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Legal briefing

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LEGAL PROFESSIONAL PRIVILEGE AND THE GOVERNMENT

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*. However, those requirements generally do not extend to information which is the subject of legal professional privilege. In addition, in many situations, statutory powers enabling 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.

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Legal professional privilege is a creature of both common law and statute (under the Evidence Acts of the Commonwealth, states and territories).[1] 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.[2]

This briefing will consider the following areas:

— key elements of the common law of legal professional principle, namely:
  – confidentiality
  – communications
  – dominant purpose
  – professional relationship

— basic features of the privilege under the *Evidence Act 1995* (Cth)

— circumstances in which privilege does not apply (the 'improper purpose' principle)

— circumstances in which privilege may be lost (or 'waived')

— privilege and the lodgment of documents under the *Administrative Appeals Tribunal Act 1975* (the AAT Act).

* *Simon Daley acknowledges the assistance of ex-AGS lawyer Philip Clarke in the preparation of this briefing.*

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

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 (*Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49 (*Esso*) at 64).

The High Court has described legal professional privilege as both a rule of substantive law and an important common law immunity (*Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 (*Daniels*) at 552–553). This 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 (*Baker v Campbell* (1983) 153 CLR 52 (*Baker*) at 132).
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 (*Daniels* at 552–553). The phrase 'necessary implication' imports 'a high degree of certainty as to legislative intention' (*Hamilton v Oades* (1989) 166 CLR 486 at 495).

Although the privilege is an important common law immunity, it must be claimed before it can have any effect (*SZHWY v Minister for Immigration and Citizenship* [2007] FCAFC 64 (*SZHWY*) at [70]).[7]

Legal professional 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.*

Who does the privilege belong to?

The privilege belongs to the *client*, not the legal adviser (*Commissioner of Australian Federal Police v Propend Finance* (1997) 188 CLR 501 (*Propend*) at 570; *Baker* at 85). It is the client who is entitled to the benefit of the privilege and who may waive that entitlement (*Mann v Carnell* (1999) 201 CLR 1 (*Mann*) at [28]).

Nevertheless, the legal adviser has ostensible authority to waive privilege on behalf of their client (*Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 539–540; *Federal Commissioner of Taxation v Coombes* (1999) 92 FCR 240 at 255). This is so irrespective of whether the legal adviser is acting contrary to the express instructions of their client (*Esso* at [79]).

The recipient of a search warrant or other notice must claim privilege over documents in their possession that they reasonably believe are subject to the privilege of someone else, such as their client (*MM v Australian Crime Commission* [2007] FCA 2026 (*MM*) at [34]; *Commissioner of Taxation v Citibank Ltd* (1989) 20 FCR 403 (*Citibank*) at 414). 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 (*MM* at [34]).

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 (*Waterford v Commonwealth* (1986) 163 CLR 54 (*Waterford*) at 62). By enabling persons to conduct their affairs with the benefit of legal advice, legal professional privilege conforms to and underpins the rule of law (*Kennedy v Wallace* (2004) 142 FCR 185 (*Kennedy*) at [201]).

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 (*Esso* at 64–65, 82).

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 (*Waterford* at 65; *Attorney-General (NT) v Kearney* (1985) 158 CLR 500 (*Kearney*) at 532).

However, as explained below at pp 12–13, no privilege *arises* in respect of a communication made for some purpose that is *contrary* to the public interest (*R v Bell; Ex parte Lees* (1980) 146 CLR 141 at 147, 156, 159, 161; *Kearney* at 514–515; *Propend* at 514).

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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 or a lawyer;
>
> 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
>
> (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' and 'lawyer'.

The 'dominant purpose' test is considered below at p 9; 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 proceedings in a federal court or an Australian Capital Territory court
- relates to 'federal courts', being bodies that, in exercising their functions, are obliged to apply the laws of evidence (s 4)
- does not apply to the Administrative Appeals Tribunal (AAT), as the AAT is not required to apply the laws of evidence (s 33 of the AAT Act; *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* (2006) 233 ALR 369 (*Ingot*) at 374)
- applies to the adducing of evidence at trial, and so the common law principles apply to pre-trial stages of proceedings (such as producing documents under a subpoena and pursuant to discovery)[8] and in non-curial contexts such as search warrants and notices to produce documents (*Esso* at [16]; *Northern Territory v GPAO* (1999) 196 CLR 553 at [16]; c.f. *Wollongong City Council v Ensile (No. 5)* [2008] NSWLEC 150 (*Ensile (No. 5)*) (see p 7 below).

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.

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

'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'.

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' (*Balabel v Air India* [1988] Ch 317 (*Balabel*) at 330; *AWB v Cole* (2005) 152 FCR 382 (*AWB v Cole (No. 1)*) at 410; *DSE (Holdings) v Intertan Inc* (2003) 135 FCR 151 (*DSE*) at [45]).

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 (*AWB v Cole (No. 1)* at 410).

'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) (*AWB v Cole (No. 1)* at 410). However,

the privilege will *not* attach to advice that is predominately for a financial, personal, commercial or public relations purpose (*Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610 (*Three Rivers (No. 6)*) at 651; *AWB v Cole (No. 1)* at 410; *DSE* at [45]; *Barnes v Commissioner of Taxation* [2007] FCAFC 88 (*Barnes*) at [5]). Nor does privilege attach to policy or administrative advice (*Waterford* at 77, 85; *WorkCover Authority (NSW), (General Manager) v Law Society of New South Wales* (2006) 65 NSWLR 502 (*WorkCover*) at [91]).

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 (*Waterford* at 63–64, 74–75; *Webb v Commissioner of Taxation* (1993) 44 FCR 312 at 317)
- advice relating to proposed laws and their drafting (*WorkCover* at [74], [94]; *Three Rivers (No. 6)* at 652)
- 'commercial' or probity advice (*National Tertiary Education Industry Union v Commonwealth and D. A. Kemp* [2002] FCA 441 (where the retainer provided for the giving of 'legal advice as to consistency and defensibility')).[9]

Third party communications: advice privilege
Until relatively recently, common law advice privilege did not apply to third party communications unless the third party was an agent.

In 2004, advice privilege at common law was extended to cover 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 (*Pratt Holdings* at 137–138; 153–154; see also *DSE* at [72]–[96], where Allsop J reached the same result by taking a broad view of the concept of 'agency').

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This is one of the few respects in which the common law privilege differs from the statutory privilege. Section 118 of the *Evidence Act 1995* (Cth) does not apply to third party communications *unless* the third party is the agent of the client (*Westpac Banking Corporation v 789TEN Pty Ltd* [2005] NSWCA 321 at [29]).

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), then existing or reasonably anticipated (*Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority* [2002] 4 VR 332 (*Mitsubishi Electric*) at 334–335; *Trade Practices Commission v Sterling* (1979) 36 FLR 244 (Sterling)).

What is the rationale for litigation privilege?
Litigation privilege exists to secure a fair criminal or civil trial within the adversarial system of justice (*AWB v Cole (No. 1)* at 424; *Re L (a minor)* [1997] AC 16 at 26). 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 (*AWB v Cole (No. 1)* at 424–425). Nevertheless, advice privilege applies in its full extent to work undertaken in connection with such an inquiry (*AWB v Cole (No. 1)* at 425).

Does litigation privilege apply in the Administrative Appeals Tribunal?
There is divided opinion about whether common law litigation privilege applies in the Administrative Appeals Tribunal (AAT).[10]

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' (at [55]).

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 (*Re Farnaby and Military Rehabilitation and Compensation Commission* (2007) 97 ALD 788 (*Farnaby*) at [19], [31]). Although not cited in *Farnaby*, 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 (*Comcare v Foster* [2006] FCA 6 at [38]–[39]).[11]

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' (*Mitsubishi Electric* at 391; *Visy Industries v ACCC* (2007) 161 FCR 122 (*Visy*) at [24]–[33], [68]–[69]).[12]

Whether such a possibility exists is determined by an objective view of the circumstances, not the subjective view of the person making the communication (*Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1998) 81 FCR 526 at 558; *Mitsubishi Electric* at [20]; *Visy* at [28]).

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 (*Sterling* at 244). This includes communications between the legal adviser or client with a potential witness or other person for the dominant purpose of obtaining evidence for use in litigation (*Sterling*; *Carbone v National Crime Authority* (1994) 52 FCR 516 (*Carbone*)).

Section 119 of the *Evidence Act 1995* (Cth) captures third party communications, and in particular communications between a party's legal adviser and an expert witness (*MI Ubase Holdings Co Ltd v Trigem Computer Inc* [2007] NSWSC 859 (*MI Ubase*) at [27]).

Criminal proceedings
At common law, a person in possession or power of 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 (*Carter v Northmore Hale Davy & Leake* (1994) 183 CLR 121 (*Carter*) at 130-131).

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 a criminal proceedings unless the relevant evidence involves an 'associated defendant'[13] (such as a co-accused).

The potential operation of s 123 to abrogate client legal privilege in criminal proceedings, for example on the part of prosecution or law enforcement agencies, is an emerging issue, particularly in New South Wales.

A useful discussion of s 123 is contained in paras 14.148–14.169 of the ALRC's final report, *Uniform Evidence Law* (ALRC 102), where the ALRC confirmed that s 123 was intended to apply only to the adducing of evidence rather than to pre-trial processes such as subpoenas. On this approach, s 123 does not overturn the rule in *Carter*—that is, an accused person cannot obtain by subpoena documents that are covered by legal professional privilege. However, there have been differing views expressed by the courts regarding the effect of s 123, in particular, the extent to which s 123 may overturn the rule in *Carter* (*R v Pearson* (unreported, Supreme Court of NSW, Court of Criminal Appeal, Gleeson CJ, Smart and Sully JJ, 5 March 1996); *Ensile (No. 5)*; c.f. *Williams v R* (2000) 119 A Crim R 490 at [32]; *DPP v Kane* (1997) 140 FLR 468 at 478).[14] It is likely that there will continue to be developments in relation to this issue.

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Elements of legal professional privilege

Confidentiality

The mere fact that the persons involved in the 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 (*Esso* at [35]; *Daniels* at [9]–[11], [44]).

Issues of confidentiality often arise in the context of communications made in the presence of third parties.[15] At common law, the general position is that the presence of a third party (who is neither an employee or agent of the client) at the time of a communication may deprive that communication of the confidentiality necessary to establish the claim for privilege (*Re Griffin* (1887) 8 LR (NSW) 132 at 134). However, the question turns on the facts in each case, including whether the presence of the third party was unavoidable (*R v Braham & Mason* (1976) VR 547).

Communications

Legal professional privilege is designed to protect communications (either oral, written or recorded), not documents per se, still less the information given by or contained in the document (*Esso* at 79, 82; *Commissioner of Australian Federal Police v Propend Finance* (1997) 188 CLR 501 (*Propend*) at 585).

Copies

Copies of non-privileged documents may be privileged if those copies were made for the requisite purpose (*Propend* at 552–553).[16] 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 (*Cadbury Schweppes Pty Ltd v Amcor Ltd* [2008] FCA 88 (*Cadbury Schweppes*) at [38]; *Spotless Group Ltd v Premier Building and Consulting Group* (2006) 16 VR 1 at [20]–[23]).

Advice privilege: communications

For advice privilege, the purpose of a legal adviser's retainer is important in determining whether or not communications with clients were brought into existence for the requisite purpose (*WorkCover* at [88]). 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

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a legal adviser and his or her client which touches upon the subject matter of the retainer (*Balabel* at 330; *AWB v Cole (No. 5)* at 47–48; *Dalleagles* at 332–333; *DSE* at [45]). 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 (*Kennedy* at 191–192).

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.

(*Sterling* at 245–246; *Australian Securities and Investments Commission v Mining Projects Group Ltd* [2007] FCA 1620 at [27].)

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 (*Propend* at 569; *AWB v Cole (No. 1)* at 417). Provided the underlying communication is privileged, privilege will extend to such documents without the necessity of again applying the dominant purpose test (*Standard Chartered Bank of Australia v Antico* (1995) 36 NSWLR 87 at 91; *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd* [1992] 2 Lloyd's Rep 540).

Privilege also extends to any document which directly reveals, or which allows a reader to infer, the content or substance of a confidential communication.

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 (*AWB v Cole (No. 1)* at 417). The mere fact that a document is based (very closely) upon a privileged communication is insufficient for privilege to apply on this basis (*AWB v Cole (No. 1)* at 420). Rather, the document, if disclosed, must allow a reader to know or infer the nature, content or substance of the privileged communication (*AWB v Cole (No. 1)* at 420).

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, and chronologies, whether or not they are actually communicated to the client (*AWB v Cole (No. 5)* at 46; *AWB v Cole (No. 1)* at 415–416; *Saunders* at 472).

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 (*Saunders v Commissioner, Australian Federal Police* (1998) 160 ALR 469 (*Saunders*) at 471–472; *AWB v Cole (No. 5)* at 46).

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

(*Attorney-General (NT) v Maurice* (1986) 161 CLR 475 (*Maurice*) at 490; *Dingle v Commonwealth Development Bank of Australia* (1989) 91 ALR 239 at 242). Examples of documents that may be privileged on this basis include drafts of pleadings, statements from potential witnesses and surveillance film.[17]

Non-privileged communications and the fact/communication distinction
Privilege does not attach to:

— communications in furtherance of an illegal or improper purpose (see pp 12–13 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 (*Baker* at 122)

— facts the legal adviser observes while acting in the course of the retainer (*Z v New South Wales Crime Commission* (2007) 233 ALR 17 at 25; *Commissioner of Taxation v Coombes* (1999) 92 FCR 240; c.f. *Hamdan v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 1267).

Dominant purpose

Common law privilege and statutory privilege each turn upon the 'dominant purpose test' (*Esso* at [61]; ss 118 and 119 of the *Evidence Act 1995* (Cth)). 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 (*Esso* at [35]–[61]).

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 that time of its creation (*Sparnon v Apand* (1996) 68 FCR 322 at 328).

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 that time of its creation.

The dominant purpose of a document is to be determined at the time it is brought into existence, not the time of its communication (*Barnes* at [5]; see also *Pratt Holdings* at 137–138 (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')).

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 (*Grant v Downs* (1976) 135 CLR 674 (*Grant*) at 677; *Commissioner of Taxation of the Commonwealth of Australia v Pratt Holdings Pty Ltd* [2005] FCA 1247 (*FCT v Pratt*) at [30]). 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 (*Pratt Holdings* at 135–136; *FCT v Pratt* at [30]; *Hartogen Energy Ltd (in liq) v Australian Gas Light Co* (1992) 36 FCR 557 at 569). 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 (*AWB v Cole (No. 1)* at 412).

Whilst there may be several purposes for which a document is brought into existence, there can only be one dominant purpose. The dominant purpose is 'the ruling, prevailing, paramount or most influential purpose' (*Mitsubishi Electric* at [10]; *AWB v Cole (No. 1)* at 411). There will be no dominant purpose where there are two purposes and both are of equal weight (*FCT v Pratt* at [30]; *AWB v Cole (No. 1)* at 411) or where there are 'several purposes of roughly similar weight' (*FCT v Pratt* at [30]; *AWB v Cole (No. 1)* at 411).

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.[18]

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'.

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

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 (*Waterford* at 62; *Re Proudfoot* at 740).

The onus falls on the party claiming the privilege to adduce evidence going to these requirements, otherwise the claim for privilege may fail (*Telstra Corporation Ltd v Minister for Communications, Information Technology and the Arts (No. 2)* [2007] FCA 1445 at [36]–[39]; *Rich* at [43]).

The competence of the legal adviser may be established by proof of the legal adviser's admission to practise as a barrister or solicitor (*Waterford* at 70).

As to independence, the question principally turns upon the nature of the relationship between the legal adviser and client (*Rich* at [46]).

In-house lawyers

An employed or in-house lawyer may claim privilege on behalf of his or her employer as client (*Kearney* at 530–531). 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 (*Seven Network News v News Ltd* (2005) 225 ALR 672 at 674). The absence of a practising certificate is relevant to determining whether the in-house lawyer lacks the necessary independence; however, the absence of such a certificate is not fatal to a privilege claim (*Commonwealth v Vance* (2005) 157 ACTR 47 at [30]). 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.

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.

Some other factors relevant to the question of independence include:

— whether the subject matter of the advice is such as to engage the personal loyalties, duties and interests of the in-house lawyer

— whether the supervision of the legal adviser impacts upon the independence of the relevant advice

— the role of the legal area within a department or agency, including whether the legal area provides independent advice and does not alter legal views to meet policy or administrative objectives.[19]

The Office of Legal Services Coordination has issued a guidance note in relation to in-house lawyers of Australian Government departments and agencies: Guidance Note 1 of 2004, *Legal professional privilege and in-house legal advice*.[20] The note contains a number of recommendations to assist departments and agencies to maintain claims for privilege where required.

It indicates that it would generally be desirable for the head of the legal area to hold a current practising certificate. It is also suggested that, if other lawyers are settling legal advice, it may be desirable for those officers to hold practising certificates.

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.[21]

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 (*Arno v Forsyth* (1986) 65 ALR 125 at 129; *AWB v Cole (No. 1)* at 390–392 (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)).

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)).

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 (*Baker* at 97). 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' (*Baker* at 97; *Oke v Commissioner of the Australian Federal Police* [2007] FCA 27 at [102]).

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.[22]

The recipient of a compulsory production notice must be given a reasonable opportunity to claim privilege on his or her behalf or on behalf of their clients.

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 on behalf of their clients (*JMA Accounting Pty Ltd v Commissioner of Taxation* (2004) 139 FCR 537 (*JMA Accounting*) at 542, 544).[23] However, the investigating authority need not give the client of the recipient, as distinct from the recipient, a reasonable opportunity of asserting privilege (*MM* at [35]–[37] (as to the obligation of the recipient to claim the privilege, see above at p 2)). 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 (*May v Commissioner of Taxation* (1999) 92 FCR 152 at [38]).

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 (*JMA Accounting* at 542; *Allitt v Sullivan* [1988] VR 621 at 640). 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 document/s 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 document/s properly falls within the search warrant

(*JMA Accounting* at 542, 544). 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, inconsistent or uncertain—causing delay and hindering access by federal bodies to information not the subject of a claim for privilege' (at [8.1]).[24] The ALRC has recommended significant changes in relation to non-curial practice and procedure.[25]

Evidence in support of a claim

The party claiming the privilege bears the onus of proving the facts giving rise to the claim, even though the other party may have applied for relief by way of an order for production for inspection or otherwise (*Grant* at 689; *Mitsubishi Electric v Victorian WorkCover* [2002] VSCA 59 (*Mitsubishi*) at [11]).

Privilege is not established by mere verbal formula or assertion (*Grant* at 689). In such a situation, a trial judge may give little or no weight to such evidence (*Kennedy* at [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' (*AWB v Cole (No. 5)* at [44]; *Kennedy* at [12]–[21]; *National Crime Authority v S* (1991) 29 FCR 203 (*National Crime Authority*) at 211).

In ruling on a contested privilege claim, the court may inspect the relevant documents, and it should not be hesitant to exercise such a power (*Grant* at 677, 689; *Esso* at 70). 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' (*Grant* at 689). If the power of inspection is to be exercised, the privilege claim may be determined by a judge other than the trial judge (*Rich* at [7]). Further, the person who leads evidence in support of the privilege claim may be cross-examined (*Esso* at 70; *National Crime Authority* at 211).

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'.

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).[26]

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 (*Baker* at 409–410; *R v Bell; Ex parte Lees* (1980) 146 CLR 141 at 147, 156, 159, 161; *Kearney* at 514–515; *Propend* at 514).[27]

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

No privilege arises in respect of a communication made for a purpose that is contrary to the public interest ...

for the purpose of seeking advice in relation to past conduct, which may be privileged (*P & V Industries Pty Ltd v Porto* [2007] VSC 113 at [27]).

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 (*Finers v Miro* [1991] 1 WLR 35 at 40; *Derby & Co Ltd v Weldon* [1990] 1 WLR 1156 at 1174).

The illegal or improper purpose principle covers all forms of fraud and dishonesty, including fraudulent breach of trust, fraudulent conspiracy, trickery and 'sham' contrivances[28] as well as cases of fraud by third parties (*Clements, Dunne & Bell Pty Ltd v Commissioner of Australian Federal Police* (2001) 188 ALR 515 (*Clements*) at [220]).

The privilege is not displaced by the mere allegation of an illegal or improper purpose (*Propend* at 559, 579, 587). 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 (*Propend* at 553, 559, 579, 587; *AWB v Cole (No. 5)* at 89; *In the matter of ACN 005408 Pty Ltd (formerly TEAC Australia Pty Ltd)* [2008] FCA 964 at [2]).

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 (*Clements*)

— evasion by a government of the law, 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) (*Kearney*; c.f. *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)

— 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 (*AWB v Cole (No. 5)*).

Waiver of privilege

Commonwealth Evidence Act

Section 122 of the *Evidence Act 1995* (Cth) relevantly provides that privilege is lost if the client has knowingly and voluntarily disclosed to another person the 'substance' of the evidence and the disclosure was not made on a confidential basis.

However, there will be no loss of privilege if (among other things) the disclosure was made under compulsion of law (s 122(2)(c); *Ingot Capital v Macquarie Equity* [2008] NSWSC 25; *New Cap Reinsurance Corporation Ltd (in liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258).

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 (s 126 of the *Evidence Act 1995* (Cth)).[29]

Common law

At common law, a person 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'—is one of the most contested areas of legal professional privilege.

Express waiver

Express waiver occurs where a party deliberately and intentionally discloses a privileged communication (*Goldberg v Ng* (1994) 33 NSWLR 639 at 670). Express waiver commonly arises upon the service of otherwise privileged documents (such as witness statements or affidavits) on the other party to proceedings.

Implied waiver

Implied waiver arises where the party entitled to the privilege performs an act which is *inconsistent* with the maintenance of the confidentiality. 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 (*Mann* at [29]).

Implied waiver arises where the party entitled to the privilege performs an act which is inconsistent *with the maintenance of the confidentiality.*

The onus of proof falls upon the party alleging the waiver (*Nine Films & Television Pty Ltd v Ninox Television Ltd* (2005) 65 IPR 442 (*Ninox*) at [21]). Privilege is not waived unless there is clear conduct or language which evidences an intention to waive privilege either expressly or by necessary implication (*Ninox* at [5]).

The *Mann* inconsistency test focuses upon the conduct of the client, not their subjective intention (*Mann* at [29]).

Depending on the circumstances, fairness may or may not be relevant to the question of inconsistency (*AWB v Cole (No. 5)* at 67). Fairness is particularly relevant where a privilege holder makes a partial disclosure of legal advice for the purpose of advancing their position in litigation (*Secretary, Department of Justice v Osland* (2007) 95 ALD 380 (*Osland*) at [19]). In fact, there is some doubt as to whether fairness may be sensibly applied outside of the litigation context (*AWB v Cole (No. 5)*, where Young J noted (at 68) 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').

The question of implied waiver turns upon the facts of each case, including the objective purpose of the relevant disclosure (*Mann* at [34]; *Osland* at [63]; *Bennett v CEO of Customs* (2004) 140 FCR 101 (*Bennett*) at [6], [68]). Implied waiver has been found where there has been a disclosure of legal advice for a forensic or commercial purpose (*Osland* at [20], [21]; *Bennett* at [68]). 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 (*Osland* at [66], [67]).[30]

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 the privilege holder's opposing litigant.

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 the

privilege holder's opposing litigant (*Mann* at [29]; *Network Ten Ltd v Capital Television Holdings Ltd* [1995] 36 NSWLR 275 (*Network Ten*) at 284; *British Coal Corporation v Dennis Rye Ltd (No 2)* [1988] 1 WLR 1113; *Goldman v Hesper* [1988] 1 WLR 1238; *Cadbury Schweppes* at [18], [43]–[45]). However, in order to constitute such a limited waiver, the privilege holder must retain full control of the further dissemination of the relevant communication (*Cadbury Schweppes* at [18]).

There is some controversy as to whether statements or affidavits filed and served in proceedings but not read in open court remain subject to legal professional privilege (see *Cadbury Schweppes* at [13]–[19]; see also *Liberty Funding Pty Ltd v Phoenix Capital Ltd* (2005) 218 ALR 283). The prevailing view in the Federal Court appears to be that filing and service, without more, constitutes a full waiver of privilege (*Cadbury Schweppes* at [13]–[19]). 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 (*Cadbury Schweppes* at [18]).

At common law, there may be no waiver of privilege where the disclosure is made under compulsion of law (*AWB v Cole (No. 5)* at 69). 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' (*Network Ten* at 279; see also *Rich* at [63]–[77]).

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.

There are five areas 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 over 'associated material'

(v) inadvertent disclosure.

These areas are considered separately below.

(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.

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It is reasonably well settled that the mere reference to advice will not amount to a waiver of privilege (*Commissioner of Taxation v Devereaux Holdings Pty Ltd* [2007] FCA 821 at [8]). Nor would privilege be likely to be waived by an assertion that advice has been taken, and the mere fact that action is then taken (*Bennett* at [13]; *Ninox* at [22]). 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 (*Ninox* at [22]).

However, there is an apparent divergence of judicial opinion about the proper application of the *Mann* inconsistency test where there has been disclosure of substance or the gist or effect of advice.

On the one hand, the view in the Federal Court is that the disclosure of the substance or the gist or effect of the advice necessarily amounts to a waiver in respect of the whole of the advice (*Bennett* at [65] per Giles J (Tamberlin J agreeing at [1]);[31] *AWB v Cole (No. 5)* at 76). On the other hand, the Victorian Court of Appeal has questioned the generality of this proposition (*Osland* at [42]).

In *Osland*, Maxwell P (with whom Ashley JA and Bongiorno AJA agreed)[32] held that disclosing the substance of advice *may or may not* amount to a waiver depending on the circumstances (including the objective purpose of the disclosure, which the Court described as 'highly relevant' (at [49])). It was held that the touchstone in each case must be the inconsistency principle enunciated in *Mann*. In 2007, the High Court granted special leave to appeal *Osland*. The appeal was heard on 24 April 2008, with the High Court reserving its decision.[33]

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

Nevertheless, 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 (*Rio Tinto* at [45]).
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 (*DSE (Holdings) v Intertan Inc* [2003] FCA 384 (*DSE (Holdings)* at [121]).
3. Privilege will not be waived by the mere denial in a pleading of an assertion made by the other party (*DSE (Holdings)* at [115]; *Rich* at [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 (*Rio Tinto* at [67]; *DSE (Holdings)* at [6], [58], [115]; *Rich* at [25]).
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 and, by such conduct, an inconsistency arises 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 (*Rio Tinto* at [61]; *DSE (Holdings)* at [58]; *Rich* at [21]).

   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 (*Rio Tinto* at [67]).
6. Privilege may be waived, notwithstanding any express disavowal of any intention of so doing (*Rio Tinto* at [72]).

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 ... to vindicate his or her claimed state of satisfaction ...

In *Rio Tinto*, the Full Federal Court held that the Commissioner had done more than merely make an assertion about the relevance of certain legal advices. In particulars required to be provided in a tax appeal, the Commissioner stated that he had taken into account certain matters 'evidenced by' listed documents, including the relevant legal advices. Further, the Commissioner expressly disavowed any intention of waiving privilege. The Court held that, notwithstanding the express disavowal, the Commissioner had made an assertion that put the contents of the legal advices in issue, or necessarily laid them open to scrutiny, and so had acted in a manner that was inconsistent with the maintence of the privilege.

(iii) Disclosure within the Commonwealth

Paragraph 10 of the *Legal Services Directions* (LSDs) deals with sharing of advice within government.[34] Paragraph 10.1 relevantly provides:

> If an FMA agency (the requesting agency) wishes to obtain legal advice (whether from an in-house or external source) on the interpretation of legislation administered by another agency (the administering agency), the requesting agency is to provide the administering agency 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 an FMA agency (subject to any legislative restriction).

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

> (4) 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 subs (1) is disclosure pursuant to a Legal Services Direction.

The combined effect of the LSDs and the Judiciary Act is that advice provided to an FMA agency is provided to the Commonwealth, with the privilege being held by the Commonwealth. It follows that provision of the advice to another FMA agency does *not* involve the advice being disclosed to a third party, such that no question of waiver arises (*NSW Council for Civil Liberties Inc v Classification Review Board (No. 1)* [2006] FCA 1409 at [29]–[34]). This position would apply where the FMA agency is simply an emanation of the Commonwealth, such as a Department of State; however, the position *may* be different where the agency is a separate legal entity (see *Mann* at [68]–[93] (McHugh J in dissent).)

(iv) Associated material: expert's 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 (*Sterling* at 244; see p 6 above).

Waiver of privilege does not arise by the delivery of a statement to a witness in circumstances of confidentiality and as part of a process of ensuring the accuracy of the statement (*Carbone* at 529; *Maurice* at 487).

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).[35]

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' ...

As to the scope of any waiver in the context of expert's reports, the relevant principles are set out in *Australian Securities and Investments Commission v Southcorp Ltd* (2003) 46 ACSR 438 as follows (at [21]; citations omitted):[36]

(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.

(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 (*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).

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.

Interaction between the test for waiver at common law and under the *Evidence Act 1995* (Cth)

One topical issue is the extent to which the common law test of waiver, as expressed in *Mann*, may (if at all) inform the operation of the statutory waiver provisions under s 122 of the *Evidence Act 1995* (Cth).

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. 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 at 168; *Singapore Airlines v Sydney Airports Corporation* [2004] NSWSC 380 (*Singapore Airlines*) at [55]).[37] The courts have taken the view that, for the purpose of ascertaining whether there has been implied consent under s 122(1), the *Mann* inconsistency test remains applicable (*Singapore Airlines* at [55]; *Wyadra Pty Ltd v Mailler (No 2)* [2005] NSWSC 88 at [6]).

The courts have taken the view that, for the purpose of ascertaining whether there has been implied consent under s 122(1), the Mann *inconsistency test remains applicable.*

On the other hand, there has been strong criticism of an approach that expresses the *Mann* inconsistency test in terms that reflect the test for waiver under s 122(2) of the *Evidence Act 1995* (Cth) (*Osland* at [29]–[51]).

Privilege and the lodgment of documents under the AAT Act

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 also to lodge 'every other document or part of a 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'.

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

What if a document is created after the reviewable decision?

Under s 37(1)(b), statutory decision makers must lodge all relevant documents in their possession or control with 28 days of receiving the notice of application for review (or within such period as the AAT allows). This obligation relates to all documents relevant at the time of lodgement, including documents that came into existence after the making of the original decision (*Schiffer v Pattison* (2001) FCA 1091). The obligation under s 37(1)(b) does not continue for the course of the review proceeding but, rather, ceases upon lodgement.

Nevertheless, the AAT may compel the production of documents by issuing a notice under s 37(2) at any time during the proceeding. Among other things, such a notice may relate to a document obtained by a decision maker after the obligation under s 37(1)(b) has arisen and been complied with (*Re Velovski* (1998) 26 AAR 454; *Re McMaugh and Australian Telecommunications Commission* (1991) 22 ALD 393).

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

In *Australian Prudential Regulation Authority (APRA) v VBN* (2005) 88 ALD 403[38] (*APRA v VBN*), 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 were considered by the decision maker, are 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 (*APRA v VBN* at 412).[39]

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 (*Re VBN and Australian Prudential Regulation Authority* [2005] AATA 1060 at [6]–[11], [35] (overturned on appeal, but not on this point). On this

[The obligation to lodge documents under s 37(1)(6) of the AAT Act] relates to all documents relevant at the time of lodgement, including documents that came into existence after the making of the original decision.

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 of 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 s 35(2).

In *APRA v VBN*, Ryan J held (at 413) that the sole source of power for the AAT to compel production under s 37 is found in s 37(2). 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 s 35(2) 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.

Section 33(1AA) of the AAT Act

Section 33(1AA) of the AAT Act raises a further issue in the case of documents held by statutory decision makers.

Section 33(1AA) provides that, in a proceeding before the AAT for a review of a decision, the decision maker must use his or her best endeavours to assist the AAT to make its decision in relation to the proceeding. While s 33(1AA) does not explicitly override legal professional privilege, the AAT has apparently taken the view that s 33(1AA) abrogates the privilege by 'necessary implication'. The *Administrative Appeals Tribunal Guide to the Workers' Compensation Jurisdiction* (Workers' Compensation Guide), which took effect on 30 April 2007, states, at para 2.3, that:

> The Tribunal is required to make the correct or preferable decision in relation to an application. It will be assisted in this task by having all relevant material available to it. Consistently with subsection 33(1AA) of the Administrative Appeals Tribunal Act 1975, the respondent *must* lodge with the Tribunal all reports that it has obtained whether or not they are favourable to the applicant. [Emphasis added.]

The AAT has apparently taken the view that s 33(1AA) abrogates the privilege by 'necessary implication'.

This suggests that, even if privilege does attach to an expert report obtained by a Commonwealth respondent, the AAT could compel its production.[40] It remains to be seen whether this view of s 33(1AA) will prevail if challenged. In any event, agencies should certainly consider the obligation contained in s 33(1AA) in determining whether to claim privilege over an unserved expert's report.

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Notes

1 Legal professional privilege is provided for by statute in the federal jurisdiction (*Evidence Act 1995* (Cth)), *New South Wales (Evidence Act 1995* (NSW)) and Tasmania (*Evidence Act 2001* (Tas)). It is also provided for by statute in the *Norfolk Island (Evidence Act 2004* (NI)).

2 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). 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.

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* (6th ed, Lawbook Co, 2004).

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 http://www.ags.gov.au/clients/agspubs/legalpubs/legalbriefings/br75.htm. See also *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 (*Farrow Mortgage Services Pty Ltd v Webb* (1996) 39 NSWLR 601 (*Farrow*) at 608–609).

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). For a recent decision on common interest privilege, see *Rich v Harrington* [2007] FCA 1987.

7 See also R Desiatnik, *Legal Professional Privilege in Australia* (2nd ed, LexisNexus Butterworths, 2005), p 74 (quoted in *SZHWY* at [70]).

8 The application of the Evidence Acts to pre-trial stages of proceedings may be extended by court rules or other legislation: for example, the *Civil Procedure Act 2005* (NSW) and the *Uniform Civil Procedure Rules 2005* (NSW) extend the application of the *Evidence Act 1995* (NSW) to pre-trial stages in civil proceedings before the NSW Supreme Court and District Court. See also *R (Cth) v Petroulias (No. 22)* [2007] NSWSC 692 at [39]–[54] (as to the basis for the application of the *Evidence Act 1995* (NSW) to pre-trial stages of certain criminal proceedings).

9 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.

10 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*). Indeed, in *Ingot*, Bergin J accepted that legal advice privilege is available in respect of tribunal proceedings (at [55]).

11 As to the interaction between the lodgment of documents under s 37 of the AAT Act and legal professional privilege, see *APRA v VBN* (2005) 88 ALD 403; also see pp 19–20 above.

12 For a recent summary of the cases considering the time at which litigation is 'reasonably anticipated' during an investigation, see *Alfred v Primmer* [2008] FMCA 235 at [45]–[48].

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

14 In New South Wales, the *Uniform Civil Procedure Rules 2005* (UCPR) apply Pt 3.10 of the Evidence Act (NSW) to pre-trial processes in civil proceedings. In *R (Cth) v Petroulias (No 22)* [2007] NSWSC 69, it was held that the effect of Pt 75 of the *Supreme Court Rules* is to apply the relevant provisions of the UCPR, and so Pt 3.10 of the *Evidence Act 1995* (NSW), to certain classes of criminal proceedings, including those involving indictable offences. Further, in *Wollongong City Council v Ensile Pty Ltd; Wollongong City Council v Hogarth (No 5)* [2008] NSWLEC 150, it was held that s 123 allowed the accused in that case to obtain access to otherwise privileged documents by way of a call for production of the documents.

In *R v Pearson*, it was common ground between the parties that 'the practical effect of s123 of the *Evidence Act 1995* when read together with s 118, in a case of the present kind, is to reverse the effect of the decision of the High Court in *Carter*'. Accordingly, *R v Pearson* reflects only the agreement of the parties. The decision was made at a time when the Evidence Act was thought, erroneously, to apply to subpoenas (see *TPC v Port Adelaide Wool* (1995) 132 ACR 645).

In *Williams v R* (2000) 119 A Crim R 490, the Full Federal Court held (at [32]) that s 123 does not apply to the production of documents.

In *Cahill v State of New South Wales (Department of Community Services)* [2007] NSWIRComm 1, Boland J (of the NSW Industrial Court) held that a rule in the *Industrial Relations Commission Rules* (which is similar to the relevant UCPR rule) did not apply to criminal proceedings. Accordingly, in that case, s 123 did not apply. In part, his Honour's reasoning was that to extend the operation of s 123 to pre-trial processes would remove the current common law right of a prosecutor (or others) to claim legal professional privilege in criminal proceedings.

[15] For a relatively recent 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.

[16] Possibly (as Brennan CJ proposed in *Propend* at 512), the copy may lose privilege if no copy of the original document is available.

[17] D Byrne and J D Heydon, *Cross on Evidence* (4th ed, looseleaf, Butterworths, 1991) Vol 1 at [25225].

[18] Privilege may attach to communications between a client and a foreign legal adviser (*Kennedy* at [198]–[215]).

[19] For an application of the independence requirement to a legal branch of an executive agency, see *Rilstone v BP Australia Pty Ltd* [2007] FCA 1557 at [20]–[26].

[20] A copy of the Guidance Note and the full list of recommendations can be found at http://www.ag.gov.au/www/agd/agd.nsf/Page/LegalservicestoGovernment_GuidanceNote1of2004Legalprofessionalprivilegeandin-houselegaladvice

[21] See, for example, *Federal Court Rules* O15 rr6, 9, 11 and 14, O33 r11.

[22] The ATO guidelines can be found at: http://www.ato.gov.au/corporate/content.asp?doc=/Content/7029.htm&page=8&H8. The AFP guidelines can be found at: http://www.lawcouncil.asn.au/get/policies/1959496083/0.pdf

[23] 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* at [73] to [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 (at [136]–[163], [193]) held that the RRT committed a jurisdictional error in asking and pursuing questions to elicit privileged communications.

[24] ALRC, *Privilege in Perspective Report—Client Legal Privilege in Federal Investigations* Report No. 107 (January 2008) http://www.austlii.edu.au/au/other/alrc/publications/reports/107/ (the Privilege Report).

[25] Privilege Report, Ch 8.

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

[27] The general principles relating to this principle are discussed in detail in *AWB v Cole (No. 5)* at [210]–[233].

[28] Byrne and Heydon, above, n 17, at [25290].

[29] For the general principles applicable under ss 122 and 126, see *Ml Ubase*.

[30] In *Osland*, Victorian Court of Appeal held that privilege had not been waived by a press release which partially disclosed legal advice for the purpose of explaining a decision by the Governor to refuse a petition for mercy, following a recommendation by the Attorney-General to the Premier that the Governor be advised to deny the petition.

[31] However, Tamberlin J later stated that such a disclosure 'can' amount to waiver (thus suggesting an approach which turns upon the facts in each case) (*Bennett* at [46]–[48]). In a subsequent decision, his Honour expressed the view that the question of waiver depended on the circumstances (*Ninox* at [26]).

[32] At [104] and [120] respectively.

[33] For the transcript of the appeal to the High Court, see: http://www.austlii.edu.au/au/other/HCATrans/2008/175.html.

[34] 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.

[35] See generally H Stowe, 'Expert reports and waiver of privilege' (2007) 45(2) *Law Society Journal* 74.

[36] For a detailed analysis of the authorities on 'associated material', see *AWB v Cole (No. 5)* at [164]–[176].

[37] See also ALRC, *Review of the Uniform Evidence Acts*, Discussion Paper 69 (2005), paras 13.124–13.128.

[38] For the earlier decision of Deputy President Forgie, see *Re VBN and Australian Prudential Regulation Authority* [2005] AATA 1060 (21 October 2005).

[39] 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.

[40] Paragraph 3.3 of the *Administrative Appeals Tribunal Guide to the Social Security Jurisdiction*, which took effect on 19 May 2008, contains a slightly different provision ('the AAT *expects* that the department will lodge with the AAT all reports that it has obtained whether or not they are favourable to the other party' (emphasis added)).

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