

WHEN AI BECOMES A DISCLOSURE:

LESSONS FROM USA v HEPPNER FOR AUSTRALIAN Lawyers

Legal Professional Privilege, Litigation Privilege and the Risks of AI-Assisted Legal Work

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1. Introduction

On 10 February 2026, Judge Jed Rakoff of the United States District Court for the Southern District of New York delivered a brief but significant ruling in *United States of America v Bradley Heppner* (Case No. 25 Cr. 503 (JSR)). Seven days after this extempore rule, Judge Rakoff delivered his reasoned judgement that explains his initial ruling.¹

The judgement concerned whether documents prepared by a criminal defendant using an artificial intelligence (AI) tool attracted the protection of attorney-client privilege or the work-product doctrine under United States federal law.² Judge Rakoff held that neither protection applied. The result turned on two distinct but reinforcing grounds:

First, that the AI tool's express terms of service stated that user inputs were not confidential;

Second, that the documents did not reflect the mental impressions or legal strategies of counsel.

The defendant's attorneys were present in court and acknowledged that the reports had been prepared by the client of his own volition, not at the direction of counsel.³

Although decided under United States law, the decision raises issues of direct relevance to Australian practitioners, and specifically to Queensland practitioners, who regularly advise clients on what documents to share, with whom, and in what form (hardcopy or digital). The proliferation of AI tools — including large language model platforms such as ChatGPT, Claude, Gemini, Microsoft Copilot— means that clients are increasingly preparing summaries, factual analyses and even draft strategies using AI platforms before, during and after engaging legal counsel.

¹ *United States of America v Bradley Heppner* (Case No. 25 Cr. 503 (JSR)) (Heppner) <<https://storage.courtlistener.com/recap/gov.uscourts.nysd.652138/gov.uscourts.nysd.652138.27.0.pdf> >

² The work-product doctrine protects materials prepared by lawyers in anticipation of future litigation. See Epstein, Edna Selan. "The attorney-client privilege and the work-product doctrine." American Bar Association, 2001. This paper will not delve into the Doctrine as it appears to be a specific US extension to Legal Professional Privilege.

³ *Heppner*, note 1, p. 3.

Judge Rakoff noted that “*Generative AI tools have become increasingly pervasive across various domains of human activity.... Yet the implications of AI for the law are only beginning to be explored*”.⁴

If, as *Heppner* illustrates, submission of privileged or potentially privileged material to an AI tool can destroy legal professional privilege (LPP), the implications for Australian litigation and transactional practice are profound.

This article examines the *Heppner* ruling, analyses how the relevant legal principles operate under Queensland and Australian law, identifies the key risks for practitioners and clients, and proposes practical measures to manage those risks.

2. The Heppner Ruling: Facts and Decision

2.1 Background

Bradley Heppner was indicted in November 2025 on charges that included securities fraud. The prosecution was brought by the United States Attorney for the Southern District of New York, Jay Clayton, through Assistant United States Attorneys Daniel Nessim and Alexandra Rothman. Heppner was represented by the firm Quinn Emanuel.

Prior to the indictment, and after receiving a grand jury subpoena in 2025, Heppner used the popular AI tool Claude to prepare a series of reports. According to defence counsel, those reports outlined defence strategy and addressed the facts and law that Heppner anticipated the government might rely upon. The purpose of preparing the reports was for Heppner to share them with his lawyers at Quinn Emanuel so that they could discuss and develop his defence strategy.⁵

The government obtained the AI-generated reports and filed a motion to overrule any claims of privilege or work product protection. The critical fact relied upon by the government — and acknowledged by defence counsel — was that the AI tool Heppner used contained an express contractual provision stating that users had no expectation of privacy or confidentiality in their inputs to the system.⁶

2.2 The Court's Ruling

Judge Rakoff granted the government's motion. His Honour's reasoning proceeded on three distinct bases:

First, in relation to attorney-client privilege, the Court found no basis for the claim at all. The documents had been submitted to a third party — the AI platform — which carried an express provision that inputs were not confidential. Voluntary disclosure of information to a third party on terms that negate confidentiality is inconsistent with any privilege claim.

⁴ Ibid p. 1.

⁵ Ibid p. 3.

⁶ Ibid p. 6.

Second, in relation to work product protection, the Court accepted that work-product doctrine can protect documents prepared by a client (and not just by counsel), provided the documents reflect the mental impressions or legal strategies of the attorney. However, defence counsel conceded in open court that the reports were prepared by Heppner on his own volition and did not reflect the strategy of Quinn Emanuel. The Court held that documents which merely reflect a client's own thinking — and not counsel's mental strategy — fall outside the core protection of the doctrine.

Third, the Court also noted that even if work product protection might otherwise have applied, the voluntary disclosure to the AI tool — on terms negating confidentiality — would have operated as a waiver.

3. Legal Professional Privilege in Australia and Queensland

3.1 The Nature and Source of LPP

In Australia, legal professional privilege (LPP) is a common law right. The High Court has confirmed that at common law, LPP is a fundamental right that protects confidential communications between a lawyer and client for the dominant purpose of obtaining or giving legal advice, or for the dominant purpose of use in litigation that is reasonably anticipated.

The landmark authority is *Esso Australia Resources Ltd v Commissioner of Taxation*,⁷ in which the High Court (Gleeson CJ, Gaudron and Gummow JJ, with Callinan J agreeing in substance) confirmed that LPP is a common law right, not merely a rule of evidence, and that it exists independently of any statutory regime.

As the Kirby J. noted:

It (LPP) arises out of "a substantive general principle of the common law and not a mere rule of evidence". Its objective is "of great importance to the protection and preservation of the rights, dignity and freedom of the ordinary citizen under the law and to the administration of justice and law".⁸

The 'dominant purpose' test which the High Court declared in *Esso* to be the common law test recognises that:

"...where a communication is made or a document prepared for the dominant purpose of giving or receiving legal advice or assistance, then it does not matter that there were also other, subsidiary purposes...." (emphasis added)

⁷ *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49
< <https://www.hcourt.gov.au/sites/default/files/eresources/2025-10-31/HCA/Esso%20Australia%20Resources%20Limited%20v%20The%20Commissioner%20of%20Taxation%20%28M53-1999%29%20%5B1999%5D%20HCA%2067.pdf> >

⁸ *Ibid*, note 7.

Gibbs CJ, stated in *Baker v. Campbell* that subject to certain exceptions (such as overriding public interests, compulsion of law and cases of fraud), a legal advisor has an obligation “to keep inviolate his client’s confidences....”⁹

In *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*.¹⁰ the High Court considered LPP as a common law right and found that LPP cannot be abrogated by statute unless the intention of the legislature is ‘clearly manifested by unmistakable and unambiguous language...to deprive a person, otherwise entitled, of such a privilege’. That is there must be an express, unambiguous intention of the legislature to deny LPP.

4. Confidentiality, Third-Party Disclosure and Waiver

4.1 Confidentiality as a Prerequisite for LPP

A fundamental requirement of LPP in Australia, under the common law is that the communication in question must be confidential. Confidentiality is not merely an attribute of LPP: it is a precondition for it. If a communication was never intended to be confidential, or if the expectation of confidentiality has been objectively destroyed, LPP does not arise. This proposition was articulated by the High Court in *Baker v Campbell*¹¹ where the Court recognised that the privilege is grounded in the necessity of a confidential professional relationship.

The AI tool issue in *Heppner* maps directly onto this requirement. Under Australian law, if a client uploads privileged communications to an AI platform that expressly states that inputs are not confidential the client has voluntarily shared the communication with a commercial third party on terms that are incompatible with confidentiality. It should be noted that most AI platform not only provide that inputs are not confidential, they typically state that the platform may store, process and use those inputs for other purposes including model training. The logical and critical consequence is that the communication ceases to satisfy the confidentiality requirement of LPP.

4.2 Waiver of LPP

Even if a communication were otherwise privileged at the time it was created, subsequent voluntary disclosure to a third party can waive the privilege. Under Australian common law privilege may be waived expressly or by conduct that is inconsistent with the maintenance of confidentiality.

The leading Australian authority on waiver is *Mann v Carnell*.¹² In a joint judgement Gleeson CJ, Gaudron, Gummow and Callinan JJ. stated:

⁹ *Baker v Campbell* (1983) 153 CLR 52 at 65 (Gibbs CJ).

¹⁰ (2002) 213 CLR 543

¹¹ Supra note 9.

¹² (1999) 201 CLR 1

< <https://www.hcourt.gov.au/sites/default/files/eresources/2025-10-31/HCA/Mann%20v%20Carnell%20%28C10-1999%29%20%5B1999%5D%20HCA%2066.pdf> >

Legal professional privilege exists to protect the confidentiality of communications between lawyer and client. It is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement. It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege.¹³

Consequently, a waiver of LPP occurs when a party acts in a manner that is inconsistent with maintaining the confidentiality that LPP is intended to protect. The test is objective: it is not necessary to show the client subjectively intended to waive the privilege.(source?)

The conduct itself viewed objectively will determine whether the voluntary disclosure of a privileged legal opinion to a third part is enough to waive LPP. Based upon this approach, any disclosure to an open AI tool where part of the terms of service state that submissions will not be classified as confidential will be fatal with regard to LPP.

The application of *Mann v Carnell* to AI submissions is absolute and fatal. A client who uploads a lawyer's advice, or a document reflecting that advice to an AI tool, on a platform that expressly states the inputs are not confidential, has acted in a manner inconsistent with maintaining the privilege. It is difficult to construct any argument that such conduct preserves confidentiality.

4.3 The 'Common Interest' Exception and Its Limits

Australian law recognises that disclosure to a third party does not necessarily waive privilege where the third party shares a "common interest" with the disclosing party¹⁴ This principle has been applied in several contexts, including joint ventures, insured-insurer relationships, and co-defendants in litigation. However, the common interest principle would plainly not assist a client who discloses privileged material to a public AI platform. A commercial AI provider does not share a legal interest in the outcome of the client's dispute, and the terms of service of most AI platforms — including those likely used in *Heppner* — expressly disclaim any duty of confidentiality. The common interest exception therefore provides no refuge.

5. AI Tools — Specific Risk Factors for LPP

5.1 Terms of Service and Confidentiality

The first and most critical risk factor is the terms of service of the AI platform. Most publicly available large language model platforms — including the major commercial products available in Australia¹⁵ — include provisions to the effect that users should not submit confidential

¹³ Ibid at para 28

¹⁴ The common interest exception is recognised in Australian law: see eg *DSE (Holdings) Pty Ltd v Intertan Inc* (2003) 135 FCR 151 (Allsop J). However, the exception is confined to parties with a shared legal interest in the subject matter of the privileged communication. A commercial AI provider clearly does not satisfy this requirement

¹⁵ See OpenAI Privacy Policy: < <https://openai.com/policies/row-privacy-policy/> >
Claude.ai Privacy Policy < <https://www.anthropic.com/legal/privacy> >
Gemini Trust Privacy Policy < <https://www.gemini.com/en-AU/legal/privacy-policy> >

information, that inputs may be reviewed by the provider's employees or contractors, and that inputs may be used to improve the model. Some platforms have introduced enterprise or privacy modes that purport to offer greater confidentiality protection, but practitioners should not assume these arrangements are legally equivalent to the protections applicable to communications with a law firm.

For a Queensland practitioner advising a client, the analysis under the the common law principles in *Mann v Carnell* is clear: if the AI platform's terms of service do not impose confidentiality obligations on the provider, any privilege attaching to the submitted material is waived upon submission. The fact that the client may not have read or understood the terms of service is unlikely to assist: the test for waiver under Australian law is objective.

5.2 Training Data and Secondary Disclosure

A related risk concerns the use of inputs as training data. If an AI platform uses prompts and inputs to train its models, those inputs may be made accessible — in whole or in derivative form — to other users of the platform. Even if the platform anonymises inputs, the risk that privileged legal advice or strategy could be reproduced in response to a third party's query is not fanciful. Australian practitioners should be aware that the submission of privileged material to an AI tool could result in a form of inadvertent secondary disclosure that is impossible to recover.

5.3 The Problem of Metadata and Data Retention

AI platforms typically retain user inputs for varying periods, and some platforms retain them indefinitely unless the user takes affirmative steps to delete them. The retention of privileged material on a third-party server — outside the control of the practitioner and potentially subject to compulsory disclosure in foreign legal proceedings, regulatory investigations or data breach events — represents a further and independent risk to the integrity of LPP.

5.4 The Practitioner's Own Exposure

The *Heppner* facts concerned a client who used an AI tool. But the same issues arise — and more acutely — where the practitioner themselves uses an AI tool to process privileged documents or communications. A Queensland solicitor who uploads a client's privileged communications to an AI platform with inadequate confidentiality protections may be in breach of rule 9 of the *Australian Solicitors' Conduct Rules* (ASCR)¹⁶ (as adopted in Queensland), which

¹⁶ QLS: Relations with Clients – Rule 9 “Confidentiality”
< <https://www.qls.com.au/practising-law-in-qld/ethics/australian-solicitors-conduct-rules/relations-with-clients> >

9 Confidentiality:

9.1 A solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client’s engagement to any person who is not:

9.1.1 a solicitor who is a partner, principal, director, or employee of the solicitor’s law practice; or

9.1.2 a barrister or an employee of, or person otherwise engaged by, the solicitor’s law practice or by an associated entity for the purposes of delivering or administering legal

imposes a duty to protect client confidentiality. It is no answer to say that the AI was used merely as a productivity tool: the mechanism of disclosure does not affect its legal or professional consequences.

6. Practical Implications and Recommendations for Queensland Practitioners

6.1 Advise Clients Before They Use AI

The first and most important recommendation is that legal practitioners should from an ethics perspective address the AI tool issue with clients at the outset of a retainer, particularly where litigation is anticipated or underway. Clients should be advised, clearly and in writing, that they should not submit privileged communications, legal advice, defence or litigation strategies, or documents prepared by their lawyer to any AI platform whose terms of service do not provide robust, legally enforceable confidentiality protections.

This advice should be given proactively. It should not be assumed that clients understand the implications of AI tool use for LPP. As Heppner illustrates, even sophisticated commercial parties may use AI tools without appreciating that they are potentially destroying the very privilege that their lawyers have worked to preserve.

6.2 Conduct AI Tool Due Diligence

Before a practitioner — or their client — uses an AI tool in connection with a matter, the practitioner should conduct due diligence on the tool's terms of service. The practitioner should identify: whether the platform imposes confidentiality obligations on the provider; whether inputs are used for model training; how long inputs are retained; and whether the platform's data handling practices comply with the Australian Privacy Act 1988 (Cth) and, where applicable, any Queensland public sector privacy obligations.

services in relation to the client,
EXCEPT as permitted in Rule 9.2.

9.2 A solicitor may disclose confidential client information if:

- 9.2.1 the client expressly or impliedly authorises disclosure;
- 9.2.2 the solicitor is permitted or is compelled by law to disclose;
- 9.2.3 the solicitor discloses the information in a confidential setting, for the sole purpose of obtaining advice in connection with the solicitor's legal or ethical obligations;
- 9.2.4 the solicitor discloses the information for the sole purpose of avoiding the probable commission of a serious criminal offence;
- 9.2.5 the solicitor discloses the information for the purpose of preventing imminent serious physical harm to the client or to another person; or
- 9.2.6 the information is disclosed to the insurer of the solicitor, law practice or associated entity.

6.3 Document the Dominant Purpose

Where a client prepares documents in anticipation of litigation — whether using AI or otherwise — the practitioner should take steps to record and document the dominant purpose of those documents. This is important because a court applying the dominant purpose test under the common law will look at objective evidence of purpose. A contemporaneous file note or email confirming that the document was prepared at counsel's direction, for the purpose of being used in anticipated litigation, and intended to be shared only with the advising lawyers, will carry significant weight.

6.4 Consider Using Closed or On-Premises AI Systems

Where AI tools are to be used in connection with privileged matters, practitioners should consider deploying closed or on-premises AI systems — systems that run on servers controlled by the law firm or client, whose outputs are not transmitted to third-party providers, and which do not use inputs for training. Several enterprise AI solutions are now marketed as being available that offer this model. But the legal practitioner **MUST** undertake due diligence to ensure that the marketing material is actually supported by appropriate contractual terms and conditions. To date this author has not identified any closed AI system that is supported by an appropriate confidentiality provision.

6.5 Include AI Use in Client Engagement Agreements

Queensland practitioners should consider including specific provisions in their client engagement agreements addressing AI tool use. These provisions might: identify which AI tools the firm uses and confirm their confidentiality status; prohibit the client from submitting privileged documents to AI platforms without the firm's prior approval; and require the client to notify the firm immediately if they become aware of any submission of privileged material to a third-party AI platform.

7. Broader Significance: LPP in the Age of AI

The *Heppner* ruling, though brief, is a harbinger of a much larger issue that Australian courts will inevitably be asked to address. LPP is a doctrine developed over centuries in an era when communications were written on paper and shared between identified individuals. Its fundamental premises — confidentiality, the lawyer-client relationship, and the specific purpose of seeking or giving legal advice — have been remarkably durable. But the advent of AI tools, with their capacity to ingest, process and potentially republish vast quantities of information, tests those premises in novel ways.

Australian courts have not yet addressed directly whether and to what extent the use of AI tools in legal practice affects LPP. But the underlying legal principles are well established, and the analysis set out in this article demonstrates that they apply clearly and — in most cases — unfavourably to unguarded AI use.

The common law as confirmed in *Esso*, *Mann v Carnell* and *Daniels Corporation* provide a coherent framework that, when applied to the facts of *Heppner*, would almost certainly produce

the same result as Judge Rakoff reached: that voluntary submission of potentially privileged material to a commercial AI platform on terms negating confidentiality destroys both the confidentiality prerequisite for LPP and, in the event privilege existed, operates as a waiver.

8. Conclusion

Even though the Heppner case is a US case, as noted above, the concepts concerning LPP and its limitations is a salutary warning to all practitioners including Australian lawyers. A defendant in the Heppner case, with the benefit of experienced commercial litigation counsel, used what appeared to be a productive and logical approach — using an AI tool to organise his thinking and prepare for discussions with his lawyers. BUT as resulted from this folly, the output from the AI tool used, destroyed any claim for LPP.

The risks are not theoretical. They are present and material in every Queensland legal practice that uses or whose clients use AI tools. Practitioners who fail to address them — through client advice, due diligence, engagement agreement provisions and careful document management — will be exposed to professional conduct risk and, more seriously, to the risk that their clients lose the privilege that is essential to their defence or their legal position

Endnotes