

AUSTRALIA

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1. DEFINITION – PRESENTATION

What attorney-client privilege is and what it is not?

In Australia, attorney-client privilege is referred to as legal professional privilege or client legal privilege. Legal professional privilege is recognised under the common law as a doctrine of substantive law, rather than just a rule of evidence.¹ It can be relied on to resist the giving of information or the production of a document which would reveal communications between a client and their lawyer made for the "dominant purpose" of giving or obtaining legal advice and the provision of legal services, including representation in legal proceedings.²

Legal professional privilege involves a balancing of competing considerations. That is, the competing interests of the communication that passes between a lawyer and his/her client versus the public interest in having all communications which are relevant within the public sphere. In *Esso Australia Resource Ltd v. Commission of Taxation of the Commonwealth of Australia*,³ these issues were discussed at length - with the High Court of Australia concluding that the rationale for the privilege is to promote the better administration of justice by:

- encouraging freedom of consultation between clients and their legal advisers and full disclosure to the advisor of the relevant circumstances; and
- encouraging the production of information for the purposes of litigation.⁴

Subject to one exception, privilege attaches to communications, not documents. What is being protected is a communication involving litigation or the provision of legal advice.

Privilege can only be relied on to withhold documents to the extent that they tend to disclose the contents of the privileged communication. One consequence of this principle is that one cannot claim privilege over documents, such as notes, made by the client or lawyer, except to the extent that they reveal the content of privileged communications.⁵

Therefore, the circumstances in which a claim for legal professional privilege can arise are.⁶

¹ *Re Southland Coal Pty Ltd (rec & mgrs apptd)(in liq)* (2006) 59 ACSR 87 at [14], *Baker v. Campbell* (1983) 153 CLR 52 and *Daniels Corp International v. ACCC* (2002) 77 ALJR 40.

² *Re Southland Coal Pty Ltd (rec & mgrs apptd)(in liq)* (2006) 59 ACSR 87 at [14].

³ (1999) 201 CLR 49.

⁴ *Esso Australia Resource Ltd v. Commission of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49 per Glesson CJ, Gaudron and Gummow JJ.

⁵ *Dalleagles v. ASC* (1991) 4 WAR 325 at 332-334.

⁶ *Trade Practices Commission v. Sterling* (1979) 36 FCL 244 at 245-6. These principles have been approved and referred to many times, including by the Full Court of the Federal Court of Australia in *Commonwealth v. Dutton* (2000) 102 FCR 168.

- (a) any communication between a party and his/her professional legal adviser if it is confidential and made to or by the professional adviser in his/her professional capacity and with a view to obtaining or giving legal advice or assistance;
- (b) any document prepared with a view to it being used as a communication of this class, although in fact not so used;
- (c) communications between the various legal advisers of the client;
- (d) notes, memoranda, minutes and other documents made by the client or officers of the client or the legal adviser of the client of communications which are themselves privileged, or containing a record of those communications, or relate to information sought by the legal adviser to enable him/her to advise the client or to conduct litigation on his behalf;
- (e) communications and other documents passing between the party's solicitor and a third party if they are made or prepared when litigation is anticipated or commenced, for the purposes of the litigation, with a view to obtaining advice as to it or evidence to be used in it or information which may result in the obtaining of such evidence;
- (f) communications and documents passing between the party and a third person if they are made with reference to litigation either anticipated or commenced, for the purpose of being put before the legal adviser with the object of obtaining his/her advice or enabling him to prosecute or defend an action; and
- (g) knowledge, information or belief of the client derived from privileged communications made to him/her by his/her solicitor or agent.

2. SOURCES

From which sources is the legal privilege derived?

There are two sources of legal professional privilege in Australia, being the common law and statute law. In some jurisdictions, both the common law and Evidence Act⁷ apply ("**the Evidence Act jurisdictions**") and in others, it is simply the common law.⁸

The Evidence Act applies in defined 'proceedings'⁹ which include proceedings relating to bail, interlocutory proceedings, proceedings heard in chambers and sentencing

⁷ *Evidence Act 1995 (Cth)* - applies to proceedings in the Federal jurisdiction and the Australian Capital Territory; *Evidence Act 1995 (NSW)* - applies to New South Wales proceedings; *Evidence Act 2001 (Tas)* - applies to proceedings in Tasmania; *Evidence Act 2008 (VIC)* - applies to Victorian proceedings (together referred to as the "the Evidence Act").

⁸ The Northern Territory, Western Australia, Queensland, and South Australia have not yet adopted the provisions of the Evidence Act relating to legal professional privilege.

⁹ *Evidence Act 1995 (Cth)* s 4(1).

proceedings. In all other proceedings, access to such documents must be determined by applying the common law.

2.1 Relevant statutes

In the Evidence Act jurisdictions, there are two distinct types of legal professional privilege which provide a legitimate "shield" against disclosure of relevant documents (subject to statutory intervention and/or waiver). The two categories are:

- legal advice privilege; and
- litigation privilege

Legal advice privilege

Under the *Evidence Act*, legal advice privilege attaches to:

- (a) confidential communications made between a lawyer and client (or made between 2 or more lawyers acting for the client); or
- (b) the contents of a confidential document (whether delivered or not) prepared by the client or a lawyer

for the dominant purpose of the client seeking or the lawyer providing legal advice.

The *Evidence Act* extended legal advice privilege to the contents of a confidential document whether delivered or not. Privilege therefore now extends to both communications, as well as final documents.

The *Evidence Act* also extends legal advice privilege to confidential documents prepared by a third party (e.g. an accountant or consultant), which is prepared for the dominant purpose of the lawyer providing legal advice to the client. These amendments were undertaken in order to align statutory advice privilege with developments in common law advice privilege.

Litigation privilege

Litigation privilege is much broader. Under the *Evidence Act*, litigation privilege attaches to:

- (a) communications of a confidential nature between the client and a third-party or the lawyer and a third-party; or
- (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 actual, anticipated or pending Australian or overseas proceeding, in which the client is or might potentially be, or was or might have been a party.

Determination of a claim for legal advice privilege or litigation privilege requires the Court be satisfied that the requirements of the relevant legislative provision have been established, including that the production of the document or part of a document would result in the disclosure of a confidential communication.

That is, the party claiming privilege must demonstrate to the Court that the legal advice privilege or litigation privilege provisions of the *Evidence Act* have been satisfied, and that the document, or the relevant part of it, discloses confidential information.¹⁰

2.2 Relevant Case Law

Common law test: elements of the privilege

There are three elements necessary to establish legal professional privilege over communications passing between legal adviser and client:

- (a) the communications must pass between the client and the client's legal adviser;
- (b) the communications must be made for the dominant purpose of enabling the client to obtain legal advice, or for the purpose of actual or contemplated litigation; and
- (c) the communications must be confidential.

In contrast to the Evidence Act, it is the actual communication that is privileged from disclosure.

The dominant purpose test

The scope of "dominant purpose" has been the subject of much case law. In general, the cases suggest that:

- The purpose, or intended use, for which a document is brought into existence is a question of fact¹¹ and must be determined objectively.¹²
- If two purposes are of equal weight or significance, neither is dominant and so the dominant purpose test would not be satisfied.¹³
- "Dominant" has to be distinguished from "primary" and "substantial". The "dominant" purpose is the paramount purpose.¹⁴

¹⁰ *In the matter of Southland Coal Pty Ltd (rec & mgrs apptd)(in liq)* [2006] NSWSC 899 at [14].

¹¹ *Singapore Airlines v. Sydney Airports Corporation & Anor* [2004] NSWSC 380 (7 May 2004), upheld on appeal in [2005] NSWCA 47 (9 March 2005); *Waterford v. The Commonwealth* (1987) 163 CLR 54 at 66.

¹² *AWB Limited v. Honourable Terence Rhoderic Hudson Cole (No 5)* [2006] FCA 1234.

¹³ *Sparron v. Apand Pty Ltd* (1996) 68 FCR 322, 327-328 per Branson J.

- In its ordinary meaning, "dominant" indicates that purpose which was the ruling, prevailing or most influential purpose.
- Where there are competing purposes, it is a question of fact whether in any case any one purpose "dominated."¹⁵

In practical terms, it will often be a matter of instructions from the client to ascertain the "purpose" for which a document was brought into existence.

3. SCOPE/LIMITS

3.1 General observations

Can the attorney-client privilege be waived? If Yes, how?

Confidentiality is an essential pre-condition to the existence of privilege. It follows that, if a privileged communication loses its confidential character, it loses its privileged status.

Waiver of privilege occurs when a party entitled to privilege "performs an act which is inconsistent with the confidence preserved by it",¹⁶ a test laid down by the High Court of Australia in *Mann v. Carnell*¹⁷ when it rejected that proposition that questions of waiver ought to be determined by reference to general notions of "fairness".

Under the Evidence Act, waiver can occur by:

- (a) consent of the client or party to adducing the evidence;¹⁸
- (b) knowing and voluntary disclosure of the client or party to another party of the substance of the evidence;¹⁹
- (c) express or implied consent to disclosure by the client or party to another party of the substance of the evidence.²⁰

In practice waiver is usually divided into two categories, express and implied. Express waiver involves the explicit disclosure of the actual document or communication to which privilege would otherwise attach. Implied waiver does not involve direct disclosure of the privileged material, but may arise when the person entitled to the

¹⁴ *Mitsubishi Electric Australia Pty Ltd v. Victorian Workcover Authority* (2002) 4 VR 332, 336-337 [10], Batt JA.

¹⁵ *Sparron v. Apand Pty Ltd.*

¹⁶ Cross on Evidence, JD Heydon (1996) at [25010]; *Mann v. Carnell* (1999) 201 CLR 1 at [13].

¹⁷ *Mann v. Carnell* (1999) 201 CLR 1.

¹⁸ Section 122(1) of the *Evidence Act*.

¹⁹ Where the conditions of sections 122(2) (3) or (5) of the *Evidence Act* are not met.

²⁰ Where the conditions of sections 122 (4) or (5) of the *Evidence Act* are not met.

privilege does something which is inconsistent with maintenance of that privilege, typically referring to part or all of the privileged material in a non-confidential context.

Cases dealing with express waiver are relatively straight forward. They typically involve the disclosure of documents containing privileged material in such a way as to lose their confidentiality. The most difficult cases of express waiver are those which involve the disclosure of privileged material to other persons who have some interest in the content, for a specific purpose.

Such disclosure does not necessarily cause the documents to lose their privileged character.²¹ It depends on whether the purpose of disclosure is inconsistent with the maintenance of privilege.

Cases concerning implied or imputed waiver are more difficult.²² This is because the doctrine of implied waiver involves consideration of "fairness". The doctrine is hard to define and cases will generally turn on their facts. For example, in *Osland v The Secretary to the Department of Justice* (2008) 249 ALR 1 where the government's disclosure of the fact that it had sought advice to show that due process in reaching a decision had been exercised, was not held to amount to waiver of privilege over that advice, as the disclosure was not undertaken in circumstances which were inconsistent with maintaining privilege over the details of the advice received.²³

One situation where the issue of implied waiver commonly arises is in litigation where a party's state of mind is put in issue and that state of mind appears to depend upon privileged documents (for example a belief as to a person's legal rights which is based on legal advice). The authorities say that the mere fact that such a state of mind is put in issue is not sufficient for waiver,²⁴ Rather the general *Mann v. Carnell* test must be applied and there may only be waiver if the party entitled to the privilege puts the contents of the privileged communication directly in issue.²⁵ The Federal Court of Australia recently held that pleading a defence in response to a pleaded allegation of state of mind did not result in a waiver of privilege over legal advice which may have informed that state of mind.²⁶

Another example is where privileged communications have been disclosed to a third party, even where this occurs for a limited or specific purpose.²⁷

²¹ *Mann v. Carnell* (1999) 201 CLR 1, *Abigroup v. Atkins* (1997) 42 NSWLR 623.

²² Young J in *AWB Limited v. Honourable Terence Rhoderic Hudson Cole (No 5)* [2006] FCA 1234 at [128] noted that the term "imputed waiver" is preferable to "implied waiver", as this more accurately reflects the High Court of Australia's pronouncement in *Mann v. Carnell*.

²³ See also *Fig Tree Developments Ltd v Australian Property Custodian Holdings Ltd* [2008] FCA 1041 where a parties press release which made reference to the "following" of senior counsel's advice was held to amount to an implied waiver as it carried with it an indication that the parties course of action was in conformity with that advice.

²⁴ *Telstra Corporation v. BT Australasia* (1998) 85 FCR 152; *DSE (Holdings) v. Intertan* (2003) 127 FCR 499; *Seven Network v. News Ltd (No 10)* [2005] FCA 1721.

²⁵ *DSE (Holdings) v. Intertan*, supra at [58], [61] per Allsop J.

²⁶ *Australian Agricultural Company Limited v. AMP Life Limited* [2006] FCA 371.

²⁷ *AWB Limited v. Honourable Terence Rhoderic Hudson Cole (No 5)* [2006] FCA 1234 at [141].

In *The University of Western Australia v Gray (No 15)* [2007] FCA 423, the Federal Court of Australia held that the University had waived legal professional privilege over legal advice received by it, when, in cross examination, a professor linked "external advice" to the formation of his opinion that the University had a reasonable case. Consequently, the Federal Court of Australia ordered that a partial version of the advice (limited to the factual matters set out) be produced.

Is the privilege limited? Which documents/information are involved?

Legal professional privilege under the *Evidence Act* applies to confidential communications or confidential documents made or prepared in the circumstances outlined in Part 2. The common law test for privilege, however, is limited to communications of a confidential nature.

The *Evidence Act* defines "confidential communication" as being a communication made in circumstances where the person who made the communication or the person to whom the communication was made, was under an obligation not to disclose its contents (whether or not the obligation arises under the law).

"Confidential document" is similarly defined as being a document prepared in circumstances where the person who prepared it, or the person for whom it was prepared was under an obligation not to disclose its contents (whether or not the obligation arises under the law).

3.2 Between lawyers

Is the correspondence between lawyers protected?

In Australia, correspondence between the various lawyers of the client is privileged, provided that the correspondence is for the dominant purpose of providing the client with legal advice or professional legal services in relation to actual, anticipated or pending Australian or overseas proceedings in which the client is or might potentially be a party.²⁸ This includes correspondence between Australian and foreign lawyers that otherwise satisfies the relevant test

3.3 Third parties

Litigation privilege may subsist between a lawyer and a third party or a client and a third party, provided that the communication is made for the dominant purpose of providing the client with professional legal services in relation to actual, anticipated or pending Australian or overseas proceedings, in which the client is or might potentially be a party.

The question of whether legal advice privilege applies to communications between a client and a third party is more difficult. This situation occurs commonly in commerce

²⁸ See Part 2 and *Trade Practices Commission v. Sterling* (1979) 36 FCL 244 at 245-6.

where a client directs or authorises a third party to prepare a documentary communication for the dominant purpose of it being communicated to a legal adviser. The leading case in Australia in this area is *Pratt v. Commissioner of Taxation*,²⁹ where the Full Federal Court of Australia held that legal advice privilege can extend to third party, non-agent communications.

4. IN HOUSE LAWYERS

Which regulations regarding legal privilege apply to in-house lawyers?

In general, the same common law and/or statutory principles regarding privilege (as identified in Part 2) apply to in-house lawyers provided they are acting in the capacity of a lawyer and the advice given is independent, notwithstanding the employment relationship.

Oral or written confidential communications between in-house lawyers and their employer should be protected by legal professional privilege as long as the communications meet the following requirements:

- (a) they are made for the dominant purpose of giving or receiving legal advice or of conducting actual or anticipated litigation;
- (b) the professional relationship of lawyer and client is maintained between the in-house lawyer and the employer, ensuring independent advice; and
- (c) the in-house lawyer is qualified and entitled to practise law, and is subject to the duty to observe professional standards and the liability to professional discipline.³⁰

For legal professional privilege to apply to communications made by in-house lawyers, the in-house lawyer must be acting in a professional or legal capacity and the advice given should be of a legal nature.³¹ There are conflicting views on whether in-house lawyers *must* also hold a current practising certificate, but on any view it remains a relevant factor in determining whether privilege exists.³²

In one formulation, the court suggested that in-house lawyers should be:

²⁹ (2004) 136 FCR 357.

³⁰ See the High Court of Australia decision of *Waterford v. Commonwealth* (1987) 163 CLR 54, a case which involved in-house lawyers in a government department. See also the decisions in *Vance v. McCormack* (2004) 154 ACTR 12 (first instance - Crispin J.) and [2005] ACTCA 35 (Court of Appeal), *Australian Hospital Care Pty Ltd v. Duggan* [1999] VSC 131, and *Southern Equities v. Arthur Andersen* [2001] SASC 398.

³¹ In *Waterford v. Commonwealth* (1987) 163 CLR 54, for example, parts of documents which dealt with policy advice given by in-house lawyers were released because those parts were held to be outside the scope of legal professional privilege.

³² In *Vance*, for example, Crispin J. held at first instance that a practising certificate was essential. This decision was reversed in the Court of Appeal. The ALRC Report 102 (published 8 February 2006) has recommended that the definition of lawyer in the *Evidence Act* be amended to make it clear that a person need not hold a practising certificate to be a "lawyer" for privilege purposes.

“...persons who, in addition to any academic or other practical qualifications, [are] listed on a roll of current practitioners, [hold] a current practising certificate, or [work] under the supervision of such person.”³³

The requirement of independence means that the advice provided by in-house lawyers must not be influenced by their loyalties or duties to their employer.³⁴

5. PROSPECTIVE

Does professional secrecy tends to be more or less protected?

In Australia, the duty of lawyers to maintain privilege is found in the common law and/or statute as identified in Part 2. Duties of confidence and privilege imposed on other professionals such as healthcare practitioners and journalists are covered by other legislation, such as privacy legislation, and national and international codes of ethics.

However, in New South Wales,³⁵ there is a concept called "professional confidential relationship privilege."³⁶ This is where a court may direct that evidence need not be adduced in proceedings if adducing it would disclose a protected confidence,³⁷ the contents of a document recording a protected confidence, or protected identity information. The direction may be made on the court's own motion, or on application by the protected confider or confidant concerned.

There are also provisions in the *Evidence Act* which deal with religious confessions.³⁸ A person who is (or was previously) a member of the clergy of any church or religious denomination can refuse to divulge that a religious confession was made, or the contents of the religious confession unless the communication involved was made for a criminal purpose.

The Australian Law Reform Commission ("the ALRC") in 2010 in which it identified the need for legislative uniformity throughout Australia, as well as the need to limit the disparity between the common law and the regulated position both nationally and on a state by state basis.³⁹ This recommendation was based on observations that the

³³ See *Waterford v. Commonwealth* (1987) 163 CLR 54.

³⁴ Emiliós Kyróu, "Legal professional privilege for general counsel wearing two hats", (June 2000) 42 *Law Society Journal* 42.

³⁵ The Australian state with the largest pop and the centre of the countries commercial activity.

³⁶ This only applies in New South Wales.

³⁷ A protected confidence is a communication made by a person in confidence to another person (a "confidant") in the course of a relationship in which the confidant was acting in a professional capacity; and when the confidant was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law or can be inferred from the nature of the relationship between the person and the confidant.

³⁸ Religious confessions are confessions made by a person to a member of the clergy in the member's professional capacity according to the ritual of the church or religious denomination concerned.

³⁹ ALRC "Privileges: Extension to Pre-Trial Matters and Client Legal Privilege", 17 August 2010.

current system has resulted in extensive confusion and on-going litigation, with attempts to extend the privilege to some pre-trial matters leading to further litigation.

The ALRC also recommended that client legal privilege under the *Evidence Act* should apply to pre-trial contexts and to any situation where a person is requested to produce a document, rather than the current state of the law whereby common law privilege applies to pre-trial contexts, and the Evidence Act applies at trial.

While the ALRC provided several alternatives as to how this recommendation could be achieved, they did not provide a specific direction as to how this recommendation should be implemented.