Buchanan Rees
DISPUTE LAWYERS

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LEGAL PROFESSIONAL PRIVILEGE: CHALLENGES AND STRATEGIES FOR IN-HOUSE COUNSEL

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1. THE LEGAL NOTION OF PRIVILEGE AND THE ELEMENTS FOR COMMUNICATIONS TO ATTRACT PRIVILEGE

What is legal professional privilege and why does it exist?

1.1 Legal professional privilege (which is called "client legal privilege" in the uniform *Evidence Acts*) protects the disclosure of confidential communications made for the dominant purpose of a client obtaining legal advice or use in existing or anticipated legal proceedings.

1.2 It is a rule of substantive law and not just a rule of evidence.[1] The rationale for the creation of the privilege was to enhance the administration of justice and the proper conduct of litigation by promoting free disclosure between clients and lawyers, to enable lawyers to give proper advice and representation to their clients.[2]

1.3 In *Baker v Campbell*, Wilson J stated:

> " … *the adequate protection according to law of the privacy and liberty of the individual is an essential mark of a free society and … [the] privilege … is an important element in that protection.*"[3]

1.4 There are two types of legal professional privilege, which are commonly known as:

[1] *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 490, per Deane J
[2] *Baker v Campbell* (1983) 153 CLR 52
[3] Ibid, at 91

(a) "legal advice privilege", which applies to confidential communications passing between a client and a lawyer (or in some circumstances, between the client or lawyer and a third party) made for the dominant purpose of enabling the client to obtain legal advice; and

(b) "litigation privilege", which applies to confidential communications passing between a client and a lawyer (or in some circumstances, between the client or lawyer and a third party) made for the dominant purpose of use in, or in relation to, litigation which is either on foot or in contemplation.

The elements of legal professional privilege

1.5 Legal professional privilege is recognised both under the common law and in the uniform *Evidence Acts* in force across various Australian jurisdictions (including New South Wales and the Commonwealth).

1.6 In both, there are 3 elements required for a communication to attract the privilege.

1.7 First, with some limited exceptions (see below), there must be a communication. Legal professional privilege does not protect physical objects other than those (such as a document or computer disc) that contain a record of a communication.

1.8 This means that, subject to satisfying the second and third elements below, legal profession privilege applies to:

(a) actual lawyer/client communications, such as letters, emails, facsimiles, telephone calls, text messages and conferences (as well as records of those communications, such as file notes);

(b) notes, memoranda and other documents that relate to information sought by a legal adviser to enable him or her to advise;[4]

[4] See *Trade Practices Commission v Sterling* (1979) 36 FLR 244 at 246

(c) drafts, notes and other material brought into existence for the purpose of communication to the lawyer, whether or not they are actually communicated to the lawyer;[5] and

(d) communications with a third party for the dominant purpose of submission to the lawyer to enable the client to obtain legal advice.[6]

1.9 Second, the communication must be confidential. In this context, "confidential" refers to:

(a) communications made in confidence by one person to another;[7] or

(b) professional communications in a professional manner.[8]

1.10 Third, the communication must be made for the dominant purpose of the client obtaining legal advice or use in existing or anticipated legal proceedings.

1.11 In the uniform *Evidence Acts*, this is stated expressly in the relevant sections (discussed below).

1.12 In relation to the common law, in *Esso Australia Resources Ltd v Federal Commissioner of Taxation*,[9] the High Court overturned the sole purpose test which it had enunciated in *Grant v Downs*.[10]

1.13 The dominant purpose is the ruling, prevailing, paramount or most influential purpose.[11] It follows that a communication is not privileged if one purpose for its creation is to obtain legal advice but there are other equally (or more) important purposes.

[5] See *Saunders v Commissioner of Australian Federal Police* (1998) 160 ALR 469 at 472
[6] See *Pratt Holdings v Commissioner of Taxation* (2004) 136 FCR 357
[7] *Johns v Australian Securities and Investments Commission* (1993) 178 CLR 408 at 436, per Dawson J
[8] *Lawrence v Campbell* (1859) 4 Drew. 485 at 490 per Kindersley V.C.
[9] (1999) 201 CLR 49
[10] (1976) 135 CLR 674
[11] *Federal Commission of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 at 416; *Grant v Downs* (1976) 135 CLR 674 at 678

1.14 A good example which illustrates that position is the case of *Sydney Airports Corporation Limited v Singapore Airlines Ltd*.[12]

1.15 In that case, an aerobridge at Sydney airport, operated by Qantas Airways Limited, had malfunctioned, causing a door to be sheared off a Singapore Airlines plane. Ms Wilder was an in-house counsel for Sydney Airports Corporation Limited (**SACL**) and she commissioned an expert report into the incident, on behalf of SACL.

1.16 Approximately 3 years after the incident, Singapore Airlines commenced proceedings against SACL and Qantas. In that litigation, SACL claimed privilege over the expert report. SACL asserted that the report was commissioned for the dominant purpose of litigation which was anticipated at the time of the commissioning.

1.17 At first instance, McDougall J found that there were 3 other purposes for the report which were unrelated to litigation, namely:

(a) to enable SACL to understand what had caused the incident;

(b) to satisfy the Airline Operations Committee that the aerobridge was safe before it was put back into use; and

(c) so that SACL could ensure similar incidents did not occur in the future.

1.18 While litigation was a fourth purpose for the report, His Honour found that SACL had not discharged its onus to establish that the report was prepared for the dominant purpose of litigation.

1.19 An appeal against that decision was dismissed, with the NSW Court of Appeal finding:

> "*The evidence that the report was always to be deployed for non-privileged purposes, which purposes were of significance to the Claimant – particularly to have the aerobridge back in service – was such that although the privileged purpose may have been the most important single factor, it was not shown to be dominant*".[13]

[12] [2005] NSWCA 47
[13] [2005] NSWCA 47 at 55

Legal advice privilege

1.20 In the *Evidence Act* 1995 (NSW), section 118 deals with legal advice privilege. That section provides:

> "*Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:*
>
> *(a) a confidential communication made between the client and a lawyer; or*
>
> *(b) a confidential communication made between 2 or more lawyers acting for the client; or*
>
> *(c) the contents of a confidential document (whether delivered or not) prepared by the client, lawyer or another person;*
>
> *for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.*"

1.21 Accordingly, in terms, the section applies to the adducing of evidence (that is, at trial). However, in New South Wales, pre-trial procedures (such as discovery, subpoenas and notices to produce) are also governed by the relevant *Evidence Act* provisions.[14] That is different from Commonwealth jurisdictions, where the relevant provisions of the *Evidence Act* 1995 (Cth) apply at trial only and pre-trial procedures are governed by the common law.

1.22 Under the common law, legal advice privilege attaches to confidential communications between a client and a legal adviser for the dominant purpose of giving or obtaining legal advice.[15]

1.23 It is worth noting that communications for the dominant purpose of a client obtaining, (or a lawyer giving) legal advice will usually include not only the advice itself but also

[14] See *Evidence Act* 1995 (NSW), s.131A
[15] *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 64-65; *Daniels Corporation International Pty Ltd v Australian Competition & Consumer Commission* (2002) 213 CLR 543 at 552

the request for the advice and any other instructions provided by the client to the lawyer in order to enable the provision of the advice.

1.24 Further, the concept of legal advice is quite wide and is not limited to advice about legal rights and obligations. For example, it includes advice as to what the client should do (or not do) in the relevant legal context. That said, it does *not* include advice which is purely of a commercial nature.[16]

Litigation privilege

1.25 In the *Evidence Act* 1995 (NSW), section 119 deals with litigation privilege. That section provides:

> "*Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:*
>
> *(a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made, or*
>
> *(b) the contents of a confidential document (whether delivered or not) that was prepared,*
>
> *for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party*."

1.26 Again:

(a) in terms, the section applies to the adducing of evidence at trial;

(b) in New South Wales, however, pre-trial procedures are also governed by the relevant *Evidence Act* provisions; and

[16] See, e.g., *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48; [2005] 1 AC 610; *DSE (Holdings) Pty Ltd v Intertan Inc* (2003) 135 FCR 151

(c) that position is different from Commonwealth jurisdictions, where the *Evidence Act* 1995 (Cth) applies at trial but pre-trial procedures are governed by the common law.

1.27 Under the common law, litigation privilege attaches to confidential communications between a client and a legal adviser, or a third party, made for the dominant purpose of use in, or in relation to, litigation which is already on foot or which is anticipated or in contemplation.[17]

1.28 For litigation to be "anticipated", there must be a real prospect of litigation and not just a speculative possibility or vague apprehension that it may ensue. However, it does not have to be more likely than not.[18]

1.29 In *Perazzoli v BankSA, a division of Westpac Banking Corporation Limited*,[19] investors brought class action proceedings on behalf of all persons who had advanced monies to a private lending business, alleging that the business was a Ponzi scheme implemented with the knowing assistance of BankSA, a division of Westpac.

1.30 BankSA issued subpoenas to a firm of solicitors and a litigation funder. In responding to the subpoenas, the firm and the funder claimed privilege over numerous documents.

1.31 At first instance, the claims for privilege in relation to documents that came into existence before 30 June 2013 were refused. Those documents had been created in the preparatory stages of the class action, before any of the investors had entered into a formal retainer agreement with the firm of solicitors or signed a litigation funding agreement. His Honour held that at that stage, litigation was no more than "a vague prospect".

[17] *Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* [2002] 4 VR 332 at 335

[18] *Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* [2002] 4 VR 332 at 335; *James v Workcover Queensland* [2001] 2 Qd R 626; [2000] QCA 507

[19] [2017] FCAFC 204

1.32 On appeal to the Full Court of the Federal Court, that finding was overturned. It was held that the evidence demonstrated that:

(a) the solicitors built a case against BankSA in late 2009 and early 2010;

(b) preparation then slowed as the firm waited for the results of a liquidators' investigation, awaited bankruptcy examinations and endeavoured to finalise litigation funding; and

(c) however, litigation was still "reasonably in anticipation" during this time.

1.33 The Full Court noted that:

(a) the collapse of an investment scheme involving allegations of fraud and causing multi-million-dollar losses very often leads to litigation and this "might well have" resulted in litigation;

(b) large class actions involve significant legal work in the incipient stages and case preparation is often slow;

(c) a lawyer's delay should not mean that clients lose the benefit of litigation privilege;

(d) litigation may be reasonably anticipated without nailing down the funding arrangements for the proposed case; and

(e) investors would not have paid significant disbursements during the investigation stage unless they were seeking to gather information in aid of prospective litigation.

1.34 In the earlier decision of *Ensham Resources v AIOI Insurance*,[20] Cowdroy J confirmed that, in order for a party to discharge the onus of proof in respect of a claim for litigation privilege:

(a) litigation must be reasonably in contemplation; and

[20] [2012] FCA 710

(b) the relevant documents must have been prepared for the dominant purpose of providing assistance or advice with respect to that anticipated litigation.

Waver of legal professional privilege

1.35 For completeness, it should be noted that, where a communication is privileged at the time of being brought into existence, the privilege can be waived.

1.36 In short, waiver of legal professional privilege occurs where the party entitled to the privilege (i.e., the client) performs an act inconsistent with the confidence preserved by it.

1.37 Under the common law, the leading Australian decision on waiver of legal professional privilege is *Mann v Carnell.*[21]

1.38 In the *Evidence Act* 1995 (NSW), section 122 deals with waiver of privilege. That section provides (emphasis added):

> "*(1) This Division does not prevent the adducing of evidence given with the consent of the client or party concerned.*
>
> ***(2) Subject to subsection (5), this Division 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.***
>
> ***(3) Without limiting subsection (2), a client or party is taken to have so acted if:***
>
> > ***(a) the client or party knowingly and voluntarily disclosed the substance of the evidence to another person, or***
> >
> > ***(b) the substance of the evidence has been disclosed with the express or implied consent of the client or party.***

[21] (1999) 201 CLR 1

(4) The reference in subsection (3)(a) to a knowing and voluntary disclosure does not include a reference to a disclosure by a person who was, at the time of the disclosure, an employee or agent of the client or party, or of a lawyer of the client or party, unless the employee or agent was authorised by the client, party or lawyer to make the disclosure.

(5) A client or party is not taken to have acted in a manner inconsistent with the client or party objecting to the adducing of the evidence merely because:

(a) the substance of the evidence has been disclosed:

(i) in the course of making a confidential communication or preparing a confidential document, or

(ii) as a result of duress or deception, or

(iii) under compulsion of law, or

(iv) if the client or party is a body established by, or a person holding an office under, an Australian law - to the Minister, or the Minister of the Commonwealth, the State or Territory, administering the law, or part of the law, under which the body is established or the office is held, or

(b) of a disclosure by a client to another person if the disclosure concerns a matter in relation to which the same lawyer is providing, or is to provide, professional legal services to both the client and the other person, or

(c) of a disclosure to a person with whom the client or party had, at the time of the disclosure, a common interest relating to the proceeding or an anticipated or pending proceeding in an Australian court or a foreign court.

(6) This Division does not prevent the adducing of evidence of a document that a witness has used to try to revive the witness's memory about a fact or

opinion or has used as mentioned in section 32 (Attempts to revive memory in court) or 33 (Evidence given by police officers)."

1.39 Analysis of the circumstances which may give rise to waiver of legal professional privilege could fill another paper in itself. For present purposes, it is sufficient to note that:

(a) waiver may be express or implied;

(b) where it is express, it usually consists of an intentional act (such as providing to a third party who owes no duty of confidentiality a document recording privileged legal advice);

(c) where it is implied, the waiver may be unintentional or inadvertent (e.g., putting into issue in legal proceedings the state of mind of a party in circumstances where legal advice received by that party is likely to have contributed to its state of mind); and

(a) once it is waived, legal professional privilege is lost (with the result that the party which had been entitled to the privilege can no longer validly claim it in any context).

2. THE DIFFICULTIES AND COMPLEXITIES IN IDENTIFYING THESE ELEMENTS FOR IN-HOUSE LAWYERS (AND CHALLENGES IN RESPECT OF PRIVILEGE FOR IN-HOUSE LAWYERS)

Close relationships with the executive and management

2.1 It is well established that legal professional privilege applies where legal advice is given by an in-house lawyer in the same way as where it is given by an external legal adviser.[22]

2.2 Under the uniform *Evidence Acts*, that position is confirmed by the definition of "client", which includes:

[22] *Attorney General for the Northern Territory vs Kearney* (1995) 158 CLR 510

"*a person or body who engages a lawyer to provide legal services or who employs a lawyer (including under a contract of service)*".[23]

2.3 However, unlike external legal advisers:

(a) an in-house lawyer is, by definition, employed by the client;

(b) in substance, an in-house lawyer has only one client and it is the same client for all matters (even though in-house lawyers may work with numerous different people involved in the commercial side of their organisation); and

(c) in many instances, reporting lines are such that an in-house lawyer reports to a non-lawyer employed by the same organisation (particularly where the in-house lawyer is the General Counsel, and therefore the most senior lawyer employed by the organisation).

2.4 In combination, these factors have the result that an in-house lawyer will often develop close relationships with the executive and management in his or her organisation. In some cases, the very nature of the employment relationship can lead to an in-house lawyer having a desire to please their client (who is also their employer) in relation to the advice they provide.

2.5 Yet, that situation is problematic in the context of legal professional privilege. That is because the privilege applies only to communications that are made in the course of a professional relationship between the client and the lawyer. In those circumstances, although the word does not appear in section 118 or 119 of the uniform *Evidence Acts*, a critical aspect of legal professional privilege is the *independence* of the lawyer, in performing his or her legal function.

2.6 In *Waterford v Commonwealth*,[24] Brennan J explained that independence is necessary:

" … *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*

[23] See, e.g., *Evidence Act* 1995 (NSW), s.117(1); *Evidence Act* 1995 (Cth), s.117(1)
[24] (1987) 163 CLR 54

conduct of litigation on behalf of his client."[25]

2.7 In *Seven Network Ltd v News Ltd*,[26] News Limited claimed privilege over 22 documents. Most of those documents were internal communications between company executives and the Chief General Counsel. However, the evidence showed that the Chief General Counsel was closely involved in the making of commercial decisions, including that he was:

(a) a director or alternate director of six companies in the News Ltd corporate group;

(b) a member of the Partnership Executive Committee, and

(c) actively involved in commercial negotiations.

2.8 In those circumstances, Seven Network contended that the Chief General Counsel did not have the independence required for legal professional privilege to apply.

2.9 In relation to 17 of the 22 documents in question, the Federal Court agreed, ruling that the dominant purpose test was not satisfied because the Court was not convinced that the Chief General Counsel was acting in a legal role or that the claims for privilege were based on an independent and impartial legal appraisal.[27] Importantly, Tamberlin J observed that:

(a) " *… 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*";[28] and

(b) although the commercial reality is that in-house lawyers may provide commercial advice, legal professional privilege is an issue of:

[25] At 70
[26] [2005] FCA 142
[27] At 38. This ruling was made even though some of the 17 documents were labelled "Privileged – contains legal advice"
[28] At 4

"*the fact and degree and involves a weighing of the relative importance of the identified purpose*".[29]

Separating what is a commercial or a privileged communication

2.10 Another factor which is relevant in determining whether particular communications involving in-house lawyers are privileged is the fact that the line between legal advice and non-legal (or commercial) advice can much more easily become blurred with respect to in-house lawyers than with respect to external legal advisers.

2.11 To a large extent, that blurring of the lines arises from the fact that in-house lawyers are often required to perform both legal and commercial functions, rather than legal functions only.

2.12 In the *Sydney Airports* case referred to above, Spigelman CJ said:

> "*An in-house solicitor is, by reason of his or her position, more likely to act for purposes unrelated to legal proceedings than an external solicitor who, in the normal course, has no relevant function other than that involving legal proceedings and/or legal advice. An in-house solicitor may very well have other functio*ns. *Accordingly, in determining whether or not a document was brought into existence for a purpose which was both privileged and dominant, the status of the legal practitioner is not irrelevant.*"[30]

2.13 It is important to recognise that it is not only the propensity for in-house lawyers to take on non-legal titles (such as Company Secretary or Head of Risk) which can generate doubt over whether the dominant purpose test is satisfied by particular communications to which they are a party.

2.14 In fact, the problem can arise if the in-house lawyer becomes in any way involved in commercial deliberations or decision-making. In other words, even without taking on an additional title, an in-house lawyer may sometimes perform a non-legal function.

[29] At 5
[30] [2005] NSWCA 47 at [24]

2.15 Indeed, the non-legal nature of a function will often be more obvious (and therefore, easier for the in-house lawyer to recognise) if it comes with a different title. For example:

(a) an in-house lawyer who is also the company secretary may find it relatively easy to clearly delineate the functions associated with each of those roles; and

(b) on the other hand, an in-house lawyer who has only one title but sits on an internal committee which deliberates on, and makes recommendations to the Bord about, commercial matters (albeit with legal advice from the in-house lawyer being part of that process) might find it more difficult to draw a line between legal and commercial functions.

3. STRATEGIES TO ATTRACT PRIVILEGE TO COMMUNICATIONS FOR IN-HOUSE LAWYERS

3.1 Notwithstanding the title of this section of the paper, it will be clear from what is said above that each communication either has the elements required for legal professional privilege (namely, a *communication* which is *confidential* and satisfies the *dominant purpose* test) or it does not. It would be wrong to think that in-house lawyers can adopt strategies which will "attract" privilege to communications that otherwise would not be privileged because they don't have those elements.

3.2 A better way to characterise the tips below is to think of them as strategies for in-house lawyers to be able to *evidence* the fact that communications are privileged (if seeking to maintain a claim for privilege before a Court), where that is genuinely the case.

3.3 Of course, in the context of a Court considering whether a communication involving an in-house lawyer is privileged, none of the following matters is determinative by itself. However, each of them can assist in demonstrating that the elements required for legal professional privilege to apply are present.

Careful structuring of employment arrangements

3.4 It can sometimes be overlooked that a contract of employment contains a description of the role and responsibilities of the employee and it is a matter for the contracting parties (the organisation and the employee) as to how detailed that description should be.

3.5 It may assist in evidencing the fact that particular communications involving an in-house lawyer are privileged if his or her contract of employment is drafted in such a way as to emphasise the legal nature of the role; in particular, with the primary responsibility being the provision of legal advice to the organisation.

3.6 Further, it is contrary to the notion of independence if an in-house lawyer's key performance indicators or remuneration/reward structure include criteria that are relevant in assessing whether the business has been financially successful (e.g., profit level). If a Court sees that an in-house lawyer is incentivised by the business achieving greater financial success, it may be more cautious about accepting a submission that the lawyer's advice is truly independent.

3.7 Another factor falling broadly under the umbrella of "employment arrangements" which can be sometimes be critical in establishing to a Court that certain communications are privileged is whether the relevant in-house lawyer has a current practising certificate.

3.8 If an organisation requires that each of its in-house lawyers maintains a current practising certificate, this may well assist in showing that those in-house lawyers are acting in a professional legal capacity and have the requisite independence from the organisation for privilege to apply to their communications.

Independence policies

3.9 Written policies of the organisation can also assist in demonstrating that legal advice given by an in-house lawyer is independent.

3.10 If there is a policy which states clearly that the function of the in-house lawyer is to provide independent legal advice (and that commercial people within the organisation must not apply pressure which might undermine that independence), that may well

assist in evidencing to a Court that communications involving the in-house lawyer are privileged.

Reporting lines

3.11 Reporting lines are another factor which can sometimes undermine a contention that the elements for legal professional privilege are present.

3.12 Where an in-house lawyer reports to a non-lawyer, it can be difficult to persuade a Court that the advice of the more junior person:

(a) is independent; and

(b) satisfies the dominant purpose test.

3.13 Therefore, where a party is seeking to establish before a Court that communications involving an in-house lawyer are privileged, it is better if the relevant in-house lawyer reports to another in-house lawyer.

3.14 As noted above, where the in-house lawyer is the most senior lawyer employed by the organisation (e.g., the General Counsel), that will normally not be possible. In those circumstances, matters such as those referred to above (employment arrangements and independence policies) can become even more significant.

Identifying the capacity in which any particular communication is made

3.15 It almost goes without saying that, if an in-house lawyer performs both legal and non-legal functions, it will assist in establishing the existence of privilege over communications sent or received in the legal function if the non-legal functions are kept entirely separate.

3.16 It follows that in respect of each piece of work they perform, an in-house lawyer should be very clear in their own mind as to which “hat” they are wearing. To the extent that this flows through to other indicia (such as the title used in an email sign-off), they should also be very clear to others on the same point.

3.17 Further, it does no harm to:

(a) state in a document that its purpose is to provide legal advice (or for use in litigation); and

(b) label the document with something like “subject to legal professional privilege”,

where that is actually the case.

3.18 That said, statements and labels of that nature should not be applied on a “blanket” basis to all communications, with no thought given to whether the communications satisfy the dominant purpose test. If that occurs, they become essentially meaningless.

26 February 2020