Privilege: General Overview of Principles and How to Apply Them

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1. INTRODUCTION

Legal professional privilege protects communications between a legal adviser and client from compulsory disclosure. While the process for properly asserting a claim of professional privilege is stringent, once established, it affords absolute protection. As a result, parties seeking to discover communications over which privilege is claimed often contest the existence of that privilege. Alternatively, they may argue that any such privilege has been waived.

As privilege is a well established principle this paper will not seek to do more than recap the requirements for a valid claim of privilege, look briefly at the categories in which privilege has been found to have been waived and provide a synopsis of contemporary cases where the courts have examined claims for legal professional privilege.

2. WHAT ARE THE REQUIREMENTS FOR A SUCCESSFUL CLAIM OF PRIVILEGE?

2.1 Rationale and core elements

The fundamental rationale behind legal professional privilege is the need to ensure the proper administration of justice by protecting freedom of consultation between a client and their legal advisor.¹

As Gibbs CJ put it in *Baker v Campbell*,²

> “to ensure that the client can consult his lawyer with freedom and candour, it being thought that if the privilege did not exist a man would not venture to consult any skilful person, or would only dare to tell…half his case”.

Privilege may attach to communications in all circumstances requiring compulsory disclosure of information including:

(a) investigative and administrative procedures;
(b) procedures requiring search warrants;
(c) pre-trial proceedings; and
(d) the giving of evidence at trial.³

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³ *Grant v Downs* (1976) 135 CLR 674.
To establish legal professional privilege the following three elements must be satisfied:

(e) communications must pass between the client and the client’s legal adviser;

(f) the communications must be made for the dominant purpose of enabling the client to obtain legal advice (advice privilege) or for the purpose of actual or contemplated litigation (litigation privilege); and

(g) the communications must be confidential.

2.2 Communications must pass between the client and the client’s legal adviser

The first element of a successful privilege claim is that the communication has passed between the client and the client’s legal adviser.

In determining whether a person is a client, the Court considers whether the person has come to stand in a relationship of trust and confidence with the adviser in circumstances where there is a duty by the adviser to promote the person’s interests, to protect the person’s rights and to respect the person’s confidences.

It is not necessary that there be a contract or retainer between the parties, however, the solicitor-client relationship must be in existence or at least contemplated at the time of the communication. Further, the communications must fall within the scope of the professional relationship of solicitor and client. Thus, communications between a person and a lawyer acting in their personal capacity will not attract legal professional privilege.

Additionally, in some circumstances legal professional privilege may also apply to confidential communications between the solicitor or client and third parties. These include where the third party is acting as agent of the client and where the communication is made to the lawyer or client on request by either of for the dominant purpose of the current or anticipated litigation.

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6 Ibid.
7 Minter v Priest [1930] AC 558.
8 Somerville v Australian Securities Comm 131 ALR 517.
9 See 2.4.
10 Grant v Downs (1976) 135 CLR 674.
2.3 Dominant purpose test

If a communication is to attract legal professional privilege it must be made for a ‘dominant purpose’ of enabling the client to obtain legal advice or for the purpose of actual or contemplated litigation.¹⁴

In Grant v Downs Barwick CJ stated:

*It seems to me to be preferable to test the status of each document according to the purpose of its production…For my part, I prefer the word "dominant" to describe the relevant purpose. Neither "primary" nor "substantial", in my opinion, satisfies the true basis of the privilege."¹⁵

The fact that there is more than one purpose for creating the document does not, of itself, result in the loss of privilege. This is provided that the subsidiary purpose would not on its own have been sufficient to give rise to the creation of the document.¹⁶

The dominant purpose test is an objective one and the subjective intentions of the document’s author are irrelevant.¹⁷

The fact that a document is given to solicitors for advice is not determinative of the purpose for which was created.¹⁸ As the test applies to the purpose for which the document was created, it also does not matter whether it was actually used for that purpose.¹⁹

2.4 Communications must be confidential

Legal professional privilege only applies to communications between a legal adviser and client that are confidential.²⁰ Where the communication between adviser and client is not confidential, the information will not attract privilege.²¹

Having a third party (not the client or legal adviser) present at the time the communication was made does not prevent it from being privileged; however, it may point towards a finding that the communication was not intended to be confidential.²²

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¹⁵ Grant v Downs (1976) 135 CLR 674, 678.
¹⁶ Jacob J’s test in Grant v Downs (1976) 135 CLR 49.
¹⁹ Trade Practices Commission v Sterling (1979) 36 FLR 244.
²¹ Wheeler v Le Marchant (1881) 17 Ch D 675.
There is a debate over the extent of this requirement when the litigation limb of privilege is concerned. In *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd*\(^{23}\) the Court said:

*As to confidentiality, we would have thought that the scope of the confidentiality arising from litigation privilege is different from advice privilege. We say this because when dealing with third parties, such as potential witnesses, unless there is a separate confidentiality agreement with such third parties, then, subject to the principle in *Harman* [1983] 1 AC 280 (as explained in *Hearne v Street* (2008) 235 CLR 125 (Hearne) at [109] per Hayne, Heydon and Crennan JJ), such potential witnesses would be free to discuss with others their potential evidence.*\(^{24}\)

In that case the Court considered that, whatever the extent of confidentiality arising from litigation privilege, one element of confidentiality is essential, namely non-disclosure to one’s opponent.\(^{25}\)

### 2.5 Documents not covered by privilege

To establish a claim of privilege a document must record the substance or nature of legal advice given.\(^{26}\) Information passed on to a solicitor in furtherance of a crime is not privileged.\(^{27}\) This exception extends to fraud or actions taken for illegal or improper purposes or for “trickery” and “shams.”\(^{28}\)

Communications from any adviser acting other than in a legal capacity, such as an accountant or financial adviser, are not privileged regardless of whether that person is in fact a lawyer.\(^{29}\)

Documents generated unilaterally by expert witness such as working notes, field notes and the witness’s own drafts of his or her report generally do not attract privilege because they are not in the nature of, and would not expose, confidential communications.\(^{30}\) The context of experts is discussed further later in this paper.

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\(^{23}\) (2009) 174 FCR 547.
\(^{24}\) *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd* (2009) 174 FCR 547, [35].
\(^{25}\) Ibid at [37].
\(^{27}\) *R v Cox and Raitton* (1884) 49 JP 374.
\(^{28}\) *Equuscors* Pty Ltd v *Glengallan Investments* Pty Ltd (2004) 218 CLR 471.
\(^{29}\) *Re Sarah C Getty Trust* [1985] QB 956.
\(^{30}\) *Australian Securities and Investment Commission v Southcorp Ltd* (2003) 46 ACSR 438, [21].
3. WAIVER OF LEGAL PROFESSIONAL PRIVILEGE

3.1 What is waiver?

Legal professional privilege is the privilege of the client not of the legal adviser. As such it may only be waived by the client with his or her consent.

A waiver by a practitioner within their actual or ostensible authority may bind the client, however, if this is beyond their actual authority the client may have an action against the solicitor in negligence or breach of contract.

A waiver of privilege may be express or implied (this is also referred to in the cases as imputed).

The concept of an implied waiver was explained in Mann v Carnell:

Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is “imputed by operation of law”. This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege.

3.2 Express

This category of waiver is self-explanatory and is not proposed to be examined in this paper.

3.3 Implied or Imputed

A mere failure to claim privilege in an affidavit of documents is not necessarily a waiver.

However, if the party fails to make a claim that the document was privileged for a substantial time period after the party knew that the document was in the hands of the Registrar or a third party, the party will have been held to have waived the privilege.

A document disclosed through inadvertence, mistake or error may still be privileged.

The Court will apply an objective test and place the onus on the party seeking to maintain the privilege to prove that a reasonable person in the shoes of the recipient ought to have realised

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31 R v Davies (1921) 21 SR (NSW) 311 (CCA).
32 Attorney-General (NT) v Maurice (1986) 161 CLR 475.
33 Divall v Mifsud [2005] NSWCA 447.
34 Mann v Carnell (1999) 201 CLR 1.
35 Hooker v Corporation Ltd v Darling Harbour Authority (1987) 9 NSWLR 538.
that there had been a mistake.\textsuperscript{37} Where there is nothing in the circumstances that would bring this to the mind of a reasonable person, the court may find the privilege is waived.\textsuperscript{38}

Where no privilege is waived, the communications mistakenly disclosed will not be admissible, and disclosed documents may be the subject of an order for their return.\textsuperscript{39}

It is open to the court to disqualify the opposing lawyer from acting on the ground that the lawyer could use the privileged communications to his or her client’s benefit.\textsuperscript{40} However, this order is of an ‘exceptional nature.’\textsuperscript{41}

Rule 31.1 of the \textit{Australian Solicitors’ Conduct Rules 2012} address the practitioner’s duty upon the receipt of inadvertently disclosed material. A solicitor to whom material known or reasonably suspected to be confidential is disclosed by another solicitor, or by some other person who is aware that the disclosure was inadvertent must not use the material and must return, destroy or delete the material upon becoming aware of the inadvertent disclosure. Further, the solicitor must notify the other solicitor or other person of the disclosure and the steps that can be taken to prevent the inappropriate misuse of the material.

Rule 31.2 adds that a solicitor who reads part or all of the confidential material before becoming aware of its confidential status must also notify the opposing solicitor immediately and not read any more of the material. Any instructions by the client to continue reading the confidential material received in error should be refused.

Partial disclosure of a privileged document may not constitute implied waiver of the entire document if the document deals with more than one subject matter and the information that was disclosed is severable from the remainder of the document.\textsuperscript{42} Nevertheless, where this partial disclosure causes the other party to be “misled by an inaccurate perception of the disclosed communication” the privilege over the whole of the communication will be impliedly waived.\textsuperscript{43}

Subsequently, if a party, whether by pleadings or evidence, makes an assertion as to the content of privilege communications, fairness to the other party may mean that this assertion is taken as a waiver of any such privilege based on the inconsistency of the conduct by the party making partial disclosure.\textsuperscript{44}

\textsuperscript{37} Unsworth v Tristar Steering and Suspension Australia Ltd [2007] FCA 1801.
\textsuperscript{38} Hooker v Corporation Ltd v Darling Harbour Authority (1987) 9 NSWLR 538.
\textsuperscript{39} INSTIL Group Inc v Zahoor [2003] 2 All ER 252.
\textsuperscript{40} H Stanke & Sons Pty Ltd v von Stanke (2006) 95 SASR 425.
\textsuperscript{41} GT Corporation Pty Ltd v Amare Safety Pty Ltd [2007] VSC 123.
\textsuperscript{43} Attorney-General (NT) v Maurice (1986) 161 CLR 475.
\textsuperscript{44} Standard Chartered Bank of Australia Ltd v Antico (1993) NCSLR 87.
4. EVIDENCE ACTS AND THE COMMON LAW IN QUEENSLAND

4.1 Common Law

Legal professional privilege in Queensland is governed almost entirely by the common law.\(^{45}\)

4.1 Evidence Act (Qld)

Section 10 of the *Evidence Act 1977* (Qld) affords individuals privilege against self-incrimination during court proceedings.

4.2 Evidence Act (Cth)

The scope of the *Evidence Act 1995* (Cth) limits its application to the Federal court and Australian Capital Territory court proceedings.

As such, any federal court proceedings held in the Queensland jurisdiction will be governed by both the *Evidence Act 1995* (Cth) and the common law.

The relevant sections of the *Evidence Act 1995* (Cth) are respectively section 118 and 119.

Section 118 of the *Evidence Act 1995* (Cth) provides confidential communications and confidential documents that have been prepared for the dominant purpose of providing a professional legal service are privileged. This section applies to communications between a client and a lawyer or between two or more lawyers acting for the client.

Section 118 mirrors the common law regarding advice privilege.

At common law, ‘legal advice’ includes any advice of what ‘may be prudently and sensibly done in the relevant legal context’.\(^{46}\) Further, the advice must be given by a legal adviser in a professional capacity.\(^{47}\) Legal advice can include commercial or probity advice,\(^{48}\) but privilege will not attach to advice given for a commercial, personal, financial or public relations purpose.\(^{49}\)

Advice privilege has been extended at common law to cover confidential communications between the client, a lawyer and a third party provided it is for the dominant purpose of providing advice.\(^{50}\)

Section 119 of the *Evidence Act 1995* (Cth) provides that confidential communications and confidential documents prepared for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding or an anticipated or

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\(^{46}\) *Balabel v Air India* [1988] Ch 317 at 330.
\(^{49}\) *Three Rivers District Council v Governor and Company of the Bank of England* (No. 6) [2005] 1 AC 610.
\(^{50}\) *Pratt Holdings* (2004) 207 ALR 217.
pending proceeding, are protected by privilege. This section applies to communications between the client and another person or between a lawyer acting for the client and another person.51

Section 119 also captures third party communications including communications between a lawyer and an expert witness.52 This section closely mirrors the common law position.

At common law, litigation privilege does not extend beyond adversarial proceedings and cannot be claimed in the context of an inquiry or commission.53 The common law has interpreted an ‘anticipated’ proceeding as where there is a ‘real possibility of litigation, as distinct from a mere possibility, but it does not have to be more likely than not’.54 Whether a real possibility exists is objectively determined by the court on a case by case basis.55

5. RECENT CASES

With this recap of privilege in mind this paper now examines a series of cases involving claims asserting the:

(a) existence of a valid claim of legal professional privilege; and

(b) waiver of what would otherwise have been legal professional privileged documents.

The cases selected largely focus on privilege claims where in-house counsel or government solicitors have been involved and one directly addresses a variation involving retained experts.

6. AQUILA COAL PTY LTD V BOWEN CENTRAL COAL PTY LTD [2013] QSC 82

Aquila Coal Pty Ltd (Aquila) and Bowen Central Coal Pty Ltd (Bowen) entered into a joint venture agreement for the development of a proposed coal mine in central Queensland. The breakdown between the two parties with respect to this agreement is the subject of a dispute which led to the institution of the proceedings by Aquila.

In the process of disclosure, Bowen claimed that certain documents in its possession were subject to a claim of legal privilege or otherwise irrelevant and accordingly, were not disclosable to Aquila.

Aquila contended that no such claim had arisen and sought orders for the disclosure of the withheld documents.

51 Evidence Act 1995 (Cth), s 119.
52 Mi Ubase Holdings Co Ltd v Trigem Computer Inc [2007] NSWSC 859.
In deciding whether Bowen’s claim of privilege had been properly asserted, Boddice J first addressed the issue of whether privilege was capable of arising in the circumstances.

The relevant issue was that the legal advisers of Bowen were in-house counsels who were supervised by Mr Milbourne, a general counsel who was not himself admitted in Australia as a legal practitioner.

In order for professional privilege to arise in the context of in-house counsel, it is necessary to ask whether the lawyers were acting independently: “bringing a disinterested mind to bear on the subject matter of the legal advice”. On this point, Boddice J accepted the evidence of Mr Jackson, an in-house counsel of Bowen, that members of the legal team were not subject to direction in respect to the giving of advice.

In regards to Mr Milbourne not being an admitted Australian legal practitioner, Boddice J found that this did not in itself preclude the existence of privilege.

Aquila contended that the weight of authority suggested that advice provided by a person who is not admitted to practice cannot be the subject of legal privilege. This argument was rejected however, as Boddice J reasoned that it is sufficient for a practitioner to be admitted in another jurisdiction for the purposes of a claim of privilege. Arguably going against a previous decision of the Queensland Court of Appeal, Boddice J also suggested that while the lack of a current practicing certificate from any jurisdiction may be a relevant factor in determining whether professional privilege exists, it is not determinative. Boddice J considered the fact that Mr Milbourne was admitted to practice and was acting in a legal advisory capacity and found legal privilege could arise. However, whether privilege actually attached to any of the documents in question required the court’s consideration of the communications as a whole.

Boddice J considered whether the communication in specific documents was substantially commercial or advisory in nature. Noting that in-house counsel often provides advice with regard to the commercial context of the business, the court said that the mere fact that Bowen’s in-house legal team dealt with issues from a strategic commercial perspective was insufficient to negate privilege. Further, the fact that the emails had often been sent to a large number of commercial managers did not take away from the fact that the dominant purpose of the communications was to provide legal advice and requests for advice in respect of matters likely to result in litigation.

The Court said that it was not determinative that only one of the emails was marked privileged or confidential.

56 Glengallan Investments Pty Ltd & Ors v Arthur Anderson & Anor (2001) QCA 115, 16.
57 Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd [2013] QSC 82, [23].
In the one instance where a document was regarded as not subject to privilege, the email chain was distinguishable as the correspondence had not been directly between the commercial managers and in-house counsel. Moreover, in-house counsel had merely been copied into the email at the end of the chain. Furthermore, in-house counsel’s response to the email was consistent with the communication being primarily commercial in nature.

In sum, twelve of the thirteen documents which were claimed to be non-disclosable for reasons of legal privilege were upheld as such.

7. SCHUTZ AUSTRALIA PTY LTD V VIP PACKAGING PTY LTD (NO 18) [2013] FCA 407

VIP Plastic Packaging Pty Ltd (VIP) and Schutz Australia Pty Ltd (Schutz), two trade rivals, were involved in litigation concerning claims relating to the Trade Practices Act 1974 (Cth) and patent infringements.

On 18 June 2012, VIP served a Notice to Produce on Schutz seeking production of various schedules that had been referred to previously in affidavits by employees of Schutz. The schedules maintained by Schutz recorded details of cross-bottled intermediate bulk containers returned under the Schutz Ticket Service to its various Australian bottling plants. This information was likely to be relevant to their proceedings, in particular, for VIP to argue that cross-bottling is an activity practised extensively in Australia.

In response to the Notice to Produce, Schutz produced redacted copies of each of the schedules, claiming that they were entitled to redact the document on the grounds of ‘privilege’. VIP sought further clarification as to the nature of the privilege claimed, to which Schutz replied it was a claim for ‘litigation privilege’. No information was provided explaining the nature of the information covered by privilege or the circumstances in which it arose.

Further correspondence took place between the two parties over December 2012 and February 2013 in relation to the issue. Schutz advised during that time that privilege was claimed on the grounds of ‘relevance’ and that the ‘portions of the spreadsheets were redacted to mask irrelevant material’.

VIP sought interlocutory orders that Schutz serve unmasked copies of various documents to the solicitors for VIP.

McKerracher J in deciding the case noted that the schedules essentially constituted source evidence or summaries of source evidence from which conclusions had been expressed in the affidavits by employees of Schutz. Accordingly, his Honour concluded that Schutz could not
decline access to the schedules when reliance had been placed on the material said to be in them.

In coming to this decision, his Honour conceded that he was satisfied of the relevance of the material. The information contained in the schedule was likely to bear directly upon VIP’s defence and it was material in the possession of Schutz. Further, it was reiterated that there is no general right to mask parts of documents on the grounds of alleged irrelevance as distinct from privilege.58

Schutz had relied upon orders of the Court made in October 2011 which allowed the redaction of ‘confidential information irrelevant to the agreed categories for discovery’. McKerracher J found that this only allowed redaction on grounds of confidentiality and doubted the ability for Schutz to assert confidentiality over the material, given that it had already disclosed a previous version of the document.

In addressing the issue of privilege his Honour applied the dominant purpose test, affirming that the relevant purpose is that which existed at the time of creation of the document and subsequent use of the document is irrelevant.59 It was found that the assertion by Schutz that the schedules were created for the purposes of monitoring VIP’s and other companies’ cross bottling practices and to identify potential witnesses in contemplation of the proceedings could not support a claim for privilege in the circumstances.

In any event, his Honour thought that the claim for privilege had been waived by Schutz acting in a way inconsistent with the confidentiality privilege would protect. It was found that Schutz could not rely on the schedules insofar as they evidenced cross-bottling activity by VIP but at the same time prevent VIP from relying on the documents in whole. This finding was based on the principle that where a document deals with one subject matter, privilege cannot be waived as to part and asserted as to the remainder.60

Accordingly, Schutz was ordered to serve unmasked copies of the relevant spreadsheets.

8. **KIRBY V CENTRO PROPERTIES LTD (NO 2) [2012] FCA 70**

Centro Properties Group, Centro Retail Group (‘Centro’) and PriceWaterhouseCoopers (PWC) were involved in complex litigation involving class actions, some brought against Centro and others against PWC.

There were a variety of cross-claims involved, including as between Centro and PWC, however, it is not proposed to address these in this paper.

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PWC sought orders requiring Centro to produce for inspection specified documents. That course was resisted by Centro on the basis that the documents or parts of the documents in question were subject to legal professional privilege. This paper focuses on the reasons of Bromberg J in relation to two groups of documents; the Hourigan Records and the Hutchinson Records.

(a) The Hourigan Records

Centro claimed legal professional privilege over handwritten notes taken by Elizabeth Hourigan (Hourigan Records). At the time, Ms Hourigan was company secretary of Centro and their controlled entities. The notes were taken at Board meetings or Board Audit and Risk Management Committee meetings of the various Centro companies by her as a record of what transpired at the meetings.

The extracts of the records that were in issue comprised notes of what Ms Hourigan had deposed to be either:

(a) Confidential communications between Board members and Centro’s General Counsel (John Hutchinson) for the dominant purpose of Centro’s General Counsel giving and the Board receiving legal advice;

(b) Confidential communications between Board members and Centro’s external lawyers, for the dominant purpose of Centro’s external lawyers giving and the Board receiving legal advice;

(c) Confidential communications between Board members which disclosed legal advice obtained by Centro from its external lawyers.

Centro’s General Counsel, a lawyer holding a practising certificate had also deposed that the communications were for the sole or dominant purpose or Mr Hutchinson giving and Centro receiving legal advice or assistance; and that in the circumstances, the advice was given independently and objectively in his professional capacity.

His Honour, in concluding that privilege did attach to the documents, noted that the evidence given by Ms Hourigan and Mr Hutchinson, demonstrated that the communications took place between a corporation and its independent legal advisor or advisors in uncontroversial circumstances. It was stated that proof of those facts alone would provide a sufficient basis for the conclusion that the communications concerned legitimate legal advice being sought or given.

In relation to Centro’s General Counsel his Honour stated that legal professional privilege is capable of extending to communications between a salaried legal advisor and his or her
employer, provided that the legal adviser is consulted in a professional capacity, in relation to a professional matter and the communications are made in confidence and arise from the relationship of lawyer and client.

(b) The Hutchinson Records

PWC also sought production of notes prepared by Mr Hutchinson in relation to Board meetings he had attended as General Counsel of Centro. Centro had claimed privilege in respect of extracts from such notes which had been provided in redacted form. Mr Hutchinson deposed that the redacted extracts comprised his notes of confidential communications between Board members and himself and that the communications occurred for the dominant purpose of Mr Hutchinson giving legal advice to Centro.

This claim for privilege was also upheld by Bromberg J on the basis of the reasons articulated above. Mr Hutchinson was acting in a professional capacity and provided a sufficient basis upon which the Court could be satisfied that the communications came into existence for the dominant purpose of Centro seeking and obtaining legal advice from its lawyer.

9. COLLEGE OF LAW LTD V AUSTRALIAN NATIONAL UNIVERSITY [2013] FCA 492

The College of Law Limited (College) commenced proceedings against the Australian National University (ANU) for trademark infringement, passing off and misleading and deceptive conduct arising from the ANU’s use of the name “ANU College of Law.”

The College challenged the claims of legal professional privilege raised by the ANU and sought orders that two groups of documents in the ANU’s List of Documents should be disclosed. Those being:

(a) documents from the University's Legal Office providing advice to the Vice-Chancellor and the ANU Faculty of Law; and

(b) chains of email correspondence involving the Dean of Law at the ANU Faculty of Law and other ANU staff.

The College argued that the ANU failed to establish that privilege attached to the relevant documents and further claimed the privilege had been impliedly waived.

The basis of the waiver argument was that the substance of the legal advice was disclosed in agenda papers for a meeting of the ANU’s governing authority and in a College Administration paper, which was prepared by the ANU Faculty of Law. These documents stated that the Legal
Office provided advice to the Vice Chancellor and that subsequently, they had formed the opinion that ANU was not prevented from using the name.

The Judge held that ANU was not required to disclose the documents from the University’s legal office that provided advice. It said it could be inferred from the description in the List of Documents that they were communications for the necessary dominant purpose. The evidence also established that the Legal Office existed only to provide legal advice to the University and the solicitor’s were not academics. The Judge also inspected the documents to ensure that privilege could properly be made out.

In relation to the email chains, the College argued that the Dean of Law is an academic and not a practising lawyer. After inspection of the documents by the Judge, his Honour held that the email chains contained legal advice which was privileged. However, his Honour accepted the submission from the College that if only parts of the email chains record privileged legal advice, it is only those parts over which privilege exists and the balance should be produced for inspection.

His Honour held that the confidential legal advice permeated the email chains to the extent that it was not practicable to separate the privileged and non-privileged material. Therefore, ANU did not need to produce these documents, all but one which was separately stapled to the emails and comprised copies of the extracts from the agenda and the Council Meeting, as these were not brought into existence for the dominant purpose of obtaining legal advice.

It was also held that the documents were not impliedly waived as the disclosures revealed very little about the subject matter or content of the legal advices other than describing their overall effect.

Further, the purpose of the two disclosures was not to secure some advantage to the ANU which had an adverse impact upon the College. Rather, the disclosure was made in the Council agenda papers as ANU is a publicly funded institution and it was keeping interested persons informed of matters which were subject to the Council’s deliberations.

The Administration paper was not impliedly waived by ANU by making it available to staff and students since it was to inform persons of the administrative implementation of the proposed restructure so as to maximise the prospects of successful implementation. The College’s argument that it was for a commercial purpose was dismissed.

10. **NOLAN V NOLAN & ORS [2013] QSC 140**

Brian and Majella Nolan (the second and third defendants) conducted farming operations on a number of properties at Dalby for many decades. The plaintiff Donna Nolan had married the
Nolan’s son Anthony (the first defendant) and was actively involved in the management and operation of one of the properties until she separated from him in December 2009.

Donna Nolan commenced proceedings seeking a declaration that she had an interest, either under a constructive trust or equitable lien, in the land owned by the Nolans. During the course of those proceedings documents were provided to Donna Nolan’s solicitors. These documents concerned a period from 1998 to 2000 when advice had been sought by the Nolans in relation to estate planning and the preparation of their wills.

The Nolans subsequently claimed that the documents provided were in fact subject to legal professional privilege and were produced without their knowledge. They stated that the first they had been informed of the disclosure was a month after their production. Donna Nolan contended that the documents were not subject to legal professional privilege and, in any event, any privilege that might attach had been waived.

The trial judge found that the documents were subject to legal professional privilege, holding that the documents fell within the category of ‘advice privilege’. Her Honour reiterated that the test at common law for legal professional privilege in relation to documents was whether a communication was made or a document was prepared for the dominant purpose of a lawyer providing legal advice or legal services.

Donna Nolan argued that the documents in question merely recorded instructions given by the defendants for the making of a will and were not a request for legal advice. It was submitted that if the giving of legal advice is incidental and subsidiary to the dominant purpose of bringing a will into existence then no privilege attaches.

In response to this argument, the trial judge noted that a retainer to draw a will “involves necessarily the providing of advice, at least as to its validity and effect. In providing the finally drafted will to the client, the solicitor is effectively saying the will complies with the law and gives effect to the client’s instructions.” Accordingly, her Honour found that the dominant purpose was indeed the obtaining of legal advice.

On the issue of whether privilege had been waived the defendants argued that it had not been as the actual consent is required of the client before any confidential information can be disclosed. Her Honour noted that while legal professional privilege is the privilege of the client, it is not a universal rule and the role of waiving privilege is frequently delegated to a client’s legal representative.
In the present case the documents had been disclosed in answer to a notice of non-party disclosure by Anthony Nolan’s solicitors. The Nolan’s solicitors had been informed that the documents would be produced and made no objection to the production of those documents. The judge considered that the failure to assert any privilege by the solicitors had resulted in it being waived.

It was also noted that Donna Nolan and her solicitors had actually acquired knowledge of the contents of the documents. In such circumstances it was stated that the future conduct of litigation would be inhibited or made difficult if Donna Nolan’s solicitors were required to shut out from their minds the content of the documents. The only exception to this general proposition occurs when the disclosure is an ‘obvious mistake’. On the facts of the case, however, this was not found.

Accordingly, the court found that the privilege attaching to the documents had been waived.

11. STATE OF NEW SOUTH WALES V BETFAIR PTY LTD [2009] FCAFC 160

A Working Group was established by The NSW Office of Liquor, Gaming and Racing (OLGR) to assist in the development of legislative drafting instructions for Parliamentary Counsel with respect to racing regulatory reform. The Working Group included representatives of the OLGR and racing bodies Racing NSW and Harness Racing NSW.

The initial email communication which established the Working Group expressly stated that the meeting was confidential. On the six occasions that the Working Group met, it was also brought to the attention of attendees that the meeting was confidential and all discussions were to “stay in the room”. Ultimately, draft legislation was produced which sought to enable the imposition of fees as a condition of using field information which was managed and published by Racing NSW and Harness Racing NSW.

Proceedings were brought by Betfair against Racing NSW and Harness Racing NSW in the Federal Court claiming the fee was unconstitutional. The State of New South Wales intervened, claiming legal professional privilege in relation to documents Racing NSW and Harness Racing NSW had discovered in the course of the proceedings.

At trial, this claim was held to be unfounded as drafting of legislation pursuant to an instruction to do so does not involve a retainer, the dominant purpose of which is to give legal advice.

The State of New South Wales appealed.
The primary question on appeal was to what extent the instructions of an executive branch of government to Parliamentary Counsel are instructions to provide legal advice and therefore privileged. The Court in coming to a conclusion affirmed the position of the High Court in *Waterford v Commonwealth*\(^1\) that the relationship between the State and Parliamentary Counsel may be one of client and lawyer.

Further, the Court found held that matters which would reasonably arise in the course of carrying out express instructions should be regarded as within the scope of the retainer. In the preparation of draft legislation, Parliamentary Counsel relies upon legal skill and knowledge to draft valid and effective legislation and regulations. As part of this, Parliamentary Counsel are also obliged to advise upon issues arising in relation to the draft legislation, such as the likely effectiveness of the legislation or regulation in achieving its policy objectives and the constitutional validity of the legislation or regulation. Accordingly, the Court determined that by instructing Parliamentary Counsel to draft legislation, OLGR was impliedly giving instructions for the provision of legal advice.

The Court also remarked that in these circumstances, it is impossible to disentangle the drafting of legislation or regulation from the provision of legal advice. Given that the dominant purpose of OLGR’s instructions to Parliamentary Counsel was to see the proper drafting of the legislation, both the communications between OLGR and Parliamentary Counsel and the draft itself were found to be properly the subject of a claim of privilege.

A point was pressed by Betfair however, that the decision of the Full Court of the Federal Court in *Pratt Holdings Pty Ltd v Commissioner of Taxation*\(^2\) limited the operation of privilege in the context of third party communications. In finding that privilege did extend to premature communications between OLGR and the Working Group, the Court remarked that it is irrelevant that such communications were between client and a third party. What is sufficient is that such communications occurred for the dominant purpose of obtaining legal advice. Here, the Court held that the dominant purpose test had been satisfied, as the communications between OLGR and the Working Group were indispensible if OLGR was to obtain effective legal advice. Accordingly, the communications between OLGR and the Working Group were also held to be the subject of a proper claim of privilege.

A further issue arose however, in that Betfair contended that notwithstanding the validity of the privilege claim, it had been waived by OLGR. The question on appeal was whether by exposing

\(^1\) (1987) 163 CLR 54, 60-62.
the contents of the draft legislation to members of the Working Group, OLGR had waived privilege.

In determining that privilege had not been waived, the Court considered whether OLGR had dealt with the various documents in a manner that destroyed their capacity to control further dissemination of them and had accordingly, acted in a manner inconsistent with the continued existence of the privilege. Although a meeting of the Board of Racing NSW had in fact mentioned the likely amendment of the legislation and passed a resolution with regard to it, the Court found that there was no basis in law upon which the resolution was made at the relevant time. Further, the resolution was an indication of the Board’s thinking at the time, and was not a “use” of the information in any real sense. It was also made clear by OLGR that communications between OLGR and the Working Group were made within a regime of strict confidence.

As such, the Court found that OLGR had not waived its claim to privilege. All communications with respect to the drafting of the legislation between OLGR, the Working Group and Parliamentary Counsel were accordingly found to be properly the subject of a claim of legal professional privilege.

12. PLAYERS PTY LTD (IN LIQ) (RECS APPT’D) & ORS V CLONE PTY LTD [2013] SASCFC 25

In proceedings before the Supreme Court of South Australia, Clone Pty Ltd (Clone) argued that it was entitled to a transfer of two liquor and gaming licences at no cost from Players Pty Ltd (Players) and sought orders protecting and giving effect to its claimed proprietary interest.

At trial and on appeal it was held that Clone was entitled to judgement and consequently Players was liable to transfer the liquor and gaming licences to Clone at no cost.

On 23 December 2010, Players sought directions that they have liberty to disclose and use evidence of the contents of documents in possession of Clone’s solicitors which had been inspected by one of the Players parties in January 2010 in connection with the taxation of costs in the original proceedings. This application had also been refused by the Court on the basis of privilege and was the subject of the appeal.

The judge at first instance concluded that the production of the documents for the purposes of taxation of costs involved a limited waiver and that the documents could only be used for that purpose.

On appeal, the Players parties contended that the circumstances of the production of the documents involved a waiver of any privilege that existed. There was no limitation imposed at the
time of disclosure and therefore no limited waiver and further, the disclosure was not made under compulsion of law.

The Full Court of the Supreme Court distinguished between two types of disclosure; intentional and imputed saying:

(a) intentional waiver occurs when the person entitled to privilege intentionally and voluntarily discloses the communication subject to privilege in circumstances where the communication loses its confidentiality.

(b) imputed waiver occurs when there is no intentional waiver but the conduct of the holder of privilege is such that considerations of fairness require the abrogation of privilege, at least as against certain persons.

On the issue of intentional waiver, the Court noted that where a document is disclosed for the purposes of taxation, through compulsion by reason of a rule of court or by reason of a specific order of the court or otherwise, waiver is limited. In the present case, however, Clone was not compelled to produce the documents. The contents of the documents were prima facie irrelevant to considerations of taxation. The Court stated that even if it was necessary to produce the documents, any privileged information in the documents could have been redacted. Accordingly, it was found there had been an intentional waiver and it was unlimited.

The Court also considered, in the event there had been no intentional waiver, whether the conduct in disclosing the documents to the Players resulted in an imputed waiver which extended to permitting use of the documents in applications to set aside judgements in the original proceedings and separate proceedings. In such a case it was noted that the question ultimately falls to be resolved by reference to the requirements of fairness in all the circumstances of the particular case.

It was found by the Court that the requirements of fairness gave rise to the conclusion that there had been an imputed waiver. The claim that was being advanced by Players was that there was an abuse of process of the court during the course of the trial and that this abuse also affected the appellate process. It was held that a court would be misled in understanding what had occurred without access to the remaining documents.

In addition to the finding of imputed waiver, the Court found that any valid claim for privilege could not be maintained because the circumstances raised a colourable case of abuse or process. Doubt was also cast over the confidentiality of some of the communications, however, due to the fact this argument was not pressed on appeal the Court left the issue unresolved.
The Court held the documents over which privilege had been claimed were no longer the subject of legal professional privilege and allowed the appeal.

13. **BRISTOL-MYERS SQUIBB CO V APOTEXT PTY LTD (NO 3) [2012] FCA 1310**

In proceedings before the Federal Court Bristol-Myers Squibb (**BMS**) alleged that Apotex Pty Ltd had infringed a patent owned by BMS. Apotex in a counter-claim alleged that the patent was invalid.

In the course of these proceedings Apotex sought an order requiring the production of notes made by Professor Easton (an expert retained by BMS) during the course of an experiment conducted pursuant to orders of the Court. BMS resisted the production of Professor Easton’s notes on the ground of legal professional privilege.

A redacted version of Professor Eaton’s notes had been provided by BMS to Apotex, however, Apotex contended that it was entitled to have all of the notes made by him. In this regard BMS relied on the comments of Barwick CJ in **Grant v Downs**:  

> [A] document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.63

BMS argued that Professor Easton’s notes were a record of confidential communications between a solicitor and a third party and that they were brought into existence for the purpose of use in the proceedings. They further argued that privilege had not been waived as the parts of the notes that had been disclosed concerned different issues and subject matter than the non-disclosed sections.

Apotex submitted that Professor Easton’s notes could not constitute a confidential communication because they recorded his observations of a non-confidential experiment. Further, BMS must have waived any privilege by filing his affidavit (which referred to the notes) to be used in the proceedings.

Young J was satisfied that Professor Easton’s notes attracted legal professional privilege. Professor Easton’s presence at the experiment was for the purposes of providing information,

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63 *Grant v Downs* (1976) 135 CLR 674, 677.
advice and opinions to the applicant’s (BMS) solicitors. Accordingly the notes, which were created to communicate his views to the solicitors, attracted litigation privilege.

His Honour also emphasised that these notes were not in the same class as mere “working notes” or “field notes” which do not attract privilege as they are not in the nature of, and would not, expose communications.  

Despite attracting legal professional privilege, Young J saw no scope for holding that the claim for privilege had been maintained given that the documents had been utilised in Professor Easton’s affidavit. The notes represented a single subject matter; namely, Professor Easton’s observations of the experiment. BMS was not entitled to selectively disclose parts of the notes and maintain privilege over the rest.

For this reason it was found that there had been an imputed waiver of privilege and as a result an order was made requiring production of the notes.

14. CONCLUSION

An review of the case law reveals that legal professional privilege can extend to communications between; in-house counsel and their employer, university legal offices and the university, State and parliamentary counsel and in some circumstances to expert reports.

However, there are also situations where privilege can be lost.

Identification and awareness of privileged material, conscious decision making around its use and the risks associated with waiving privilege should be in the forefront of legal advisers minds, because once the genie of privilege is let out of the confidential bottle it is unable to be put back again.

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64 *Australian Securities and Investment Commission v Southcorp Ltd* (2003) 46 ACSR 438, [21].
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Legal Professional Privilege: Principles and how the courts are applying these when privilege is claimed

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5 September 2013

Outline

• Recap
  – what is privilege?
  – requirements
• Waiver
  – Express
  – Implied / imputed
• Recent cases and implications
Recap – what is privilege? Requirements.

• Key principles:
  – Confidential communication between legal adviser and client; and
  – Made for the dominant purpose of obtaining legal advice or for actual or anticipated litigation.

Waiver – how it occurs

• Express
• Implied - Test for implied waiver is inconsistency: Mann v Carnell.
• Inadvertent – Test is objective: a reasonable person would realise that there had been a mistake.
Recent cases and implications

• Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd [2013]
• Claim for privilege over in-house counsel communications

Recent cases and implications

• Bristol-Myers Squibb Co v Apotex Pty Ltd (No.3) [2012]
• Claim for privilege of notes of an expert
Recent cases and implications

• Schutz Australia Pty Ltd v VIP Plastic Packaging Pty Ltd (No. 18)[2013]
• Claim for privilege on material relied upon in proceedings

Recent cases and implications

• Kirby v Centro Properties Ltd (No. 2) (2012)
• Privilege found to attach to in-house counsel documents
Recent cases and implications

• College of Law Ltd v Australian National University [2013]
• Claim of privilege by in-house counsel

• Nolan v Nolan & Ors [2013]
• Claim for privilege over documents asserted not to be for dominant purpose of providing legal advice
Recent cases and implications

• State of New South Wales v Betfair Pty Ltd [2009]
• Interaction of privilege and government

Recent cases and implications

• Players Pty Ltd (in liq)(Receivers appointed) & Ors v Clone Pty Ltd [2013]
• Waiver of privilege - costs
Discussion on preserving privilege

• Assert privilege if thought applicable
• Ensure any disclosure to third parties is done under a regime of confidentiality
• Consider substantive content and separate where necessary to maintain privilege
• Redactions

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