



Express law *fast track information for clients*

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Quoting the substance of legal advice in negotiations may make it subject to FOI

The Full Federal Court has confirmed that quoting the substance of legal advice in negotiation can waive legal professional privilege. As a result you might be required to make the full text of your legal advice and opinion available under Freedom of Information or court related discovery.

Bennett v Chief Executive Officer of the Australian Customs Service

Full Federal Court [2004] FCAFC 237 (25 August 2004)

Mr Bennett was in dispute with Customs over certain public comments he had made about Customs' operations and subsequent disciplinary action that had been taken. In the course of the dispute Customs made various statements about legal advice it had obtained. For example that it had obtained legal advice that:

that your client is not correct in asserting that he is not subject to the Act and Regulations if he makes public statements about Customs-related matters in his capacity as President of COA [Customs Officers' Association]. It is a matter for your client, in the light (perhaps) of legal advice provided by you, whether he adheres to or moderates his position on this question ...'

At some later time, Mr Bennett made an FOI request to Customs. That request, among other documents, covered the legal advice to Customs. Customs refused access to documents containing the advice, claiming that they were exempt under s. 42 of the *Freedom of Information Act 1982* as being privileged from production in legal proceedings on the ground of legal professional privilege.

AAT and Federal Court at first instance

Mr Bennett challenged this claimed exemption on review to the AAT, claiming that the reference to the advice constituted a waiver of legal professional privilege. The AAT, purporting to apply *Mann v. Carnell* (1999) 201 CLR 1, ruled that the privilege had not been waived. Mr Bennett appealed to the Federal Court on the issue, as raising a question of law. The primary judge also ruled that there had been no waiver. Only the conclusion of the advice had been disclosed, not the reasoning underlying that conclusion. No unfairness was involved in these circumstances in continuing to maintain the privilege.

On appeal, Full Court found the privilege waived

On appeal, the Full Court (Tamberlin and Gyles JJ, Emmett J dissenting) overturned the primary judge's decision on this point whilst upholding the primary judge's decision on several FOI specific points. On the waiver of privilege point Gyles J said (at para [68]):

Each of the Tribunal and the primary Judge correctly identified the decision in *Mann v Carnell* as providing appropriate guidance as to the law to be applied. However, in my respectful opinion, the test has been misunderstood at least in part. The test looks to inconsistency between the disclosure that has been made by the client on the one hand and the purpose of confidentiality that underpins legal professional privilege on the other. It is not a matter simply of applying general notions of fairness as assessed by the individual judge. The authorities to which I have referred show that it is well established that for a client to deploy the substance or effect of legal advice for forensic or commercial purposes is inconsistent with the maintenance of the confidentiality that attracts legal professional privilege.

Tamberlin J, who agreed with the judgment of Gyles J, added for his own part (at para [6]):

It may perhaps have been different if it had been simply asserted that the client has taken legal advice and that the position which was adopted having considered the advice, is that certain action will be taken or not taken. In those circumstances, the substance of the advice is not disclosed but merely the fact that there was some advice and that it was considered. However, once the conclusion in the advice is stated, together with the effect of it, then in my view, there is imputed waiver of the privilege. The whole point of an advice is the final conclusion. This is the situation in this case.

Emmett J differed from the majority in holding that the challenge to the correctness of the AAT's decision on waiver of legal professional privilege involved a question of fact rather than one of law (see para [36]). Section 44 of the *Administrative Appeals Tribunal Act 1975* confines appeals from the AAT to the Federal Court to questions of law. As he saw it, the question of waiver had been a matter of judgment for the AAT.

Conclusion

Use of legal advice needs to be carefully managed if you wish to ensure that the advice will be protected by legal professional privilege and not have to be disclosed under Freedom of Information requests or under court discovery processes.

The decision increases the odds that a disclosure of the substance or effect of legal advice to a third party (by expressing the conclusion of the advice) will be found to constitute a waiver of legal professional privilege in the whole advice. A statement as simple as 'in accordance with legal advice received, the decision-maker came to the decision that . . .' may be sufficient to waive privilege.

Following this decision by the Full Federal Court', the test for waiver of common law legal professional privilege would appear now to be the same as that for waiver of *client privilege* under the *Evidence Act 1995* section 122 the relevant part of which states:

(2) Subject to subsection (5), this Division does not prevent the adducing of evidence if a client or party has knowingly and voluntarily disclosed to another person the substance of the evidence... .

Inappropriate use of legal advice in negotiations is only one of many ways in which privilege can be waived. All people who seek or make use of legal advice should be familiar with the dangers and what needs to be done to ensure legal professional privilege is maintained wherever that is desirable. To assist you in achieving this AGS has developed a range of training programs and follow up material which can be customised to the specific needs of your organisation.

Text of the decision is available at:

<http://www.austlii.edu.au/au/cases/cth/FCAFC/2004/237.html>

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