LEGAL PROFESSIONAL PRIVILEGE

AN OVERVIEW

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AN OVERVIEW

Introduction

1. The law has long recognised that certain communications may remain secret, and may not be disclosed even in curial proceedings. Whilst there are some exceptions to this proposition, they are of narrow compass. One of the types of protected communications is between a lawyer and a client; for the purposes of obtaining or giving legal advice or assistance; it is often referred to as legal professional privilege. There are two types of communications which attract legal professional privilege, first communications between lawyer and client for the dominant purpose of obtaining legal advice. Secondly, communications between lawyer and client for the dominant purpose of use in relation to litigation either in existence or within reasonable contemplation. I will deal with each in more detail later in this paper.

2. Legal professional privilege is a substantive general principle of the common law and not a mere rule of evidence. It is a fundamental and general principle of the common law. Further, it like other traditional common law rights, it is not to be abolished or cut down otherwise than by clear statutory provision nor should it be narrowly construed or artificially confined.

3. The common law has dealt with and developed the law in relation to legal privilege for a very long time. More recently it has been codified in statutory form. I will deal first with the common law provisions prior to briefly traversing the statutory provisions.

Rationale

4. The rationale behind legal professional privilege is the furtherance of the administration of justice through the fostering of trust and candour in the relationship between lawyer and client.

5. The rule furthers the administration of justice by ‘encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor’. The High Court has explained that it is necessary for the proper conduct of litigation that litigants should be represented by qualified and experienced lawyers rather than that they should appear for themselves, and it is equally necessary that a
lawyer should be placed in full possession of the facts to enable him to give proper advice and representation to his client. The privilege is granted 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 tell his counsellor have his case.  

6. Whilst the communication must be confidential, that alone would not be sufficient to resist curial compulsion although the relationship between solicitor and client imposes on the solicitor a duty (subject to certain exceptions) to keep inviolate his client’s confidences, that in itself has not been held to be a sufficient reason for holding that legal professional confidences are privileged from disclosure. It is well established that no obligation of confidence, of itself, entitles the person who owes the duty to refuse to answer a question or to produce a document in the course of legal proceedings.

WHAT IS PROTECTED?

7. Legal professional privilege claims fall within one of two heads, generally referred to as “advice privilege” and “litigation privilege”. “Advice privilege” protects confidential communications made for the dominant purpose of giving or obtaining legal advice. “Litigation privilege” protects communications that were brought into existence, or record a communication that was undertaken for the purposes of use in, or in relation to, litigation which was either pending or in contemplation.

8. To make out “advice privilege”, a party asserting privilege must establish with respect to each such communications:

(a) the purpose of the creation of the document, or the communication recorded in it, was the receipt or provision of legal advice;

(b) the purpose of receiving or providing legal advice was the dominant purpose. The word “dominant” means “ruling, prevailing or most influential purpose... clear paramountcy should be touchstone.”;

(c) the communication over which privilege is claimed was between the client (or its agents) and the lawyer.

9. In relation to “litigation privilege”, a party asserting privilege must establish with respect to each such communications:

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8 Baker v Campbell (1983) 153 CLR 52 at 66 per Gibbs CJ.
9 Baker v Campbell at 65 per Gibbs CJ.
13 Mitsubishi at 337.
litigation was either pending or in contemplation. Litigation is in contemplation if it is “likely or reasonably probable”.\textsuperscript{14} Although litigation need not be more probable than not, there must be a real prospect of litigation as opposed to a mere possibility;\textsuperscript{15}

the communication recorded in the document was made, or the document created, for the purpose of use in, or in relation to, litigation;

the purpose of use in, or in relation to, litigation was the dominant purpose. The meaning of “dominant’ purpose is discussed above in relation to advice privilege.

10. The scope of the privilege (both advice and litigation proceedings) was usefully summarised in \textit{AWB (No. 5)} as follows:\textsuperscript{16}

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 may be appropriate to assume that legitimate legal advice was being sought, absent any contrary indications in the ordinary case of a client consulting a lawyer about a legal problem in uncontroversial circumstance, proof of those facts alone will provide a sufficient basis for a conclusion that legitimate legal advice is being sought or given.\textsuperscript{17}

The concept of legal advice is fairly wide. It extends to professional advice as to what a party should prudently or sensibly do in the relevant legal context; but it does not extend to advice that is purely commercial or of a public relations character.\textsuperscript{18}

Legal professional privilege protects the disclosure of documents that record legal work carried out by the lawyer for the benefit of the client, such as research memoranda, collations and summaries of documents, chronologies and the like, whether or not they are actually provided to the client.\textsuperscript{19}

Subject to meeting the dominant purpose test, legal professional privilege extends to notes, memoranda or other documents made by officers or employees of the client that relate to information sought by the client’s legal adviser to enable him or her to advise. The privilege extends to drafts, notes and other material brought into existence by the client for the purpose of

\begin{enumerate}
\item[14] Mitsubishi at 340.
\item[15] Mitsubishi at 341.
\item[16] [2006] FCA 1234 at para 44 per Young J.
\item[17] At 44(4).
\item[18] At 44(7).
\item[19] At 44(8).
\end{enumerate}
communication to the lawyer, whether or not they are themselves actually communicated to the lawyer.\textsuperscript{20}

(e) Legal professional privilege is capable of attaching to communications between a salaried legal adviser 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.\textsuperscript{21} This is discussed in more detail later in this paper (paragraph 18 and following).

(f) Legal professional privilege protects communications rather than documents, as the test for privilege is anchored to the purpose for which the document was brought into existence. Consequently, legal professional privilege can attach to copies of non-privileged documents if the purpose of bringing the copy into existence satisfies the dominant purpose test.\textsuperscript{22}

11. The types of communications which may be the subject of legal professional privilege include the following:\textsuperscript{23}

(a) any communication between a party and his professional legal adviser if it is confidential and made to or by the professional adviser in his professional capacity and with a view to obtaining or giving legal advice or assistance; notwithstanding that the communication is made through agents of the party and the solicitor or the agent of either of them;

(b) any document prepared with a view to its being used as a communication of this class, although not in fact so used;

(c) communication between the various legal advisers of the client, for example between the solicitor and his partner or his city agent with a view to the client obtaining legal advice or assistance. Similarly, if a solicitor’s typist is given an audio tape to transcribe or a confidential document to copy, the privilege is not lost;

(d) notes, memoranda, minutes or other documents made by the client or officers of the client or the legal adviser of the client of communications which are themselves privileged, or containing a record of those communications, or relate to information sought by the client’s legal adviser to enable to advise the client or to conduct litigation on his behalf;

(e) communications and documents passing between the party’s solicitor and a third party if they are made or prepared when litigation is anticipated or

\textsuperscript{20} At 44(9).
\textsuperscript{21} At 44(10).
\textsuperscript{22} At 44(11).
\textsuperscript{23} See Trade Practices Commission v Sterling (1979) 36 FLR 244 at 245-246.
commenced, for the purposes of the litigation, with a view to obtaining
advice as to it or evidence to be used in it or information which may result
in the obtaining of such evidence;

(f) communications passing between the party and a third person (who is not
the agent of the solicitor to receive the communication from the party) if
they are made with reference to litigation either anticipated or commenced,
and at the request or suggestion of the party’s solicitor; or, even without any
such request or suggestion, they are made for the purpose of being put
before the solicitor with the object of obtaining his advice or enabling him
to prosecute or defend an action; and

(g) knowledge, information or belief of the client derived from privileged
communications made to him by his solicitor or his agent.

PURPOSE

12. The purpose for which the communication was made is critical to determining
whether the communication may be characterised as privileged. The purpose
must either be to obtain (or provide) legal advice or in relation to litigation
(whether pending or within the reasonable contemplation of the parties). It will
therefore be necessary to examine the circumstances and surrounding facts in
order to ascertain the purpose. It is a question of fact and will be determined
objectively.

13. The current test requires a dominant purpose to be established. Although this was
not always the case, the High Court has returned to a “dominant” purpose after
briefly requiring a sole purpose to be established.

14. Accordingly, a communication made for several purposes may still be privileged
provide that the dominant purpose was to obtain legal advice or in relation to
litigation. Where there may be two purposes, each of equal importance, the
communication will not be privileged because there was no “dominant” purpose.

15. A “dominant purpose is one that predominate the other purposes: it is the
prevailing or paramount purpose”. An appropriate starting point when
applying the dominant purpose test is to ask, what was the intended use of the
document, which accounted for it being brought into existence?

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24 Grant v Downs (1976) 135 CLR 674 at 688 per Stephen, Mason and Murphy JJ.
25 Esso Australia Resources Limited v FCT (1999) 201 CLR 49 at [77] per McHugh J.
26 See Grant v Downs for sole purpose test, returning to dominant purpose in Esso.
27 Grant v Downs at 692 per Jacobs J.
28 AWB (No. 5) at [44].
29 AWB (No. 5) at [44].
16. If a document contains legal advice and non-legal advice, the legal advice can be privileged without the whole document attracting privilege, provided the two types of communications can be separated.\textsuperscript{30}

17. It is worth mentioning copy documents, because they are often \textit{wrongly} thought always to be privileged. A copy of a privileged communication (document) is clearly privileged.\textsuperscript{31} Where non-privileged documents are prepared for the prescribed dominant purpose, the copies are privileged.\textsuperscript{32} Thus, the documents included in a brief to counsel will be privileged notwithstanding that some of them (as originals) would not be privileged.

**IN-HOUSE COUNSEL**

18. The position of in-house counsel should also be noted. Communications with in-house counsel will be protected 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. This will include “salaried” advisers and employees.\textsuperscript{33}

19. The authorities emphasise that, with in-house counsel, what is required is that the lawyer be "independent". The purpose of legal professional privilege is to facilitate the seeking and giving of legal advice and thereby to ensure that the law be applied and litigation be properly conducted. If the purpose of the privilege is to be fulfilled, the legal adviser must be competent and independent. Competent, in order that the legal advice be sound and the conduct of litigation be efficient; independent, in order that the personal loyalties, duties or interests of the adviser should not influence the legal advice which he gives or the fairness of his conduct of litigation on behalf of his client. If a legal adviser is incompetent to advise or to conduct litigation or if he is unable to be professionally detached in giving advice or in conducting litigation, there is an unacceptable risk that the purpose for which privilege is granted will be subverted.\textsuperscript{34}

20. It may be the case that an in-house lawyer will lack the requisite measure of independence if his advice is at risk of being compromised by virtue of the nature of his employment relationship with his employer. On the other hand, if the personal loyalties, duties and interests of the in-house lawyer do not influence the professional legal advice which he gives, the requirement for independence will be satisfied.\textsuperscript{35}

\textsuperscript{30} Kennedy v Wallace [2004] FCAFC 337 at [157]-[159].
\textsuperscript{31} Mann v Carnell (1998) 89 FCR 247 at 254.
\textsuperscript{32} Commissioner of Australian Federal Police v Propend Finance Pty Ltd (1997) 188 CLR 501; R v P [2001] NSWCA 473 at [56].
\textsuperscript{33} Waterford v The Commonwealth (1986-1987) 163 CLR 54 at 96 per Dawson J and at 79-82 per Deane J.
\textsuperscript{34} Waterford at page 70.
\textsuperscript{35} Seven Network Ltd v News Ltd (2005) 225 ALR 672 at [15].
21. The dominant purpose test has particular importance in relation to the position of in-house counsel because they may be in a closer relationship to the management than outside counsel and therefore more exposed to participation in commercial aspects of an enterprise. The courts recognise that being a lawyer employed by an enterprise does not of itself entail a level of independence. Each employment will depend on the way in which the position is structured and executed. For example, some enterprises may treat the in-house adviser as concerned solely in advising and dealing with legal problems. As a matter of commercial reality, however, both internal and external legal advisers will often be involved in expressing views and acting on commercial issues. The authorities recognise that in order to attract privilege the legal adviser should have an appropriate degree of independence so as to ensure that the protection of legal professional privilege is not conferred too widely. Commercial reality requires recognition by the courts of the fact that employed legal advisers not practising on their own account may often be involved to some extent in giving advice of a commercial nature related to the giving of legal advice. Such involvement does not necessarily disqualify the documents relating to that role from privilege. The matter is necessarily one of fact and degree and involves a weighing of the relative importance of the identified purposes. There is no bright line separating the role of an employed legal counsel as a lawyer advising in-house and his participation in commercial decisions. In other words, it is often practically impossible to segregate commercial activities from purely ‘legal’ functions. The two will often be intertwined and privilege should not be denied simply on the basis of some commercial involvement.  

LIMITATIONS ON LEGAL PROFESSIONAL PRIVILEGE

22. Communications between a legal adviser and client which facilitate the commission of a crime or fraud are not privileged.  

23. In Cox and Railton, the solicitor was called to give evidence that Cox and Railton had consulted him as to how they could defeat the judgment creditor’s claim. The Court held the communications were not privileged because they were made prior to the commission of a crime and for the purposes of Cox and Railton being guided as to how to commit the crim. The Court concluded that the reason on which the rule is said to rest cannot include the case of communications, criminal in themselves, or intended to further any criminal purpose, for the protection of such communications cannot possibly be otherwise than injurious to the interests of justice, and to those of the administration of justice. Nor do such communications fall within the terms of the rule. A communication in

36 Seven Network Ltd v News Ltd [2005] FCA 142.
37 R v Cox and Railton (1884) 14 QBD 153; Conlon v Lensworth Interstate Pty Ltd [1970] VR 293.
furtherance of a criminal purpose does not come into the ordinary scope of professional employment. 38

24. A rather more succinct statement was made by Young J in AWB (No. 5): 39

“The privilege takes flight if the relationship between lawyer and client is abused.”

25. Recently the Victorian Supreme Court has stated that communications in furtherance of a crime or fraud are not protected by legal professional privilege because the privilege never attaches to them in the first place. In P & V Industries Pty Ltd v Porto, 40 the Court explained that, in order to displace the privilege on the ground of the exception, a mere allegation of fraud in the pleading is not sufficient; a prima facie case of fraud must be established by evidence. 41

26. The approach of the Courts to the crime/fraud exception may be seen as a further expression of public policy. Just as there are sound reasons for the establishment and maintenance of legal professional privilege which are rooted in public policy, so must the principle yield to countervailing public policy considerations are warranted. The crime/fraud exception is a clear example of this influence. 42

27. The crime/fraud exception now has a statutory enactment in s. 125 of the Evidence Act 2008, which provides that the Act does not prevent the adducing of evidence of:

(a) a communication made or the contents of a document prepared by a client or lawyer (or both), or a party who is not represented in the proceeding by a lawyer, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty; or

(b) a communication or the contents of a document that the client or lawyer (or both), or the party, knew or ought reasonably to have known was made or prepared in furtherance of a deliberate abuse of a power.

28. Pursuant to s. 125(2), if the commission of the fraud, offence or act, or the abuse of power, is a fact in issue and there are reasonable grounds for finding that:

(a) the fraud, offence or act, or the abuse of power, was committed; and

(b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act or the abuse of power—

38 At 166.
39 At [215].
41 At [25], cited with approval by Vickery J in Hodgson v Amcor (No. 2) [2011] VSC 204 at [68].
42 Hodgson at [69] per Vickery J.
the court may find that the communication was so made or the document so prepared.

29. In *Hodgson v Amcor (No. 2)*,\(^{43}\) Vickery J stated a number of propositions regarding s. 125:

(a) the Court must be satisfied that there are reasonable grounds for finding that first the fraud, offence or act, or the abuse of power was committed and second a communication was made or document prepared in furtherance of the commission of the fraud, offence or act or the abuse of power, before the exception may apply to otherwise privileged material;\(^{44}\)

(b) fraud is one of some breadth and “embraces a range of legal wrongs that have deception, deliberate abuse of or misuse of legal powers or deliberate breach of a legal duty at their heart...”;\(^{45}\)

(c) consistently, with its public policy origins, the reference to a communication being in ‘furtherance’ of a fraud ought not be read too narrowly, or be too confined in a temporal sense. The fraud exception will not protect legal professional privilege if:

(i) a solicitor is consulted ‘to cover up or stifle a fraud’;

(ii) steps are taken to ‘conceal’ profits, or to ‘defeat or delay’ recovery by victims of an initial fraud;

(iii) to ‘conceal an abuse of delegated powers to enact legislation.’

(d) proof of the fraud to the civil standard, taking into account the *Briginshaw* test, or to the criminal standard, is not required. In *Propend*, the position was variously expressed as follows: ‘to show reasonable ground for believing the communication... [was made] for some illegal or improper purpose’; ‘there must be something to give colour to the charge’ and ‘[it] is enough that circumstances are made to appear which sufficiently point to the bona fides and credibility of the allegation’; or ‘some prima facie evidence that it has some foundation in fact’. In *Southern Equities*, Doyle CJ referred to the need for ‘material raising an arguable case that the relevant communications were made for the purpose of furthering or assisting a ... fraud’. Under s. 125(2) Evidence Act 2008, there must be ‘reasonable grounds’ for finding the fraud, crime or abuse was committed.

30. The privilege can be abrogated by statute, whilst this is extremely rare, it did occur in Victoria in 1998. *The Crimes Confiscation and Evidence Acts*

\(^{44}\) At [79].
\(^{45}\) At [80].
(Amendment) Act 1998\(^{46}\) inserted section 19D into the Evidence Act 1958. Royal Commissioners were, at the time, constituted by provisions of the Evidence Act. Section 19D abrogated legal privilege in Royal Commissions such that “…if a person is required by a commission to answer a question or produce a document or thing, the person is not excused from complying with the requirement on the ground that the answer to the question would disclose, or the document contain, or the thing discloses, matter in respect of which the person could claim legal professional privilege.”

31. More recently, the Courts have determined that litigation privilege does not apply to documents brought into existence in relation to a commission of inquiry (a Royal Commission) established pursuant to the Royal Commission Act 1902 (Cth). The reason was not that the Act abrogated privilege\(^{47}\) rather the Court considered that a Royal Commission carried out investigations, determines the facts and prepares a report and recommendations. A Commission does not finally determine any rights or obligations. Therefore the litigation privilege would not apply, whereas the advice privilege would still apply.

HOW TO MAKE A CLAIM FOR LEGAL PROFESSIONAL PRIVILEGE

32. The obligation to make discovery may come either from the rules of Court (a more traditional but perhaps less common approach), or an order of the Court requiring that a party provide a list of documents. Insofar as the more traditional affidavit is concerned, the process is quite straightforward. A party upon whom a notice for discovery or order is served must make an affidavit of documents.\(^{48}\) There are two schedules in the affidavit, the first identifies those documents which are in the litigant’s possession, the second, those documents which are no longer in the litigant’s possession. However, within the first schedule, there are two parts. The first deals with documents which are to be discovered and may be inspected. The second with those in relation to which a claim for privilege is made and in relation to which inspection is objected to.

33. The grounds of the claim for privilege must be set out.\(^{49}\) Commonly the claim for privilege will be made by reference to a class or classes of documents. For example, confidential communications between solicitor and client for the purposes of providing or requesting legal advice.

34. The Rules of the Supreme Court make it possible to describe documents more generally, “…in the case of a group of documents of the same nature... describe the group sufficiently to enable the document or group to be identified.”

\(^{46}\) Act No. 80/1998.
\(^{47}\) AWB v Cole [2006] FCA 571 at [36] per Young J.
\(^{48}\) Rule 29.03; within 42 days and in Form 29B.
\(^{49}\) Rule 29.04(d).
35. Indeed, this is the generally accepted way in which privilege is claimed. This is inadequate and at the least does not comply with the rules of Court. A party is obliged to enumerate the documents and to describe each document when giving discovery. This means that in addition to the general claim of a class of privileged documents, each document must be identified and described (including a date). This view is supported by authority. In *Kennedy v Wallace*, the Full Federal Court stated that it is not sufficient for a party merely to assert a claim for privilege nor will an affidavit asserting the purpose for which a document was brought into existence followed by a statement about the category of legal professional privilege to which the document is said to belong necessarily be sufficient. The problem is that the documents will be assessed individually by reference to the date, persons between whom the communication passes and purpose in order to ascertain privilege. It cannot be assessed without those details. The proper way to describe the documents for which privilege is claimed is to list the documents and in respect of each document, to state the basis of the claim. The authorities support this view. In order to make out the claim, it is not necessary to disclose the content of the document. To do so would amount to a waiver and defeat the purpose of the claim. The claim would sufficiently made if the document is described (e.g. email), a date provided, the author and recipient identified (from Mr [solicitor] to Mr [client]) and the purpose of the communication explained (e.g. providing legal advice in relation to the subject matter of the proceeding).

36. It is permissible to redact parts of documents which are irrelevant and in relation to the balance assert a claim for privilege. Although there are some authorities which suggest that redaction does not comply with the parties’ obligation to provide for inspection of the whole of the document. In that regard the cases express the view that redaction is only acceptable if the material is irrelevant in that it contains nothing that might directly or indirectly lead to a train of inquiry to advance the case of the other party.

37. In the event of a challenge to the claim for privilege, the onus will be upon a party claiming privilege to provide evidence to support the claim. The onus might be discharged by evidence as to the circumstances and context in which the communications occurred or the documents were brought into existence, or by evidence as to the purposes of the person who made the communication, or authored the document, or procured its creation. It might also be discharged by

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50 Rule 29.04(1)(b).
51 *Kennedy v Wallace* at [13] per Black CJ and Emmett J.
53 *Alstom Power v Yokogawa Australia Pty Ltd (No. 5)* [2010] SASC 267.
54 *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No. 4)* [2010] FCA 863; *Octagon Inc. v Hewitt (No. 2)* [2011] VSC 373 per Dixon J at [53]; *Gunn Ltd v Marr* [2008] VSC 464 at [32] per Kaye J.
55 *Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* (2002) 4 VR 332 at 337.
reference to the nature of the documents, supported by argument or submissions. The purpose for which a document is brought into existence is a question of fact that must be determined objectively. Evidence of the intention of the document’s maker, or of the person who authorised or procured it, is not necessarily conclusive. It may be necessary to examine the evidence concerning the purpose of other persons involved in the hierarchy of decision-making or consultation that led to the creation of the document and its subsequent communication.  

38. The challenge will usually be in the form of a summons for production or a notice to produce (see attached example). This will usually be done by an affidavit (either by a lawyer or the client) which narrates, in more detail than the affidavit or list) the nature of the document. As an aside, the application is one for production of the document. The document having already been discovered, but an objection has been made to its production. The basis for the objection, of course, is legal professional privilege. The summons therefore is very simple to draft. One identifies the document by reference to their discovered document number and seeks orders for their production. If a “generic” claim for legal professional privilege has been made, it will be necessary to insist, as a preliminary step, that each document is identified and described in the usual way (subject to an objection to production because they are privileged).

39. It will not be a waiver of privilege to have a “bare reference to the document or its contents” in an affidavit. There will clearly be a waiver if the document is set out in full, or if the contents of the document is disclosed. Where the line is to be draw is “…a matter of some nicety…” Extreme caution should be taken not to disclose the contents of the communication and thereby waive privilege.

40. In the usual course, the documents are brought to Court and if needed, the judge will inspect the documents to satisfy the Court whether the claim is properly asserted. Alternately, the Court may make orders allowing evidence to be given in confidence under such conditions as to preserve the claimed privilege.

41. The mere use of a solicitor’s letterhead or the labelling of a document as “privileged” will not affect the character of the communication. In each case it will be a question of fact to be determined by the Court.

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56 At [44(1)] and [44(2)].
57 *Lyell v Kennedy* (No. 3) (1884) 27 Ch D 1 at 24; *Infields Ltd v P Rosen & Son* [1938] 3 All ER 591 at 597; *AWB v Cole* (2006) FCR 382.
58 *AG (NT) v Maurice* (1986) 161 CLR 475 at 481.
60 *Buttes Gas & Oil Co. v Hammer* (No. 3) [1981] QB 223 at 252.
61 Rule 29.13; *Grant v Downs* (1976) 11 ALR 577 at 589.
62 *Kennedy* at [17] per Black CJ and Emmett J.
63 *Carter Holt Harvey Wood Products Australia Pty Ltd v Auspine Ltd* [2008] VSCA 59.
42. Once made out, the effect is that the document need not be produced for inspection to the other side.\textsuperscript{64}

43. The "List of Documents" approach, more in favour in today’s Courts, is an analogous process. What is important is that the document is identified but that an objection to production is made (and the basis explained).

**WAIVER OF PRIVILEGE**

44. At common law, a person who would otherwise be entitled to the benefit of legal professional privilege may waive the privilege. Legal professional privilege exists to protect the confidentiality of communications between a lawyer and client. It is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement. It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege. Examples include disclosure by a client of the client’s version of communication with a lawyer, which entitles the lawyer to give his or her account of the communication, or the institution of proceedings for professional negligence against a lawyer, in which the lawyer’s evidence as to advice given to the client will be received.\textsuperscript{65}

45. Waiver may be express or implied. 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. Thus, the client was held to have waived privilege by giving evidence, in legal proceedings, concerning her instructions to a barrister in related proceedings, even though she apparently believed she could prevent the barrister from giving the barrister’s version of those instructions. She did not subjectively intend to abandon the privilege. She may not even have turned her mind to the question. However, her intentional act was inconsistent with the maintenance of the confidentiality of the communication. What brings about waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.\textsuperscript{66}

\textsuperscript{64} Rule 29.10(4).

\textsuperscript{65} Mann v Carnell (1999) 201 CLR 1 at [28]-[29] per Gleeson CJ, Gaudron, Gummow and Callinan JJ.

\textsuperscript{66} Benecke v National Australia Bank (1993) 35 NSWLR 110.
46. What is needed therefore is some inconsistency with the conduct and maintenance of the privilege. Often described in terms of “unfairness”, in fact it is inconsistency which is the relevant factor.

Expert reports

47. Expert reports often create some problems in the context of privilege. The instructions to obtain an expert, the recommendation as to the need for one, the search for an expert, interviews with an expert, retainers of an expert, communications between solicitor and expert and the report are all the subject of privilege (if for the required purpose). The documents will remain privileged forever and may not be disclosed in proceedings. However, once the decision is made to call the expert and the report is made public, that is to say, provided to the other party or filed/tendered in Court, the privilege is waived. It is an express waiver of privilege by reason of the disclosure of the report. All communications regarding the report and the expert immediately become non-privileged. It is for that reason that once the report is served on the opposite party they are entitled to see, and often call for, the drafts and all communications in relation to the report and the expert.

Issue waiver

48. One aspect of waiver which comes up quite frequently is issue waiver, often referred to as “state of mind waiver”.

49. Where a party pleads that he or she undertook certain action ‘in reliance on’ a particular representation made by another, he or she opens up as an element of his or her cause of action, the issue of his or her state of mind at the time that he or she undertook such action. The court will be required to determine what was the factor, or what were factors, which influenced the mind of the party so as to induce him or her to act in that way. That is, the party puts in issue in the proceeding a matter which cannot fairly be assessed without examination of relevant legal advice, if any, received by that party. In such circumstances, the party, by putting in contest the issue of his or her reliance, is to be taken as having consented to the use of relevant privileged material, or to put it another way, to have waived reliance on the privilege which such material would otherwise attract.67

50. However, if the plaintiff has put his state of mind in issue, then the fact of the plaintiff’s state of mind being in issue is not, however, of itself a sufficient basis on which to order the production of privileged documents.

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67 Telstra Corp Ltd v BT Australasia Pty Ltd (1998) 156 ALR 634. See also Commissioner of Taxation v Rio Tinto Ltd (2006) 151 FCR 341 at [24]; Vic Hotel Pty Ltd v DC Payments Australasia Pty Ltd [2015] VSCA 101 at [34].
In particular, mere materiality of a state of mind to an issue in the litigation is not enough to remove privilege. It is “merely the starting point”.\textsuperscript{68} Rather, in order to establish that there has been an implied or imputed waiver:

(a) first, the applicant must show that communications the subject of legal professional privilege contributed to or affected \textbf{the relevant state of mind};\textsuperscript{69}

(b) secondly, the applicant must show that it would be unfair for the plaintiff to withhold those communications from the applicant.\textsuperscript{70}

Assuming there is no express or intentional general waiver by the plaintiff of privilege by the relevant pleadings. Further that there has been no waiver of the confidentiality necessary for the maintenance of privilege. For any waiver of privilege to have occurred, the applicant must show that there has been an implied or imputed waiver by operation of law by reason of the plaintiffs’ conduct.\textsuperscript{71}

\textbf{Inadvertent waiver}

A privileged document may be disclosed inadvertently, often by solicitors in the course of discovery. The position of such a disclosure has been considered by Courts both in Australia and the United Kingdom.

In Guinness Peat Properties Ltd v Fitzroy Robinson Partnership\textsuperscript{72} the Court of Appeal did not accept that immediately a privileged document is disclosed the privilege is lost. Slade LJ considered that even after inspection the Court is not powerless to intervene to correct the mistake. The general rule which his Lordship stated\textsuperscript{73} - that, the circumstances of fraud or obvious mistake aside, once inspection has occurred it is too late to grant injunctions – was not based upon waiver having been effected by the disclosure. Its basis lies in policy. This may be seen from the acceptance by the Court of Appeal of submissions\textsuperscript{74} to the effect that imposing a restriction on relief after the point of inspection provides ‘a simple practical rule’. The rule puts the onus on the party giving discovery to ensure its accuracy and avoids the practical problems involved in restoring the status quo by prohibiting the party to whom the documents are disclosed from using the information. Nevertheless, the English Courts recognise the two exceptions to

\begin{footnotes}
\item[68] \textit{Liquorland} at [41]; see also \textit{Southern Equities Corporation Ltd v Arthur Andersen & Co} (1997) 70 SASR 166 at 181
\item[69] See \textit{Southern Equities} per Doyle CJ at 181, Bleby J (Matheson J concurring) at 193; \textit{Ampolex v Perpetual Trustee Co (Canberra) Ltd} 37 NSWLR 405 at 411; \textit{Liquorland} at 37; \textit{ANZ Banking Group Ltd v ANZCover Insurance Pty Ltd} [2005] VSC 21 at [7]
\item[70] See \textit{Mann} at 13; \textit{Attorney-General (Northern Territory) v Maurice} (1986) 161 CLR 475 per Gibbs CJ at 481, Mason and Brennan JJ at 488; \textit{Liquorland} at 42.
\item[71] See \textit{Mann v Carnell} (1999) 201 CLR 1.
\item[72] [1987] 1 WLR 1027 at 1044; [1987] 2 All ER 716 at 730.
\item[73] At 731.
\item[74] At 729.
\end{footnotes}
that general rule, and in those cases will use their power in the equitable jurisdiction to make the injunctions.

55. Further, the Court of Appeal discussed the use of its own powers concerning proceedings in only one context. The Court observed that if inspection had not occurred, the Court would permit a party who had mistakenly disclosed a privileged document to amend its List of Documents, under Or 20, r 8 of the Rules of the Supreme Court 1965 (UK). In fact, the terms of that rule did not restrict the making of any order to such a time. The restriction appears to have been self-imposed, by the adoption of the general rule which followed.

56. A similar issue came to the High Court in Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd. The Court concluded that although discovery is an inherently intrusive process it is not intended that it be allowed to affect a person’s entitlement to maintain the confidentiality of documents where the law allows. It follows that where a privileged document is inadvertently disclosed, the court should ordinarily permit the correction of that mistake and order the return of the document, if the party receiving the documents refuses to do so.

57. The decision does not address the more practical issue, whether the person or persons who have read the document can continue to act in the proceeding. It is a truism but an important one that the information can never be erased from one’s mind. Once confidential information is disseminated it can never regain its confidential character.

LEGAL PROFESSIONAL PRIVILEGE – SECTIONS 118 AND 119 OF THE EVIDENCE ACT 1995

58. The common law rule of legal professional privilege has statutory force in the Uniform Evidence Act. Sections 118 and 119 set out the requirements, respectively for advice privilege and litigation privilege. At the outset it is noteworthy that the statutory privilege is confined to disclosure in “proceedings” whereas the common law doctrine is not.

59. Pursuant to s. 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

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75 Guinness Peat at 730-731.
76 (2013) 250 CLR 303 at 319 per French CJ, Kiefel, Bell, Gageler and Keane JJ.
77 At [43]-[45].
78 Mobil Oil Australia Pty Ltd v Guina Developments Pty Ltd [1996] 2 VR 34 at 38.55 per Hayne JA; at 35 per Winneke P and JD Phillips JA.
(b) a confidential communication made between two or more lawyers acting for the client; or

(c) the contents of a confidential document (whether delivered or not) prepared by the client, lawyer or another person for the dominant purpose of the lawyer, or one or more of the lawyers providing legal advice to the client.

60. Pursuant to s. 119 evidence is not to be adduce 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 anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.

61. The terms “client”, “confidential communication”, “confidential document”, “lawyer” and “party” are defined in s. 147. The word “document” is defined in clause 8 of Part 2 of the Dictionary.

Client

62. The Act defines “client” as follows:

(a) a person or body who engages a lawyer to provide legal services or who employs a lawyer (including under a contract of service);

(b) an employee or agent of a client;

(c) an employer of a lawyer if the employer is:

   (i) the Commonwealth or a State or Territory; or

   (ii) a body established by a law of the Commonwealth or a State or Territory;


(d) if, under a law of a State or Territory relating to persons of unsound mind, a manager, committee or person (however described) is for the time being acting in respect of the person, estate or property of a client—a manager, committee or person so acting;

(e) if a client has died—a personal representative of the client;

(f) a successor to the rights and obligations of a client, being rights and obligations in respect of which a confidential communication was made.

63. In ordinary parlance, a “client” vis-à-vis a lawyer is a person for whom the lawyer performs legal services. Whether a relationship of that kind exists is to be determined by reference to the intentions of the parties objectively ascertained. “Client”, in its ordinary signification, must therefore be regarded as referring to a person who, in respect of some legal matter within the scope of professional services normally provided by lawyers, has, with the consent of a lawyer, come to stand in a relationship of trust and confidence to the lawyer entailing duties of the lawyer to promote the person’s interests, to protect the person’s rights and to respect the person’s confidences. The privilege exists so that a person may consult his legal adviser in the knowledge that confidentiality will prevail.82

64. There is no requirement that there be a valid contract of retainer between the lawyer and the “client”.83 Under the common law “privilege can exist in respect of communications where there is no valid retainer of the lawyer” and there is no express requirement in s. 118 of the Evidence Act 1995 or in the definition of ‘client’ or ‘lawyer’ which requires that a person only becomes a client if there is a contract of retainer or if the lawyer has accepted instructions to act. The only requirement is that the lawyer is “engaged”.

65. The definition of “client” (in sub-paragraph (b)) extends to an “agent” of a client. The term “agent” is not defined. The issue will be whether the client has expressly or impliedly authorised the “agent” to act on behalf of the client in the context of obtaining legal advice (s. 118) or professional legal services relating to ongoing or anticipated litigation (s. 119). The “agent” would encompass office staff of the lawyer and experts retained by the lawyer.

Confidential communication and confidential document

66. The terms are defined as follows:

(a) “confidential communication” means a communication made in such circumstances that, when it was made, the person who made it; or the person

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to whom it was made; was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law; and

(b) “confidential document” means a document prepared in such circumstances that, when it was prepared, the person who prepared it; or the person for whom it was prepared; was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law.

67. Several propositions can be stated:

(a) a communication or document will be “confidential” for the purpose of the Act if either the person who made/prepared it or the person to/for whom it was made/prepared “was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law”; 

(b) the obligation must exist at the time when the communication or document was made. If it does, the communication or document will be “confidential”; 

(c) the phrase “under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law” should not be read narrowly and should not be confined to “the type of obligation which arises in the course of a solicitor/client relationship”;  

(d) each case will turn on “the nature of the relationship in question and the circumstances, including conduct and/or conversations, surrounding the communications or documents in question” as well as “the nature of the documents in question and the purpose and context of their communication.”  

Lawyer

68. The term “lawyer” is defined to mean:

(a) an Australian lawyer; and

(b) an Australian-registered foreign lawyer; and

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84 Carnell v Mann (1998) 89 FCR 247 at 259 per Higgins, Lehane and Weinberg JJ; see also New South Wales v Jackson [2007] NSWCA 279 at [41]. Giles JA (Mason P and Beazley JA agreeing) at [41].
(c) an overseas-registered foreign lawyer or a natural person who, under the law of a foreign country, is permitted to engaged in legal practice in that country; and

(d) an employee or agent of a lawyer referred to in paragraph (a), (b) or (c).

69. “Legal advice” is advice and includes confidential communications for the purpose of legal advice. It extends to advice as to what should prudently and sensibly be done in the relevant legal context. A lawyer’s views on the legal framework may so inform what appears to be commercial advice that it is properly characterised as legal advice. There will be no privilege if a communication is with a lawyer acting in a non-legal capacity providing something other than “legal advice”. In ASIC v Rich Hamilton J considered that the appropriate test was whether the communication could be characterised as “the giving of independent legal advice by a person acting in the role of a legal adviser giving advice to a client.”

70. Although, the authorities do recognise that it may be impossible to disentangle the lawyer’s views of the legal framework from other reasons that all go to make up the advice as to what should prudently and sensibly be done in the relevant legal framework.

Document

71. Document is defined as: any part of the document; or any copy, reproduction or duplicate of the document or of any part of the document; or any part of such a copy, reproduction or duplicate.

72. However, it is to be noted that paragraph (c) should not be given its widest possible meaning because that “would in a practical sense subsume most, if not all, documentary communications falling with para (a) and para (b).”

73. The purpose for which the communication was made is critical, and is the same as for the common law privilege namely the dominant purpose.

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86 Workcover Authority of NSW, General Manager v Law Society (NSW) [2006] NSWCA 84 at [77].
87 See DSE (Holdings) Pty Ltd v Intertan Inc (2003) FCA 1191 at [45] per Allsop J.
89 DSE(Holdings) Pty Ltd at [45] per Allsop J (as he then was).
90 Clause 8 of Pt 2 of the Dictionary.
91 Telstra Corp v Australis Media Holdings (1997) 41 NSWLR 147 at 149B per McLelland CJ in Eq.
Waiver

74. The common law position in relation to waiver has also been codified in the Evidence Act. Pursuant to s. 122(2), the Act does not prevent the adducing of evidence if the client or party concerned has acted in a way that is inconsistent with the client or party objecting to the adducing of the evidence because it would result in a disclosure of a kind referred to in section 118, 119 or 120.

75. The High Court has made it clear that the statutory test in relation to waiver is the same as in the common law test.\textsuperscript{92}

76. Finally, as in the common law, the burden of proof on establishing the privilege rests with the client ("...on objection by a client... contained in s. 118"). The standard of proof is that the Court is satisfied that the facts necessary for deciding the factual question have been established on the balance of probabilities.\textsuperscript{93} Accordingly the standard of proof and burden of proof are the same as for a claim made at common law.

CONCLUSION

77. Legal professional privilege is an important legal right which enures to the benefit of the client. It ensures that lawyers are able to give appropriate advice by encouraging clients to be completely frank in their instructions. It can be waived, and if so, it can open up a variety of communications to the opponent and to the Court. It has some limitations but generally speaking is strictly upheld by the Courts. Recent codification of the right has done very little to change its concepts or application.

19 March 2015

P J BOOTH

Victorian Bar

\textsuperscript{92} Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd (2013) 250 CLR 303 at 315 para [30].
\textsuperscript{93} Section 142(1).
DRAFT AFFIDAVIT LEGAL PROFESSIONAL PRIVILEGE

I John Smith of ________________________, Melbourne in Victoria, solicitor, make oath and say as follows:

1. I am an Australian Legal Practitioner within the meaning of the Legal Profession Act 2004 (Vic) and responsible for this matter on behalf of the Plaintiff.

2. I refer to the Summons dated ______________ (“the Summons”) and filed ___________ seeking that the Plaintiff produce for inspection by the Defendant the documents numbered 1 to 8 in the affidavit of documents sworn by __________ on ____________.

Claim for privilege

3. I say in relation to each of the documents referred to in the Summons numbered 1 to 8 that the Plaintiff maintains a claim for legal professional privilege over each and every document as against the Defendant. Each of the documents records a communication between the Plaintiff or the Plaintiff’s agent and myself or a member of my legal staff. Each communication was for the dominant purpose of obtaining or providing legal advice as the case may be.

General

4. In __________ the Plaintiff contacted me for the purposes of receiving legal advice in relation to matters which ultimately became the subject of this proceeding. The proceeding was not issued until ____________.

5. The documents are dated between __________ and ______________ and record communications between my client, the Plaintiff, and his lawyers (myself or other members of my legal staff) in the nature of instructions.
provided to me or my staff by the plaintiff and the subsequent advice provided to the plaintiff by myself or my staff.

6. The documents were referred to in the Plaintiff’s list of documents dated __________ and in our letter to the Defendant’s lawyers dated __________.

7. The Plaintiff instructed me to maintain the claim for legal professional privilege in relation to each document in the proceeding.

**The documents**

8. The nature of each document and the circumstances in which each was created is as follows:

(a) **Document 1** referred to in the Summons is a file note dated __________ prepared by me following a telephone discussion I had with the Plaintiff on __________. The subject of the discussion was legal advice regarding __________. This document was brought into existence for the purpose of recording the Plaintiff’s instructions and for the purpose of giving legal advice to the Plaintiff on the matters which are the subject of this proceeding.

(b) **Document 2** referred to in the Summons is a chain of 2 emails passing between the Plaintiff and me. The first email is an email from ____________ to me dated ________ and refers to instructions sent to me, and the second is an email dated ____________ from me to ____________ which refers to receipt of those instructions. This document was received by me for the purpose of giving legal advice.

(c) **Document 3** referred to in the Summons is a letter from the Plaintiff dated ________ including a letter from ____________ enclosing
memorandum of instructions regarding ___________ and advice sought by the Plaintiff, and a letter dated ___________ from the Defendant to the Plaintiff. The letter dated ___________ and memorandum of instructions were received by me for the purpose of giving legal advice. I have been informed by the Plaintiff and believe that he does not claim privilege over the letter from Defendant’s solicitors dated ___________ and it has already been discovered by the Plaintiff to the Defendant (see Plaintiff’s discovered document 178).

(d) Document 4 referred to in the Summons is a chain of 3 emails. The first email is passing between ___________ and the Defendant dated _______ regarding ______________. The second email is from _______________ to the Plaintiff and dated _______ forwarding a copy of the first email. The third email is between the Plaintiff and me, forwarding a copy of the first 2 emails. These documents were received by me for the purpose of giving legal advice.

(e) Document 5 referred to in the Summons is a file note dated _______ taken by me of a conference with the Plaintiff conducted on ___________ covering 4 pages relating to the structure of the business, properties, parties involved in the business and professional advisors. This document was brought into existence for the purpose of giving legal advice.

(f) Document 6 referred to in the Summons is a file note dated _______ of one of my formerly employed lawyers also present at the conference referred to in paragraph # above following the conference on _______. These are notes of __________ relating to the structure of the business, properties, parties involved in the business and professional advisors. This document
was brought into existence for the purpose of recording our instructions and giving legal advice.

(g) Document 7 referred to in the Summons is a letter dated __________ from my firm to the Plaintiff. The letter records advice provided by me regarding documents, scope of work and ____________. This document was brought into existence for the purpose of giving legal advice.

(h) Document 8 referred to in the Summons is a letter dated __________ from my firm to the Plaintiff regarding commercial advice. The letter records the return of financial information provided to my firm in __________. This document was brought into existence for the purpose of giving legal advice.

9. I am informed by the Plaintiff and believe that he maintains claim for legal professional privilege in respect of documents 1 to 8 referred to in the Summons and opposes the orders sought by the Defendant in the Summons.