice established by agreement with the Law Council of Australia as to the execution of search warrants on lawyers’ premises. Documents which had been seized and which fell within a claim of legal professional privilege were lodged, ultimately, in the registry of the Federal Court. Undertakings were given by the police not to inspect those documents until the resolution of all of the respondents’ legal challenges. Relevantly, those challenges claimed a return to the solicitor of the documents in respect of which legal professional privilege was claimed by him on behalf of his clients”.

²⁸ See *Crimes Act 1914* (Cth) s 3N.

- 4.1.1. A member of the [AFP version of the Electronic Evidence Examination Unit] at the Australian Federal Police may under the supervision of the lawyer, implement searches to determine what material is relevant.

Example:

Searches could include keyword searching, date and time searches, image searches, hashtag searches.

- 4.1.2. No other person within the Australian Federal Police or anyone acting under their direction can access or copy any of the material seized under the warrant subject to a claim for CLP, unless by order of the court..
- 4.1.3. The results of the searches must be forensically copied and a copy provided to the lawyer with an Appendix 3 form.
- 4.1.4. If the forensic copy mentioned in 4.1.3 contains material that is subject to CLP, the lawyer must then complete an Appendix 2 form within 14 days, or longer time if otherwise agreed. If the lawyer fails to complete the Appendix 2 form within 14 days, then the Australian Federal Police should follow the relevant process set out in guideline 8 (application to the court for a declaration relating to legally privileged documents).
- 4.1.5. The relevant process set out in guideline 8 (application to the court for a declaration relating to legally privileged documents should be followed in relation to documents over which a claim of CLP has been made.

5. Privilege not Asserted During or After the Execution of the Search Warrant

- 5.1. If no claim of CLP is raised during or after the execution of a search warrant the Australian Federal Police will be entitled to examine the warrant evidence or property.²⁹

6. Claim of Client Legal Privilege Made After the Completion of a Search Warrant on a Lawyer's Premises

- 6.1. If a lawyer claims CLP after the Australian Federal Police has commenced an examination of the warrant evidence or property, the lawyer must attend the Australian Federal Police or provide written advice to the executing officer or, if unavailable, another member of the investigating team with particulars of the CLP claim including the name of the client on whose behalf they are claiming CLP.
- 6.2. No one within the Australian Federal Police or anyone acting under their direction can access or copy any of the material seized under the warrant subject to a claim of CLP, or any copies that have been made, unless by order of the court.
- 6.3. The lawyer should complete an Appendix 1 or Appendix 2 form, as appropriate, within 14 days of advising the Australian Federal Police of the CLP claim.
- 6.4. The lawyer can request a copy of the warrant evidence or property, or a second copy of any forensic copy made during or after the search warrant.

²⁹ See *ibid* s 3K.

- 6.5. If, within 14 days or longer time as agreed by the parties after the lawyer advises of a CLP claim, the lawyer has not provided specific details regarding a privilege claim, or has not completed Appendix 1 or 2, the Australian Federal Police should follow the relevant process set out in guideline 8 (application to the court for a declaration relating to legally privileged documents).

7. Process When a Lawyer Asserts CLP Over a Document on Behalf of a Client

- 7.1. A lawyer may assert a claim of CLP and in many circumstances has a duty to do so.³⁰ However, a vague claim of CLP will not be an adequate assertion of privilege.³¹
- 7.2. If a blanket claim of privilege is made by the lawyer, the lawyer must take steps to provide specific details of the privilege to ensure that a valid claim of privilege has been asserted on behalf of their client. The parties agree that the following level of detail is sufficient in order to identify a document for the purposes of claiming privilege:
- 7.2.1. Date of the document;
 - 7.2.2. Nature of the document (e.g.: a letter of advice, a draft affidavit, a file note of a conversation;
 - 7.2.3. Name and description of the roles of the author and recipient; and
 - 7.2.4. If the document is stored electronically, any unique identifier.³²
- 7.3. The Australian Federal Police and any constables assisting will not seek to rely on the provision of this level of detail as amounting to waiver of CLP.
- 7.4. When privilege has been asserted on behalf of a client affected by the search warrant, the responsible lawyer must:
- 7.4.1. Notify the client in writing that a claim of CLP has been asserted;
 - 7.4.2. Seek instructions from the client regarding the claim of CLP; and
 - 7.4.3. If a blanket claim of CLP has been asserted on behalf of the client, inform the client that a blanket claim of CLP is not an adequate assertion of privilege and a specific claim of privilege must be provided to the Australian Federal Police.
- 7.5. For the purposes of 7.3, it is sufficient if the lawyer contacts the client at the client's last known address.
- 7.6. If the client does not respond or does not provide instructions to the lawyer within 14 days of the notification the lawyer should:

³⁰ A lawyer should ensure that they are aware of and comply with their legal and ethical obligations when making a claim of privilege on behalf of a client.

³¹ *Grant v Downs* (1976) 135 CLR 674, 689; *National Crime Authority v S* (1991) 100 ALR 151, 159-160; *Standard Chartered Bank of Australia Ltd v Antico* (1993) 36 NSWLR 87, 95.

³² See Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (2008) [8.146]
<<http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC107.pdf>>.

- 7.6.1. Provide names of the clients on whose behalf privilege has been claimed to the Australian Federal Police.
- 7.6.2. Inform the Australian Federal Police that they have no current instructions to act on behalf of the client in relation to CLP.
- 7.6.3. Inform the Australian Federal Police that no waiver of the blanket privilege has been made.
- 7.7. If a blanket claim of privilege has been made and the lawyer cannot or fails to obtain instructions from their client in relation to CLP the Australian Federal Police may:
 - 7.7.1. Notify the client in writing that a blanket claim of privilege has been asserted on behalf of the person.
 - 7.7.2. Inform the client that a blanket claim of privilege is not an adequate claim of privilege.
 - 7.7.3. Request the client completes either Appendix 1 or 2 or provides specific details of the documents over which privilege is claimed.
 - 7.7.4. Inform the client that if no valid claim of privilege has been received within 14 days of the date of the written notification the Australian Federal Police will examine the documents in their possession on the basis that no valid claim of privilege has been asserted.
- 7.8. The lawyer may request, and the Australian Federal Police should grant, reasonable extensions of time should the timeframe for contacting the client not be able to be met.
- 7.9. If no claim of CLP is received within 14 days of the date of notification, or by the expiry of an agreed extension, the Australian Federal Police may examine the documents in their possession.

8. Resolution of a Claim of Client Legal Privilege

Following the execution of a search warrant if CLP has been raised, the following documentation must be completed:

Appendix 1 → Hard Copy CLP Privilege Form; and/or

Appendix 2 → CLP Privilege Form (Forensic Copy)

- 8.1. When an Appendix 1 form is completed the Australian Federal Police must:
 - 8.1.1. Notify the lawyer whether or not the claim of privilege is accepted.
 - 8.1.2. If all claims of privilege are accepted the Australian Federal Police must ensure the return of all privileged material to the lawyer that is in the custody of the Australian Federal Police, without it being inspected or copied by the Australian Federal Police.
 - 8.1.3. If the Australian Federal Police disputes any of the claims of privilege, they must notify the lawyer in writing what claim of privilege is disputed and the grounds on which it is disputed.

8.1.4. If the Australian Federal Police accepts some of the claims of privilege, those documents and any copies over which privilege is accepted will be returned to the lawyer without being inspected by the Australian Federal Police. The remainder of the documents over which the claim to privilege is disputed must remain at the Federal Court of Australia registry at which they were deposited until the claim has been resolved in accordance with these Guidelines or by court order.

8.1.5. If, after the lawyer receives notice under 8.1.1, the parties are not in agreement regarding some or all of the CLP claims, the lawyer should notify the Australian Federal Police within 14 days, or within a longer time if otherwise agreed, of the extent of this disagreement. The parties should seek to resolve the claims by an independent review process for which any third party costs should be shared equally.

8.1.6. If, following reasonable attempts to resolve any disputed claims, including by way of an independent review process, the Australian Federal Police does not accept a claim of CLP in respect of any document, the Australian Federal Police should notify the lawyer in writing within 7 days.

8.1.7. Upon the lawyer receiving notice under 8.1.6, if the client seeks to maintain the claim of privilege, the client should, within 14 days, commence proceedings in the Federal Court of Australia in relation to any claim of CLP sought to be maintained.

8.1.8. The proceeding should be commenced as an application for a declaration that the documents are privileged and must comply with the Federal Court Rules 2011 and any applicable practice direction.³³

8.1.9. An affidavit regarding the custody of the material must accompany the material lodged with the Court.³⁴

8.1.10. If the client fails to commence proceedings under 8.1.7 within 14 days, and the Australian Federal Police maintains that information over which privilege has been claimed is not privileged, then the Australian Federal Police should make an application to the Federal Court of Australia for a declaration that the documents are not privileged.

8.1.11. If the Australian Federal Police is required to make an application for a declaration under 8.1.10, and is successful in obtaining that declaration, the Australian Federal Police will seek recovery of its costs.

8.2. When an Appendix 2 form is completed the Australian Federal Police must:

8.2.1. Notify the lawyer whether or not the claims of privilege are accepted.

8.2.2. If all claims of privilege are accepted the Australian Federal Police must ensure that all material that is subject to CLP is permanently removed from all forensic copies. This may involve the Australian Federal Police making a new forensic copy with the CLP material removed. The Australian Federal Police must provide information to the lawyer on how the CLP material will be removed from the warrant evidence or property held by the Australian Federal

³³ See Federal Court Rules 2011 div 31.1.

³⁴ See *ibid* r 31.03.

Police. If a CLP forensic copy was made, the Australian Federal Police must ensure this is destroyed or returned to the lawyer.

8.2.3. If the Australian Federal Police accepts some of the claims of privilege, those documents over which privilege is accepted must be permanently removed from all forensic copies.

8.2.4. If the Australian Federal Police disputes any of the claims of privilege, they must notify the lawyer in writing what claim of privilege is disputed and the grounds on which it is disputed.

8.2.5. If, after the lawyer receives notice under 8.28.1.1, the parties are not in agreement regarding the CLP claims, the lawyer should notify the Australian Federal Police within 14 days, or within a longer time if otherwise agreed, of this disagreement. The parties should seek to resolve the claims by an independent review process for which costs should be shared equally.

8.2.6. If, following reasonable attempts to resolve any disputed claims, including by way of an independent review process, the Australian Federal Police does not accept a claim of CLP in respect of any document, the Australian Federal Police should notify the lawyer in writing within 7 days.

8.2.7. Upon the lawyer receiving notice under 8.2.6, if the client seeks to maintain the claim of privilege, the client should, within 14 days, commence proceedings in the Federal Court of Australia in relation to any claim of CLP sought to be maintained. If the client fails to commence proceedings within 14 days, the Australian Federal Police should make an application

8.2.8. The proceedings should be commenced as an application for a declaration that the documents are privileged and must comply with the Federal Court Rules 2011 and any applicable practice direction.

8.2.9. An affidavit regarding the custody of the material must accompany the material lodged with the Court.

8.2.10. If the client fails to commence proceedings under 8.2.7 within 14 days, and the Australian Federal Police maintains that information over which privilege has been claimed is not privileged, then the Australian Federal Police should make an application to the Federal Court of Australia for a declaration that the documents are not privileged.

8.2.11. If the Australian Federal Police is required to make an application for a declaration under 8.2.10.1.10, and is successful in obtaining that declaration, the Australian Federal Police will seek recovery of its costs.

9. Lawyer's Obligation to Notify Clients Affected by the Execution of a Search Warrant

The lawyer should take reasonable steps to inform clients affected by the search warrant:

- About the seizure of any of their documents;
- Whether or not the lawyer has asserted CLP;
- How the affected client or former client can assert or waive CLP; and

- Any other information that will assist the client in protecting their interests as a result of the execution of a search warrant, including seeking independent legal advice.

If a lawyer is unable to contact the client the lawyer should record:

- Steps taken to locate a client or former client; and
- Whether a claim of CLP has been made.

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Appendix 1: Hard Copy CLP Privilege Form

Documents for which privilege is claimed during the execution of a search warrant on a lawyer's premises³⁵

Document ID	Document Type	Date Created	Title	# Author (Surname Initials)	# Author (Organisation)	#Recipient(s) (Surname Initials and Organisation)	CLP Claim*

If multiple parties separate with a semicolon “;”

* Must include:

- Type of CLP claimed and specific grounds on which CLP is claimed
- Facts relied upon giving rise to a claim of CLP
- whether CLP is claimed over whole or part of the document

Signed:

Description:

³⁵ Document ID detail required to this level to ensure that material can be quarantined and excluded if CLP claim accepted by the Australian Federal Police or upheld by the Court.

Appendix 2: CLP Privilege Form (Forensic Copy)

Documents for which privilege is claimed during the execution of a search warrant on a lawyer's premises³⁶

Document ID	Document Type (e.g.: email, Word document, etc.)	Date Created	File name (for documents) or Subject line (for emails)	# Author (Surname Initials)	# Author (Organisation)	#Recipient(s) (Surname Initials and Organisation)	CLP Claim*

If multiple parties separate with a semicolon “;”

* Must include:

- Type of CLP claimed and specific grounds on which CLP is claimed
- Facts relied upon giving rise to a claim of CLP
- whether CLP is claimed over whole or part of the document

Signed:

Description:

³⁶ Document ID detail required to this level to ensure that material can be quarantined and excluded if CLP claim accepted by Australian Federal Police or upheld by the Court.

Appendix 3: List of Relevant Warrant Evidence or Material

Document ID	Document Type (Including file name and file path)

If multiple parties separate with a semicolon “;”

Signed:

Description:

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