

## Legal professional privilege and the government

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The government receives legal advice and is involved in legal matters, including litigation, on a daily basis in a wide range of areas. The government can be required to disclose information held by it through litigation and under the *Freedom of Information Act 1982* (Cth). However, those requirements generally do not extend to information which is the subject of legal professional privilege. Further, in many situations, the statutory powers which enable the government to require information to be disclosed to it do not extend to legally privileged information. It is, therefore, important to be aware of the principles governing legal professional privilege and how to claim and retain the privilege.

Legal professional privilege is a creature of both common law and statute (under the Evidence Acts of the Commonwealth, states and territories).<sup>1</sup> Generally speaking, the statutory privilege under each of the Evidence Acts:

- is known as ‘client legal privilege’
- is substantially the same (but not identical), being based upon the *Evidence Act 1995* (Cth)
- where it applies, overrides the common law to the extent of any inconsistency.<sup>2</sup>

<sup>1</sup> Legal professional privilege is provided for by statute in the federal jurisdiction (*Evidence Act 1995* (Cth)), New South Wales (*Evidence Act 1995* (NSW)), Victoria (*Evidence Act 2008* (Vic)), the ACT (*Evidence Act 2011* (ACT)), the Northern Territory (*Evidence (National Uniform Legislation) Act 2011* (NT)), Tasmania (*Evidence Act 2001* (Tas)), and Norfolk Island (*Evidence Act 2004* (NI)).

<sup>2</sup> Stated briefly, the Evidence Acts sought to codify the rules of evidence, including in relation to privilege in circumstances where those Acts apply. Section 9 of the *Evidence Act 1995* (NSW) makes it clear that the Act *does not* affect the operation of a principle or rule of common law or equity in relation to evidence in a proceeding to which the Act applies, except so far as the Act provides otherwise expressly or by necessary intendment (*Meteyard v Love* (2005) 65 NSWLR 36, [129]-[132]). Section 9 of the *Evidence Act 1995* (Cth) does not contain this specific provision but does deal with the effect of the Act on other laws.

This briefing will consider the following areas:

- The common law of legal professional privilege
- Privilege under the Commonwealth Evidence Act
- The two limbs of legal professional privilege, namely:
  - Common law advice privilege
  - Common law litigation privilege
- Elements of common law of legal professional privilege, namely:
  - Confidentiality
  - Communications
  - Dominant purpose
- The professional relationship requirement
- Practice and procedure
- Illegal or improper purpose (circumstances in which privilege does not apply)
- Waiver of Privilege (Circumstances in which privilege may be lost)
- Privilege and the lodgement of documents under the *Administrative Appeals Tribunal Act 1975* (the AAT Act).

Accordingly, this briefing does not consider the detailed operation of the privilege under the Evidence Acts,<sup>3</sup> the interaction between implied undertakings in litigation and legal professional privilege,<sup>4</sup> joint privilege,<sup>5</sup> or common interest privilege.<sup>6</sup>

## The common law of legal professional privilege

### The nature of the privilege

Legal professional privilege protects the confidentiality of certain communications made in connection with giving or obtaining legal advice or in the provision of legal services, such as representation in legal proceedings.<sup>7</sup>

The High Court has described legal professional privilege as both a rule of substantive law and an important common law immunity.<sup>8</sup> More recently, the High Court has confirmed the view expressed in *Daniels Corporation v ACCC*<sup>9</sup> that legal professional privilege is ‘only an immunity from the exercise of powers which would otherwise

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3 The relevant provisions of the *Evidence Act 1995* (Cth) will be noted. However, for a more detailed analysis of the Evidence Acts, see S Odgers, *Uniform Evidence Law* (15th ed, Lawbook Co, 2020).

4 For more on implied undertakings in litigation, see *AGS Legal briefing* No. 75, ‘Implied undertakings in litigation’, by Tom Howe QC, which can be found at <<https://www.ags.gov.au/publications/legal-briefing/br75.htm>>. See also: *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd* [2009] FCAFC 32, [47]-[50]; *Cadbury Schweppes Pty Ltd v Amcor Ltd* [2008] FCA 398; *Spalla v St George Motor Finance Ltd* [2004] FCA 1014.

5 Joint privilege arises where two or more persons join in communicating with a legal adviser for the purpose of retaining services or obtaining advice. The privilege which protects these communications from disclosure belongs to all such persons and so the privilege can’t be waived unless all of the joint holders of the privilege consent (*Farrow Mortgage Services Pty Ltd v Webb* (1996) 39 NSWLR 601 (*Farrow*), 608-609); *Equititrust Ltd (In Liq) v Equititrust Ltd (In Liq) (No 3)* (2016) 341 ALR 301, [28].

6 Common interest privilege arises where parties have a shared or similar interest in the subject of communications between one or more of them and the legal adviser (*Farrow* at 609–612). Disclosure of privileged information to a person with a common interest will not result in waiver. For recent decisions on common interest privilege see: *Marshall v Prescott* [2013] NSWCA 152, [57]; *Inlon Pty Ltd v Celli SpA* [2017] NSWSC 569, [103], [107].

7 *Eso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49 (*Eso*), 64-65 [35]

8 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 (*Daniels*), 552-3 [9]-[11].

9 *Ibid.*

compel the disclosure of privileged communications' and confirmed that the privilege does not confer any actionable right to restrain the use of privileged communications.<sup>10</sup>

The description of legal professional privilege as both a rule of substantive law and an important common law immunity has the following consequences:

1. Being a *rule of substantive law* and not a mere rule of evidence, the privilege may be relied upon to resist all forms of compulsory disclosure, including in judicial or quasi-judicial proceedings and in the context of non-judicial investigatory procedures<sup>11</sup>
2. As an *important common law immunity*, the privilege cannot be overridden (or 'abrogated') by statute unless the statute does so by clear and unambiguous words or necessary implication.<sup>12</sup> The phrase 'necessary implication' imports 'a high degree of certainty as to legislative intention'.<sup>13</sup>

Although the privilege is an important common law immunity, it must be claimed before it can have any effect.<sup>14</sup>

### Who does the privilege belong to?

The privilege belongs to the client, not the legal adviser.<sup>15</sup> It is the client who is entitled to the benefit of the privilege and who may waive that entitlement.<sup>16</sup>

*'The privilege belongs to the client, not the legal adviser.'*

Nevertheless, the legal adviser has ostensible authority to waive privilege on behalf of their client.<sup>17</sup> This is so irrespective of whether the legal adviser is acting contrary to the express instructions of their client.<sup>18</sup> However inadvertent disclosure by a legal advisor of a document subject to a privilege claim may not amount to a waiver of the privilege.<sup>19</sup>

The recipient of a search warrant or other compulsory notice has an obligation to claim privilege over documents in their possession that they reasonably believe are subject to the privilege of someone else, such as their client.<sup>20</sup> This obligation arises out of the status of the documents and the recipient's possession of them rather than any contractual obligation between the recipient and their client.<sup>21</sup> A 'practical and realistic opportunity' must be given to the person holding the documents to claim privilege.<sup>22</sup> However, where an authority has already obtained possession of documents from third persons, no such obligation exists.<sup>23</sup>

10 *Glencore International AG v Commissioner of Taxation* (2019) 265 CLR 646 (*Glencore*), [12]-[22]. See also *Commissioner of Taxation v Donoghue* (2015) 237 FCR 316 (*Donoghue*) at [52], [57].

11 *Baker v Campbell* (1983) 153 CLR 52 (*Baker*), 132.

12 *Daniels* [11]. A statute may also expressly state that it does not abrogate legal professional privilege; see, for example, ss 17(2) and 47(2) of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth).

13 *Hamilton v Oades* (1989) 166 CLR 486, 495.

14 *SZHWY v Minister for Immigration and Citizenship* [2007] FCAFC 64 (*SZHWY*), [70]. See also R Desiatnik, *Legal Professional Privilege in Australia* (LexisNexis Butterworths, 3rd ed, 2016), 102 (quoted in *SZHWY*, [70]), footnote 25.

15 *Commissioner of Australian Federal Police v Propend Finance* (1997) 188 CLR 501 (*Propend*), 570; *Baker*, 85.

16 *Mann v Carnell* (1999) 201 CLR 1 (*Mann*), [28].

17 *Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 529, 539-40; *Federal Commissioner of Taxation v Coombes* (1999) 92 FCR 240, 255.

18 *Esso*, [79].

19 *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303. See also 'Inadvertent disclosure' discussed below.

20 *MM v Australian Crime Commission* [2007] FCA 2026 (*MM*), [34]; *Commissioner of Taxation v Citibank Ltd* (1989) 20 FCR 403 (*Citibank*), 414.

21 *MM*, [34].

22 *Australian Securities and Investments Commission v Lindberg* [2009] VSCA 234 (*Lindberg*), [51].

23 *Lindberg*, [51]; *Donoghue*, [57]. The right to restrain the use of documents or to compel their return is grounded in equity rather than the common law of privilege.

## The rationale for the privilege

Legal professional privilege serves the public interest in the administration of justice by facilitating freedom of consultation between the client and the legal adviser.<sup>24</sup> By enabling persons to conduct their affairs with the benefit of legal advice, legal professional privilege conforms to and underpins the rule of law.<sup>25</sup>

The formulation of the privilege is the product of a balancing between competing public interests. Subject to the illegal or improper purpose principle, the balance is struck in favour of the public interest of encouraging the full and frank disclosure by clients to their legal advisers without the apprehension of being prejudiced by subsequent disclosure of the communication; as against the public interest in obtaining the fullest possible access to all relevant facts.<sup>26</sup>

*‘By enabling persons to conduct their affairs with the benefit of legal advice, legal professional privilege conforms to and underpins the rule of law.’*

There is no further balance to be struck; the privilege may be abrogated by statute or waived by the client, but, where it applies, the privilege confers an absolute protection that cannot be overridden by some supposedly greater public interest at play in any given case.<sup>27</sup>

However, as explained below, the ‘improper purpose’ principle operates such that no privilege *arises* in respect of a communication made for some purpose that is *contrary* to the public interest.<sup>28</sup>

## Privilege under the Commonwealth Evidence Act

### General provisions

The provisions of the *Evidence Act 1995* (Cth) which deal with the subject of client legal privilege are ss 118 and 119. They are in the following terms:

- 118.** Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:
- a) a confidential communication made between the client and a lawyer; or
  - b) a confidential communication made between 2 or more lawyers acting for the client; or
  - c) the contents of a confidential document (whether delivered or not) prepared by the client, lawyer or another person;
- for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.
- 119.** Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:
- a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made; or

<sup>24</sup> *Waterford v Commonwealth* (1986) 163 CLR 54 (*Waterford*), 62.

<sup>25</sup> *Kennedy v Wallace* (2004) 142 FCR 185 (*Kennedy*), [201].

<sup>26</sup> *Esso*, 64-5, 82; *Glencore*, [29].

<sup>27</sup> *Waterford*, 65; *Attorney-General (NT) v Kearney* (1985) 158 CLR 500 (*Kearney*), 532; *Glencore*, [29]-[30].

<sup>28</sup> *R v Bell; Ex parte Lees* (1980) 146 CLR 141, 147, 156, 159, 161; *Kearney*, 514-5; *Propend*, 514.

- b) the contents of a confidential document (whether delivered or not) that was prepared;

for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.

Section 117 relevantly defines ‘confidential document’, ‘confidential communication’, ‘client’, ‘lawyer’, and ‘party’. The ‘dominant purpose’ test is considered below; it is a common element of both the common law and statutory privilege.

### When does the Commonwealth Evidence Act apply?

The *Evidence Act 1995* (Cth):

- applies to all proceedings in a federal court (s 4)<sup>29</sup>
- does not apply to the Administrative Appeals Tribunal (AAT), as the AAT is not required to apply the laws of evidence<sup>30</sup>
- applies to the adducing of evidence at trial.

The client legal privilege provisions in the *Evidence Act 1995* (Cth) do not apply to pre-trial stages of proceedings (such as producing documents under a subpoena and pursuant to discovery) and do not apply in non-curial contexts such as search warrants and notices to produce documents.<sup>31</sup> This position is modified in certain State and Territory courts, where pre-trial stages of proceedings are decided under the relevant provisions of the State or Territory Evidence Act.<sup>32</sup> Consequently, in a proceeding in the Federal Court to which the Commonwealth Act applies, a claim of privilege in answer to a subpoena will fall to be determined on common law principles. In contrast, a similar issue in the Supreme Court of NSW will fall to be determined under Part 3.10 of the NSW Evidence Act.

## The two limbs of legal professional privilege

At common law, legal professional privilege is commonly split into the following two limbs:

- advice privilege
- litigation privilege.

Generally speaking, ss 118 and 119 of the *Evidence Act 1995* (Cth) deal with advice privilege and litigation privilege respectively.

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29 ‘Federal Court’ is defined in the definitions section of the *Evidence Act 1995* (Cth) as the High Court or any other court created by the Parliament (other than a court or magistrate of a State or Territory) and includes a person or body (other than a court or magistrate of a State or Territory) that, in performing a function or exercising a power under a law of the Commonwealth, is required to apply the laws of evidence.

30 Section 33(1)(c) of the *AAT Act*; *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* (2006) 233 ALR 369 (Ingot), 374.

31 *Esso*, [16]-[28] and [64]; *Australian Competition and Consumer Commission v NSW Ports Operations Hold Co Pty Ltd* [2020] FCA 1232 (NSW Ports), [37].

32 See: s 131A of the *Evidence Act 1995* (NSW), s 131A of the *Evidence Act 2008* (Vic), s 131A of the *Evidence Act 2001* (Tas), s 131A of the *Evidence (National Uniform Legislation) Act 2011* (NT) and s 131A of the *Evidence Act 2011* (ACT).

## Common law advice privilege

At common law, advice privilege attaches to confidential communications between a legal adviser and client or third party for the dominant purpose of giving or receiving legal advice.<sup>33</sup>

### What is legal advice?

Legal advice in this context includes more than just telling the client the law; it also includes advice as to ‘what may prudently and sensibly be done in the relevant legal context’.<sup>34</sup> For example, where the relevant communication by the lawyer occurred in the context of a complex commercial transaction, it may not be ‘amendable to sharp division between what was advisory and what was merely administrative’,<sup>35</sup> and it is necessary to recognise ‘the form and nature of advice in a practical day to day context’.<sup>36</sup>

However, to attract privilege, the advice must be *professional advice* given by the legal adviser in their professional capacity, and the communications must be for the dominant purpose of obtaining legal advice.<sup>37</sup>

Legal advice may include professional advice given by a legal adviser to a client about evidence and submissions to be placed before a commission of inquiry (such as a Royal Commission).<sup>38</sup> However, the privilege will *not* attach to advice that is predominately for a financial, personal, commercial or public relations purpose.<sup>39</sup> Nor does privilege attach to policy or administrative advice.<sup>40</sup>

*‘Legal advice may include professional advice given by a legal adviser to a client about evidence and submissions to be placed before a commission of inquiry (such as a Royal Commission).’*

### What kinds of advice provided to government may be privileged?

Examples of advice provided to government that may be privileged include:

- advice relating to the exercise of a statutory power or the performance of a statutory duty or function<sup>41</sup>
- advice relating to proposed laws and their drafting<sup>42</sup>
- commercial or probity advice.<sup>43</sup>

33 *AWB v Cole (No. 5)* (2006) 155 FCR 30 (*AWB v Cole (No. 5)*), 44; *Waterford*, 95; *Pratt Holdings*.

34 *Balabel v Air India* [1988] Ch 317 (*Balabel*), 330; *AWB v Cole* (2005) 152 FCR 382 (*AWB v Cole (No. 1)*), [410].

35 *DSE (Holdings) v Intertan Inc* (2003) 135 FCR 151 (*DSE*), [22].

36 *DSE*, [45]; *Archer Capital 4A Pty Ltd as trustee for Archer Capital Trust 4A v Sage Group plc (No 2)* [2013] FCA 1098 4 (*Archer Capital*), [12], [50]-[51]; *Kenquist Nominees Pty Ltd v Campbell (No. 5)* [2018] FCA 853 (*Kenquist Nominees*), [15].

37 *AWB v Cole (No. 1)*, 410.

38 *Ibid.*

39 *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610 (*Three Rivers (No. 6)*), 651; *AWB v Cole (No. 1)*, 410; *DSE*, [45]; *Barnes v Commissioner of Taxation* [2007] FCAFC 88 (*Barnes*), [5].

40 *Waterford*, 77, 85; *WorkCover Authority (NSW), (General Manager) v Law Society of New South Wales* (2006) 65 NSWLR 502 (*WorkCover*), [91].

41 *Waterford*, 63-4, 74-5; *Webb v Commissioner of Taxation* (1993) 44 FCR 312, 317.

42 *WorkCover*, [74], [94]; *Three Rivers (No. 6)*, 652; *New South Wales v Betfair Pty Ltd* (2009) 180 FCR 543 (*Betfair*), [22]-[24].

43 *National Tertiary Education Industry Union v Commonwealth and D. A. Kemp* [2002] FCA 441. This matter related to a retainer provided for the giving of ‘legal advice as to consistency and defensibility’. Written reasons for the rulings were not handed down by the Court and do not appear in the report of the case. However, the basis of the rulings can be discerned from the transcript of the proceedings.

### Third party communications: advice privilege

Historically, common law advice privilege did not apply to third party communications unless the third party was an agent.

In 2004, the Full Federal Court accepted that advice privilege at common law covered confidential communications between a legal adviser or client and a third party made for the dominant purpose of the legal adviser providing advice to the client, notwithstanding that the third party is not an agent of the client or legal adviser for the purpose of the communication.<sup>44</sup> Section 118(c) of the *Evidence Act 1995* (Cth) was subsequently amended to reflect this position.<sup>45</sup>

### Common law litigation privilege

At common law, litigation privilege attaches to confidential communications passing between a legal adviser or client and a third party if made for the dominant purpose of use in, or in relation to, litigation (including criminal proceedings) – whether the litigation is existing or reasonably anticipated.<sup>46</sup>

#### What is the rationale for litigation privilege?

Litigation privilege exists to secure a fair criminal or civil trial within the adversarial system of justice.<sup>47</sup> Consistent with this rationale, litigation privilege does not apply outside of adversarial proceedings, and thus cannot be claimed in the context of a commission of inquiry.<sup>48</sup> Nevertheless, advice privilege applies in its full extent to work undertaken in connection with such an inquiry.<sup>49</sup>

#### Does litigation privilege apply in the Administrative Appeals Tribunal?

There is divided opinion about whether common law litigation privilege applies in the AAT.<sup>50</sup>

In *Ingot*, Bergin J (of the NSW Supreme Court) held that litigation privilege did not apply in the AAT because proceedings in the AAT are not adversarial and, therefore, do not answer the description of 'litigation'. Her Honour accepted that legal advice privilege is available in respect of tribunal proceedings.<sup>51</sup>

However, the AAT has not followed *Ingot*, taking the view that AAT proceedings are sufficiently analogous to court proceedings to warrant recognition of common law litigation privilege.<sup>52</sup> Although not cited in *Farnaby*,<sup>53</sup> there appears to be Federal Court authority in support of the AAT's view as to the availability of common law litigation privilege in that jurisdiction.<sup>54</sup>

44 *Pratt Holdings*, 137-8; 153-4; see also *DSE*, [72]-[96] where Allsop J reached the same result by taking a broad view of the concept of 'agency'; *Betfair*, [40]; *Archer Capital*, [17]-[24].

45 *Meadis v Meadis* [2020] FamCAFC 301, [67].

46 *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority* [2002] 4 VR 332 (*Mitsubishi Electric*), 334-5; *Trade Practices Commission v Sterling* (1979) 36 FLR 244 (*Sterling*); *Ensham Resources Pty Ltd v AIOI Insurance Company Ltd* (2012) 209 FCR 1, [51].

47 *AWB v Cole* (No. 1), 424; *Re L (a minor)* [1997] AC 16, 26.

48 *AWB v Cole* (No. 1), 424-5.

49 *Ibid* 425.

50 There are many cases in which it has been held that legal advice privilege is available in the AAT (including the High Court case of *Waterford*).

51 *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* (2006) 233 ALR 369 (*Ingot*), [55].

52 *Re Farnaby and Military Rehabilitation and Compensation Commission* (2007) 97 ALD 788 (*Farnaby*), [19], [31]; *Re VCA and Australian Prudential Regulation Authority* [2008] AATA 580, [205].

53 *Farnaby*.

54 *Comcare v Foster* [2006] FCA 6, [38]-[39]. See *APRA v VBN* (2005) 88 ALD 403 as to the interaction between the lodgement of documents under s 37 of the AAT Act and legal professional privilege.

### When is litigation ‘reasonably anticipated’?

For litigation privilege to apply, litigation must be at least ‘reasonably anticipated’ at the time of the relevant communication. Litigation will be ‘reasonably anticipated’ when there is a ‘real possibility of litigation, as distinct from a mere possibility, but it does not have to be more likely than not’.<sup>55</sup>

Whether such a possibility exists is determined by an objective view of the circumstances, not the subjective view of the person making the communication.<sup>56</sup>

### Third party communications: litigation privilege

Litigation privilege extends to third party communications where those communications are referable to the lawyer/client relationship and are made for the dominant purpose of existing or reasonably anticipated litigation.<sup>57</sup> This includes communications between either the legal adviser or client with a potential witness or other person for the dominant purpose of obtaining evidence for use in litigation.<sup>58</sup> It also includes communications between a party’s solicitor and an expert witness (for further discussion of communications to an expert see Expert reports below).<sup>59</sup>

Section 119 of the *Evidence Act 1995* (Cth) captures third party communications, including communications (including draft documents) between a party’s legal adviser and an expert witness.<sup>60</sup>

### Criminal proceedings

At common law, a person in possession of, or with power over, documents which are the subject of legal professional privilege cannot be compelled to produce those documents on subpoena issued by an accused person in criminal proceedings, even though they may establish the innocence of the accused or may materially assist his or her defence.<sup>61</sup> Further, in *DPP v Kinghorn*, it was decided that in criminal matters, the prosecution’s duty of disclosure does not override a claim for privilege.<sup>62</sup>

Section 123 of the *Evidence Act 1995* (Cth) provides that Div 1 of Pt 3.10 of the *Evidence Act 1995* (Cth) (ss 117–126) does not apply where the evidence is sought to be adduced by a defendant in criminal proceedings unless the relevant evidence involves an ‘associated defendant’ (such as a co-accused).<sup>63</sup> The phrase ‘adducing evidence’ in s 123 has been given a confined meaning such that it is said to relate only to ‘the adducing by an accused of evidence already in the accused’s possession or knowledge’ and is ‘intended to do no more than create a statutory exception (from the privilege created by ss 118 and 119) corresponding to the exception recognised by the common law’.<sup>64</sup>

55 *Mitsubishi Electric* at 391; *Visy Industries v ACCC* (2007) 161 FCR 122 (*Visy*), [24]-[33], [68]-[69]. For a summary of the cases considering the time at which litigation is ‘reasonably anticipated’ during an investigation, see *Alfred v Primmer* [2008] FMCA 235, [45]-[48]; *Australian Securities and Investments Commission (ASIC) v Australian Lending Centre Pty Ltd (No 2)* [2011] FCA 1057, [23].

56 *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1998) 81 FCR 526, 558; *Mitsubishi Electric*, [20]; *Visy*, [28]; *Australian Competition and Consumer Commission v Prysmian Cavi E Sistemi Energia Srl (No 2)* (2012) 287 ALR 760, [23]-[26].

57 *Sterling*, 244.

58 *Sterling*; *Carbone v National Crime Authority* (1994) 52 FCR 516 (*Carbone*).

59 *Sterling*, 245.

60 *MI Ubase Holdings Co Ltd v Trigem Computer Inc* [2007] NSWSC 859 (*MI Ubase*), [27]; *Shea v TruEnergy Services Pty Ltd (No 5)* [2013] FCA 937, [46], [57].

61 *Carter v Northmore Hale Davy & Leake* (1994) 183 CLR 121 (*Carter*), 130-1. For a more recent expression of the rule in *Carter*, see *Glencore*, [17].

62 See the discussion of *DPP v Kinghorn* (2020) 102 NSWLR 72 (*Kinghorn*) below.

63 The term ‘associated defendant’ is defined in the Pt 1 of the Dictionary of the *Evidence Act 1995* (Cth).

64 *DPP (Cth) v Galloway* [2014] VSCA 272, [6]-[8], [85]; see also *Giurina v DPP* [2020] VSCA 54, [35]-[36].



While Carter means that there is no common law right in an accused person to the production of or access to documents protected by legal professional privilege, s 123 of the *Evidence Acts 1995* (Cth and NSW), 2001 (Tas), 2008 (Vic) and 2011 (ACT) and the *Evidence (NUL) Act 2011* (NT) grants that right (save for confidential communications between associated defendants and their lawyers or confidential documents prepared by associated defendants and their lawyers). But s 123 will not apply in the context of pre-trial proceedings in any of those jurisdictions.<sup>65</sup>

## Elements of legal professional privilege

### Confidentiality

The mere fact that the persons involved in a communication are the legal adviser and client does not of itself afford the protection of the privilege. To attract privilege, the communication must be, among other things, confidential.<sup>66</sup>

Issues of confidentiality often arise in the context of communications made in the presence of third parties.<sup>67</sup> At common law, the general position is that the presence of a third party, who is neither an employee nor agent of the client, at the time of a communication may deprive that communication of the confidentiality necessary to establish the claim for privilege.<sup>68</sup> However, the question turns on the facts in each case, including whether the presence of the third party was unavoidable,<sup>69</sup> or whether there was an ethical, moral or social obligation of confidentiality.<sup>70</sup>

### Communications

Legal professional privilege is designed to protect communications, whether oral, written or recorded, though not documents per se, and still less the information given by or contained in the document.<sup>71</sup>

*'Legal professional privilege is designed to protect communications, whether oral, written or recorded...'*

### Copies

Copies of non-privileged documents may be privileged if those copies were made for the requisite purpose.<sup>72</sup> On this basis, a non-privileged document copied for the purpose of inclusion in a brief to counsel will be privileged.

A copy of a privileged document will be privileged unless the privilege has been expressly or impliedly waived.<sup>73</sup>

65 *The Evidence Act 1995* (Cth) does not, as stated above, apply to pre-trial proceedings. Further, although the NSW, Tas, Vic, ACT and NT Evidence Acts apply when determining legal professional privilege claims in pre-trial proceedings, the provision in each Act that allows them to do so (s 131A) excludes the application of s 123.

66 *Esso*, [35]; *Daniels*, [9]-[11], [44]; *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Ltd (No 2)* [2014] FCA 481 (*Asahi*), [47].

67 For consideration of this issue under s 119 of the *Evidence Act 1995* (Cth), see *Unsworth v Tristar Steering and Suspension Australia Ltd* [2007] FCA 1082.

68 *Re Griffin* (1887) 8 LR (NSW) 132, 134.

69 *R v Braham & Mason* (1976) VR 547.

70 *New South Wales v Jackson* [2007] NSWCA 279, [41].

71 *Esso*, 79, 82; *Commissioner of Australian Federal Police v Propend Finance* (1997) 188 CLR 501 (*Propend*), 585.

72 *Propend*, 552-3; *Donoghue*, [68]; *Asahi*, [30]; *Kenquist Nominees*, [12]. Possibly (as Brennan CJ proposed in *Propend*, 512), the copy may lose privilege if no copy of the original document is available.

73 *Cadbury Schweppes Pty Ltd v Amcor Ltd* [2008] FCA 88 (*Cadbury Schweppes*), [38]; *Spotless Group Ltd v Premier Building and Consulting Group* (2006) 16 VR 1, [20]-[23].

### Email chains

Given the predominance of email communications in the workplace, it is useful to consider the application of legal professional privilege to email chains. Importantly, when reviewing email communications for the purpose of determining privilege, a distinction must be made between the lead email (the most recent in time, comprising the principal communication) and all other emails in the chain (referred to as subsequent emails in the case cited immediately below). While the privileged status of the lead email is often important to determining whether the email chain in its entirety will be subject to legal professional privilege, that email need not always be made for the dominant purpose of obtaining or giving legal advice in order for other emails in the chain to be subject to privilege. In *Kenquist Nominees*, Thawley J made the following observations:

- (1) If the communication being the lead email was not made for the dominant purpose of obtaining or giving legal advice, then it may nevertheless be appropriate to redact parts of the lead email or subsequent emails in the chain, or attachments to the lead email, if the content or nature of a privileged communication might be inferred from the document if it were left unredacted...
- (2) If the dominant purpose of the communication being the lead email was the giving of legal advice by a retained lawyer, then it may be that the email chain will be privileged because the subsequent emails in the chain are to be regarded, in effect, as copies of documents furnished by the lawyer with the advice being the lead email. The lead email is a communication of legal advice, with the subsequent emails in the chain being components of that communication (in effect, copies of documents) provided by the lawyer for the dominant purpose of providing the legal advice (and perhaps also constituting copies of communications to the lawyer for the purpose of obtaining the advice). If the dominant purpose of the lawyer notionally making the copy of the email chain beneath the lead email was to provide the email chain to the client as part of the communication of legal advice, that email chain is privileged.
- (3) If the dominant purpose of the communication being the lead email was the obtaining of legal advice from a retained lawyer, then the email chain may also be privileged because that email chain is, in effect, a copy of communications provided to the lawyer for the dominant purpose of obtaining legal advice. The forwarding of a chain of emails might constitute or be treated as 'material prepared for submission to the legal adviser' or 'components' of the privileged communication being the lead email: *Propend* at 571. So far as concerns the email chain forwarded with the lead email, the inquiry centres on the dominant purpose of the client in making what is, in effect, a copy of the email chain. It is at the point in time when the email chain is notionally copied (when it is notionally copied by forwarding or replying) that the question of dominant purpose must be analysed... At that time, the whole chain is generally notionally copied (by forwarding or replying) as a component of the lead email, even though it may be that only particular emails in the chain were regarded as relevant or significant to the obtaining of advice. The dominant purpose of making the copy of the chain is often, if not generally, to put particular emails in the chain for submission to the lawyer...<sup>74</sup>

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<sup>74</sup> *Kenquist Nominees Pty Ltd v Campbell (No. 5)* [2018] FCA 853, [19] (quoted in *Zantran Pty Limited v Crown Resorts Limited (No 2)* [2020] FCA 1024, [66]).

The third category above was considered in *Kamasae v Commonwealth (No 2)*.<sup>75</sup> Macaulay J held that forwarding an antecedent chain of emails to a lawyer to obtain advice amounted to making a copy of the email chain for the dominant purpose of providing it to the lawyer for advice. It did not matter that the earlier emails themselves were non-privileged communications.<sup>76</sup>

### **Advice privilege: communications**

For advice privilege, the purpose of a legal adviser's retainer<sup>77</sup> is important in determining whether or not communications with clients were brought into existence for the requisite purpose.<sup>78</sup> Provided the dominant purpose of the retainer is the obtaining and giving of legal advice, then privilege may attach to any communication of a professional nature between a legal adviser and his or her client which touches upon the subject matter of the retainer.<sup>79</sup> Whilst the existence of a retainer is important, in the absence of a retainer, if 'advice is given in pursuance of a request, whether express or implied, made of the lawyer in his professional capacity, or if the circumstances are such that the 'client' would reasonably expect to be given such advice, then it will be privileged'.<sup>80</sup>

Where communications take place between a client and his or her independent legal advisers, or between a client's in-house lawyers and those legal advisers, it is assumed that legitimate legal advice was being sought, absent any contrary indications.<sup>81</sup>

### **Litigation privilege: communications**

Subject to the other requirements, litigation privilege attaches to two broad categories of communications, being those made:

- when litigation is reasonably anticipated or commenced, for the purposes of the litigation (for example, advice regarding the litigation, evidence to be used in the litigation or information that may lead to such evidence being obtained)
- with reference to litigation either reasonably anticipated or commenced, at the request or suggestion of the legal adviser or, even without any such request or suggestion, made for the purpose of being put before the legal adviser to obtain advice or to enable the legal adviser to prosecute or defend an action.<sup>82</sup>

### **Other material**

Privilege also extends to any document which directly reveals, or which allows a reader to infer, the content or substance of a confidential communication.<sup>83</sup> Provided the underlying communication is privileged, privilege will extend to such documents without the necessity of again applying the dominant purpose test.<sup>84</sup>

75 [2016] VSC 404, [43]-[47].

76 *Kenquist Nominees*, [20].

77 By 'retainer' it is meant the most common understanding of that term, being a contract, express or implied, in which a lawyer or legal entity provides services in exchange for a fee.

78 *WorkCover*, [88].

79 *Balabel*, 330; *AWB v Cole (No. 5)*, 47-48; *Dalleagles*, 332-3; DSE, [45].

80 *Brookfield*, [21].

81 *Kennedy*, 191-2.

82 *Sterling*, 245-6; *Australian Securities and Investments Commission v Mining Projects Group Ltd* [2007] FCA 1620, [27]; *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia* [2009] NSWSC 225 (*Buzzle*), [15].

83 *Propend*, 569; *AWB v Cole (No. 1)*, 417.

84 *Standard Chartered Bank of Australia v Antico* (1995) 36 NSWLR 87, 91; *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd* [1992] 2 Lloyd's Rep 540.

Whether or not a document discloses a privileged communication is a question of objective fact which turns upon what the document states or conveys, either expressly or by reasonable inference.<sup>85</sup> The mere fact that a document is based (very closely) upon a privileged communication is insufficient for privilege to apply on this basis. Rather, the document, if disclosed, must allow a reader to know or infer the nature, content or substance of the privileged communication.<sup>86</sup>

Privilege may also extend to 'legal work' carried out by the legal adviser for the client, including research memoranda, collations and summaries of documents, draft pleadings, draft agreements, draft affidavits and chronologies, whether or not they are actually communicated to the client.<sup>87</sup>

Subject to the dominant purpose test, advice privilege extends to notes, drafts, charts, diagrams, spreadsheets and the like prepared by the client as a way of organising information to be communicated to the legal adviser, whether or not they are actually communicated to the legal adviser.<sup>88</sup>

Litigation privilege extends to material that is not communicated but which is gathered by the legal adviser or client for the dominant purpose of use in, or in relation to, existing or reasonably anticipated litigation.<sup>89</sup> Examples of documents that may be privileged on this basis include drafts of pleadings, statements from potential witnesses, surveillance film and other materials which have come into existence as materials for the lawyer's brief.<sup>90</sup> For a discussion of materials provided to an expert see the discussion of Expert reports below.

### **Non-privileged communications**

Privilege does not attach to:

- communications in furtherance of an illegal or improper purpose (see below)
- documents which are the means of carrying out, or are evidence of, transactions which are not themselves the giving or receiving of legal advice (such as contracts and deeds) or part of the conduct of actual or reasonably anticipated litigation<sup>91</sup>
- facts the legal adviser observes while acting in the course of the retainer<sup>92</sup>
- finalised proofs of evidence created by a party for the purpose of being served on the party's opponent in litigation, and in fact served on that opponent.<sup>93</sup>

### **Dominant purpose**

Common law privilege and statutory privilege each turn upon the 'dominant purpose test'.<sup>94</sup> Under this test, privilege will only apply if the communication was made, or the document was prepared, for the dominant purpose of the legal adviser providing legal advice or services.<sup>95</sup>

85 *AWB v Cole (No. 1)*, 417.

86 *Ibid* 420.

87 *AWB v Cole (No. 5)*, 46; *AWB v Cole (No. 1)*, 415-6; *Saunders v Commissioner, Australian Federal Police* (1998) 160 ALR 469 (*Saunders*), 472; *Asahi*, [38].

88 *Saunders*, 471-2; *AWB v Cole (No. 5)*, 46.

89 *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 (*Maurice*), 490; *Dingle v Commonwealth Development Bank of Australia* (1989) 91 ALR 239, 242.

90 J D Heydon AC QC, *Cross on Evidence* (Lexis Nexis: Section 4 Legal Professional Privilege, March 2020), [25225].

91 *Baker*, 122.

92 *Z v New South Wales Crime Commission* (2007) 231 CLR 75, [35]; *Commissioner of Taxation v Coombes* (1999) 92 FCR 240; cf *Hamdan v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 1267.

93 *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd* (2009) 174 FCR 547, [37].

94 *Esso*, [61]; ss 118 and 119 of the *Evidence Act 1995* (Cth).

95 *Esso*, [35]-[61]; *Daniels*, [9]; *Kenquist Nominees*, [10].

The dominant purpose test brings within the scope of privilege a document brought into existence for the purpose of legal advice notwithstanding that some ancillary use of the document was contemplated at the time of its creation.<sup>96</sup>

The dominant purpose of a document is to be determined at the time it is brought into existence, not the time of its communication.<sup>97</sup>

The purpose for which a document is brought into existence is a question of objective fact, which is to be determined by reference to the evidence, the nature of the document and the parties' submissions.<sup>98</sup> Notwithstanding that the purpose must be determined objectively, evidence of subjective purpose is relevant and although not necessarily conclusive, can be decisive.<sup>99</sup> Evidence of the intended use or uses of a document by the person who created the document or the person who procured its creation (for example, a legal adviser) will be relevant, but not conclusive.<sup>100</sup> In appropriate circumstances, it may be necessary to examine the evidence concerning the purpose of other persons involved in the hierarchy of decision making or consultation that lead to the creation of the document and its subsequent communication.<sup>101</sup>

Whilst there may be several purposes for which a document is brought into existence, there can only be one dominant purpose.<sup>102</sup> The dominant purpose is 'the ruling, prevailing, paramount or most influential purpose'. There will be no dominant purpose where there are two purposes and both are of equal weight, nor where there are 'several purposes of roughly similar weight'.<sup>103</sup> Evidence in support of a claim of privilege is discussed below.

*'The mere fact that advice is given by a qualified legal adviser does not mean that privilege attaches to that advice.'*

## Professional relationship

### General requirements

The mere fact that advice is given by a qualified legal adviser does not mean that privilege attaches to that advice.

Subject to the other requirements, privilege attaches to communications between a legal adviser and client only if:

- the advice is provided by the legal adviser in his or her capacity as a professional legal adviser
- the legal adviser is competent and independent, the latter involving 'professional detachment', 'objective impartiality' or 'an absence of fear or favour'.<sup>104</sup>

Whether in any particular case the relationship between the legal adviser and client is such as to give rise to privilege is a question of fact.<sup>105</sup> The onus falls on the party claiming the privilege to adduce evidence going to these requirements, otherwise the

96 *Sparnon v Apand* (1996) 68 FCR 322, 328.

97 *Barnes*, [5]; see also *Pratt Holdings*, 137-8 (where Finn J said that privilege does not extend to 'third party advices to the principal simply because they are then "routed" to the legal adviser').

98 *Grant v Downs* (1976) 135 CLR 674 (*Grant*), 677; *Commissioner of Taxation of the Commonwealth of Australia v Pratt Holdings Pty Ltd* [2005] FCA 1247 (*FCT v Pratt*), [30]. For a summary of the cases considering the dominant purpose test see: *Australian Crime Commission v Stewart* [2012] FCA 29, [76]-[82].

99 *Esso*, [172]; *AWB (No 5)*, [44(2)]; *Archer Capital*, [11]; *Asahi Holdings*, [32]; *Kenquist Nominees*, [11].

100 *Pratt Holdings*, 135-6; *FCT v Pratt*, [30]; *Hartogen Energy Ltd (in liq) v Australian Gas Light Co* (1992) 36 FCR 557, 569.

101 *AWB v Cole (No. 1)*, 412.

102 *Mitsubishi Electric*, [10]; *AWB v Cole (No. 1)*, 411; *Archer Capital*, [11]; *Kenquist Nominees*, [11].

103 *FCT v Pratt*, [30]; *AWB v Cole (No. 1)*, 411.

104 *Re Proudfoot v HREOC* (1992) 28 ALD 734 (*Re Proudfoot*), 740; *Rich v Harrington* [2007] FCA 1987 (*Rich*), [36]-[46].

105 *Waterford*, 62; *Re Proudfoot*, 740.

claim for privilege may fail.<sup>106</sup> The competence of the legal adviser may be established by proof of the legal adviser's admission to practise as a barrister or solicitor.<sup>107</sup> As to independence, the question principally turns upon the nature of the relationship between the legal adviser and client.<sup>108</sup>

### In-house lawyers

An employed or in-house lawyer may claim privilege on behalf of his or her employer as client.<sup>109</sup> Legal professional privilege may attach to confidential communications between an employer and its employed or 'in-house' solicitor or counsel provided that the employer consulted the employed solicitor in a 'professional capacity in relation to a professional matter and the communications are made in confidence and arise from the relationship of lawyer and client'.<sup>110</sup>

*'An employed or in-house lawyer may claim privilege on behalf of his or her employer as client.'*

Whilst there has been considerable judicial debate about whether a requirement of 'independence' must be evidenced,<sup>111</sup> it has been held that 'the better view is that there is no separate requirement to prove that the in-house lawyer was acting independently of any pressure from his or her employer, or had any requisite measure of independence, so long as the in-house lawyer was acting in his or her professional capacity as his or her employer's lawyer and the communication otherwise meets the dominant purpose test'.<sup>112</sup> However, an in-house lawyer will lack the necessary independence if their advice is at risk of being compromised by his or her personal loyalties, duties, and interests.<sup>113</sup>

Potential for abuse of the privilege (for example, where communications between a legal practitioner and client are made subject to privilege claims when, in truth, the communications have been made by the lawyer acting in some other capacity) is mitigated by the safeguards referred to in the judgments of *Waterford*<sup>114</sup> and *Kearney*.<sup>115</sup>

- the requirement that the lawyer be admitted to practise and so subject to regulatory oversight, and
- the ability of the court to inspect the documents for itself.<sup>116</sup>

The absence of a practising certificate, whilst a very relevant factor in determining whether legal professional privilege exists in respect of advice given by in-house legal representatives, is not determinative of the existence of privilege.<sup>117</sup> Ultimately, each case must be considered in the light of its circumstances, including the nature of, and parties to, the dispute about which advice is given.

<sup>106</sup> *Telstra Corporation Ltd v Minister for Communications, Information Technology and the Arts (No. 2)* [2007] FCA 1445, [36]-[39]; *Rich*, [43].

<sup>107</sup> *Waterford*, 70.

<sup>108</sup> *Rich*, [46].

<sup>109</sup> *Kearney*, 530-1.

<sup>110</sup> *Waterford*, 100.

<sup>111</sup> *Archer Capital*, [59]-[73].

<sup>112</sup> *NSW Ports*, [48]; *Martin v Norton Rose Fulbright Australia (No 2)* [2019] FCA 96 (*Norton Rose*), [187].

<sup>113</sup> *Seven Network News v News Ltd* (2005) 225 ALR 672, 674.

<sup>114</sup> *Waterford*.

<sup>115</sup> *Kearney*.

<sup>116</sup> *Norton Rose*, [190]-[191].

<sup>117</sup> *Commonwealth v Vance* (2005) 157 ACTR 47, [30]; *Aquila Coal Pty Ltd v Bowen Central Coast Pty Ltd* [2013] QSC 82, [23].

The Office of Legal Services Coordination has issued a guidance note in relation to in-house lawyers of Australian Government departments and agencies.<sup>118</sup> The note sets out the factors relevant to the Attorney-General's consideration of whether to approve the use of in-house lawyers to conduct court litigation as solicitor on the record or as counsel by a non-corporate Commonwealth entity. The guidance note indicates that one of the factors to be considered by the Attorney-General is whether the lawyers are supervised by a senior lawyer, and whether that senior lawyer has a practising certificate, as well as the general nature of supervisory arrangements, and how these fit within the overall structure of the entity.

## Practice and procedure

### Curial practice and procedure

In a curial situation, the court determines whether the privilege is substantiated. The process for determining the privilege claim will usually be set out in the court rules.<sup>119</sup>

### Non-curial practice and procedure

Generally, non-curial bodies cannot make legally binding decisions on privilege claims. In these situations, affected persons can agree on a process to determine the claim or an affected person can commence court proceedings for this purpose.<sup>120</sup>

Some non-curial bodies have been given express powers to determine contested privilege claims (for example, s 6AA(2) of the *Royal Commissions Act 1902* (Cth)).<sup>121</sup>

The High Court has acknowledged the 'procedural difficulties' that arise in non-curial contexts where there is no established procedure for determining contested privilege claims.<sup>122</sup> In the context of search warrants, the view has been taken that these difficulties could be overcome if 'members respectively of the police force and the legal profession co-operate in a reasonable way'.<sup>123</sup>

The Australian Federal Police and Australian Tax Office have each developed guidelines with the Law Council of Australia in relation to the exercise of their powers.<sup>124</sup> The guidelines are now quite dated, and revised versions are yet to be published.

### Reasonable opportunity to claim the privilege

The recipient of a compulsory production notice must be given a reasonable opportunity to claim privilege on his or her behalf or, in the case of lawyers, on behalf

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<sup>118</sup> Guidance Note 2, *Use of in-house lawyers for court litigation* <<https://www.ag.gov.au/sites/default/files/2020-03/Guidance-note-2-use-of-in-house-lawyers-for-court-litigation.pdf>>.

<sup>119</sup> See, for example, *Federal Court Rules 2011* rr 2.32, 7.26, 20.02, 20.19, 20.31 and more generally, *Federal Court Subpoenas and Notice to Produce Practice Note (GPN-SUBP)*.

<sup>120</sup> *Arno v Forsyth* (1986) 65 ALR 125, 129; see also *AWB v Cole* (No. 1), 390-2 as to the jurisdiction of the Federal Court to declare that legal professional privilege attaches to a document the production of which has been compulsorily required.

<sup>121</sup> For a current example of how a Commonwealth Royal Commission addresses privilege see *Practice Guideline 2: Legal Professional Privilege*, 10 August 2020, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability <<https://disability.royalcommission.gov.au/system/files/2020-08/Practice%20guideline%202%20-%20Legal%20professional%20privilege.pdf>>.

<sup>122</sup> *Baker*, 97.

<sup>123</sup> *Ibid*; *Oke v Commissioner of the Australian Federal Police* [2007] FCA 27, [102].

<sup>124</sup> The ATO guidelines can be found at <<https://www.lawcouncil.asn.au/publicassets/d120289c-e1d6-e611-80d2-005056be66b1/01-Policy-Guideline-ATO-Access-to-Lawyers'-Premises.pdf>>. The AFP guidelines can be found at <<https://www.lawcouncil.asn.au/publicassets/0321289c-e1d6-e611-80d2-005056be66b1/97-Policy-Guideline-Execution-of-AFP-Search-Warrants-on-Lawyers'-Premises.pdf>>.

of their clients.<sup>125</sup> However, the investigating authority need not give the client of the recipient, as distinct from the recipient, a reasonable opportunity of asserting privilege.<sup>126</sup> Nor is there any general requirement to notify the client that a notice has been issued to another person, so that the client may challenge the validity of the notice on grounds of privilege.<sup>127</sup>

In the context of a search and seizure, an investigating authority will not infringe legal professional privilege by the seizure of a document without reading it.<sup>128</sup> Where there is no one present to claim the privilege, or there is a blanket privilege claim made and it is reasonably apparent that the claim is not sustainable, an investigating authority may undertake a cursory review of the documents for the limited purpose of determining whether it may be covered by privilege, at least where the review is conducted prior to the seizure and for the purpose of determining whether the documents properly fall within the search warrant.<sup>129</sup> However, it is unclear whether this principle authorises the review of documents after their seizure.

### ALRC recommended changes to non-curial practice and procedure

In its final report entitled *Privilege in Perspective Report-Client Legal Privilege and Federal Investigatory Bodies*, the ALRC described the existing practices and procedures for determining privilege claims in non-curial situations as ‘inadequate or uncertain - causing delay and hindering access by federal bodies to information not the subject of a claim for privilege’ (at [8.1]).<sup>130</sup> The ALRC has recommended significant changes in relation to non-curial practice and procedure,<sup>131</sup> however the recommended changes are yet to be adopted.

## Evidence in support of a claim

The party claiming the privilege bears the onus of proving the facts giving rise to the claim,<sup>132</sup> even though the other party may have applied for relief by way of an order for production for inspection or otherwise, such as a declaration pursuant to section 39 of the *Judiciary Act 1903* (Cth) that the documents are not subject to legal professional privilege.<sup>133</sup>

Privilege is not established by mere verbal formula or assertion.<sup>134</sup> In such a situation, a trial judge may give little or no weight to such evidence.<sup>135</sup>

<sup>125</sup> *JMA Accounting Pty Ltd v Carmody* (2004) 139 FCR 537 (*JMA Accounting*), 542, 544. In a different context, Lander J held that an administrative decision maker may be obliged to warn or inform a person of their common law right to claim legal professional privilege (*SZHWY*, [73]-[77]). His Honour took the view that the Refugee Review Tribunal (RRT) committed a jurisdictional error by failing to do so. In *SZHWY*, Rares J held that the RRT committed a jurisdictional error in asking and pursuing questions to elicit privileged communications ([136]-[163], [193]). See also the discussion of jurisdictional error in *BW019 v Minister for Immigration* [2020] FCAFC 181, [100]-[109], [138] where the Full Court upheld the decision of the primary judge that there was no jurisdictional error on the part of the Tribunal as the failure by the Tribunal to advise the appellant that he could claim legal professional privilege did not deprive him of a favourable outcome and so was not material.

<sup>126</sup> *MM*, [35]-[37] (as to the obligation of the recipient to claim the privilege, see above under the heading *Who does the privilege belong to?*)

<sup>127</sup> *May v Commissioner of Taxation* (1999) 92 FCR 152, [38].

<sup>128</sup> *JMA Accounting*, 542; *Allitt v Sullivan* [1988] VR 621, 640.

<sup>129</sup> *JMA Accounting*, 542, 544, cited in *CFMEU v Commissioner of the Australian Federal Police (No 2)* [2016] FCA 833.

<sup>130</sup> ALRC, *Privilege in Perspective Report-Client Legal Privilege and Federal Investigatory Bodies*, Report No. 107 (January 2008), <http://www.austlii.edu.au/au/other/lawreform/ALRC/2007/107.html> (*Privilege Report*).

<sup>131</sup> *Privilege Report*, Ch 8.

<sup>132</sup> *Grant*, 689; *Mitsubishi Electric v Victorian WorkCover* [2002] VSCA 59 (*Mitsubishi*), [11]; *Kenquist Nominees*, [18].

<sup>133</sup> *Deputy Commissioner of Taxation v Nicholls (No 3)* [2009] FCA 785, [16], [25]-[26], [128]. See also *Deputy Commissioner of Taxation v Nicholls (No 2)* [2009] FCA 234, [5].

<sup>134</sup> *Grant*, 689.

<sup>135</sup> *Kennedy*, [17]-[21].



Evidence led in support of a privilege claim should address the substance of the claim for privilege by ‘identifying the circumstances in which the relevant communication took place and the topics to which the instructions or advice were directed’.<sup>136</sup>

In ruling on a contested privilege claim, the court may inspect the relevant documents.<sup>137</sup> The court’s power to inspect documents exists not to facilitate proof by a claimant of the facts required to sustain the claim, but to provide a means of enabling a claim to be scrutinised and tested. As such, inspection of documents is at the discretion of the judge who will only do so if there is good reason.<sup>138</sup> The courts have acknowledged that ‘in many instances the character of the documents the subject of the claim will illuminate the purpose for which they were brought into existence’.<sup>139</sup> If the power of inspection is to be exercised, the privilege claim may be determined by a judge other than the trial judge.<sup>140</sup> Further, the person who leads evidence in support of the privilege claim may be cross-examined.<sup>141</sup>

## Illegal or improper purpose

### Commonwealth Evidence Act

Section 125 of the *Evidence Act 1995* (Cth) provides that a confidential communication will not be privileged if made or prepared in furtherance of a fraud, offence, an act attracting penalty, or a deliberate abuse of a power conferred by an Australian law (as defined).<sup>142</sup>

### Common law

At common law, no privilege arises in respect of a communication made for a purpose that is contrary to the public interest; that is, where the communication is made in furtherance of an illegal or improper purpose, whether or not the legal adviser knows of that purpose.<sup>143</sup>

For the purposes of the illegal or improper purpose principle, the relevant distinction is between a communication made for the purpose of being guided or helped in achieving an illegal or improper purpose, which is a non-privileged communication, as compared with a communication made for the purpose of seeking advice in relation to past conduct, which may be privileged.<sup>144</sup>

However, a communication in relation to past conduct will *not* be privileged if the communication is for the purpose of covering up a crime or fraud, or for the purpose of defeating or delaying recovery by the victims of a crime or fraud.<sup>145</sup>

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<sup>136</sup> *AWB v Cole* (No. 5), [44]; *Kennedy*, [12]-[21]; *National Crime Authority v S* (1991) 29 FCR 203 (*National Crime Authority*), 211; *Hancock v Rinehart (Privilege)* [2016] NSWSC 12 (*Hancock*), [7], [27], [35]; *NSW Ports*, [49].

<sup>137</sup> *Grant*, 677, 689; *Esso*, 70.

<sup>138</sup> *Hancock*, [31]; *NSW Ports*, [50].

<sup>139</sup> *Grant*, 689.

<sup>140</sup> *Rich*, [7].

<sup>141</sup> *Esso*, 70; *National Crime Authority*, 211; *Hancock*, [28]-[29].

<sup>142</sup> For the general principles in relation to s 125 of the *Evidence Act 1995* (Cth), see *Kang v Kwan* [2001] NSWSC 698.

<sup>143</sup> The general principles relating to this principle are discussed in detail in *AWB v Cole* (No. 5), [210]-[233].

<sup>144</sup> *P & V Industries Pty Ltd v Porto* [2007] VSC 113, [27].

<sup>145</sup> *Finers v Miro* [1991] 1 WLR 35, 40; *Derby & Co Ltd v Weldon* [1990] 1 WLR 1156, 1174; *Hodgson v Amcor Ltd*; *Amcor Ltd v Barnes* (No 2) [2011] VSC 204, [68].

The illegal or improper purpose principle covers all forms of fraud and dishonesty, including fraudulent breach of trust, fraudulent conspiracy, trickery and ‘sham’ contrivances,<sup>146</sup> as well as cases of fraud by third parties.<sup>147</sup>

The privilege is not displaced by the mere allegation of an illegal or improper purpose.<sup>148</sup> However, those seeking to exclude the privilege do not have to prove that the communication was in furtherance of an illegal or improper purpose. Rather, the party seeking to resist the assertion of privilege must adduce prima facie admissible evidence that the allegation has some foundation in fact.<sup>149</sup>

Examples of communications made in the pursuit of improper purposes include:

- documents brought into existence in furtherance of a prima facie wrongful claim for tax deductions<sup>150</sup>
- evasion of the law by a government, by knowingly making regulations not contemplated by an Act as part of a scheme to defeat a land claim (i.e. a deliberate abuse of statutory power)<sup>151</sup>
- documents deliberately and dishonestly structured so as to misrepresent the true nature and purpose of certain payments and to work a trickery on the United Nations<sup>152</sup>
- communications which assisted in furthering the sale of shares in a company at below value.<sup>153</sup>

## Waiver of privilege

### Commonwealth Evidence Act

Section 122(1) of the *Evidence Act 1995* (Cth) provides that the Act does not prevent the adducing of evidence given with the consent of the client.<sup>154</sup>

Subsection 122(2) of the *Evidence Act 1995* (Cth) relevantly provides that privilege is lost if the client has acted in a way that is inconsistent with the maintenance of the privilege. The client will be taken to have so acted if the client knowingly and voluntarily disclosed the substance of the evidence to another person, or the substance of the evidence has been disclosed with the express or implied consent of the client.<sup>155</sup>

However, there will be no loss of privilege if, among other things, the disclosure was made:

- in the course of making a confidential communication or preparing a confidential document<sup>156</sup>

<sup>146</sup> *Baker*, 409-10; *R v Bell*; *Ex parte Lees* (1980) 146 CLR 141, 147, 156, 159, 161; *Kearney*, 514-5; *Propend*, 514; see also Heydon (n 93) [25290].

<sup>147</sup> *Clements, Dunne & Bell Pty Ltd v Commissioner of Australian Federal Police* (2001) 188 ALR 515 (*Clements*), [220].

<sup>148</sup> *Propend*, 559, 579, 587.

<sup>149</sup> *Propend*, 553, 559, 579, 587; *AWB v Cole (No. 5)*, 89; *In the matter of ACN 005408 Pty Ltd (formerly TEAC Australia Pty Ltd)* [2008] FCA 964, [2].

<sup>150</sup> *Clements*.

<sup>151</sup> *Kearney*; cf *Health Insurance Commission v Freeman* (1998) 88 FCR 544, where the improper or illegal purpose principle was held not to apply to an inadvertent abuse of statutory power, such as one caused by a genuine but mistaken view of the scope of the relevant power.

<sup>152</sup> *AWB v Cole (No. 5)*.

<sup>153</sup> *Deppro Pty Ltd v Hannah* [2009] 1 Qd R 1.

<sup>154</sup> The concept of ‘consent’ in s 122(1) has been held to include both express and implied (or imputed) consent (*Telstra Corporation Ltd v BT Australasia Pty Ltd* (1998) 85 FCR 152, 168; *Singapore Airlines v Sydney Airports Corporation* [2004] NSWSC 380 (*Singapore Airlines*), [55]).

<sup>155</sup> *Evidence Act 1995* (Cth) s 122(3).

<sup>156</sup> *Ibid* s 122(5)(a)(i).

- as a result of duress or deception<sup>157</sup>
- under compulsion of law.<sup>158</sup>

Section 122 was substantially rewritten in 2009 to adopt the approach of the High Court in *Mann*.<sup>159</sup> It has been acknowledged that s 122(2) is formulated differently from the common law principle, however the relevance of the origin of the formulation is that ‘the common law cases on the question of waiver of privilege continue to be relevant to the question arising under s 122 of the Evidence Act’.<sup>160</sup>

If privilege is waived in respect of an otherwise privileged communication or document under s 122, the waiver extends to such associated documents as are reasonably necessary to enable a proper understanding of that communication or document.<sup>161</sup>

### Common law

At common law, a person who is entitled to the benefit of the privilege can waive that benefit by either:

- intentionally disclosing a privileged communication (‘express waiver’); or
- engaging in conduct that is inconsistent with the maintenance of the confidentiality that the privilege protects (‘implied waiver’).

Not surprisingly, waiver (especially implied waiver) remains one of the most contested areas of legal professional privilege.<sup>162</sup>

#### Express waiver

Express waiver occurs where a party deliberately and intentionally discloses a privileged communication.<sup>163</sup>

Express waiver commonly arises upon the service of otherwise privileged documents (such as witness statements or affidavits) on the other party to proceedings.

Further examples include providing privileged material to a potential adversary,<sup>164</sup> and the failure to object to the disclosure of privileged information in cross-examination.<sup>165</sup>

*‘Express waiver occurs where a party deliberately and intentionally discloses a privileged communication.’*

#### Implied waiver

Implied waiver arises, as per the test formulated in *Mann*, where the conduct of the party entitled to the privilege is *inconsistent* with the maintenance of the confidentiality which the privilege is intended to protect.<sup>166</sup> The assessment of such inconsistency is informed, where necessary, by considerations of fairness; though the assessment is not by reference to some overriding principle of fairness operating at large.<sup>167</sup> Whether implied waiver has occurred is a question of fact and degree, and must be answered by reference to the particular context and circumstances of the case at hand.<sup>168</sup>

<sup>157</sup> *Ibid* s 122(5)(a)(ii).

<sup>158</sup> *Ibid* s 122(5)(a)(iii); *Ingot Capital v Macquarie Equity* [2008] NSWSC 25; *New Cap Reinsurance Corporation Ltd (in liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258.

<sup>159</sup> *Mann; Matthews v SPI Electricity Pty Ltd* [2013] VSC 33 (*Matthews*), [35].

<sup>160</sup> *Matthews*, [36].

<sup>161</sup> *Evidence Act 1995* (Cth) s 126. For the general principles applicable under ss 122 and 126, see *MI Ubase*.

<sup>162</sup> *Dreyfus v Attorney-General* (Cth) [2021] AATA 249, [20]-[21] (*Dreyfus*). For another recent case discussing the principles regarding waiver, see *Commonwealth Director of Public Prosecutions v Citigroup Global Markets Australia Pty Ltd* [2021] FCA 511, [128]-[145].

<sup>163</sup> *Goldberg v Ng* (1994) 33 NSWLR 639, 670.

<sup>164</sup> *Asahi*, [83].

<sup>165</sup> *Banksia Mortgages Ltd v Croker* [2010] NSWSC 535, [38].

<sup>166</sup> *Mann v Carnell* (1999) 201 CLR 1 (*Mann*), [29].

<sup>167</sup> *Ibid* [29].

<sup>168</sup> *Ibid* [27].

The onus of proof falls upon the party alleging the waiver.<sup>169</sup> Privilege is not waived unless there is clear conduct or language which evidences an intention to waive privilege either expressly or by necessary implication.<sup>170</sup>

The *Mann* inconsistency test focuses upon the conduct of the client, not their subjective intention.<sup>171</sup> Recently, the NSW Court of Criminal Appeal explained that ‘the relevant inquiry in relation to waiver only considers ‘fairness’ as an aspect of considering whether there is an inconsistency between the conduct of the privilege holder and the maintenance of the privilege’.<sup>172</sup>

In *Kinghorn*, the NSW Court of Criminal Appeal unanimously overturned a decision of the NSW Supreme Court, confirming that in criminal matters, the prosecution’s duty of disclosure does not override a claim for privilege. In reaching this decision, the NSW Court of Criminal Appeal found that the test for whether a prosecutor (or prosecuting agency) is to be imputed with waiver ‘is not informed by the prosecutorial duty of disclosure and an imputed waiver does not arise, per se, from the continuation of a prosecution without disclosure of privileged material that is caught by the duty’.<sup>173</sup> The Court seemed to accept that the doctrine of imputed waiver, as articulated by the High Court in *Mann*, is limited to preventing a holder of privilege from abusing that privilege to ‘create an inaccurate perception of [a] protected communication’. It is not a means of ‘serving a wider public interest in ensuring a fair trial’.<sup>174</sup>

*‘Depending on the circumstances, fairness may be relevant to the question of inconsistency.’*

Depending on the circumstances, fairness may be relevant to the question of inconsistency.<sup>175</sup> Fairness is particularly relevant where a privilege holder makes a partial disclosure of legal advice for the purpose of advancing their position in litigation.<sup>176</sup> In fact, there is some doubt as to whether fairness may be sensibly applied outside of the litigation context.<sup>177</sup>

The question of implied waiver turns upon the facts of each case, including the objective purpose of the relevant disclosure.<sup>178</sup> Implied waiver has been found where there has been a disclosure of legal advice for a forensic or commercial purpose.<sup>179</sup> There is some authority for the proposition that the partial disclosure of legal advice for the purpose of explaining the reasonableness of the process adopted by the government may not amount to a waiver of privilege, at least where the disclosure is unconnected with the respective positions of the parties in litigation.<sup>180</sup>

169 *Nine Films & Television Pty Ltd v Ninox Television Ltd* (2005) 65 IPR 442 (*Ninox*), [21].

170 *Ninox*, [5]; *RCI Pty Ltd v Commissioner of Taxation* (2009) 76 ATR 591, [39].

171 *Mann*, [29].

172 *Mann*, [13], cited in *Kinghorn*, [153].

173 *Kinghorn*, [172].

174 *Ibid*, [171]. The NSWCCA also found that the CDPP’s functions as ‘lawyer’ (in advising other government agencies) and as ‘client’ (in receiving advice from lawyers in her office) are not mutually exclusive, and therefore that the CDPP’s privilege in a communication within the CDPP’s office is not lost merely because it relates to the CDPP’s function of advising other agencies ([60]-[66]).

175 *Dreyfus*, [26].

176 *Secretary, Department of Justice v Osland* (2007) 95 ALD 380, [19]; approved in *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 (*Osland*), 296-7 [44]-[45], 298-9 [48]-[49].

177 *AWB v Cole (No. 5)*, [68]. Young J noted that ‘[f]airness presupposes a balancing of interests between parties who are in dispute. In that context, partial disclosures raise a question of fairness because there is the capacity to mislead one party to the dispute to his or her detriment’.

178 *Mann*, [34]; *Osland*, 298-299 [49]; *Bennett v CEO of Customs* (2004) 140 FCR 101 (*Bennett*), [6], [68].

179 *Bennett*, [68].

180 *Osland*, 298-299 [48]-[49]; *British American Tobacco Australia v Secretary, Department of Health and Ageing* (2011) 281 ALR 75 (*British American Tobacco*); *College of Law Ltd v Australian National University* [2013] FCA 492, [36].

The disclosure of a privileged communication to a third party does not necessarily constitute a full, as opposed to limited, waiver of privilege. Rather, the courts have held that, where privileged communications are disclosed to a third party for a limited and specific purpose, privilege may be waived for that limited and specific purpose as against the third party, but not as against others, including the privilege holder's opposing litigant.<sup>181</sup> However, in order to constitute such a limited waiver, there must be no inconsistency between the waiving of privilege for a third party and the maintenance of the privilege as against the rest of the world.<sup>182</sup> The privilege holder must, for example, retain full control of further dissemination of the relevant communication.<sup>183</sup>

Where there is no common interest between the parties,<sup>184</sup> confidentiality may be lost if a document is disclosed without adequate restrictions to preserve confidentiality, even if the document is marked 'privileged and confidential'.<sup>185</sup> One way to secure the confidentiality of a document is by express agreement which sets out the basis upon which disclosure is made and the limitations upon its further use. Certain regulatory bodies, such as ASIC and the Fair Work Ombudsman, allow those making voluntary disclosures of privileged documents to enter into such agreements.<sup>186</sup>

Filing and service of affidavits, without more, constitutes a full waiver of privilege.<sup>187</sup> However, there may be a limited waiver of privilege where a witness statement or affidavit is provided to a party subject to conditions that the party may use it only for internal purposes, may not read it in court, may not place it into evidence and may not otherwise rely on it in examination or the proceedings generally.<sup>188</sup>

At common law, there may be no waiver of privilege where the disclosure is made under compulsion of law.<sup>189</sup> There may also be no waiver of privilege where the disclosure is between parties with a common interest for the purpose of 'common interest privilege'.<sup>190</sup>

Ultimately, whether or not the disclosure of advice to a third party amounts to a waiver of privilege will depend on all the circumstances surrounding the particular disclosure.<sup>191</sup>

**There are 5 areas (explored further below) in which the question of implied waiver commonly arises:**

- (i) the partial disclosure of legal advice
- (ii) where a party's state of mind is in issue in proceedings
- (iii) where there is a disclosure of advice within the Commonwealth
- (iv) waiver of privilege and expert reports
- (v) inadvertent disclosure.

<sup>181</sup> *Mann*, [29]; *Network Ten Ltd v Capital Television Holdings Ltd* [1995] 36 NSWLR 275 (*Network Ten*), 284; *British Coal Corporation v Dennis Rye Ltd (No 2)* [1988] 1 WLR 1113; *Cadbury Schweppes*, [18], [43]-[45]; *Cantor v Audi Australia Pty Ltd* [2016] FCA 1391 (*Cantor*), [88], [123]-[125], [136]-[140]; *Re Northern Energy Corporation Ltd* (2020) 147 ACSR 572, [60]-[65], [70].

<sup>182</sup> *Cantor*, [136].

<sup>183</sup> *Cadbury Schweppes*, [18].

<sup>184</sup> For a brief description of common interest privilege, see n 6.

<sup>185</sup> See *Asahi*, [74]-[85].

<sup>186</sup> See ASIC's [Information Sheet 165](#) and [Voluntary Confidential Legal Professional Privilege Disclosure Agreement](#). See the Fair Work Ombudsman's [Legal Professional Privilege Policy](#). Note that while disclosure agreements are advantageous to a regulator as they allow it to receive documents subject to legal professional privilege, there are some drawbacks to such agreements; the relevant documents would be subject to very strict use requirements, for example.

<sup>187</sup> *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd* (2009) 174 FCR 547, [97].

<sup>188</sup> *Cadbury Schweppes*, [18].

<sup>189</sup> *AWB v Cole (No. 5)*, 69.

<sup>190</sup> *Network Ten*, 279; see also *Rich*, [63]-[77]. For a brief description of common interest privilege, see n 6 above.

<sup>191</sup> *Osland*, 296-299 [44]-[49].

(i) *Partial disclosure*

Partial disclosure of legal advice (such as the substance, gist or conclusion of the advice) can amount to a waiver of privilege over the whole of that advice. Waiver by partial disclosure commonly arises where a party writes to another asserting that it has legal advice to a particular effect, so as to emphasise and promote the strength and substance of the case to be made against them.

The mere reference to advice will not amount to a waiver of privilege and it is not likely that privilege will be waived by an assertion that advice has been taken and the mere fact that action is then taken.<sup>192</sup> The position may be different if the advice and action are linked so that it is clear that the advice was that the action be taken.

The High Court has affirmed that, if there is partial disclosure of legal advice, the appropriate test to determine whether a privilege claimant has waived privilege over a document is the *Mann* inconsistency test. The High Court has also acknowledged that a limited disclosure of the existence and the effect of legal advice could be consistent with maintaining confidentiality in the actual terms of the advice. Whether, in a given context, a limited disclosure of the existence and effect of legal advice is inconsistent with maintaining confidentiality in the terms of the advice will depend on the circumstances of the case.<sup>193</sup>

Partial disclosure of the purpose and reasoning behind an advice, included in an affidavit prepared as part of court proceedings, may waive privilege if it has been included to explain the rationale for a particular transaction or to secure a forensic advantage in the proceedings.<sup>194</sup>

Where privileged material has been disclosed, subject to small yet significant redactions, privilege over the redacted part of the document may be found to have been impliedly waived on the basis that the redaction is inconsistent with the disclosure and the maintenance of the privilege.<sup>195</sup>

(ii) *Issue waiver where a party's state of mind is in issue in proceedings*

The question of waiver may arise in cases where a party's state of mind is put in issue on the pleadings, whether by claim or defence. This is known as 'issue waiver'. Being a form of implied waiver, issue waiver is governed by the *Mann* inconsistency test.<sup>196</sup>

The following principles have emerged in cases of this kind:

1. Issue waiver turns upon the facts of each case – earlier cases will provide limited guidance only, unless they arise out of similar facts<sup>197</sup>
2. The basis of an issue waiver is some act or omission of the person entitled to the benefit of the privilege. It is not open to another party to litigation to force a waiver of privilege by making assertions about, or seeking to put in issue, that party's state of mind<sup>198</sup>
3. Privilege will not be waived by the mere denial in a pleading of an assertion made by the other party<sup>199</sup>

192 *Commissioner of Taxation v Devereaux Holdings Pty Limited* [2007] FCA 821, [8]; *Bennett*, 105; *Ninox*, [22]; *Priceline Pty Ltd v JHY Nominees Pty Ltd and Ors* [2010] VSC 61; *Hanks v Admiralty Resources NL (No 2)* [2011] FCA 1464.

193 *Osland*, 298-299 [49]. See also *British American Tobacco*, [44]-[45]; *Dreyfus*, [23]-[24].

194 *Krok v Commissioner of Taxation* [2015] FCA 51, [26].

195 *Zentai v O'Connor (No 2)* (2010) 183 FCR 180. The court noted at [134] that it could not be said that 'the maintenance of the privilege would be fair in the circumstances'.

196 *Commissioner of Taxation v Rio Tinto Ltd* (2006) 151 FCR 341 (*Rio Tinto*), 357.

197 *Ibid*, [45].

198 *DSE (Holdings) v Intertan Inc* [2003] FCA 384 (*DSE (Holdings)*), [121].

199 *DSE (Holdings)*, [115]; *Rich*, [25].

4. The mere fact that a person (including a statutory decision maker) raises an issue as to their state of mind, and the basis for it, does not generally waive privilege over legal advice that may have contributed to that state of mind<sup>200</sup>
5. Rather, issue waiver arises where the party entitled to the privilege has made an assertion (express or implied), or brings a case (including a defence), which is either about the contents of the confidential communication or which necessarily lays open the confidential communication to scrutiny. By such conduct, an inconsistency must arise between the act and the maintenance of the confidence, informed partly by the forensic unfairness of allowing the claim to proceed without disclosure of the communication.<sup>201</sup> Thus, privilege may be waived if a statutory decision maker puts the contents of the legal advice in issue by specifically relying on the contents of the advice (and not merely the fact of the advice) to vindicate his or her claimed state of satisfaction or exercise of discretion.<sup>202</sup>
6. Privilege may be waived, notwithstanding any express disavowal of any intention of so doing.<sup>203</sup> Privilege is not likely to be waived by an assertion that advice has been taken, and the mere fact that action is then taken.<sup>204</sup> The position may be different if the advice and action are linked, such that it is apparent that the advice was that the action be taken.<sup>205</sup>

*(iii) Disclosure within the Commonwealth*

Paragraph 10 of the Legal Services Directions (LSDs) deals with the sharing of advice within government.<sup>206</sup> Paragraph 10.1 relevantly provides:

If a non corporate Commonwealth entity... wishes to obtain legal advice (whether from an in house or external source) on the interpretation of legislation administered by another non corporate Commonwealth entity... the requesting entity is to provide the administering entity with:

...

(d) a copy of the advice.

Further, para 10.7 provides:

The Attorney-General is entitled to obtain access to any legal advice obtained by the non corporate Commonwealth entity (subject to any legislative restriction).

Section 55ZH(4) of the *Judiciary Act 1903* (Cth) provides:

If a communication that is the subject of legal professional privilege is disclosed under subsection (1) or (2), then, in spite of the disclosure, privilege is taken not to have been waived in respect of the communication.

Disclosure under sub-s (1) is disclosure pursuant to the LSDs.

The combined effect of the LSDs and the *Judiciary Act 1903* (Cth) is that advice provided to a non corporate Commonwealth entity is provided to the Commonwealth, with

<sup>200</sup> *Rio Tinto*, [67]; *DSE (Holdings)*, [6], [58], [115]; *Rich*, [25]; *Archer Capital*, [24]-[26]; *Matthews*, [23].

<sup>201</sup> *Rio Tinto*, [61]; *DSE (Holdings)*, [58]; *Rich*, [21].

<sup>202</sup> *Rio Tinto*, [67].

<sup>203</sup> *Ibid* [72].

<sup>204</sup> *Bennett*, [13]; *Ninox*, [22].

<sup>205</sup> *Ninox*, [22].

<sup>206</sup> Note 1 to para 10.8 describes the purpose of para 10 as being to promote consultation between agencies on the interpretation of legislation with the aim of reaching consistency in statutory interpretation 'across the Commonwealth'. It also emphasises the importance of agencies not acting in a manner inconsistent with Commonwealth policy in respect of a particular piece of legislation.

the privilege being held by the Commonwealth. It follows that provision of the advice to another non corporate Commonwealth entity does *not* involve the advice being disclosed to a third party, such that no question of waiver arises.<sup>207</sup>

*(iv) Expert reports*

As previously mentioned, common law litigation privilege attaches to confidential communications between a legal adviser and an expert witness if made for the dominant purpose of pending or anticipated litigation.<sup>208</sup>

Waiver of privilege does not arise by the delivery of a witness statement to a witness in circumstances of confidentiality and where this was performed as part of a process to ensure the accuracy of the statement.<sup>209</sup>

At common law, once an expert's report has been filed and served, privilege may be waived in respect of both the report and 'associated material' (i.e. material forming part of the expert's brief, such as the legal adviser's instructions to the expert).<sup>210</sup>

As to the scope of any waiver in the context of expert reports, the relevant principles are set out in *ASIC v Southcorp* as follows:

- 1) Ordinarily the confidential briefing or instructing by a prospective litigant's lawyers of an expert to provide a report of his or her opinion to be used in the anticipated litigation attracts client legal privilege.
- 2) Copies of documents, whether the originals are privileged or not, where the copies were made for the purpose of forming part of confidential communications between the client's lawyers and the expert witness, ordinarily attract the privilege.
- 3) Documents generated unilaterally by the expert witness, such as working notes, field notes, and the witness's own drafts of his or her report, do not attract privilege because they are not in the nature of, and would not expose, communications.
- 4) Ordinarily disclosure of the expert's report for the purpose of reliance on it in the litigation will result in an implied waiver of the privilege in respect of the brief or instructions or documents referred to in (1) and (2) above, at least if the appropriate inference to be drawn is that they were used in a way that could be said to influence the content of the report, because, in these circumstances, it would be unfair for the client to rely on the report without disclosure of the brief, instructions or documents.
- 5) Similarly, privilege cannot be maintained in respect of documents used by an expert to form an opinion or write a report, regardless of how the expert came by the documents.
- 6) It may be difficult to establish at an early stage whether documents which were before an expert witness influenced the content of his or her report, in the absence of any reference to them in the report.<sup>211</sup>

<sup>207</sup> *NSW Council for Civil Liberties Inc v Classification Review Board (No. 1)* [2006] FCA 1409, [29]-[34].

<sup>208</sup> *Sterling*, 244.

<sup>209</sup> *Carbone*, 529; *Maurice*, 487.

<sup>210</sup> See *Collins Debden Pty Ltd v Cumberland Stationary Co Pty Ltd* [2005] FCA 1194, [9]; and generally H Stowe, 'Expert reports and waiver of privilege' (2007) 45(2) *Law Society Journal* 74. For the position in South Australia, however, see rr 74.3 and 74.4 of the [Uniform Civil Rules 2020 \(SA\)](#).

<sup>211</sup> (2003) 46 ACSR 438, [21] (citations omitted) (*ASIC v Southcorp*). This case, and the principles it contains, have been applied numerous times since 2003 (the date the case was decided). See, for example, *Quach v MLC Life Ltd (No 5)* [2020] FCA 1134, [13]; *TJ v Western Australia (No 4)* [2016] FCA 231, [18]; and *Shea v Energy Australia Services Pty Ltd (No 5)* (2013) 303 ALR 230, [17]. For a detailed analysis of the authorities on 'associated material', see *AWB v Cole (No. 5)*, [164]-[176]. See also ALRC, *Review of the Uniform Evidence Acts*, Discussion Paper 69 (2005), paras 13.124-13.128.



The third proposition in *Southcorp* needs to be understood in the context of that case, where a subpoena had been issued to the expert which helps to explain why copies of drafts in the expert's hands were not considered to be communications. The position may be different where a draft is prepared for the purposes of communication to the lawyer or where the copy that is sought is in the hands of the lawyer.

This issue arose in *New Cap Reinsurance Corporation Ltd (in liq) v Renaissance Ltd*.<sup>212</sup> In that case, the defendant argued that although the draft expert reports in question had been communicated to the plaintiffs' solicitors, it could not be inferred that at the time they were prepared, this was for the purpose of its being so communicated. They submitted that the fact of the draft reports being communicated did not change the fact that the purpose of their creation was not that they be communicated between the expert and the client, or between the expert and the lawyers for the client. White J said about this submission (at [22]):

I doubt that this would be a proper ground for rejecting a claim for privilege at common law in respect of the communication of a draft report to the lawyers for the client. I would infer that the draft reports were produced for the purpose of being communicated in that way. A document brought into existence by the expert for the purpose of being communicated to the client's lawyer for the purposes of the litigation would be privileged on any view of the authorities at common law, provided they have the necessary quality of confidentiality (*Interchase Corporation Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 1)* at 153, 162; *Australian Securities and Investments Commission v Southcorp Ltd* at 441–442, [21] (1) and (3); *Brookfield v Yevad Products Pty Ltd* [2006] FCA 1180 at [12]–[16]).

The fourth proposition in *Southcorp* also arose for consideration in *New Cap Reinsurance*. In that case, White J considered whether service of a final report waived privilege in a draft expert report provided back to the expert with the lawyer's annotations. White J summarised:

The question is not merely whether it could be said that the privileged materials were used in such a way that they could be said to influence the content of the report, but whether it could be said that they influenced the content of the report in such a way that the use or service of the report would be inconsistent with maintaining the privilege in those materials, such as, where it would be unfair for the party to rely on the report without disclosure of those materials.

White J went on to say:

Where an expert's report is submitted to a party's legal advisers so as to be put into a form which will ensure that it is admissible, it can be said that the privileged communications between the expert and the lawyers have influenced the content of the report, in the sense of its form, although not in the sense of the formulation of the substantive opinions expressed by the expert. Likewise, privileged communications between an expert and the party's lawyers whereby material information is provided to the expert in the form of assumptions or documents may well influence the content of the report. However, an expert's report is required to state what material and assumptions are relied on. Use of a final report, which refers to such materials and assumptions, is not inconsistent with maintaining confidentiality in the communications which produced the final product.<sup>213</sup>

White J's comments in *New Cap* have been cited with approval in the subsequent decisions of Ball J in *Traderight (NSW) Pty Ltd v Bank of Queensland Ltd (No 14)*,<sup>214</sup> Dodds-Streeton J in *Shea v TruEnergy Services Pty Ltd (No 5)*,<sup>215</sup> and Dicker DCJ in *North Shore Real Estate v Real Estate Property Management Services Pty Ltd (No 2)*.<sup>216</sup> Importantly,

<sup>212</sup> *New Cap Reinsurance Corporation Ltd (in liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258 (*New Cap*).

<sup>213</sup> *New Cap*, [53].

<sup>214</sup> *Traderight (NSW) Pty Ltd v Bank of Queensland Ltd (No 14)* [2013] NSWSC 211 (*Traderight*), [16]–[21].

<sup>215</sup> *Shea v TruEnergy Services Pty Ltd (No 5)* (2013) 303 ALR 230 (*TruEnergy*), [25]–[60].

<sup>216</sup> *North Shore Real Estate Pty Ltd v Real Estate Property Management Services Pty Ltd (No 2)* (2017) 24 DCLR (NSW) 291 (*North Shore Real Estate*), [17], [28]–[45].

while *ASIC v Southcorp* was decided under the common law, *New Cap*, *Traderight*, and *TruEnergy* were decided under the *Evidence Act 1995* (NSW), mainly s 122. However, following the substantial rewrite to s 122 in 2009 discussed above, s 122 now reflects the position at common law regarding waiver, as s 122(2) applies the *Mann* inconsistency rule.

#### (v) *Inadvertent disclosure*

Privilege may not be lost where disclosure of the privileged document was not authorised or where it was clearly evident that the document was privileged and that its disclosure was inadvertent.<sup>217</sup>

Where an inadvertent disclosure has occurred during a discovery process, the High Court, citing a lawyer's professional duties<sup>218</sup> and the court's case management powers,<sup>219</sup> has unanimously held that 'the court should ordinarily permit the correction of that mistake and order the return of the document, if the party receiving the documents refuses to do so'.<sup>220</sup> The High Court stopped short of adopting the view that inadvertent disclosure could never amount to waiver, instead stating:

The courts will normally only permit an error to be corrected if a party acts promptly. If the party to whom the documents have been disclosed has been placed in a position, as a result of the disclosure, where it would be unfair to order the return of the privileged documents, relief may be refused. However, in taking such considerations (analogous to equitable considerations) into account, no narrow view is likely to be taken of the ability of a party, or the party's lawyers, to put any knowledge gained to one side. That must be so in the conduct of complex litigation unless the documents assume particular importance.<sup>221</sup>

Importantly, when considering its decision in *Expense Reduction Analysts*, the High Court in *Glencore* concluded that:

[t]he Court [in *Expense Reduction Analysts*] held that it was not necessary for the holder of the privilege to seek an injunction because the court's case management powers were sufficient to make the necessary orders. Contrary to what the plaintiffs contend, the case [*Expense Reduction Analysts*] does not stand for any broader proposition which would allow the privilege to be asserted in order for relief in the nature of an injunction to be granted.<sup>222</sup>

## Privilege and the lodgement of documents under the *AAT Act*<sup>223</sup>

### Section 37 of the *AAT Act*

Statutory decision makers often grapple with issues of privilege in the course of preparing documents to be lodged under s 37 of the *AAT Act*.

Under s 37(1)(a), a decision maker is required to lodge with the AAT a statement of reasons. Section 37(1)(b) requires the decision maker to also lodge 'every other

<sup>217</sup> *Unsworth v Tristar Steering and Suspension Australia Ltd* [2007] FCA 1081; *Boensch v Pascoe* [2007] FCA 532; *Hooker Corporation Ltd v Darling Harbour Authority* (1987) 9 NSWLR 538.

<sup>218</sup> *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303 (*Expense Reduction Analysts*), [64]-[67].

<sup>219</sup> *Expense Reduction Analysts*, [56]-[60].

<sup>220</sup> *Expense Reduction Analysts*, [43]. In its decision, the Court commented that 'it goes without saying that the courts will not need to be concerned with the correction of error unless there is a dispute. In the case of inadvertent disclosure, this should not often arise' (*Expense Reduction Analysts*, [50]).

<sup>221</sup> *Expense Reduction Analysts*, [49].

<sup>222</sup> *Glencore*, [36].

<sup>223</sup> See: AAT Practice Direction, *Lodgement of Documents under Sections 37 and 38AA of the AAT Act* <<https://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/Practice-Direction-Lodgement-of-Documents-under-sections-37-and-38AA-of-the-AAT-Act.pdf>>.

document that is in the person's possession or under the person's control and is relevant to the review of the decision by the Tribunal'.<sup>224</sup>

Under s 37(2), the AAT has power to compel the production of documents that 'may be relevant to the review of the decision by the Tribunal'.

Subsection 37(3) provides that s 37 has effect 'notwithstanding any rule of law relating to privilege or the public interest in relation to production of documents'. Section 37(1AE) requires the documents lodged under s 37(1)(b) be given to the other parties.

Section 37(1AF) provides that, if a decision maker applies for a confidentiality order pursuant to s 35(2) of the Act, the obligation to lodge documents under s 37(1)(b) is suspended pending the AAT's determination of the confidentiality claim.

### Are legal advices or opinions relevant for the purposes of section 37?

In *APRA v VBN*,<sup>225</sup> Ryan J was prepared to accept that legal advice or opinion which bears on an issue which a decision maker had to resolve in making a decision, and which was considered by the decision maker, is relevant for the purposes of s 37, and so will normally need to be produced. That is the case whether the original decision maker acted on, or adopted, the legal advice or opinion or rejected it.<sup>226</sup>

However, the obligation under s 37(1)(b) does not normally extend to legal advice or opinion which relates to the process followed by the decision maker.<sup>227</sup> On this basis documents such as draft statements of reasons, including discussion drafts prepared by legal advisers, may not be relevant to the AAT's task of undertaking merits review. One important qualification to this is that, to the extent that such documents contain legal advice as to the law to be applied or followed, such advice may be relevant and so will need to be produced.

### When can a confidentiality order be sought over legal advice or opinion?

There is a distinction between lodging documents with the AAT and giving those documents to an applicant. That distinction is somewhat blurred by s 37(1AE), which requires the automatic service on other parties of documents that have been lodged with the AAT. Nevertheless, s 37(1AE) is subject to s 37(1AF), which removes the obligation to serve documents which are the subject of an application for a confidentiality order under ss 35(3)-(4).

*'There is a distinction between lodging documents with the AAT and giving those documents to an applicant.'*

In *APRA v VBN*, Ryan J held that the sole source of power for the AAT to compel production under s 37 is found in s 37(2).<sup>228</sup> One consequence of this is that, irrespective of whether a legal advice or opinion is produced pursuant to s 37(1)(b) or in answer to a notice issued under s 37(2), the decision maker may seek a confidentiality order pursuant to ss 35(3)-(4) to prevent disclosure to another party. In considering whether to make such an order, the AAT must take into account any claims for legal professional privilege.<sup>229</sup>

224 Under sub-s 37(1AAB), the requirements in sub-s 37(1) also apply to an application for second review of a decision of the Social Services and Child Support Division.

225 *Australian Prudential Regulation Authority (APRA) v VBN* (2005) 88 ALD 403. Note that *APRA v VBN* is discussed with approval in *KLGL v Australian Prudential Regulation Authority* [2008] AATA 452 at [41], [46], [48]-[49].

226 *APRA v VBN*, 412. Although Ryan J's remarks in relation to the relevance of legal advice or opinion were not expressed in definitive terms, they carry considerable persuasive weight and should not be ignored.

227 *KLGL v Australian Prudential Regulation Authority* [2008] AATA 452, [41].

228 *APRA v VBN*, 413.

229 Note *APRA v VBN* was decided before the introduction (in 2015) of s 38AA of the *AAT Act*.

### Section 38AA of the AAT Act

Prior to the insertion of s 38AA, the obligation on a party to lodge relevant documents under s 37(1)(b) ceased upon the lodgement of those documents.<sup>230</sup> Section 38AA was inserted into the *AAT Act* by the *Tribunals Amalgamation Act 2015* (Cth) and came into effect on 1 July 2015.

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<sup>230</sup> At any time during a proceeding the AAT could compel the production of documents by issuing a notice under s 37(2) of the *AAT Act*.

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