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High Court judgment has implications for the inconsistency test for waiver of legal professional privilege and freedom of information

Recently the High Court in *Osland v Secretary to the Department of Justice* [2008] HCA 37 (7 August 2008) (*Osland*):

- affirmed that the appropriate test to determine whether a privilege claimant has waived legal professional privilege over a document is the 'inconsistency test' in *Mann v Carnell* (1999) 201 CLR 1—that is, that the privilege is waived where the privilege claimant's conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect
- showed that inconsistency may not arise as easily as some decisions since *Mann v Carnell* have indicated, especially those subsequent to *Bennett v Chief Executive Officer of the Australian Customs Service* (2004) 140 FCR 101 (*Bennett*), in which one member of the Full Court of the Federal Court, Gyles J, had said (119, [65]) that the voluntary disclosure of the gist or conclusion of legal advice amounts to waiver in respect of the whole of the advice, including the reasons for the conclusion
- affirmed the ruling of the Victorian Court of Appeal that, although the Attorney-General of Victoria had disclosed the effect of legal advice in a press release, this was not so inconsistent with the confidentiality of the advice that legal professional privilege was waived over the advice
- by a majority decided that the Court of Appeal erred in not itself viewing certain advices before overturning the decision by the Victorian Civil and Administrative Tribunal (VCAT) to allow access to these advices under the Victorian *Freedom of Information Act 1982* (FOI Act).

Kirby J also commented more broadly that legal professional privilege should extend only to what is necessary and justifiable to fulfil its purposes.

Background

After being convicted of murder in 1996, Mrs Marjorie Heather Osland submitted a petition for mercy for a pardon to the Victorian Attorney-General. In 2001, the Attorney-General announced by press release that the State Governor had refused the petition, saying:

- he had received advice from three senior counsel who had recommended rejection of the petition (the joint advice)

— in accordance with the joint advice, the Attorney-General recommended to the State Premier that the Governor be advised to reject the petition

— the Governor had accepted the joint advice and rejected the petition.

Mrs Osland then sought access under the FOI Act to various legal advices regarding her petition, including the joint advice. The Secretary to the Department of Justice refused access, claiming that the advices were exempt from release as they were internal working documents the disclosure of which would be contrary to the public interest and were subject to legal professional privilege.

Review by the Victorian Civil and Administrative Tribunal

Mrs Osland applied for review of the decision to VCAT. The President of VCAT found that:

— the advices were subject to legal professional privilege

— the privilege had not been waived, but

— although the advices were exempt documents, access ought to be granted to the documents under s 50(4) of the FOI Act, as VCAT was of the opinion that the public interest required such access.

Before the Victorian Court of Appeal

The Secretary to the Department of Justice appealed to the Victorian Court of Appeal. The appeal was confined to whether legal professional privilege had been waived in the joint advice, and whether in any event access should be granted to all the advices under s 50(4) of the FOI Act.

The Court of Appeal held that legal professional privilege had not been waived and, without reviewing the advices, ruled that there was no basis for granting access under s 50(4).

Decision by the High Court

On appeal to the High Court, Mrs Osland argued that:

— having regard to what Gyles J had said in *Bennett* at [65], the Attorney-General had waived legal professional privilege in the joint advice as the press release disclosed the substance and gist of the advice and the conclusions reached in it

— the Court of Appeal erred in concluding, without having inspected the advices, that there was no basis upon which an opinion could be formed under s 50(4) of the FOI Act that the public interest required that access be granted to them.

The High Court unanimously dismissed the grounds relating to waiver of legal professional privilege, but allowed the ground of appeal relating to s 50(4) by a five to one majority.

Waiver of privilege under the Mann v Carnell inconsistency test

The key issue in *Osland* was whether, in accordance with the *Mann v Carnell* inconsistency test, legal professional privilege over the joint advice was waived by the Attorney-General's press release. The High Court held that the test was not satisfied; hence there was no waiver.

The case deals with waiver of legal professional privilege at common law 'imputed by operation of law', rather than under s 122 of the *Evidence Act 1995* (Cth) (see [49]), and affirms that the *Mann v Carnell* inconsistency test applies. That is, the High Court held that a privilege claimant will waive legal professional privilege where, in a given context, the conduct of the privilege claimant is inconsistent with the maintenance of confidentiality which the privilege is intended to protect.

The High Court 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 (see [48] to [50] of the majority joint judgment of Gleeson CJ, Gummow, Heydon and Kiefel JJ, with which Hayne J concurred on the issue of waiver (see [131]); note also, to similar effect, Kirby J at [97] and [98]). In regard to the case that was before them, Gleeson CJ, Gummow, Heydon and Kiefel JJ stated (at [48]):

> The evident purpose of what was said in the press release was to satisfy the public that due process had been followed in the consideration of the petition, and that the decision was not based on political considerations. … The Attorney-General was seeking to give the fullest information as to the process that had been followed, no doubt in order to deflect any criticism, while at the same time following the long-standing practice of not giving the reasons for the decision. This did not involve inconsistency; and it involved no unfairness to the appellant.

They went on to make the general point (at [49]):

> Whether, in a given context, a limited disclosure of the existence, and the effect, of legal advice is inconsistent with maintaining confidentiality in the terms of the advice will depend upon the circumstances of the case.

Kirby J also commented on legal professional privilege in the broader governmental context (see [89]). In Kirby J's view, it should not be assumed that all communications with government lawyers fall within the ambit of legal professional privilege, especially in the context of freedom of information and legal advice to government. Legal professional privilege should extend only to what is necessary and justifiable to fulfil its legal purposes.

Public interest exception under section 50(4) of the Victorian Freedom of Information Act

By a majority of five to one (Hayne J dissenting), the High Court ruled that the Victorian Court of Appeal made an error of principle in the exercise of its discretion by not examining the advices before overturning the decision by VCAT to allow access to them (see [57]).

The majority allowed the appeal on this issue, and remitted the matter back to the Court of Appeal to inspect the advices and deal with the matter in accordance with the High Court's reasons.

Implications

The High Court, by:

- affirming that the *Mann v Carnell* inconsistency test is the appropriate test for determining whether the privilege has been waived, and
- ruling that, although the Attorney-General disclosed the effect of legal advice in the press release, this disclosure was not so inconsistent with the confidentiality of the advice that legal professional privilege was waived over the advice

has made it clear that voluntary disclosure of the gist or conclusions of advice by a privilege claimant will not necessarily constitute a waiver of the legal professional privilege over the whole of the advice referred to, including the reasons for making those conclusions. The decision provides greater assurance that, particularly where appropriate care is taken in the way reference is made to an advice, the risk that legal professional privilege will be waived is not as great as has been feared by some subsequent to *Bennett*.

The High Court's decision has no direct application to the Commonwealth *Freedom of Information Act 1982*, which does not contain a provision equivalent to s 50(4) of the Victorian FOI Act. However, the decision is noteworthy for:

- the decision of the majority that the Victorian Court of Appeal made an error of principle in the exercise of its discretion by not reviewing the advices before overturning VCAT's decision. In the Commonwealth sphere, appeals from the Administrative Appeals Tribunal lie to the Federal Court on questions of law only (much like the Victorian Court of Appeal). However, the Federal Court does have limited powers to make findings of fact in order to deal finally with the proceedings (s 44(7) of the *Administrative Appeals Tribunal Act 1975*) and, if requested to make such findings of fact, this decision could encourage the court to inspect the documents in issue before exercising its fact finding power in FOI appeals
- the analysis of the public interest
- the comments of Kirby J at [89] that:

  > Especially in the context of the FOI Act, and legal advice to government, courts need to be on their guard against any inclination of lawyers to expand the ambit of legal professional privilege beyond what is necessary and justifiable to fulfil its legal purposes.

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