WHEN FOREIGN LEGAL ADVICE MEETS AUSTRALIAN PRIVILEGE: FEDERAL COURT OF AUSTRALIA PROVIDES GUIDANCE

Date: 27 November 2026

Australia Litigation and Dispute Resolution Alert

By: Peter Brabant, Alby McClelland

Businesses operating across jurisdictions may be required to investigate matters and obtain legal advice across borders. As a result, legal advice obtained in one country may become relevant to litigation in another, raising questions about how that advice will be treated by local courts.

The Federal Court of Australia (Federal Court) recently considered this issue in *White Oak Commercial Finance Europe (Non-Levered) Ltd v Insurance Australia Ltd (Japanese Privilege)* [2026] FCA 1475. Justice Thawley held that Australian law governed a claim for privilege and that a report prepared by a Japanese law firm was protected from production in Australia, despite the report being prepared in Japan where the doctrine of legal professional privilege does not exist.

HOW DID A JAPANESE LEGAL REPORT BECOME RELEVANT IN AUSTRALIA?

Tokio Marine Holdings, Inc (TMHD) became aware of concerns that the former head of trade credit at its Australian subsidiary, BCC Trade Credit Pty Ltd (BCC), had written trade credit insurance policies outside his approved authority limits. In response, TMHD engaged Japanese law firm Mori Hamada & Matsumoto (MHM) to advise on possible noncompliance with Japanese laws or regulatory standards, preventative measures and TMHD's ongoing legal and regulatory obligations. MHM prepared a report addressing those matters.

The report later became relevant to Federal Court proceedings in Australia brought by White Oak against various parties, including BCC and the Tokio Marine entities. Those proceedings form part of a group of related proceedings concerning claims arising from trade credit insurance policies purportedly issued by BCC as the authorised representative of Insurance Australia Limited.

As part of those proceedings, White Oak Commercial Finance Europe (Non-Levered) Ltd (White Oak) sought an unredacted copy of MHM's report. BCC and two Tokio Marine entities resisted production on the basis that it was protected by legal professional privilege.

This brought into focus the question: which country's law should determine whether the Japanese report was privileged?

WHICH LAW GOVERNED THE PRIVILEGE QUESTION?

White Oak argued that Japanese law should determine whether the report was privileged, relying on the fact that the advice was given in Japan by Japanese qualified lawyers. On that basis, White Oak contended that Japanese

©2005-2026 K&L Gates LLP. All Rights Reserved.

law governed the privilege issue and, because the doctrine of legal professional privilege does not exist in Japan, the report was not protected by privilege and should be produced.

The Federal Court, however, disagreed. Justice Thawley held that “privilege” in rule 20.02 of the *Federal Court Rules 2011* (Cth) means privilege under Australian law. As the issue concerned whether the report was protected from compulsory production in Australian proceedings, his Honour found that no choice-of-law question arose. Even if a choice-of-law analysis was required, his Honour held that Australian law would apply as the law of the forum.

Importantly, the absence of an equivalent doctrine in Japan did not prevent the report from being privileged under Australian law. In considering the position, the Federal Court had regard to the protections Japanese law gives to confidential lawyer-client communications and expert evidence concerning whether the report would be protected from compulsory production in Japanese civil proceedings.

INVESTIGATION OR LEGAL ADVICE?

White Oak also argued that the report was the product of a factual investigation, rather than being a confidential communication made for the dominant purpose of providing legal advice, and, accordingly, was not properly protected by privilege under Australian law.

However, the Federal Court was not persuaded. It found that the report's dominant purpose was the communication of legal advice concerning TMHD's obligations under Japanese law. Although MHM had undertaken factual inquiries, those inquiries formed part of the work required to provide that legal advice. References in contemporaneous documents to an “investigation” or “root cause investigation” did not determine the report's dominant purpose.

DID DISCLOSURE TO THE JAPANESE REGULATOR WAIVE PRIVILEGE?

A further question was whether privilege had been waived because information based on the report had been provided to Japan's Financial Services Agency (FSA).

The report itself, however, had not been provided to the FSA. Rather, the regulator received a confidential update based on the contents of the report. In addition, FSA officials are subject to statutory confidentiality obligations. In those circumstances, the Federal Court held that the disclosure was not inconsistent with maintaining the confidentiality of the report. Privilege had therefore not been waived, and White Oak's application for production was dismissed.

WHAT DOES THE DECISION MEAN FOR CROSS-BORDER INVESTIGATIONS?

The decision shows that legal advice prepared by foreign lawyers is not necessarily excluded from being protected by Australian legal professional privilege simply because the foreign jurisdiction does not recognise privilege in the same way. Whether privilege applies will, however, depend on applicable Australian principles and the circumstances of the case.
As a practical matter, the decision also illustrates the importance of considering privilege from the outset of a

©2005-2026 K&L Gates LLP. All Rights Reserved.

cross-border investigation, how lawyers' work is undertaken and documented, and how the resulting advice is subsequently used or disclosed, especially where there is a risk of litigation.

For businesses operating across jurisdictions, this means that legal, regulatory and litigation issues must be considered together at the outset. K&L Gates' integrated international platform enables our lawyers to work across jurisdictions to assist clients with cross-border disputes, investigations and related regulatory issues.

KEY CONTACTS



PETER BRABANT
PARTNER

SYDNEY
+61.2.9513.2493
PETER.BRABANT@KLGATES.COM



ALBY MCCLELLAND
SENIOR ASSOCIATE

SYDNEY
+61.2.9513.2527
ALBY.MCCLELLAND@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.