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## THE LAW OF PRIVILEGE: A CRITICAL ANALYSIS

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Note that the textbook, *The Law of Privilege* (Law Book Co 1992), pp 1-501, i-ixi, has also been submitted as part of this PhD thesis. It has been submitted separately as a "stand alone" book but is to be read together with the thirteen chapters included in this binder.

*The Law of Privilege* was published on 30 September 1992 and launched by The Hon Sir Gerard Brennan, AC, KBE (Justice of the High Court of Australia) on 13 November 1992 at the Law Institute of Victoria. The book has been cited by the High Court, Federal Court, various State Supreme Courts and County Courts and has had several reviews. For example, Judge F.G. Dyett, [1994] 88 *Vic Bar News* 101, Professor D.W. Elliott, [1993] *Crim LR* 547, Professor R. MacCallum [1994] 16 *Syd LR* 562, G. McArthur, (1993) 67 *ALJ* 165, Associate Professor F. Auburn, (1993) 23 *UWALR* 188, C. Metcalfe, (1993) 67 *LIJ* 532, C. Erskine, (1993) *Law Soc ACT Gaz* 37, T. Bryant, (1994) 16 *Law Soc Bull* 39.

## ACKNOWLEDGMENT OF AUTHORSHIP

I acknowledge that I am the sole author of all the chapters in this thesis, that is Chapters 1-13 inclusive.

Signed

  
Suzanne B. McNicol

Date ..... 27 July 2001 .....

I acknowledge that Sue McNicol is the sole author of Chapter 4, Chapter 5 and Chapter 6 of S. McNicol and D. Mortimer, *Evidence* (Butterworths Tutorial Series, 2<sup>nd</sup> edition, 2001) as they appear in Chapter 12 of this thesis.

Signed

  
Debra Mortimer

Date ..... 27 July 2001 .....

## ABSTRACT

This thesis analyses and critically evaluates the doctrine of privilege. It consists of (a) a textbook entitled *The Law of Privilege* (Law Book Co 1992) which is submitted separately as a "stand alone" book and (b) eleven supporting articles, chapters in books and other publications which are included in this binder (as Chapters Two to Twelve inclusive) and (c) an Introduction and a Conclusion which are included in this binder (as Chapters One and Thirteen respectively).

The aim of the thesis is to analyse the whole of the law of privilege both from a descriptive and a normative perspective with a particular focus on legal professional privilege. The descriptive aspect of the thesis explains and evaluates definitively every form of privilege and explores the limits and exceptions to the privilege, and in particular the situations where the privilege is lost by inadvertent disclosure and other forms of waiver. The textbook *The Law of Privilege* covers the field by explaining and evaluating every form of privilege in eight chapters - nature of privilege, lawyer-client (legal professional privilege), doctor-patient (medical professional privilege), clergy-communicant, husband-wife (marital privilege), privilege against self-incrimination, without prejudice privilege and public interest immunity. Since publication of the textbook, *The Law of Privilege* in 1992 there have been changes to the common law doctrine of privilege. All of these changes are analysed in the various chapters in this binder. These cover the common law rules of privilege in each Australian jurisdiction as well as the statutory privileges created by the State and Territory Evidence Acts and the changes brought about by the "uniform" evidence legislation - the Evidence Act 1995 (Cth) and the Evidence Act 1995 (NSW).

Whilst every form of privilege is dealt with in the thesis, there is a particular emphasis on the common law doctrine of legal professional privilege. This is because there has been a vast amount of activity and attention devoted to legal professional privilege especially over the last ten to fifteen years. Developments and changes have occurred mainly through a plethora of case law on legal professional privilege but also through some statutory intervention and a keen interest in legal professional privilege evidenced by legal practitioners, government bodies and legal academics.

The normative aspect of the thesis questions what should be the correct basis for privilege in general and whether privilege should still be justified in continuing to operate as a means of suppressing valuable information. It is argued that it remains important to consider the interests in disclosure of evidence and

information and not merely the competing interest in confidentiality. This is so despite the more recent tendency of judges in Commonwealth jurisdictions to treat privilege (in particular legal professional privilege but with the exception of public interest immunity) as absolute in the sense that there is nothing left to be balanced because privilege is already the result of a balancing exercise. Judges, lawmakers and others involved in the application of legal professional privilege are exhorted to be always cognisant of the traditional instrumental rationale for the privilege (that is, to maximise the professional and confidential relationship between lawyers and clients which is in turn said to be necessary for an effective administration of justice) and not merely to focus on the more recently formulated rationale which posits that privilege is a human right. It is argued that if this is done, there would be much less justification for the common law's jealous protection of the privilege and for its refusal to recognise further exceptions to it.

## **CHAPTER ONE**

### Introduction and Overview

## INTRODUCTION AND OVERVIEW

This thesis consists of (a) a textbook entitled *The Law of Privilege* (Law Book Co 1992) which is submitted separately as a "stand alone" book, (b) eleven supporting articles, chapters in books and other publications which are included in this binder (as Chapters Two to Twelve inclusive) and (c) this Introduction and a Conclusion which are included in this binder (as Chapters One and Thirteen respectively). Taken together, the textbook and the thirteen chapters in this binder combine to present the basis of the thesis entitled: *The Law Of Privilege: A Critical Analysis*. The supporting articles and chapters which are submitted in this binder as part of this PhD thesis are linked thematically with the arguments presented and the law expounded in the textbook, *The Law of Privilege*. The sustained theme will be described below.

The aim of the thesis is to analyse the whole of the law of privilege both from a descriptive and a normative perspective with a particular focus on legal professional privilege. The descriptive aspect of the thesis aims to explain and evaluate definitively every form of privilege and to explore the limits of and so called exceptions to the privilege, and in particular the situations where the privilege is lost by inadvertent disclosure and other forms of waiver. The descriptive aspect attempts to be definitive by outlining the common law rules of privilege in each Australian jurisdiction as well as the statutory privileges created by the State and Territory Evidence Acts and the "uniform" evidence legislation – the Evidence Act 1995 (Cth) and the Evidence Act 1995 (NSW).

Whilst every form of privilege is dealt with in the thesis, there is a particular emphasis on the common law doctrine of legal professional privilege. This is because there has been a vast amount of activity and attention devoted to legal professional privilege especially over the last ten to fifteen years. Developments and changes have occurred mainly through a plethora of case law on legal professional privilege but also through some statutory intervention and a keen interest in legal professional privilege displayed by legal practitioners, government bodies and legal academics. In brief, legal professional privilege amounts to a rule that confidential communications passing between a lawyer and her or his client, which have been made for the dominant purpose of seeking or being furnished with legal advice or for the dominant purpose of preparing for actual or contemplated litigation, need not be disclosed in evidence or otherwise revealed. This rule also extends to communications passing between a lawyer or client and third parties if made for the purpose of actual or contemplated litigation.

The normative aspect of the thesis aims to question what should be the correct basis for privilege in general and whether privilege should still be justified in continuing to operate as a means of suppressing valuable information. Privilege

operates to protect particular communications between certain persons (for example, between lawyers and their clients, doctors and their patients, priests and their penitents, husbands and wives etc). The effect of holding a communication privileged is to withhold the contents of that communication from the courts and other persons and bodies. Quite often this information is vital for the resolution of disputes, the ascertainment of facts and the determination of legal responsibility. Hence it is essential to understand the rationale for the privilege (and in particular why it should operate to suppress important information), to ascertain the limits of the doctrine and to reassess the values that underlie the arguments for its continued existence. It is argued that it remains important to consider the interests in disclosure of evidence and information and not merely the competing interest in confidentiality. This is so despite the more recent tendency of judges in commonwealth jurisdictions to treat privilege (and in particular legal professional privilege but with the exception of public interest immunity) as absolute in the sense that there is nothing left to be balanced because privilege is already the result of a balancing exercise.

The normative aspect of the thesis also exhorts judges, lawmakers and others involved in the application of legal professional privilege to be always cognisant of the traditional instrumental rationale for the privilege (that is, to maximise the professional and confidential relationship between lawyers and clients which is in turn said to be necessary for an effective administration of justice) and not merely to focus on the more recently formulated rationale which posits that privilege is a human right. It is argued that if this is done, there would be much less justification for the common law's jealous protection of the privilege and for its refusal to recognise further exceptions to it.<sup>1</sup>

My textbook, *The Law of Privilege* (Law Book Co, 1992), which is being submitted separately as part of this PhD thesis, analyses the common law doctrine of privilege which operates to withhold vital information from the courts and other bodies. The book is the first of its type - never before had there been a definitive book written exclusively on the law of privilege. The book covers the field by explaining and evaluating every form of privilege in eight chapters - nature of privilege, lawyer-client (legal professional privilege), doctor-patient (medical professional privilege), clergy-communicant, husband-wife (marital privilege), privilege against self-incrimination, without prejudice privilege and public interest immunity. The question whether a particular communication is privileged is a matter of vital concern, not only for legal practitioners who must

<sup>1</sup> See, for example, the decision in *Carter v Managing Partner, Northmore, Hale Davy and Leake* (1995) 183 CLR 121 where the High Court refused to recognise an exception to legal professional privilege in criminal cases where the information or documents would tend to establish the innocence of an accused person. This is dealt with in Chapter Twelve, Part A.

invoke legal professional privilege for certain confidential communications passing between themselves and their clients. But also, in many other relationships where confidential or professional information is exchanged, a question of privilege will arise - for example, the relationships of doctor-patient, clergy-communicant, and husband-wife. There is also a strong case to be made for extending privilege to other relationships of confidence such as accountant-client, journalists and their sources, banker-client, psychiatrist-patient, etc. Thus far, however, the law has been reluctant to extend to other relationships the legal protection of privilege.

The textbook *The Law of Privilege* analyses the extent to which the law can and should compel disclosure of privileged information at every stage, ranging from pre-trial procedures of an interlocutory nature, to non curial and quasi curial proceedings of royal commissions, boards of inquiry and other administrative or executive agencies (including search warrants and Anton Piller orders) and finally to judicial proceedings (both civil and criminal) themselves. A strong emphasis is also given to the growing area of statutory attenuation and abrogation of privilege as well as to the doctrine of waiver of privilege. The book has a strong Australian emphasis although the law in other jurisdictions, such as England, Canada, New Zealand and the United States is also referred to where it is considered relevant, particularly by way of contrast.

Since the publication of the textbook, *The Law of Privilege* in 1992 there have been changes to the common law doctrine of privilege. For example, in April 1995 the Evidence Act 1995 (Cth) came into effect, followed closely by the Evidence Act 1995 (NSW). The Evidence Act 1995 (Cth) applies to all evidence adduced in federal courts (and this includes the High Court, the Federal Court and the Family Court) and the Evidence Act 1995 (NSW), which is virtually identical to the Commonwealth Act, applies to all evidence adduced in New South Wales courts. In Part 3.10 of both these Acts, a statutory "client legal privilege" is introduced to apply in the courtroom and to replace legal professional privilege<sup>2</sup>, a modified form of the privilege against self incrimination is preserved<sup>3</sup> and new formulations of the clergy communicant privilege<sup>4</sup> and the without prejudice privilege<sup>5</sup> (called "settlement negotiations privilege") are provided for. These changes which have been effected by the Evidence Acts 1995 (Cth) and (NSW) are explored and evaluated in Chapters Six, Seven and Nine below.

<sup>2</sup> ss 118-126

<sup>3</sup> s 128

<sup>4</sup> s 127

<sup>5</sup> s 131

Further changes have occurred in relation to legal professional privilege. For example, in 1999, the High Court decision of *Esso Australia Resources Ltd v Federal Commissioner of Taxation*<sup>6</sup> abolished the sole purpose test for legal professional privilege and replaced it with a dominant purpose test and the case of *Mann v Carnell*<sup>7</sup> replaced a fairness test for waiver of privilege with an inconsistency test. *Esso* also circumscribed the operation of the uniform legislation in relation to interlocutory proceedings. The High Court has now also allowed, in certain situations, for privilege to apply to copies of non-privileged documents in *Commissioner, Australian Federal Police v Propend Finance Pty Ltd*.<sup>8</sup> These changes brought about by *Esso's* case are explored and evaluated in Chapter Ten and Part A of Chapter Twelve and the further changes of *Mann v Carnell* and *Propend's* case are discussed in Part A of Chapter Twelve. In the case of *Baker v Campbell*<sup>9</sup> (which is discussed in *The Law of Privilege*) the High Court held that legal professional privilege is not merely a rule of evidence applicable in judicial and quasi-judicial proceedings but a fundamental principle of the common law capable of applying to all forms of compulsory disclosure. At the time Brennan J (as he then was) in a powerful dissenting judgement predicted insuperable pragmatic obstacles with extending legal professional privilege to the non-curial arena. Brennan CJ reiterated this view some 14 years later in *Propend's* case<sup>10</sup>. Some of these insuperable pragmatic obstacles which have come to fruition are discussed in Chapter Eight. In addition, new sub-categories of legal professional privilege have emerged in the form of joint privilege and common interest privilege. These new extensions of the doctrine of legal professional privilege are explored and evaluated in Chapter Five.

There have also been changes to another important common law privilege, namely the privilege against self incrimination. In brief, the privilege against self incrimination states that a person is not obliged to answer any question or produce any document if the answer or the document would have a tendency to expose that person to a criminal conviction or the imposition of a penalty. The privilege against self incrimination also incorporates an analysis of the right of silence of citizens, suspects under interrogation and accused persons. In 1993, a landmark decision of the High Court in *Environment Protection Authority v Caltex Refining Co Pty Ltd*<sup>11</sup> held that a corporation, unlike a natural person,

<sup>6</sup> (1999) 168 ALR 123

<sup>7</sup> (1999) 168 ALR 86

<sup>8</sup> (1997) 141 ALR 545

<sup>9</sup> (1983) 153 CLR 52

<sup>10</sup> Op. Cit. n.7

<sup>11</sup> (1993) 118 ALR 392

cannot claim the privilege. This decision is explored and evaluated in Chapter Four and Part A of Chapter Twelve. The relationship between the privilege against self incrimination on the one hand and the right of silence of suspects under interrogation and the rationale for the "voluntariness" rule for confessions is explored and evaluated in Chapter Two. It is now proposed to describe briefly the aim and content of each chapter.

Chapter One consists of this Introduction and Overview

Chapter Two is entitled "Strategies for Reform of the Law Relating to Police Interrogations". This article was published in (1984) 33 International and Comparative Law Quarterly (ICLQ) 265-300 which is a refereed journal. The article seeks to examine in detail the recommendations of the English Royal Commission on Criminal Procedure and the Australian Law Reform Commission on Criminal Investigation in relation to the common law rules on the right to remain silent and the admissibility of confessions. In particular the connection between the right of silence and the privilege against self incrimination is examined. It is submitted that whenever the right of silence is debated it is usually the privilege against self incrimination which is in issue, and not the right, in the narrow sense to say nothing at all. The arguments in favour of retaining the right of silence are examined as are the arguments for abolishing the right. One of the former arguments is that for any suspect to speak and therefore to implicate himself or herself in a crime would be a breach of the maxim *nemo debet prodere se ipsum* – no one should be obliged to give himself away – which is called the privilege against self incrimination. Four possible rationales for the voluntariness rule for confessions are also examined, namely, the reliability principle, the disciplinary principle, the protective principle and the privilege against self incrimination. It is argued that the privilege against self incrimination is the most appropriate explanation for the voluntariness rule.

Chapter Three is entitled "Privilege in Academia: A Consideration of the Power to Resist Disclosure of Information Obtained by Academics in Confidence". This article is published in (1989) 9 University of Tasmania Law Review (Uni Tas L Rev) 205-244 which is a refereed journal. It is argued that the specific application of the general principles of privilege law to particular classes of persons other than those upon whom are conferred recognised privileges (for example the clients of lawyers and the patients of doctors) has been largely ignored. The article attempts to remedy that defect by aiming to apply the law of privilege to two classes of potential claimants, namely academic researchers and those who supply them with information. It is argued that the subject is important because in the course of their research and professional work academics may receive information on a confidential basis, that is, on the basis that the information will not be disclosed to others or else will not be disclosed except for certain purposes. Such information may nevertheless be relevant to issues raised for determination in courts of law or administrative tribunals and other boards of inquiry. It is submitted that the academic researcher may in certain situations claim legal professional privilege,



medical professional privilege, public interest immunity, and to a lesser extent, the privilege against self incrimination in order to resist disclosure of information to a court or non curial body. It is further argued that if these substantive claims to privilege are unsuccessful, there are various procedural methods which may be adopted whereby the court or other body may order disclosure on a restricted basis. It is concluded that the law of privilege as a whole may be merely awaiting invocation in other areas and by other potential claimants who do not fall into any of those categories which have been treated traditionally by the courts as having secured a foothold of recognition at common law.

Chapter Four is entitled "Corporations and the Privilege Against Self-Incrimination: The High Court Rules" This article is published in (1994) 68 *Law Institute Journal (LIJ)* 1058-1061, which is a non-refereed journal. It examines the landmark decision of the High Court in *Environment Protection Authority v Caltex Refining Co Pty Ltd*<sup>12</sup> which held, by a majority of four to three, that a corporation, unlike a natural person, cannot claim the privilege against self-incrimination. All four judges in the majority, Mason CJ and Toohey J (in a joint judgment), Brennan and McHugh JJ, carefully examined the rationales of the privilege against self-incrimination and decided that those rationales, whilst appropriate for the protection of the rights, dignity and privacy of individuals, had no application to artificial entities such as corporations. The article evaluates both the majority and the minority decisions and advances eight separate and important implications which flow from the decision. For example, it is argued that although the underlying rationale for the privilege against self incrimination is now much more clearly tied to notions of human rights, the High Court still stressed that the older rationale of protecting the integrity of the adversary system has not disappeared. Practical effects of the decision are also highlighted, such as the fact that the areas of production of documents and the answering of interrogatories will be most affected because a corporation cannot be a witness in any event. Paradoxes flowing from the decision are emphasised, for example, the fact that the position of other collective bodies such as partnerships and unincorporated bodies has been left open, as with the position with regard to corporations and legal professional privilege and the position regarding the penalty privilege (although it is conceded that the latter was subsequently rectified by the decision in *Trade Practices Commission v Abbco Ice Works Pty Ltd*).<sup>13</sup>

Chapter Five is entitled "Professional Privilege Spreads Its Wings" This article was published in (1996) 70 *Law Institute Journal (LIJ)* 32-35 which is a non-refereed journal. It argues that during the two years from 1994 to 1996 the established

<sup>12</sup> Ibid

<sup>13</sup> (1994) 123 ALR 503. This decision held that corporations cannot claim the penalty privilege.

doctrine of legal professional privilege has substantially altered mainly due to a redefining of the lawyer/client relationship. This is particularly apparent due to the emerging doctrines of joint privilege and common interest privilege. The essential features of these two relatively new doctrines are both outlined and contrasted in the context of recent decisions in the area. The significant differences between joint privilege and common interest privilege are also discussed both at common law and under the Evidence Act 1995 (Cth). It is argued that despite the fact that the courts and, to a lesser extent, Parliament are tinkering with and extending the traditional doctrine of legal professional privilege, they should be careful in this process to adhere to the instrumental rationale for the privilege and to reflect the commercial and legal reality of transactions.

Chapter Six is entitled "Privilege Under the Evidence Act" pp 1-7. This conference paper was presented at the Leo Cussen Institute and was published in the Institute's non-refereed *Seminar Papers, Evidence Intensive 1997*. It provides a brief overview of all the privileges created by the Evidence Act 1995 (Cth) such as client legal privilege under ss117-120, loss of client legal privilege under ss121-126, religious confessions privilege under s 127, the privilege against self incrimination under s 128, public interest privilege under ss 129-130 and settlement negotiations privilege under s 131. It also notes that the doctor-patient privilege has been omitted altogether from the Federal Act and that this is preferable to having a narrow and unworkable privilege such as that under s 28(2) of the Evidence Act 1958 (Vic). The paper then analyses the most important of these privileges, namely client legal privilege, arguing that it has been made wider in scope and application than legal professional privilege at common law.

Chapter Seven is entitled "Legal Privilege - How It Is Won and Lost" pp 1-11. This paper was presented as part of the Monash Graduate Lecture Series in 1996 and was published in 1997 in the non-refereed *Monash 1996 Graduate Lecture Series - Law at the Leading Edge*. It first explains how legal professional privilege is established at common law and how client legal privilege is established under the Evidence Act 1995 (Cth). Comparisons between legal professional privilege at common law and client legal privilege under the Evidence Act 1995(Cth) are also made and important differences highlighted. Second, the "losing" of privilege at common law and under the Evidence Act 1995(Cth) is analysed. This involves evaluating the decision in *Goldberg v Ng*<sup>14</sup> where the High Court decided that at common law the privilege can be lost and that imputed waiver will be deemed to have occurred wherever "fairness" dictates it. Third, the "losing" of privilege under the Evidence Act 1995(Cth) is explored and again a contrast is made with the common law position of waiver. In particular, it is argued that the concept of

<sup>14</sup> (1996)185 CLR 83

waiver changes its meaning depending on whether a qualitative test under the common law is used or a quantitative test under the Evidence Act 1995(Cth). Finally, the essential features of the paper are drawn together and applied to various practical issues on office management. In this last section some practical suggestions are given to lawyers and other professional bodies as to what safeguards should be put in place to ensure that privileged documents retain that status.

Chapter Eight is entitled "Unresolved Issues Arising from the Guidelines Between the Australian Federal Police and the Law Council of Australia". This article is published in (1998) 72 *Australian Law Journal (ALJ)* 137-147 which is a non-refereed journal. It explores the operation of legal professional privilege in a non curial context and confronts the problems of not having an impartial judicial officer present in this context to determine the validity of a claim to legal professional privilege. In particular the article analyses the new Guidelines between the Australian Federal Police and the Law Council of Australia relating to the "boxing" of documents which are the subject of a search warrant but for which legal professional privilege has been claimed. It argues that there are many serious uncertainties and practical problems within the Guidelines which can operate as major obstacles to investigative officers who attempt to execute a search warrant in relation to documents which may not, in fact, be privileged. It recommends that the Guidelines be rewritten with a view to devising workable mechanisms for allowing access to documents which are not privileged.

Chapter Nine is entitled "Client Legal Privilege and Legal Professional Privilege: Considered, Compared and Contrasted". This article is published in (1999) 18 *Australian Bar Review*, 189-213 which is a non-refereed journal. It seeks broadly to achieve two things. First, it aims to analyse separately each of the sections of the Evidence Act 1995(Cth) which relate to client legal privilege ie ss 117 to 126 with a view to highlighting the differences between each section and the common law doctrine of legal professional privilege. It is hoped that by drawing out these differences between the law in the "Evidence Act 1995 jurisdictions" (ie the Federal Courts, High Court and Family Courts, NSW Courts and ACT Courts) and the "non-Evidence Act jurisdictions" that law reformers will make an effort to assimilate some of these differences and work towards uniformity in privilege and evidence law but not at the cost of making "bad" law.<sup>15</sup> It is argued that whilst uniformity between Australian jurisdictions in any area of law is a laudable objective, this must be tempered with considerations which dictate that the law be coherent, consistent, logical and capable of practical application without producing absurd results. It is suggested that, if the legislatures of the non-

<sup>15</sup> By "bad" law here, I mean law which is confusing, anomalous, unclear and/or leading to difficulties of application in practice: see (1999) 18 *Australian Bar Review*, 189 at 191, fn 15.

Evidence Act 1995 jurisdictions decide to adopt the uniform evidence law, they first of all negotiate with the legislatures and law makers in the Evidence Act jurisdictions so that some desirable amendments can initially be made to the Evidence Acts. Secondly the article seeks to argue that the Evidence Act 1995(Cth) was never intended to apply, and should not apply, to ancillary processes, such as the pre-trial contexts of discovery and other interlocutory stages of curial proceedings. (At the time of writing, the majority of the Full Federal Court in *Esso Australia Resources Ltd v Federal Commissioner of Taxation*<sup>16</sup> had reversed a line of decisions which had held that the principles of the Evidence Act 1995(Cth) apply "derivatively" to ancillary processes, modifying the common law so as to accord with the Act<sup>17</sup> Further, special leave to appeal had just been granted by the High Court in the *Esso* case on the 14 May 1999).

Chapter Ten is entitled "Before the High Court: *Esso Australia Resources Ltd v Federal Commissioner of Taxation*". This article is published in (1999) 21 *Sydney Law Review*, 656-666 which is a refereed journal. It first sets out briefly the decision of the Full Federal Court in *Esso Australia Resources Ltd v Federal Commissioner of Taxation*<sup>18</sup>. Here it is argued that *Esso's* appeal to the High Court should endorse the majority decision of the Full Federal Court in the *Esso* case. Second, the facts of the *Esso* case are explained. Third, the judgments of the majority of the Federal Court together with the two dissenting judgments are analysed in detail. Finally, the important issues arising out of the appeal are examined and the article concludes with a strong plea to the High Court to embrace its previous decision in *Grant v Downs* and thereby to continue to adopt a "sole purpose" test for legal professional privilege in Australia. In the conclusion it is submitted that it is in the interests of the fair administration of justice that courts have all available evidence before them. It is conceded here that one of the functions of a court of law is to determine and resolve disputes between the parties appearing before it, based on the evidence adduced by those parties. But, more importantly, it is posited that it is also the function of a court to ascertain the truth. The rationale for the majority decision in *Grant v Downs*<sup>19</sup> that legal professional privilege was being used by too many corporate litigants to shield the truth is relied upon. It is also pointed out that the sole purpose test was being used as a means of limiting or contracting this unintended growth of the privilege. It is concluded that (a) the current climate is one where the privilege is often used by corporate litigants and where the privilege has been extended even further

<sup>16</sup> (1998)159 ALR 664

<sup>17</sup> Eg, *Telstra Corp v Australis Media Holdings (No 1)* (1997) 41 NSWLR 277

<sup>18</sup> Op cit fn 15.

<sup>19</sup> (1976)135 CLR 674

than its original definition,<sup>20</sup> and (b) judicial law makers should be cautious in expanding the doctrine again (by substituting a dominant purpose test at common law for a sole purpose test), especially if the sole (or even dominant!) reason for doing so would be to rectify a problem created by Parliament.

Chapter Eleven is entitled "Book Review: J Auburn, *Legal Professional Privilege: Law and Theory* (Hart Publishing Oxford 2000)" This book review is published in (2001) 1 *Oxford University Commonwealth Law Journal* 115-122 which is a refereed journal. Although this is a review of another author's recent treatise on legal professional privilege, it is included in this thesis because it serves to illustrate the present candidate's views on legal professional privilege. For example, the review picks up on the fact that Auburn has omitted some important areas of legal professional privilege which were deserving of inclusion, such as the litigation privilege and its rationale, statutory abrogations from the privilege, joint privilege, copies of unprivileged documents and the dominant purpose test. It is argued that a discussion of the litigation privilege and its rationale may have enhanced the quality of the book and may also have altered the central argument in Chapter Ten of Auburn's book that equitable confidentiality is fundamentally different from privilege. In particular, it is argued that the introduction of the litigation privilege may have cast doubt on the suggestion that privilege is only concerned with disclosure to a court or other investigative body, whereas the equitable confidentiality protects disclosure to the rest of the world.<sup>21</sup>

Further, Auburn's descriptive thesis is that Commonwealth judges insist on an 'absolute' privilege and that they refuse to engage in a process of rule balancing to recognise new derogations from it.<sup>22</sup> They also refuse to engage in *ad hoc* balancing.<sup>23</sup> Auburn's normative thesis is that Commonwealth judges should not regard the privilege as absolute, and that they should be encouraged to engage in rule balancing in order to recognise new derogations from it. However a refusal to

<sup>20</sup> See, for example, the extension of legal professional privilege to copies of original unprivileged documents in *Commissioner, Australian Federal Police v Propend Finance Pty Ltd* (1997) 141 ALR 545 and the abolition of the exception to legal professional privilege in respect of documents which further the defence of an accused or tend to establish the accused's innocence in *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 and the growth of legal professional privilege via the doctrines of joint privilege and common interest privilege as discussed in McNicol S, "Professional Privilege Spreads its Wings" (1996) 70 LJ 32: see Chapter Five of this thesis and (1999) 21 *Sydney Law Review*, 656 at 666 fn 49.

<sup>21</sup> J. Auburn, *Legal Professional Privilege: Law and Theory* (Hart Publishing Oxford 2000) 211.

<sup>22</sup> *Legal Professional Privilege* (ibid n 20) 8.

<sup>23</sup> *Legal Professional Privilege* (op cit n 20) 117.

engage in *ad hoc* balancing is acceptable.<sup>24</sup> It is argued in the review that the term 'absolute' may be redundant in Auburn's thesis and that he can successfully make his case for judges engaging in rule balancing in the future (so that competing public policies can be weighed and new exceptions created) without obscuring this argument by resorting to the term 'non-absolute' (or 'absolute'). It is also suggested that Auburn might have provided some guidance or predictions as to what may be the areas where future derogations from the privilege should occur.

Chapter Twelve is entitled "S McNicol and D Mortimer, *Evidence* (Butterworths Tutorial Series, 2<sup>nd</sup> edition, 2001) Chapters Four, Five and Six". These chapters are part of a student tutorial book on Evidence. Chapters Four, Five and Six (along with eight other chapters in the *Evidence* book) are written exclusively by the candidate, S B McNicol.

Part A of Chapter Twelve is entitled "Common Law Privileges (Chapter 4)". This Part analyses the current Australian position regarding three common law privileges, namely, the privilege against self-incrimination, legal professional privilege and without prejudice privilege. Recent changes to the law in these areas are all incorporated. These include a discussion of the case of *Esso Australia Resources Ltd v Federal Commissioner of Taxation*<sup>25</sup> where a majority of the High Court held that at common law in Australia, the dominant purpose test applies to legal professional privilege. In so doing, the High Court in *Esso* overruled the majority decision in *Grant v Downs*<sup>26</sup> that a sole purpose test applied and followed what was said by Barwick CJ in dissent in *Grant v Downs*. There is also a discussion of *Commissioner, Australian Federal Police v Propend Finance Pty Ltd*<sup>27</sup> where the High Court by a 5:2 majority held that privilege attaches to a copy document which is provided to a lawyer if the copy was made solely for the purpose of obtaining legal advice or solely for use in legal proceedings. Further, recent changes to the doctrine of waiver are included. In particular, it is noted that waiver which is imputed by operation of law had in the past occurred where there had been no express or intentional general waiver and had generally been governed by considerations of fairness. However, the case of *Mann v Carnell*<sup>28</sup> the High Court demonstrated a reluctance to use "unfairness"

<sup>24</sup> Hence his statement, 'A refusal to engage in "balancing" is justifiable to the extent that it implies a rejection of *ad hoc* balancing. However a refusal to countenance any new exceptions to the privilege at all requires further justification': *Legal Professional Privilege* (op cit n 20) 117.

<sup>25</sup> Op Cit n 5.

<sup>26</sup> Op Cit n 18

<sup>27</sup> Op Cit n 7.

<sup>28</sup> Op Cit n 6

as the governing test for imputed waiver. Gleeson CJ, Gaudron, Gummow and Callinan JJ in a joint judgment in that case preferred a test of "inconsistency", not "unfairness", for the doctrine of imputed waiver. Finally, the important recent Full Federal Court decision in *Australian Competition and Consumer Commission v The Daniels Corporation International Pty Ltd*<sup>29</sup> is noted in Part A. In this case it was held that legal professional privilege was impliedly abolished by s 155 of the Trade Practices Act 1974 (Cth) despite the fact that the doctrine of legal professional privilege is not referred to in the section.

Part B of Chapter Twelve is entitled "Other Privileges (Chapter 5)". This Part recognises the fact that some Australian jurisdictions have decided to create limited statutory privileges mainly because parliament has deemed certain confidential relationships worthy of protection. For example, in some Australian States a statutory privilege exists protecting communications between husband and wife during the marriage, between clergy and communicant, and between doctor and patient. These limited statutory privileges are analysed in Part B.

Part C of Chapter Twelve is entitled "Exclusion of Evidence in the Public Interest (Chapter 6)". This Part considers the current common law doctrine of public interest immunity, which operates to withhold relevant information from a court or other body having the power to coerce the giving of evidence. It is noted that public interest immunity differs from privilege, however, because it operates for the benefit of the public interest at large and not for any private relationships or interests. It is stressed that nonetheless it is a fundamental common law doctrine (which was formerly known as Crown privilege) which excludes from evidence any information the disclosure of which would be injurious or prejudicial to public or state interests.

Chapter Thirteen consists of a conclusion to the thesis.

## CHAPTER TWO

### "Strategies for Reform of the Law Relating to Police Interrogations"

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<sup>29</sup> [2001] FCA 244 (16 March 2001)

## STRATEGIES FOR REFORM OF THE LAW RELATING TO POLICE INTERROGATIONS

SUZANNE B. McNICOL\*

THE pre-trial right of a suspect to remain silent in the face of police questioning and the law on the admissibility of confessions have in recent years been the subject of detailed scrutiny and criticism by numerous law reform bodies. The present article seeks to examine in detail the recommendations of two such bodies. These are the proposals of the English Royal Commission on Criminal Procedure<sup>1</sup> and the Australian Law Reform Commission on Criminal Investigation.<sup>2</sup>

While the common law rules relating to the right to remain silent and the admissibility of confessions are essentially the same in both countries, the approaches taken by the two Commissions are diametrically opposed. For this reason, a detailed comparative examination of their proposals may serve to highlight with particular clarity both the defects and underlying rationales of the existing rules of the law and practice in these two areas.

Part I of this article will deal with the right of a suspect to remain silent in the face of police questioning. Part II will deal with the admissibility of confessions. At the end of each part an overall comparative appraisal of the reform strategy of the two Commissions will be presented. In Part III a fundamental criticism, common to both reports, will be advanced, and an attempt will be made to point in the

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The law and the progress of the legislation based on the two reports discussed in this article are stated as at 10 November 1983.

1. Royal Commission on Criminal Procedure *Report* (1981, Cmnd.8092). The *Report* was used as the basis for the Police and Criminal Evidence Bill 1982 which has recently been amended by Standing Committee J of the UK Parliament in the Police and Criminal Evidence Bill 1983 (now pending). The 1983 Bill has made a substantial alteration to the Royal Commission's recommendation on confessions (in cl.59, considered *infra*). The Home Office has also prepared two draft codes pursuant to the *Report*: *Draft Codes of Practice for the Treatment, Questioning and Identification of Persons Suspected of Crime* (Home Office, November 1982). See also [1982] Crim.L.R. 625 and [1983] Crim.L.R. 1. The *Report* will be referred to hereafter as *RC Report*.

2. Australian Law Reform Commission: *Report No.2. An Interim Report; Criminal Investigation* (1975). This *Report* also contains a draft Bill which was used as the basis for the Criminal Investigation Bill 1981 (now pending). The *Report* will be referred to hereafter as *ALRC Report*.



direction of a solution more satisfactory than that recommended by either the Royal Commission or the Australian Commission.

# I. THE RIGHT OF SILENCE

## A. Definition and Rationale

The right of silence stands for the proposition that citizens have the freedom, in the sense that no legal penalty attaches, to refuse to answer questions put to them by persons charged with investigating an offence. It exists in two distinct situations—at the pre-trial stage, where the right can be exercised by a suspect, and at the trial itself, where the right can be exercised by an accused. This article is concerned principally with the pre-trial right of silence of suspects.

The right of silence is often defined as merely "another way of stating that no man can be required to incriminate himself".<sup>3</sup> This is, however, one of the justifying principles behind the right rather than a statement of the right itself. A person may speak but not necessarily incriminate himself. For example, witnesses generally have no right of silence in court and can be compelled to give evidence but they may claim the privilege against self-incrimination in giving their evidence. Similarly, it does not follow that when suspects talk they necessarily incriminate themselves. On the other hand, a person may not speak at all and yet his very silence may incriminate him. For example, an accused may exercise his right of silence in court but the fact that a judge is allowed to comment on this<sup>4</sup> may result in the accused's silence incriminating him in the eyes of the jury. Similarly, if adverse inferences were allowed to be drawn in court from the suspect's exercise of his pre-trial right of silence, this might amount to a denial of the privilege against self-incrimination.

However, when the right of silence is debated, it is usually the privilege against self-incrimination which is in issue and not the right, in the narrow sense, to say nothing at all. Research shows that only a minority of suspects do in fact exercise the right to say nothing.<sup>5</sup> Those

3. The Royal Commission in its accompanying volume entitled *The Investigation and Prosecution of Criminal Offences in England and Wales: The Law and Procedure* (1981, Cmnd.8092-1), para.77, p.28.

4. In England and three Australian states, the failure of any person charged with an offence to give evidence shall not be made the subject of any comment by the prosecution: s.1(b), Criminal Evidence Act 1898 (UK); s.18, Evidence Act 1929-1976 (SA); s.8, Evidence Act 1906-1976 (WA), and s.85, Evidence Act 1910 (Tas.). By employment of the principle *expressio unius est exclusio alterius* to such legislative provision, the courts have held that the judge can still make a comment on the accused's failure to give evidence: *R. v. Rhodes* [1899] 1 Q.B. 77.

5. M. Zander, "The Criminal Process—A Subject Ripe for a Major Enquiry" [1977] *Crim.L.R.* 249; P. Softley and others, "Police Interrogation: An Observational Study in Four Police Stations", *Royal Commission Research Study No.4* (1980).

who seek to abolish the right of silence are not suggesting that a suspect ought somehow to be made to talk or that his failure to answer questions should be made a criminal offence. What is in issue is whether or not a suspect's silence under interrogation should be able to be commented on adversely at his trial by the prosecutor or the judge and whether adverse inferences from the silence may be drawn by the jury. A distinction must be drawn therefore between "having a right of silence", which raises such issues as whether the caution under the Judges' Rules is adequate etc., and the "consequences of having exercised the right" which raises the issues of judicial comment and adverse inference.

The following arguments are advanced in favour of retaining the right of silence. Firstly, there might be reasons for silence which are consistent with innocence, for instance, the suspect may be embarrassed or shocked by the accusation. Secondly, it is argued that to draw inferences from silence will force suspects to speak and possibly to lie. This will in itself be undesirable because the weak, the immature and the inadequate will be particularly vulnerable—for them the right of silence is an essential safeguard and its removal could increase the risk of false confessions by those unable to withstand police interrogation. Furthermore, for any suspect to speak and thereby implicate himself in crime will be a breach of the maxim *nemo debet prodere se ipsum*—no one should be obliged to give himself away—which is called the "privilege against self-incrimination".<sup>6</sup> Thirdly, the assertion that the right of silence has resulted in high acquittal rates for serious crimes is said to be unproved and mistaken.<sup>7</sup> Finally, there is the argument that the right of silence is fundamental to an accusatorial system which stipulates that "it is the duty of the prosecution to prove the prisoner's guilt" as the "golden thread running through English criminal justice".<sup>8</sup>

The arguments for abolishing the right of silence<sup>9</sup> are as follows. Firstly, it is "without foundation in any system of justice which is remotely concerned with establishing the truth".<sup>10</sup> As Bentham said: "Innocence claims the right of speaking, as guilt invokes the privilege of silence."<sup>11</sup> Secondly, it is said that abolition would rationalise the law and excuse the courts from drawing absurdly fine distinctions for

6. Cross on *Evidence* (5th ed., 1979), pp.165 and 275.

7. *ALRC Report*, para.149. P. Morris, "Police Interrogation: Review of the Literature", *Royal Commission Research Study No.3* (1980), p.30.

8. *Per Lord Sankey in Woolmington v. D.P.P.* [1935] A.C. 462, 481. P. Morris, *op.cit.supra* n.7, at p.30, gives this principle as a definition of the right of silence.

9. Those in favour of abolition include the English Criminal Law Revision Committee in *Eleventh Report on Evidence (General)* (1972, Cmnd.4991), para.28 *et seq.*, and the South Australian Criminal Law and Penal Methods Reform Committee, in the *Second Report on Criminal Investigation* (1974), Chap.7.

10. *ALRC Report*, para.147.

11. J. Bentham, *Treatise on Evidence* (M. Dumont, London, 1825), p.241.

juries.<sup>12</sup> Thirdly, it is argued that abolition would not be oppressive in practice because the inferences of guilt would not be automatic, but would have to be reasonable in the circumstances and determined by a jury in the light of all the evidence. Finally, it is said that the fact that the right is hardly ever exercised in practice makes it more a myth than a reality and it is therefore futile to maintain it. Also, when it is exercised, it has resulted in high acquittal rates for serious crimes and lower prosecution and conviction rates.

### B. *The Present Position*

The Judges' Rules, which were originally drawn up by the English judges in 1912 as guides for the police when questioning suspects, are to some extent a reinforcement of the right of silence.<sup>13</sup> Rule II of the 1912 Rules provided that a caution should be given to the suspect as soon as a police officer had made up his mind to charge a person with a crime. The Rules were extensively revised in 1964 but they are still merely rules of conduct and not rules of law.<sup>14</sup> The main change was to bring forward the time at which the caution should be administered by the police officer to the suspect. Rule II of the 1964 Rules provides that, as soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person before putting to him any questions relating to that offence.<sup>15</sup> While theoretically both the 1912 and 1964 Rule II protect the suspect's right of silence, in both cases the timing of the caution depends purely on the subjective state of mind of the police officer, who can easily delay characterising the situation as custodial so that no caution need be

12. R. Cross, "The Evidence Report: Sense or Nonsense" [1973] *Crim.L.R.* 329, 333, states it "would spare the judge from talking gibberish to the jury . . ."

13. The 1912 version of the Judges' Rules has been adopted in every Australian state except Victoria with some modifications. In Queensland and South Australia the 1912 Rules have been adopted judicially: [1958] *Qd.R.* 200; [1958] *S.A.S.R.* 301. In the other states the rules are incorporated in police regulations: in Western Australia, by the Circular Orders and General Instructions issued by the Police Commissioner pursuant to the Police Act 1892; in Tasmania, by the Standing Orders of the Chief Commissioner of Police pursuant to the Police Regulations 1968; in New South Wales, by instructions issued by the Commissioner of Police pursuant to the Police Regulation Act 1899. In Victoria, the 1964 version of the Judges' Rules with some modifications has recently been adopted. These are found in Standing Orders 1981 of the Chief Commissioner of Police made pursuant to the Police Regulations Act 1958.

14. The 1964 version of the Judges' Rules is reprinted in (1978) 67 *Cr.App.R.* 191 and as Home Office Circular 89/1978. See also *R. v. Ovenall* [1969] 1 *Q.B.* 17, 26. The Rule II caution states: "You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence."

15. In Victoria, the 1981 Standing Orders have adopted a combination of the 1912 Rule II and the 1964 Rule II. Order 8.9 of those Rules provides that as soon as a police officer has evidence which would afford reasonable grounds for charging a person with an offence he shall caution that person.

given.<sup>16</sup> In addition, a failure to caution has not in practice been sufficient grounds for the judge to exercise his discretion to exclude a resulting confession.<sup>17</sup>

The question then arises as to what are the consequences to an accused of the exercise of his right of silence. Two distinctions should be made at the outset. The first is between judicial comment on silence and the inference that may be drawn by the jury. Where a judge makes no comment, an adverse inference from silence might still be drawn by the jury. Even where the judge invites the jury to draw a particular inference, it does not follow that the inference will be drawn by the jury.<sup>18</sup> The second distinction is between a judge who is to make "no comment on silence"<sup>19</sup> and a judge who is to make "no adverse comment on silence".<sup>20</sup> Confusion between the two has resulted from the following statement of Viscount Dilhorne in the case of *R. v. Gilbert*:<sup>21</sup>

It is in our opinion now clearly established . . . that to invite a jury to form an adverse opinion against an accused on account of his exercise of his right to silence is a *misdirection* . . . . In our view, it *may not be a misdirection* to say simply "This defence was first put forward at this trial" . . . but if more is said, it may give rise to the inference that a jury is being invited to disregard the defence put forward because the accused exercised his right of silence . . . As the law now stands . . . [the jury] *must not be told* that they *may draw an inference of guilt* from his silence . . . A right of silence is one thing. No accused can be compelled to speak before, or for that matter at his trial. But it is another thing to say that if he chooses to exercise his right of silence, *that must not be the subject of any comment adverse* to the accused. A judge is entitled to comment on his failure to give evidence. As the law now stands, *he must not comment adversely* on the accused's failure to make a statement.<sup>22</sup>

Cross interprets this decision to mean that the judge should generally make no comment on the accused's pre-trial silence.<sup>23</sup> But it can be seen from the italicised passages that Viscount Dilhorne's view is ambiguous. His Lordship moves freely between the terms "adverse inference" and "adverse comment" and never states what the word "adverse" means in this context. The clearest and most adverse inference is an inference of

16. *ALRC Report*, para.140.

17. [1978] *Crim.L.R.* 117, 121; C. R. Williams, "Judicial Discretion in Relation to Confessions" (1983) 3 *O.J.L.S.* 222, 241-242.

18. Salmon LJ recognises this distinction in *R. v. Sullivan* (1966) 51 *Cr.App.R.* 102, 105.

19. Cross, *op.cit. supra* n.6, at p.549.

20. Viscount Dilhorne in *R. v. Gilbert* (1977) 66 *Cr.App.R.* 237, 245.

21. *Ibid.*

22. *Idem*, pp.244-245 (italics added).

23. Cross, *op.cit. supra* n.6, at p.549.

guilt. Viscount Dilhorne makes clear that the judge must not tell the jury that they may draw such an inference.

Furthermore, to "invite a jury to form an adverse opinion" is a misdirection. However, if the accused does not raise a particular defence until the day of his trial, the judge may comment on this in order to draw the jury's attention to this fact. Presumably this will not count as an adverse comment but there is no doubt that the judge is drawing attention to this fact so that the jury will give it some weight which will be damaging to the accused. Nonetheless, the only forbidden inferences expressed by Viscount Dilhorne are an inference of guilt and an inference that the defence put forward at the trial is untrue. Both these inferences are forbidden because they are "adverse" and the forbidden judicial comment is one which invites the jury to draw either of these two inferences. Any other reasonable comment is apparently not prohibited, regardless of the fact that such a comment may lead the jury to draw an inference prejudicial to the accused.

### C. *The Royal Commission*

#### 1. *The Royal Commission's approach to the right of silence*

The Royal Commission proposes to retain the pre-trial right of silence.<sup>24</sup> It states that the right of silence *at the trial* derives from "two factors": "the nature of the accusatorial system of trial and the impossibility of compelling someone to speak or in speaking to tell the truth."<sup>25</sup> However, when these "two factors" are transferred to the pre-trial situation,<sup>26</sup> it is the burden of proof principle which becomes the essential factor behind the right of silence.<sup>27</sup> Thereafter, the justification that compulsion must be disallowed because it might not produce speech or the truth is ignored by the Royal Commission.

That the burden of proof principle is essential to the Royal Commission's argument to retain the right of silence can be seen in its treatment of the proposal of the Criminal Law Revision Committee.<sup>28</sup> The latter body recommended that failure by an accused on being interrogated to mention any fact on which he subsequently relies in his defence may, provided that fact is one he could reasonably be expected to have mentioned, be the basis of such inferences as appear proper by the courts or jury in determining the question before them.<sup>29</sup> The Royal

24. *RC Report*, para.4.53.

25. *Idem*, para.4.34.

26. *Idem*, para.4.37.

27. *Ibid.* The burden of proof principle is described by Lord Sankey in *Woolmington v. D.P.P.* [1935] A.C. 462, 481: *RC Report*, para.4.35.

28. *RC Report*, para.1.24 *et seq.*

29. *Eleventh Report on Evidence*, *op.cit.supra* n.9. at paras.28-52, especially para.32.

Commission is very concerned to avoid the adverse reactions which resulted from this proposal<sup>30</sup> which it inaccurately interprets to mean that "the court would be allowed to conclude, where appropriate . . . that his refusal to answer is indicative of guilt".<sup>31</sup> The first reason given to reject the Criminal Law Revision Committee's proposal is purely methodological<sup>32</sup> and does not undermine the substantive proposal that some inference should be drawn from silence on certain occasions. But the second reason is that "any attempt to use a suspect's silence as evidence against him seems to run counter to a central element in the accusatorial system of trial".<sup>33</sup> This central element, namely, the burden of proof principle, merits further attention.

The Royal Commission believes that the onus of proof will be "reversed" or "subverted" in two situations, firstly, if the suspect is forced to speak and in speaking to rebut unsubstantiated allegations.<sup>34</sup> But the burden of proof cannot possibly be reversed just because the suspect is being forced to speak. Forcing someone to speak does not mean that the person forced has to prove anything. As to requiring the suspect to respond to unsubstantiated allegations, the more the allegations are substantiated, the more reasonable it would be for the suspect to respond to them without the burden of proof being reversed. Secondly, the Royal Commission states that if the suspect's silence is used "as evidence against him"<sup>35</sup> then this would run counter to the central element of the accusatorial system. But, even if silence is used so that it is equivalent to guilt, at the very most the burden of proof will be satisfied by proving the silence. In such a case silence would have similar weight in court to a voluntary confession, which in practice does not reverse the burden of proof. *A fortiori*, if silence is permitted to give rise to an inference short of guilt, the burden of proof will be unaffected as the silence will merely go to the weight of the evidence.

Furthermore, the Royal Commission assumes that the present accusatorial system could no longer remain if the burden of proof was "weakened" or "reversed".<sup>36</sup> It is, however, doubtful that this is the case. As a result of a Court of Appeal decision,<sup>37</sup> it is said that the

30. *RC Report*, para.1.24 *et seq.*

31. *Idem*, para.4.40.

32. The fear is that the Criminal Law Revision Committee's modified Rule III caution might increase the risk of innocent people making inculpatory statements: *idem*, paras.4.49 and 4.50.

33. *Idem*, para.4.51. See also *idem*, paras.4.35, 4.37, 4.41 and 4.52.

34. *Idem*, paras.4.35 and 4.37.

35. *Idem*, para.4.51.

36. *Idem*, para.4.52.

37. *Edwards* [1975] Q.B. 27, where Lawton LJ devised an exception to the *Woolmington* principle which virtually means that, if an accused's defence rests on a statutory provision, then he must prove his innocence on a balance of probabilities. See "A Threadbare Principle" [1978] *Crim.L.R.* 385.



English law now so frequently imposes upon a defendant the burden of proving a particular defence that the "golden thread has become tarnished".<sup>38</sup> And in present practice the law already requires the accused to give notice of alibi,<sup>39</sup> to give fingerprints<sup>40</sup> and to subject himself to blood tests.<sup>41</sup> Has the accusatorial system been undermined because the burden of proof has been placed on the accused in these cases? Arguably not. Whether or not it has depends on how one views the accusatorial system as a whole. At the beginning of the report the Royal Commission says that "change to a fully-fledged inquisitorial system . . . would be impossible [and that it] had to take the accusatorial system as given".<sup>42</sup> It then draws the familiar distinction between an accusatorial system which treats the trial itself as fundamental and an inquisitorial system which concentrates on pre-trial investigation and treats the trial merely as a review.<sup>43</sup> The introduction of any pre-trial inquisitorial features is rejected by the Royal Commission because it may have "drastic" consequences for the trial and "it is the nature of the trial itself which largely determines the pre-trial procedure".<sup>44</sup> But surely the Royal Commission must concede that the converse, to some extent, is also true? Research presented to the Royal Commission found that six out of ten of those interrogated by the police made a confession<sup>45</sup> and that there is an "extremely high probability of conviction" where the defendant has made a full confession to the police.<sup>46</sup> In other words, in a great many criminal cases, the outcome of the trial is determined by the pre-trial investigation. A strict adherence to the accusatorial system would require the trial to have a more important function than merely confirming confessions by entering a conviction.

In conclusion, it remains unclear why the Royal Commission "had to take the accusatorial system as given".<sup>47</sup> The Royal Commission's fundamental objective is to preserve an accusatorial system which it believes should exhibit formal accusatorial features at all stages of the

38. [1978] Crim.L.R. 385.

39. Criminal Justice Act 1967 (Eng.), s.11; Crimes Act 1900 (NSW), s.405 A; Crimes Act 1958 (Vic.), s.399 A.

40. Magistrates' Courts Act 1980, s.49; Criminal Justice Act 1967, s.33.

41. Family Law Reform Act 1969, ss.18-24 (where paternity is in issue).

42. *RC Report*, para.1.8.

43. *Idem*, paras.1.6 and 1.8. See also P. Devlin, *The Judge* (1979), pp.70 and 78. For a recent analysis see G. L. Certoma, "The Accusatory System v. the Inquisitorial System: Procedural Truth v. Fact?" (1982) 56 A.L.J. 288.

44. *RC Report*, paras.1.6, 4.52 and 4.59.

45. *Idem*, para.4.43. P. Softley and others, *op.cit.supra* n.5, at p.85.

46. *RC Report*, para.4.45. J. Baldwin and M. McConville, "Confessions in Crown Court Trials", *RC Research Study No.5* (1980), Chaps.3 and 4.

47. *RC Report*, para.1.8.

pre-trial investigation.<sup>48</sup> This is to be contrasted with Lord Devlin's argument that there is a "vacancy"<sup>49</sup> in our accusatorial system for the distinctly inquisitorial features of a judicial intermediary at the pre-trial stage. This will in no way threaten or undermine the continuance of an accusatorial system of trial. On the contrary Lord Devlin argues that it is necessary in order to prevent our present adversarial system from sliding even further into a police inquisition without an official inquisitor.<sup>50</sup> There is still room, therefore, for the argument that the implementation of one or two formal "inquisitorial" features might be the most effective method of achieving an accusatorial system in substance.

## 2. *The Royal Commission's practical solutions*

The Royal Commission states that the right of silence is rarely exercised in practice<sup>51</sup> and that, as a result, the "timing, clarity and logic" of the Rule II caution should be changed.<sup>52</sup> The connection, however, between the finding of fact that suspects do not exercise their right of silence and the consequent need for "attention" to the Rule II caution is not established. The further finding that the caution is in fact freely administered, even though suspects do not generally exercise their right of silence,<sup>53</sup> may suggest a problem which calls for more than a mere rewording of the caution. There was in fact strong evidence that it is the "questioning in custody" itself and its attendant psychological effects which cause suspects to speak.<sup>54</sup> This research calls for a reconsideration of the desirability of retaining the whole process of police interrogation in the form in which it now exists. A suspect, for example, may not feel such a strong pressure to speak if the interrogation process were transformed so that an independent third party or solicitor were always present. Nevertheless, the new caution is to make it clear to the suspect that anything he has said to the police officer before he was cautioned may be reported to the court.<sup>55</sup> But this may well affect the suspect's judgment on whether he should now exercise his right of silence. He may be more inclined to speak once he has the knowledge that anything he has already said may be reported to the court. Surely, if it is essential that the suspect knows that anything

48. Hence the Royal Commission's rejection of the proposal to have questioning in front of a magistrate: *idem*, para.4.59.

49. Devlin, *op.cit.supra* n.43, at p.82.

50. *Idem*, pp.74 and 78.

51. *RC Report*, paras.4.46 and 4.54.

52. *Idem*, paras.4.54 to 4.57.

53. *Idem*, para.4.54.

54. *Idem*, para.4.46 and 4.73.

55. *Idem*, para.4.45.

he says during the initial stages of questioning may be reported to the court, he should be told this before he says it? The new Rule II caution is also to be brought forward, so that "once the person becomes the subject of suspicion sufficient to justify arrest he should be formally cautioned".<sup>56</sup> But while it is in the interest of the suspect to be made aware of his position at the earliest possible opportunity, this proposal does not remove the problem that the timing of the caution is dependent purely on the subjective state of mind of the police officer.

Finally, there are the proposals on "safeguards" to the right of silence. The Royal Commission recommends a "Code of Practice"<sup>57</sup> which gives suspects at the police station the right not to be held incommunicado and the right to legal advice.<sup>58</sup> There is, however, a police discretion to refuse such access where "it is not in the interest of the investigation or the prevention of crime or the arrest of other offenders".<sup>59</sup> The feasibility of tape recording police-suspect interviews is also considered but rejected because of the problems of cost, irrelevant material and transcription.<sup>60</sup> A scheme which would regulate the nature of questioning is also rejected as not "practicable or desirable"<sup>61</sup> as is a proposal to have questioning in front of a magistrate immediately after charge.<sup>62</sup> Any breach of the provisions of the "Code" will be subject to internal review only.<sup>63</sup> It appears therefore that these proposals will not very much improve the practical problems of the present system. The right of silence will probably still be exercised rarely because the safeguards and sanctions necessary for its more effective and frequent operation in the future are either denied completely or hedged with provisos and exceptions. The police are still given ample scope to apply pressure to make the suspect "waive" his right of silence without any fear of external repercussions.

56. *Idem*, para.4.46.

57. *Idem*, para.4.110. The Home Office has issued two Draft Codes (*supra* n.1) pursuant to this proposal. See P. Mirfield, "The Draft Code on Police Questioning—A Comment" [1892] *Crim.L.R.* 659, and [1983] *Crim.L.R.* 1. These Draft Codes accompany the Police and Criminal Evidence Bill 1983 (see cl.51).

58. *RC Report*, paras.4.80 and 4.91. The Draft Code has further attenuated the right to legal advice (P. Mirfield, *op.cit.supra* n.57, at p.661) as also has the 1983 Bill itself (see cl.45).

59. *RC Report*, para. 4.80. The proviso is to apply in all cases for the right not to be held incommunicado and, in the case of "grave crimes", for the right to legal advice: *idem*, paras.4.80 and 4.91.

60. *Idem*, para.4.26. Note, however, that the present UK Government has gone further than the Royal Commission by the announcement of the Home Secretary on 15 Nov. 1982 that field trials extending to the tape recording of entire interviews will be introduced over the next two years and completed in 1985. The first police stations to instal tape recording for all interviews with suspects (Holborn and Croydon) began using it on 6 February 1984: *The Times*, 7 Feb. 1984, p.3.

61. *Idem*, para.4.113.

62. *Idem*, para.4.59.

63. "... except for civil actions": *idem*, para.4.112; see also paras.4.118-4.133.

Contrary to the proposals of the Criminal Law Revision Committee, the Royal Commission considers that the "consequences of having exercised the right of silence" should be very favourable to the accused. It proposes to retain the present law on the right of silence<sup>64</sup> which it represents as stating that "no inference whether of guilt or anything else adverse to the accused may be drawn from the accused's silence in the face of police questioning".<sup>65</sup> The overall discussion of "inferences" to be drawn at the trial is, however, very sparse<sup>66</sup> and the issue of "judicial comment" is never mentioned. What is clear is that the Royal Commission desires a "prohibition on drawing inferences from silence"<sup>67</sup> from the point when the suspect has been formally cautioned. What is unclear is what type of comment the judge may make, especially in the case where the accused raises a defence for the first time in court. It is arguable that the Royal Commission is contemplating an even stricter rule on judicial comment than under the present law because it states that no adverse inference of any kind may be drawn by the jury.<sup>68</sup> This would mean that a judge would not even be able to state that a defence was raised for the first time at the trial, because this would be allowing adverse inferences to be drawn by the jury. The Royal Commission needs to address this issue and to clarify the whole area of the right of silence.

#### D. The Australian Commission

##### 1. The Australian Commission's approach to the right of silence

The Australian Commission proposes to retain the pre-trial right of silence<sup>69</sup> despite the observation that it is "illusory in practice".<sup>70</sup> It finds the arguments in favour of abolishing the right insufficiently persuasive<sup>71</sup> and it fears that any diminution of the right "would undermine one of the most fundamental tenets of the present criminal justice system [which is] the principle that it is for the prosecution to establish guilt".<sup>72</sup> The Australian Commission is using the burden of proof principle in the same way as the Royal Commission—to justify the retention of the right of silence. Therefore, the same remarks as were made with regard to the Royal Commission's use of the burden of proof

64. *Idem*, para.4.53.

65. *Idem*, para.4.48.

66. Briefly mentioned in *idem*, para.4.39.

67. *Idem*, para.4.56.

68. *Idem*, paras.4.48 and 4.51.

69. *ALRC Report (supra* n.2), paras.107 and 150.

70. *Idem*, para.140.

71. *Idem*, para.150.

72. *Idem*, para.107, see also para.150.

principle can now be made here. In short, it is not satisfactory simply to state that allowing inferences to be drawn will mean either that the Crown will no longer "be required to make its case" or, even more doubtfully, that "the person who is suspected or accused" will have "to prove his innocence".<sup>73</sup> On the contrary, the most that allowing inferences to be drawn can do is to satisfy the Crown's burden of proof.

Although it never mentions the preservation of the accusatorial system as a central theme, the Australian Commission clearly has this in mind when it says: "Policemen are investigators, not inquisitors."<sup>74</sup> This statement suggests from its context that if the right of silence were abolished the police would become inquisitors. This seems to be out of touch with the evidence that in practice policemen are already inquisitors and that in the main the right of silence only exists in theory, since it is rarely exercised. There is, however, other evidence that the Australian Commission is aware of the actual state of current pre-trial practice because it proposes rigorous safeguards to protect the suspect under interrogation.<sup>75</sup> By doing this, the Australian Commission is restoring to the police the function of investigators. The proposed safeguards are said to be "calculated directly to improve the reliability of the evidence".<sup>76</sup> But they also regulate and limit the extent to which the police ought properly to affect the freedom of the citizen and his treatment in custody.

A vital theme running through the Australian Commission's report is the proposition that there must be a close correspondence between law and practice.<sup>77</sup> It proposes to bring the written rules and actual practice closer together by a stricter concentration on reinforcing safeguards and sanctions. In its own words, it seeks "to give teeth" to many of the existing rules by "providing new mechanisms for their enforcement".<sup>78</sup> Actual failure by a policeman to employ a safeguard where it was practicable to do so is to be *prima facie* grounds for the exclusion of evidence.<sup>79</sup> The Australian Commission is working towards a recognition of the right of silence not only as a theoretical right but as a practical, operative right which is able to be used by a suspect much more frequently than it is at present.

## 2. *The Australian Commission's practical solutions*

The Australian Commission identifies several problems connected

73. *Idem*, para.150.

74. *Idem*, para.107.

75. See *infra* Section 2.

76. ALRC Report, para.164.

77. *Idem*, paras.7, 8, 9 and 140-142.

78. *Idem*, para.11.

79. *Idem*, paras.164 and 347.

with the right of silence in practice. For example, the Judges' Rules are imprecise, ambiguous and frequently no more than an illusory safeguard in practice.<sup>80</sup> The caution frequently comes too late from the accused's point of view because the police delay characterising the situation as "custodial". The Australian Commission believes that the Judges' Rules must serve as a practical safeguard for the suspect and not merely as guidelines for the police. It therefore proposes that the caution be reworded so that it is made "absolutely explicit" to the suspect what his rights are<sup>81</sup> and that it be administered before the police exercise any of their powers of arrest etc.<sup>82</sup> But the factor which, more than any other, makes the right of silence "illusory in practice" is the "present absence of any right to a lawyer".<sup>83</sup> Accordingly, the Australian Commission proposes that there be a statutory guarantee that the suspect be afforded the opportunity to obtain such professional assistance as is necessary to exercise the right of silence.<sup>84</sup> There is also proposed a right of access to a friend or relative provided there is no room for a reasonable belief that an accomplice will be "tipped off".<sup>85</sup> Finally, it is proposed to introduce both the tape recording of interviews<sup>86</sup> and other safeguards for ensuring the reliability of confessional evidence, such as the corroboration and checking of interviews by third persons<sup>87</sup> and the reduction of all confessions to writing.<sup>88</sup>

The Australian Commission, however, is quick to point out that the "real question . . . is not the right to silence itself, but rather the consequences of exercising that right".<sup>89</sup> As to the present law, the Australian Commission states that the "basic principle is clear that no inference adverse to an accused person can be drawn from a refusal to answer questions put to him or a failure to mention, until the trial, some fact which would exculpate him".<sup>90</sup> The report of the Australian Commission pre-dates the decision in *R. v. Gilbert*,<sup>91</sup> which arguably holds that the judge should make no comment on the accused's pre-trial silence. Prior to *R. v. Gilbert*, cases such as *R. v. Ryan*<sup>92</sup> did allow

80. *Idem*, para.140.

81. *Idem*, para.100.

82. *Idem*, para.101.

83. *Idem*, para.140.

84. *Idem*, paras.142, 107-110 and 344. But see now cl.21(2) of the Criminal Investigation Bill 1981 (Aust.), *op.cit.supra* n.2.

85. *ALRC Report*, para.103.

86. *Idem*, paras.145 and 156-159. This is included in the 1981 Bill (see cl.32(4)(d)(i)) although subject to a wide proviso (cl.32(10)).

87. *Idem*, paras.160 and 162.

88. *Idem*, para.161.

89. *Idem*, para.137.

90. *Ibid.*

91. (1977) 66 Cr.App.R. 237.

92. (1966) 50 Cr.App.R. 144, 148.

judicial comment on the belatedness of the accused's explanation as a factor to be taken into account when assessing its weight so long as the judge did not suggest to the jury that they may draw an inference of guilt from the silence by itself. Yet *R. v. Ryan* is cited by the Australian Commission as supporting the basic principle that no inference adverse to the accused can be drawn from his refusal to answer questions or failure to mention some exculpatory fact. This means that the Australian Commission must be adopting a narrow definition of "adverse", where it means "equivalent of guilt". Otherwise it is simply not the case that no other inference may be drawn by the jury. By expressly endorsing the present law,<sup>93</sup> it appears that the Australian Commission would allow a judge both to direct a jury that no inferences of guilt are to be made and to comment on the belatedness of a defence.

It follows, therefore, that a right of silence is not necessarily abolished because some inference is allowed to be drawn. There must be a midway position where the "right of silence exists" and "inferences (short of guilt) from that silence also exist". It is clear that the Australian Commission does not conceive of the existence of this midway position when it says that the right of silence will be "abolished"<sup>94</sup> if "inferences are allowed to be drawn".<sup>95</sup> What it means to say is that the right of silence will be abolished if inferences of guilt are allowed to be drawn. Perhaps it would be more accurate to talk of the "diminution"<sup>96</sup> of the right of silence and of the retention of the right of silence "in its basic sense"<sup>97</sup> where inferences short of guilt are allowed to be drawn.

#### E. *Comparison of the Approaches of the Royal Commission and the Australian Commission*

Both the Royal Commission and the Australian Commission propose to retain the pre-trial right of silence and to alert the suspect of that right by a new style of caution. Both Commissions are more interested in devising practical safeguards for the protection of "having a right of silence" than in analysing the law on what should be the proper comments and inferences after "having exercised that right". But apart from these similarities, there is evident in each set of proposals a difference in attitude towards the right of silence and this can be detected by the introduction of a third distinction, namely, that of the "consequences of not having exercised the right of silence". This is probably at the moment the most important area of all three, simply

93. *ALRC Report*, para.150.

94. *Idem*, para.147.

95. *Idem*, para.150.

96. *Idem*, para.107.

97. *Idem*, paras.146 and 148.

because the right of silence is hardly ever exercised in practice. Although it will be considered in detail in Part II of this article, it is important for the moment to consider each Commission's proposals in this third area so that they can be assessed together with the first two distinctions of "having the right" and the "consequences of having exercised the right".

Briefly, the Royal Commission takes the view that exclusion of evidence by the courts is not an appropriate means of enforcing the rules and safeguarding the rights of suspects.<sup>98</sup> Rather, it prefers that any breach of the "Code of Practice" be subject to internal police discipline only.<sup>99</sup> In contrast, the Australian Commission takes a "global view"<sup>100</sup> of the problem of enforcement. It proposes a new "reverse onus" exclusionary rule of evidence<sup>101</sup> together with a new police discipline code.<sup>102</sup>

In the first area, that of "having a right of silence", the Royal Commission retains the right of silence in the sense that it is no offence to refuse to answer questions but it does not in any way assist a suspect to exercise this right. The old problems with the caution still remain, and the proposal to tape-record the interviews is rejected as is the introduction of an examining magistrate. Even the right of access to a solicitor is subject to exceptions.<sup>103</sup> In the second area, the "consequences of having exercised the right of silence" will be that no inference of any kind at all can be drawn from silence. As to the third area, it will be seen that, once there has been a breach of rules protecting silence, the right itself is no longer protected in any way. The "consequences of not having exercised the right of silence" as far as the Royal Commission is concerned is that anything the suspect says will be admitted in evidence, regardless of a breach of any of the proposed safeguards. So it could be said that the Royal Commission in fact only "retains" (or "protects") the right of silence in one out of three possible areas. The suspect's right of silence will be rigorously protected in the second area, that is, if he manages, despite all the obstacles, to exercise his right of silence, then the consequence will be that no inferences will be drawn. But if he does not manage to exercise it, which is more likely,

98. *RC Report* (*supra* n.1), para.4.131. But note the UK Government's willingness to go further than the Royal Commission and exclude confessions which the prosecution fails to prove were not obtained by oppression or in consequence of anything said or done which was likely to render the confession unreliable. See cl.59(2) of the 1983 Bill and the non-exhaustive definition of oppression in cl.59(8). For comment, see P. Mirfield, "Confessions and Oppression" (1983) 3 O.J.L.S. 289. See also *infra* n.161.

99. *RC Report*, paras.4.116 and 4.118. See also cl.51(9) of the 1983 Bill.

100. A. Ashworth, "Some Blueprints for Criminal Investigation" [1976] *Crim.L.R.* 594, 608.

101. *ALRC Report*, para.298. See also cl.69(1) of the 1981 Bill.

102. *Idem*, para.301, and *ALRC Report No.1*; "Complaints against Police" (1975).

103. *RC Report*, paras.4.26, 4.59-4.62 and 4.91. Cf. *supra* section C.2.



then anything he says will be admitted in court.<sup>104</sup>

This is to be compared with the Australian Commission's approach. In the first area, the right of silence is supported by safeguards and the suspect is given a much greater chance of exercising it. He is given a caution at the beginning of the interview informing him of his right to a solicitor, friend or relative, with possible tape recording of the interview or corroboration by an independent third party.<sup>105</sup> In the second area, the "consequences" of the suspect having exercised it is that no inference of guilt can be drawn from the silence. There is the possibility, however, that other inferences short of guilt may be drawn since the judge has the opportunity to comment on the belatedness of an accused's defence. However, this is not to "abolish" the right of silence but to "diminish" its effect.<sup>106</sup> In the third area, it will be seen that the Australian Commission proposes a rule which is tantamount to the exclusion of all evidence obtained in breach of a safeguard.<sup>107</sup> In other words, the right of silence is a right which is protected at all three stages by the Australian Commission, although there may not be "absolute" protection in the second area.

It can now be seen what is meant by a difference in attitude of the two Commissions. One is totally committed to a recognition of a right of silence in the theoretical and practical sense. The other is half-hearted—for it the right of silence exists, but only just. Can this difference in attitude be put down to differing philosophies between the two Commissions?

When examining the debate on the right of silence which followed the proposals of the Criminal Law Revision Committee, the Royal Commission identifies two very "opposed philosophies in perceiving . . . the criminal process, the utilitarian and the libertarian . . . which defy reconciliation".<sup>108</sup> The Criminal Law Revision Committee adopted a utilitarian approach where "the law should be such as will secure as far as possible the right result at the trial . . . and the right of silence was not to be seen as a unique or invariable right".<sup>109</sup> In contrast the libertarian approach rested on the assumption that "in reality the right of silence formed a vital issue in the whole constitutional

104. It must be noted, however, that, if the UK Government's proposal to exclude those confessions mentioned in cl.59(2)(a) and (b) of the 1983 Bill is enacted by Parliament, then the right of silence will be protected to that limited extent in the third area. This proposal by the Government, although more protective of the rights of the accused than the Royal Commission's proposal in *RC Report*, para.4.131, is still to be contrasted with the ultra-libertarian proposal of the Australian Commission.

105. *ALRC Report*, paras.100, 142, 145 and 160.

106. Cf. *supra* Section D.3.

107. *ALRC Report*, para.347.

108. *RC Report*, para.1.29. For the "debate", see *idem*, para.1.24 *et seq.*

109. *Idem*, para.1.26.

relationship in a free society between the individual and the State [and that] each step in the criminal process must be judged for its coherence with a liberal understanding of how free persons, including suspects . . . at all stages ought to be treated".<sup>110</sup> Which of these two philosophies do the Australian Commission and the Royal Commission adopt? It is obvious that the Australian Commission is libertarian—for it the right of silence does in reality form a vital issue in a free society. But is the right of silence such a vital issue for the Royal Commission? It does not reinforce its proposal to retain the right of silence by effective safeguards and it could hardly be said to be treating persons with a liberal understanding by admitting all evidence obtained in breach of a safeguard. The Royal Commission must, therefore, either be utilitarian in its approach (which is unlikely because of its vehement rejection of the Criminal Law Revision Committee's proposal on the right of silence) or it is managing to "escape the utilitarian and libertarian horns of the dilemma".<sup>111</sup>

There is, however, a subsequent subtle change of meaning in the Royal Commission's definition of "libertarian". In summary, it says: "[T]here had been little meeting of minds . . . between those who gave paramountcy to the principles of the presumption of innocence and the burden of proof, and those who saw . . . the criminal justice system as a means of bringing the guilty to justice".<sup>112</sup> It is much clearer here that the Royal Commission is libertarian in approach, as "libertarian" is now defined. It never stops giving "paramountcy" to the burden of proof principle. To the Royal Commission, this is the fundamental principle of the accusatorial system.

But how does the notion of "burden of proof" really fit into the opposing "utilitarian" and "libertarian" philosophies? The degree of the burden of proof certainly "protects" the individual in so far as he is presumed innocent until his guilt is proved beyond reasonable doubt. But often where offences are created by statute the prosecution does not bear the burden of proof at all.<sup>113</sup> In such cases the "burden of proof" principle does not "protect" the individual. But whatever philosophy the burden of proof principle is concerned with, the Royal Commission overestimates its importance. A commitment to it does not make it "libertarian"—a suspect needs other protection besides the burden of proof principle (such safeguards as access to a solicitor and exclusionary rules) in order to ensure that the right of silence forms a vital issue in society. Even if the right of silence were "abolished" in the sense that inferences of guilt were allowed to be drawn from silence, the burden of

110. *Idem*, para.1.27.

111. *Idem*, paras.1.31 and 1.32.

112. *Idem*, para. 1.32.

113. Cf. *supra* Section C.1.

proof principle would still be unaffected. Therefore, it appears that the Royal Commission vacillates between a libertarian approach (by retaining only a theoretical right of silence) and a utilitarian approach (by adopting an inclusionary rule). By clinging to the burden of proof principle, it has found a compromise which does not commit it to any definable "philosophy". The Australian Commission, on the other hand, is firmly committed to a libertarian approach.

## II. THE ADMISSIBILITY OF CONFESSIONS

### A. *The Present Law*

#### 1. *The voluntariness rule*

At common law in both the United Kingdom and Australia, a confession of guilt is only admissible in evidence against the party who made it if it is voluntary.<sup>114</sup> In England, the voluntariness rule stems from the statement of Lord Sumner in *Ibrahim v. R.*<sup>115</sup> that a statement by an accused, to be admissible against him, must be shown by the prosecution to have "not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority" [or by oppression].<sup>116</sup> In Australia, the voluntariness rule is given a wider formulation by Dixon J in *McDermott v. R.*<sup>117</sup> where he said:

If he [the accused] speaks because he is overborne . . . [or] if his confessional statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary. But it is also a definite rule of the common law that a confessional statement cannot be voluntary if it is preceded by an inducement held out by a person in authority . . .

The House of Lords in *Director of Public Prosecutions v. Ping Lin*<sup>118</sup> held that for a confession to be involuntary it is not essential that there should have been impropriety on the part of the person to whom the statement was made. The House of Lords further states that the fact that the alleged inducement was not uttered with the intention of inducing a confession is immaterial.<sup>119</sup> Rather, the question is whether

114. This rule has been modified by statute in Victoria and the Australian Capital Territory where confessions induced by threats or promises which were not really calculated to cause an untrue admission of guilt are admissible: s.149, Evidence Act (Vic.); s.68, Evidence Ordinance 1971 (ACT). See also s.410, Crimes Act 1900 (NSW) which extends the common law rule.

115. [1914] A.C. 599, 609.

116. These words were added by Lord Parker in *Callis v. Gunn* [1964] 1 Q.B. 495, 501.

117. (1948) 76 C.L.R. 501, 511.

118. [1976] A.C. 574.

119. *Idem*, pp.594, 602, 604 and 607.

the inducement, on the facts of the particular case, caused the confession.

#### 2. *The discretion rule*

In both England and Australia, the judge has a discretion to reject a confession even though it has been found to be voluntary. Despite the fact that the discretion is rarely exercised by a judge to exclude a confession,<sup>120</sup> it can generally be said that there are three separate grounds upon which he may do so. Firstly, the judge may exercise his discretion to reject a voluntary confession which has been obtained irregularly in the sense that the Judges' Rules have been breached.<sup>121</sup> Secondly, a judge may exercise his discretion to reject a confession on the ground that its reception in evidence will be unfair to the accused.<sup>122</sup> In the decision of *R. v. Sang*,<sup>123</sup> the House of Lords stresses that a judge has an overriding discretion to exclude evidence the admission of which would prevent the accused from having a fair trial. Presumably a confession, the prejudicial effect of which far outweighs its probative value, could be excluded on this ground. Thirdly, a judge may exercise his discretion to exclude a confession on the ground that it was improperly, unlawfully or unfairly obtained.<sup>124</sup> Here the courts have traditionally applied the same principles as in cases involving illegally obtained non-confessional evidence.<sup>125</sup> The discretion in relation to these latter cases was, however, virtually abolished in *R. v. Sang*.<sup>126</sup> This now leaves the scope of the discretion in relation to unfairly obtained confessional evidence uncertain in England,<sup>127</sup> despite the express preservation of this discretion in *R. v. Sang*. This is to be contrasted with Australia, where the High Court in *Cleland v. R.*<sup>128</sup> has affirmed that the general discretion to exclude unlawfully or improperly obtained non-confessional evidence is applicable to evidence of a

120. [1978] Crim.L.R. 117, 121. See also R. D. Pattenden, *Discretion in the Rules of Evidence and Procedure in Criminal Trials on Indictment in England and Australia* (D.Phil. Thesis C2977, University of Oxford, 1979), p.170. See now R. D. Pattenden, *The Judge, Discretion and the Criminal Trial* (1982).

121. *R. v. Voisin* [1918] 1 K.B. 531, 539; *McDermott v. R.* (1948) 76 C.L.R. 501, 513; *R. v. Ovenall* [1969] 1 Q.B. 17; *Conway v. Hotten* [1976] 2 All E.R. 213; *R. v. Lemsatef* [1977] 2 All E.R. 835.

122. *Conway v. Hotten* [1976] 2 All E.R. 213, 216-217; *Jones* [1970] 1 N.S.W.R. 190; *McDermott v. R.* (1948) 76 C.L.R. 501, 506.

123. [1979] 2 All E.R. 1222, 1239; [1979] 3 W.L.R. 253, 281; see also [1979] Crim.L.R. 656, 657.

124. *R. v. Sang* [1979] 2 All E.R. 1222.

125. R. D. Pattenden, *op.cit.supra* n.120, at p.181. In England, these principles are whether the confession was obtained by deception, misrepresentation or some other unfair conduct: *Kuruma v. R.* [1955] A.C. 197; *R. v. Houghton* (1978) 142 J.P. 396, 401.

126. [1979] 2 All E.R. 1222, 1231.

127. C. R. Williams, *op.cit.supra* n.17, at p.227 *et seq.*

128. (1982) 57 A.L.J.R. 15.

confession by the accused. In such cases the judge must weigh the competing public interests in conviction of the guilty and the protection of the individual against unlawful and unfair treatment.<sup>129</sup> It is said that as a result of the different tests in Australia and England, illegality is much more likely to lead to the exclusion of evidence in Australia and has in fact done so on a number of occasions.<sup>130</sup>

### B. *Rationale of the Present Law*

#### 1. *The voluntariness rule*

It is now necessary to consider what is the real reason for excluding involuntary confessions. This is particularly important in cases where the *Ibrahim* test indicates that a confession is involuntary but nonetheless the judge is convinced that the confession is true. Lords Morris and Salmon in *D.P.P. v. Ping Lin*, however, expressly refused to consider the rationale of the voluntariness rule,<sup>131</sup> stating that such a consideration was not "within the province of judicial decision".<sup>132</sup> Lord Hailsham in that case merely described the voluntariness rule as a "rule of policy" which is "not wholly rational".<sup>133</sup> It is proposed to consider four possible rationales of the rule and to argue that the true rationale for the voluntariness rule is the "privilege against self-incrimination".

(i) *The "reliability" principle.* For some time it was thought that the exclusionary rule was essential to safeguard reliability.<sup>134</sup> On this view, an involuntary confession is excluded because there is a high probability that it is false. However, this is not necessarily the case. As the High Court of Australia remarked in *Basto v. R.*<sup>135</sup> "A confessional statement may be voluntary, and yet to act upon it might be quite unsafe . . . Or such a statement may be involuntary and yet carry with it the greatest assurance of its reliability or truth." The truth of this statement has been borne out in subsequent cases.<sup>136</sup>

Furthermore, a "reliability" principle is not necessarily compatible with an exclusionary rule. It would, for example, be consistent with the

129. *Bunning v. Cross* (1978) 141 C.L.R. 54 and *R. v. Ireland* (1970) 126 C.L.R. 321.

130. R. D. Pattenden, *op.cit. supra* n.120, at p.194.

131. [1976] A.C. 574, 595 (per Lord Morris) and 607 (per Lord Salmon).

132. *Idem*, p.595 (per Lord Morris).

133. *Idem*, p.599.

134. E.g. Wigmore, *Treatise on Evidence* (3rd ed., 1940), paras.2183-2184. J. A. Andrews, "Involuntary Confessions and Illegally Obtained Evidence in Criminal Cases" [1963] Crim.L.R. 15, 77. But see now Lord Diplock in *R. v. Sang* [1979] 3 W.L.R. 263, 271.

135. (1954) 91 C.L.R. 628, 640.

136. E.g. in *Wong Kam-Ming v. R.* [1979] 2 W.L.R. 81. See also Lord Scarman's comments in *Sang v. R.* [1979] 3 W.L.R. 263, 287, and those of Lord Salmon, at p.279.

"reliability" principle to include all confessions and either to leave the question of reliability to the jury or to adopt an exclusionary discretion on grounds of unreliability. The Criminal Law Revision Committee recommended that the "reliability" principle should be adopted to provide a justification for its proposed exclusionary rule. But it proposed a rule that a confession should be inadmissible unless the prosecution prove that it was "not made in consequence of any threat or inducement of a sort likely . . . to render unreliable any confession . . . made by the accused".<sup>137</sup> This test attempts to connect the inducement with the aim of reliability. In contrast, the *Ping Lin* test merely considers whether the inducement caused the confession. It could be argued from this that reliability is not the primary justification for the present voluntariness rule.

(ii) *The "disciplinary" principle.* According to the "disciplinary" principle, exclusion of evidence is desirable in order to discourage improper police methods. This discouragement takes place by depriving them of the advantage of the confession for the purpose of obtaining a conviction.<sup>138</sup> There are, however, three obstacles which prevent the disciplinary principle from being the exclusive rationale for the voluntariness rule. Firstly, there is the recognition by the House of Lords that a confession may be involuntary and therefore excluded even though no improper conduct by the person in authority has been shown by the accused.<sup>139</sup> Secondly, there is the prevailing attitude among the judiciary that their function is not concerned with controlling police behaviour.<sup>140</sup> The third obstacle is the fact that the exclusion of evidence does not in fact work as an effective deterrent to police misconduct.<sup>141</sup> This is partly because a challenge to a confession is usually remote in time and effect from the incident giving rise to it.<sup>142</sup> But, more important, there is the strong likelihood that once the accused has confessed he will plead guilty, which will counterbalance any fear on the part of the policeman that evidence will be inadmissible.<sup>143</sup>

(iii) *The "protective" principle.* The "protective" principle argues that an infringement of an individual's rights supplies a *prima facie*

137. *Eleventh Report on Evidence, op.cit. supra* n.9, at paras.56 and 65.

138. *Idem*, para.55. See also A. Ashworth, "Excluding Evidence as Protecting Rights" [1977] Crim.L.R. 723, 724.

139. *D.P.P. v. Ping Lin* [1976] A.C. 574.

140. See Lord Diplock's remarks in *R. v. Sang* [1979] 2 All E.R. 1222, 1230.

141. D. H. Oaks, "Studying the Exclusionary Rule in Search and Seizure" (1970) 37 U.Chi.L.Rev. 665. But see M. Inman, "Royal Commission on Criminal Procedure: The Admissibility of Confessions" [1981] Crim.L.R. 469, 473.

142. *RC Report (supra* n.1), para.4.125.

143. *ALRC Report (supra* n.2), para.297.



justification for the exclusion of evidence obtained as a result of that infringement.<sup>144</sup> These rights are said to be derived from "standards of conduct" which in turn are reflected in certain "hallowed principles of fairness" such as the double jeopardy rule, the presumption of innocence and the principles of natural justice.<sup>145</sup>

It is said that the *Ping Lin* decision "embodies a clear rejection of the disciplinary principle as a justification for excluding confessions and represents a step towards a protective principle".<sup>146</sup> This is because the courts find it more important to know whether the defendant perceived the things said to him as inducements rather than whether the official intended to raise hope of advantage or fear of prejudice etc.<sup>147</sup> But surely if the "protective" principle is based on objective "standards of conduct" under English law then one of those "standards" will have to be actually infringed for the protective principle to be invoked. It cannot be enough that the defendant merely perceived his "right" as being infringed. If there has to be actual infringement of a right, then the courts will not be exclusively concerned with how the defendant perceived the supposed inducements. They will have to consider *all* the circumstances of the case, including the official's alleged impropriety. Once this is so, the "protective" principle has no separate existence from the "disciplinary" principle. Rather it is a logical extension of it. There is, however, the independent argument that a citizen may be "best protected" by the exclusion of evidence whereas the policeman may be most "effectively disciplined" by an internal body.

(iv) *The privilege against self-incrimination.* Speaking of confessions, Lord Diplock in *R. v. Sang*<sup>148</sup> stated:

The underlying rationale of this branch of the criminal law, though it may originally have been based on ensuring the reliability of confessions is, in my view, now to be found in the maxim *nemo debet prodere se ipsum*, no one can be required to be his own betrayer or in its popular English mistranslation, "the right to silence".<sup>149</sup>

The privilege against self-incrimination has recently been described as "an instance of the 'protective' principle".<sup>150</sup> However, because the precise scope and effect of the "protective" principle has not yet been determined, it is preferable at this stage to keep the older common law

144. A. Ashworth, *op.cit. supra* n.138, at p.725.

145. *Idem*, p.725. See also A. Ashworth, "Concepts of Criminal Justice" [1979] *Crim.L.R.* 412, 413-414, 422.

146. A. Ashworth, *op.cit. supra* n.138, at p.727.

147. A. Ashworth, *op.cit. supra* n.145, at pp.425-426.

148. [1979] 2 *All E.R.* 1222.

149. *Idem*, p.1230.

150. P. Mirfield, "Confessions—the Person in Authority Requirement" [1981] *Crim.L.R.* 92, 96.

principle distinct from the more recently developed "protective" principle.

The "privilege" aspect of the privilege against self-incrimination is generally interpreted to mean the equivalent of a "right not to be compelled or pressurised".<sup>151</sup> If this "compulsion" element were not regarded as essential, then any confession from an accused would be a breach of the privilege against self-incrimination. The question then arises as to what amount of pressure or compulsion is permissible before the so-called "privilege" will have been breached. Cross states that if the question and answer<sup>152</sup> in *Ping Lin's* case had preceded the confession, this would not have been sufficient "pressure" to breach the privilege against self-incrimination. Yet two members of the House of Lords state that if the question and answer had preceded the confession then a judge might properly have held that *Ping Lin's* confession had been obtained by the "hope" held out to him by the superintendent.<sup>153</sup> There may be disagreement as to the degree of pressure which will constitute a breach of the privilege against self-incrimination, just as there may be disagreement as to what constitutes an inducement or oppressive conduct. Both will depend on a judge's answer to a question of fact.<sup>154</sup> Nevertheless the "pressure" or "compulsion" aspect of the privilege against self-incrimination is closely allied to the "inducement" or "oppression" required for the voluntariness test. When a court asks whether a confession is voluntary, it is asking whether there has been any pressure on the accused to incriminate himself. If a court holds a confession "involuntary" it is stating that there has been either an inducement or oppressive conduct (or force) which caused the accused to confess. In other words, there has been sufficient pressure or compulsion for the privilege against self-incrimination to have been breached. It may be concluded, therefore, that the privilege against self-incrimination is the most appropriate explanation of the voluntariness rule.

## 2. *The discretion rule*

In England, there is some confusion about the basis upon which the discretion should be exercised.<sup>155</sup> One possibility is the aim of disciplining the police and deterring misconduct.<sup>156</sup> Another possibility

151. Cross, *op.cit. supra* n.6, at p.539.

152. *Ibid.* *Ping Lin* had asked the Superintendent: "If I help police, can you help me?" The Superintendent had replied: "If you show the judge that you have helped the police to trade bigger drug people, I am sure he will bear it in mind when he sentences you." This dialogue occurred after *Ping Lin* had confessed in a small way to being a dealer in drugs.

153. [1976] *A.C.* 574, 607-608 (*per* Lord Salmon) and 605 (*per* Lord Kilbrandon).

154. *Idem*, p.600 (*per* Lord Hailsham).

155. R. D. Pattenden, *op.cit. supra* n.120, at pp.169 and 198.

156. *R. v. Allen* [1977] *Crim.L.R.* 163.

is the reliability principle.<sup>157</sup> But the English courts have also treated the discretion as a means of avoiding unfairness to the accused, in the form of compulsory self-incrimination or deception.<sup>158</sup> In Australia, the discretion derived "almost certainly from the strong feeling for the wisdom and justice of the traditional principle . . . *nemo tenetur se ipsum accusare* [and] . . . may be regarded as an extension of the common law rule excluding statements".<sup>159</sup> It is submitted that if guidelines were drawn up to assist the judge in the exercise of his discretion (as has been done in Australia with the discretion to exclude illegally obtained evidence)<sup>160</sup> there would be less confusion because it would no longer be necessary to determine a single rationale for the discretion rule and, at the same time, the flexibility required for the discretion rule could be contained within reasonable limits.

### C. The Royal Commission

#### 1. The proposals

The Royal Commission recommends the abolition of both the common law voluntariness rule<sup>161</sup> and the judicial discretion to exclude improperly and unfairly obtained evidence.<sup>162</sup> All statements made by the suspect under police interrogation are to be admitted in evidence but, where there has been a breach of the "Code of Practice", the jury should be warned that a person under pressure may make an incriminating statement that is not true, that the Code has been introduced to control police behaviour and minimise the risk of untrue statements and that accordingly they (the jury) should look for

157. *R. v. Voisin* [1918] 1 K.B. 531, 539; *R. v. Elliott* [1977] Crim.L.R. 551, 552.

158. *R. v. Payne* [1963] 1 All E.R. 848; *R. v. Court* [1962] Crim.L.R. 697. See R. D. Pattenden, *op.cit. supra* n.120, at p.198.

159. *McDermott v. R.* (1948) 76 C.L.R. 501, 513.

160. *Bunning v. Cross* [1978] 19 C.L.R. 641, 661-663. Note that these guidelines are now embodied in cl.69(2) of the 1981 Bill.

161. *RC Report*, paras.4.73, 4.75, 4.109 and 4.131. Note, however, that the 1983 Bill has altered the Royal Commission's proposal for a general inclusionary rule by providing in cl.59(2):

(2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained—

(a) by oppression of the person who made it; or

(b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,

the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.

162. *RC Report*, para.4.131. The judicial discretion as defined *supra* in Section A.2 is apparently completely abolished.

independent support for any such statement made.<sup>163</sup> The Royal Commission believes that the "Code of Practice" will be more effectively enforced by contemporaneous controls and good supervision than by court review long after the event.<sup>164</sup> Therefore, all exclusionary rules of evidence should be abolished except where there is violence, threats of violence, torture or inhuman or degrading treatment. Any evidence obtained in these latter cases is to be automatically excluded to mark the seriousness of the breach of the Code and society's abhorrence of such conduct.<sup>165</sup>

#### 2. Comments on the Royal Commission's approach and proposals

(i) *The voluntariness rule.* The Royal Commission states that the voluntariness rule should be abolished for two reasons: firstly, because the rule is ineffective as a means of controlling the police, and, secondly, because "legal" and "psychological" voluntariness do not match.<sup>166</sup> As to the second reason, the Royal Commission was presented with some important research which stated that the police interrogation process itself, even without threats or violence, produces a state of mind in the suspect which could be described as "psychological involuntariness".<sup>167</sup> As a direct result of this research, the Royal Commission decided to abolish the voluntariness rule.<sup>168</sup> This is, however, a seriously overreactive response to the problem. The whole idea of the voluntariness rule is to catch those situations where there is a form of pressure on the accused which results in his statement not being psychologically voluntary. The research, however, points out that the voluntariness rule will not in fact catch all those situations which it is intended to catch.<sup>169</sup> One obvious remedy for this would be to attempt to widen the definition of voluntariness. Another feasible but more drastic remedy would be to "abolish the whole institution" of interrogation<sup>170</sup> (this could be done, for example, by instituting questioning before an independent third person, such as a magistrate). But the idea of abolishing the safeguard of the voluntariness test and admitting into evidence all the statements

163. *Idem*, para.4.133.

164. *Idem*, para.4.118.

165. *Idem* para.4.132. Note that cl.59(8) of the 1983 Bill merely lists torture, inhuman or degrading treatment and the use or threat of violence as examples of oppression.

166. *Idem*, para.4.73.

167. B. Irving and L. Hilgendorf, "Police Interrogation: The Psychological Approach", *RC Research Study No.1* (1980), and B. Irving, "Police Interrogation: A Case Study of Current Practice", *RC Research Study No.2* (1980). See also P. Morris, *op.cit. supra* n.7, at p.32.

168. *RC Report*, para.4.73.

169. For a criticism of Irving's research, see D. P. Farrington, "Psychology and Police Interrogation" [1981] Br.J.L. & S. 97, 104.

170. E. Driver, "Confessions and the Social Psychology of Coercion" [1978] 82 Harv.L.Rev. 42, 61. See also P. Morris, *op.cit. supra* n.7, at p.32.

which are the product of this coercive interrogation process is to aggravate, rather than to remedy, the problem.

The Royal Commission also decides that the voluntariness rule should be abolished because it is ineffective as a means of controlling the police.<sup>171</sup> The police need greater certainty than the existing rules provide<sup>172</sup> and the decision in *Ping Lin* is regretted as not giving any firmer guidelines to the police.<sup>173</sup> It may seem from these findings that the Royal Commission believes that the "disciplinary" principle is the underlying rationale of the voluntariness rule. However, the Royal Commission somewhat awkwardly divides the voluntariness rule into two separate parts:<sup>174</sup> that dealing with the conduct of the police that is prohibited (threats, inducements and oppression) and that dealing with the means of enforcing that prohibition (exclusion of evidence). This way it can confine discussion of the "rationale" to the second "exclusionary" part of the rule.<sup>175</sup> The first part of the rule is presumed to operate as a set of guidelines for the police—similar to the Judges' Rules. The Royal Commission persistently calls this part of the voluntariness rule "principle (e) of the Judges' Rules".<sup>176</sup> But it is clear that the voluntariness rule does not have the same origin, purpose or status<sup>177</sup> as the Judges' Rules. To treat the rule as merely a guide to the police does some injustice to the true nature of the rule as an exclusionary rule of law. The decision to abolish the voluntariness rule on this ground is simply not justified.

The second (exclusionary) part of the voluntariness rule is said to have two rationales—the "reliability" and the "disciplinary" principles.<sup>178</sup> But English judges have not in practice "seen themselves" as controlling police behaviour; "their main concern has always been with the reliability of evidence".<sup>179</sup> A quotation from Lord Diplock in *Sang* is given to support this, which quotation, however, merely purports to reject the "disciplinary" principle and no more. In fact, on the very same page of his judgment, Lord Diplock also rejects the "reliability" principle as being the rationale of the confessions rule today.<sup>180</sup> This part of the judgment is not mentioned by the Royal Commission. Instead, the Royal Commission look at the American

171. *RC Report*, paras.4.73, 4.72 and 4.70.

172. *Idem*, para.4.131.

173. *Idem*, para.4.70.

174. *Idem*, para.4.69.

175. *Idem*, para.4.123 *et seq.*

176. *Idem*, para.4.68, 4.74 and 4.109.

177. As to the Judges' Rules, see *supra* Part I, Section B. As to the voluntariness rule, see *supra* Part II, Section A.1.

178. *RC Report*, para.4.123.

179. *Idem*, para.4.124.

180. [1979] 2 All E.R. 1222, 1230; [1979] 3 W.L.R. 263, 271.

experience and conclude that an automatic exclusionary rule would be unsatisfactory as a means of securing compliance with the statutory rules they propose.<sup>181</sup> This, however, says nothing about the effectiveness of the exclusionary rule in ensuring reliability, in protecting the accused or in safeguarding the privilege against self-incrimination. It only displays a misconception of the purpose of an exclusionary rule which they assume can either operate only as some sort of disciplinary measure or not at all.

On the other hand, the Royal Commission clearly favours the "reliability" principle as a justification for their inclusionary rule on confessions. It was pointed out in Section B.1(i) above that the "reliability" principle can be used to support either an exclusionary rule or an inclusionary rule on confessions. The difference depends on whether one takes the view that it is better that the jury have all available evidence before them, despite a risk that some of it may be unreliable, or whether one takes the view that unreliability should be avoided at all costs, in which case, if there is any risk that evidence is unreliable, it must be excluded. That the Royal Commission adheres to the former inclusionary view is clear from its statement that it "favours" the "reliability" principle but that it desires to "apply" it only to its rules of conduct controlling police questioning and not to the court's decision whether to admit evidence or not.<sup>182</sup> If there is a breach of the "Code of Practice", the jury are to be warned of the possible ensuing unreliability of the evidence.<sup>183</sup>

(ii) *The discretion rule.* The Royal Commission fails to consider the important area of the judicial discretion to exclude improperly or unfairly obtained evidence. The discretion is mentioned very briefly by the Royal Commission<sup>184</sup> but it is never considered separately and it is unclear whether it intends its stated rationale of the present law to be applicable both to the voluntariness rule of law and to the discretion rule. Furthermore, it is unclear for what reasons the discretion is abolished. The Royal Commission merely states that it is not content to leave the enforcement of its proposed rules to control police conduct to the courts "for the reasons developed in the preceding paragraphs".<sup>185</sup> The preceding paragraphs, however, do not talk of any exclusionary discretion, but merely of the automatic exclusionary rule in the United States and of the proposed "reverse onus" rule in Australia.<sup>186</sup> Although the voluntariness rule is abolished by the Royal Commission, there is still room for the existence of the exclusionary discretion,

181. *RC Report*, paras.4.125–4.131.

182. *Idem*, para.4.131.

183. *Idem*, para.4.133.

184. *Idem*, paras.4.123 and 131.

185. *Idem*, para.4.131.

186. *Idem*, paras.4.126–4.130.

untouched by the two reasons given for the abolition of the voluntariness rule. In fact, it might be thought that the retention of the exclusionary discretion is advisable as a necessary check on the virtual blanket rule of admissibility which the Royal Commission proposes.

#### D. *The Australian Commission*

##### 1. *The proposals*

The common law voluntariness rule is expressly retained by the Australian Commission but "in a modified form".<sup>187</sup> There is to be an absolute exclusion rule for all confessions extracted by the use of force, violence or the threat thereof.<sup>188</sup> These confessions should be "deemed involuntary".<sup>189</sup> On the other hand confessions made as a result of other forms of inducement should not be treated as involuntary if the court is satisfied that the means by which the confession was obtained were not in fact likely to cause an untrue admission to be made.<sup>190</sup> The Australian Commission also proposes a "reverse onus discretionary exclusionary rule of evidence"<sup>191</sup> which will apply to all evidence, including confessions.<sup>192</sup> Under this rule, any evidence obtained by any contravention of any statutory or common law rule—including all the rules of procedure proposed in the report—should be inadmissible in any criminal proceedings for any purpose unless the court decides in the exercise of its discretion that the admission of such evidence would specifically and substantially benefit the public interest without unduly derogating from the rights and liberties of any individual.<sup>193</sup>

##### 2. *Comments on the Australian Commission's approach and proposals*

(i) *The voluntariness rule.* Although the notion of legal "voluntariness" has been retained by the Australian Commission, it is redefined in such a way that its meaning is now even further removed from actual voluntariness. There is no mention of oppression, maltreatment or impairment of mental faculties as factors which may render a confession "involuntary". Only those confessions obtained by violence or inducements likely to cause an untrue confession will be deemed

187. *ALRC Report*, paras.348 and 153.

188. *Idem*, para.153.

189. *Idem*, para.348.

190. *Idem*, para.153. See now cl.31 of the 1981 Bill.

191. *Idem*, para.298.

192. *Idem*, paras.11, 347 and 382.

193. *Idem*, paras.298 and 382. This rule is now slightly modified under cl.69(1) of the 1981 Bill, which provides that only evidence obtained in contravention of a provision of the 1981 Bill itself will be inadmissible under the "reverse onus" rule.

"involuntary".<sup>194</sup> Surely it would be enough merely to deem such confessions "inadmissible" without having to deem them "involuntary" as well. It is obvious that the voluntariness label is no longer serving any useful function and that it is unnecessary to retain it. This is particularly the case when one considers that the overall trend in their proposals is to move away from the notion of "voluntariness" as a test of admission and towards a wider test of "public interest".<sup>195</sup>

The Australian Commission states in clear terms that the present voluntariness rule is justified by both the "reliability" principle and the "disciplinary" principle.<sup>196</sup> However, it refers to a quotation from the High Court in *Basto v. R.*<sup>197</sup> which shows that in many cases the "reliability" principle cannot support the voluntariness rule and there is other evidence which suggests that the Australian Commission believes that the "disciplinary" principle is the real justification for the present voluntariness rule. For instance, it states that the voluntariness rule had not "been a particularly effective deterrent to overly enthusiastic law enforcement activity",<sup>198</sup> and that there is a need to have "extra disincentives" to meet the mischief in every case.<sup>199</sup> These findings indeed prompt the proposal for absolute exclusion of all confessions obtained by force, violence or the threat thereof.<sup>200</sup> In the light of the discussion of the effectiveness of the voluntariness rule, the Australian Commission decides to "soften the full potential effect of the common law rule as to inducements". This is only conditional, however, on the proposed "reverse onus" rule being accepted.<sup>201</sup>

It is essential, therefore, to discover how the proposed confessions rule will interact with the "reverse onus" rule. In the first place, the Australian Commission concedes that the "reverse onus" rule will create the "very real possibility that evidence illegally or unfairly obtained will not be admitted into evidence".<sup>202</sup> This is presumably because it believes there will be minimal exercise of the inclusionary discretion under the "reverse onus" rule. How then will this affect the proposed confessions rules? It will not, of course, affect the proposed rule as to confessions obtained by force, violence or the threat thereof, because they will be deemed "involuntary" and automatically excluded. But it will affect those confessions obtained by inducements which were

194. K. Amarasekara, "Confessions: Recent Developments in England and Australia" (1980) 29 I.C.L.Q. 327, 328-332.

195. *ALRC Report*, para.298.

196. *Idem*, para.151.

197. (1954) 91 C.L.R. 628, 640. *ALRC Report*, para.151.

198. *ALRC Report*, para.287.

199. *Idem*, para.153, 294, 299 and 300.

200. *Idem*, para.153.

201. *Ibid.*

202. *Idem*, para.302.



not likely to have caused an untrue admission. Such confessions will have been declared admissible under the "inducements" rule but, because the inducement will involve a breach of the rules of procedure, they will be *prima facie* excluded under the "reverse onus" rule. Only then, if the judge exercises his inclusionary discretion, can such confessions be admitted. This will call for an enormous amount of positive exercise of judicial discretion and will result in increases in court time, especially at the *voir dire*. But unless the inclusionary discretion is exercised, the effect will be that a large proportion of "induced" confessions may be excluded under the "reverse onus" rule even though the inducement was not of a sort likely to cause an untrue confession. It seems artificial to propose a rule designed to ensure reliability ("only those confessions obtained by inducements likely to cause an untrue confession will be excluded") which will in many cases be overridden by another rule designed to discipline breaches of procedure.

(ii) *The discretion rule.* In contrast with the Royal Commission, the Australian Commission devotes a whole separate section of its report to the "discretion" rule under the present system.<sup>203</sup> However, it confines its discussion to the discretion to exclude illegally obtained evidence and never considers the discretion to exclude lawfully but improperly obtained evidence, the latter of which is, however, particularly needed because no independent civil or criminal proceedings are possible.<sup>204</sup> Furthermore, it is said that the discretion to exclude lawfully but improperly obtained evidence is exercised more often than the discretion to exclude illegally obtained evidence.<sup>205</sup> This may explain why the Australian Commission is able to conclude that the discretion to exclude illegally obtained evidence is in practice very "narrow" and "rarely acted on".<sup>206</sup> It states that the "present discretion rule" tends to "increase the admissibility" of evidence and could only remain if "other circumstances" existed which were "sufficient to control, deter and punish" serious police improprieties.<sup>207</sup> Because these "other circumstances" do not exist in "modern Australia", the Australian Commission is forced to conclude that the appropriate rule for the admissibility of evidence illegally obtained is the "reverse onus" rule.<sup>208</sup>

It is clear that the Australian Commission is against any rule which would either produce or increase admissibility of confessions<sup>209</sup> and it

203. *Idem*, para.288 et seq.

204. R. D. Pattenden, *op.cit.supra* n.120, at p.201.

205. *Idem*, p.199.

206. *ALRC Report*, para.288.

207. *Idem*, para.294.

208. *Idem*, para.298.

209. *Idem*, paras.294 and 291.

tends to view the present Anglo-Australian law as having this effect. In surveying the conditions of modern Australia, the discretion rule is treated as though it does not exist and other methods of law enforcement such as police discipline and civil remedies are treated as grossly inadequate.<sup>210</sup> The solution proposed is the introduction of a discretionary rule for the "much smaller judiciary" in Australia.<sup>211</sup> But what the Australian Commission fails to take up here is the point that there is already a discretionary rule in Australia. How can it reach the conclusion that Australia is an appropriate jurisdiction for a discretionary rule when it has observed earlier that there is already a "rarely exercised"<sup>212</sup> discretionary rule in existence in Australia? There must be a difference between the existing discretion and proposed discretion which will cure the defect of the existing discretion. But it is never identified. There is never any evidence presented (and there is no reason to suppose) that because the discretion under the proposed "reverse onus" rule is an inclusionary one it will be exercised more often than the existing exclusionary discretion. One is forced to conclude that the Australian Commission does not want a discretion which is regularly exercised. What it does want is the "first part" of its "reverse onus" rule—that is, a presumption of exclusion for all evidence obtained in breach of any statutory or common law rule including breaches of the "Code of Procedure". This is the real impetus behind the "reverse onus" rule. Surely honesty dictates that the Australian Commission state that it really wants a rule which is tantamount to an automatic exclusionary rule.

#### E. *Comparison of the Approaches of the Royal Commission and the Australian Commission*

Apart from the rules regarding confessions obtained by torture and violence, what is being compared in this section are two rules on confessions which are almost the exact antithesis of one another. The Royal Commission is in favour of a broad rule of admissibility. The Australian Commission proposes a rule which is tantamount to a rule of absolute exclusion. These rules are, however, not to be compared in isolation. As Professor Cross states, any change in the law concerning confessions "will have to go arm in arm with changes in the right of silence generally".<sup>213</sup> Therefore one must consider what each Commission desires to achieve in its respective decisions to retain the right of silence and assess whether those achievements will be possible in the

210. *Idem*, para.294.

211. *Idem*, para.297.

212. *Idem*, para.288.

213. Cross, *op.cit.supra* n.6, at p.539.

light of its proposals on confessions. Both the Royal Commission and the Australian Commission believe that retaining the right of silence and embodying it within a "code of practice" containing many other safeguards will achieve greater "reliability" of evidence.<sup>214</sup> The question arises then as to which set of proposals will be more conducive to "reliability" as a whole.

There are two ways of achieving "reliability" and this can be seen by comparing the approaches of the Royal Commission and the Australian Commission. The Royal Commission takes a positive approach—it wishes to achieve reliability of evidence in court and, to that end, proposes a pre-trial "Code of Practice" which guarantees reliability.<sup>215</sup> All confessions are to be admitted and any question of improper methods should merely be a matter for the jury. The Australian Commission, on the other hand, takes a negative and cautious view. Its desire is to discourage unreliability at all costs. Hence, although it also proposes a pre-trial "Code of Procedure"<sup>216</sup> with safeguards which are much more rigorous than those of the Royal Commission, it also proposes an exclusionary rule for evidence obtained in breach of a safeguard. It is perhaps a matter of opinion whether "reliability" is more effectively achieved by an inclusionary rule or an exclusionary rule. With an inclusionary rule, at least the jury will have all the evidence in front of them even though there is a risk that some of it might be unreliable. With an exclusionary rule the opposite is the case—there is a risk that some reliable evidence might be excluded.

It is claimed that the English criminal justice system tends to the view that "it is better that ten guilty men go free than that one innocent man be convicted".<sup>217</sup> The Australian Commission obviously agrees with this and under its proposed system there is little chance that an innocent man will be convicted. In fact, unreliable evidence may be avoided at the cost of reliable evidence. The only possibility that reliable evidence obtained in breach of a safeguard will be admitted is if the judge exercises his inclusionary discretion. On the other hand, there is perhaps more of a chance that an innocent man will be convicted under the Royal Commission's proposals. The Royal Commission's response to this allegation would be that its pre-trial system has "guaranteed" reliability before the evidence is admitted. This is, however, placing too much confidence in the infallibility of a pre-trial system to screen reliable statements. It is submitted that the Royal Commission's methodology of seeking positive reliability of evidence by admitting confessions is preferable but it requires the addition of an exclusionary

214. *RC Report*, para.4.131; *ALRC Report*, para.164.

215. *RC Report*, para.4.110.

216. *ALRC Report*, para.303.

217. *Idem*, para.149.

discretion in cases of unreliability. The Australian Commission's rule, on the other hand, is self-defeating—it assumes that all evidence obtained in breach of a safeguard will always be unreliable and that as such it should never be admitted in court. The latter assumption directly contradicts its own assertion that "reliability is primarily a matter for the jury".<sup>218</sup> There is in fact a strong "disciplinary" element which is the backbone of the Australian Commission's proposals which leads it to adopt such a self-defeating rule.

But to state that the Royal Commission's proposed system is "better designed" to achieve reliability of evidence is not to say that it is a perfect system. Both systems contain fundamental defects. Arguably more effective systems could be produced by combining the Royal Commission's proposals on confessions with the Australian Commission's pre-trial proposals on the right of silence and *vice versa*. Certainly the Australian Commission proposes enough pre-trial safeguards protecting the accused to allow for a general rule of admissibility on confessions similar to that proposed by the Royal Commission. And it may well be that there is not enough protection for the accused in the Royal Commission's pre-trial recommendations to allow for a general rule of admissibility of confessions. Since there is much opportunity for the police to avoid the safeguards in the Royal Commission's "Code of Practice", the reliability which the "Code" was designed to achieve may not always be possible, in which case the "reverse onus" rule could be used to exclude such unreliable evidence. Another alternative could be to retain the Royal Commission's confessions proposal but to ensure that the pre-trial procedure does not leave open the opportunity for police improprieties and unreliable evidence by introducing an independent third party. This would first involve the need to convince the Royal Commission that the present pre-trial system is in fact inquisitorial in order then to convince it of the need to formalise what already exists.

### III. CONCLUSION: A FUNDAMENTAL BALANCE AND THE ROLE OF THE POLICE?

BOTH the Royal Commission and the Australian Commission desire to achieve a fundamental balance between the interests of a State in "practical and effective law enforcement" and the interests of the individual in the "protection of [his] rights and liberties".<sup>219</sup> It is, however, misleading to present the problem as a conflict between the State on the one hand and the individual on the other, because this gives the impression that the State is only concerned with law enforcement and crime control. That is not, however, the case. The State is also

218. *Idem*, para.164.

219. *Idem*, para.6. *RC Report*, para.1.11.

interested in individual rights and it would generally adhere to the maxim that "it is better that ten guilty men go free than that one innocent man be convicted".<sup>220</sup> Whether or not the State is ten times more concerned that the innocent be acquitted than that the guilty be convicted is not important. But what is important is that this maxim shows that the State is interested in ensuring that convictions are accurate. In other words, the State must avoid mistaken convictions in order to protect the innocent. That is why the judge in criminal cases must be impartial and detached and why there are several rules of evidence designed to ensure that the jury will be impartial.<sup>221</sup> There is, however, no guarantee that the police will also be detached and impartial. But perhaps that is not necessary because the police are not meant to be concerned with accurate convictions to the same extent as the State. If this is true, then the separate question arises as to what is the proper function of the police and, if the answer reveals that the police do have "interests" which are distinct from those of the State, then there will no longer be only two parties' interests—those of the State and the individual—to be "balanced".

Broadly speaking, there are two possible roles which the police could be said to play. First, there is the "law and order" role where the chief emphasis is on crime detection and securing convictions. Interrogations are conducted with the aim of securing confessions. In contrast, the police under the second model are merely "investigators" and their primary concern is to gather evidence freely and impartially as an important preliminary step to the trial itself. Interviews, not interrogations, take place where the police officer merely "communicates" to the suspect in order to "ascertain the truth of a situation".<sup>222</sup> Existing research today points to the fact that the police, in modern Anglo-Australian societies, exercise a "law and order" role.<sup>223</sup> In other words, they operate in a practical, flexible and non-detached manner which enables them to respond to emergency situations and to public pressure to obtain convictions. Furthermore, they are said to have "operational independence", which they see as an essential safeguard against subservience to the State.<sup>224</sup>

The above conclusion means that the desire of the State to avoid mistaken convictions will not always be evident in police practices.

220. *ALRC Report*, para.149.

221. E.g. s.1(f), Criminal Evidence Act 1898 (UK); s.399, Crimes Act 1958 (Vic.).

222. P. Morris, *op.cit.supra* n.7, at pp.9-13 and 41-42.

223. J. R. Lambert, *Crime, Police and Race Relations* (1970); M. Cain, *Society and the Policeman's Role* (1973); P. Morris, *op.cit.supra* n.7, at p.9; T. Carney and J. Epstein, "Police Powers of Criminal Investigation: Principle or Pragmatism" [1980] 11 *Fed.L.Rev.* 283, 284, 289.

224. A. S. Bowley, "Prosecution—A Matter for the Police" [1975] *Crim.L.R.* 442.

There will be no possibility of a "balance" being achieved between the State and the individual because there is no such conflict even existing. There merely exists an unequal and imbalanced interrogation procedure between an individual and the police, with the State's interests not being represented in either party. What is also significant about the "law and order" model is that the pre-trial procedure possibly becomes even more important than the trial itself. As Lord Devlin says, evidence which such police interrogations produce is often decisive.<sup>225</sup>

The first step for the reformer is to cure the obvious defect that the interests of the State are not being represented at the pre-trial stage. This can be done in two ways. The first is to admit what is the true inquisitorial nature of our pre-trial procedure and to formalise it by introducing an examining magistrate. This would add the missing "third party" who would represent the State in the existing conflict between the police and the individual. The second alternative would be to reinstate the importance of the trial itself, in the true "accusatorial" tradition. To do this, one would have to impose on the police the role of mere "investigators" in gathering evidence and establishing good community relations. The defence solicitor too would have to become more actively involved in preparing for the trial. This would all be done with a view to striking a fair and reliable balance between the three groups represented at the trial and ultimately to allowing the court to obtain the truth.

The problem with the second alternative is that it assumes that the police will willingly change their role. It would first of all be crucial that the police accept such changes as necessary and legitimate. Research indicates that the police are often angered and frustrated by calls for improvement which are too far removed from the practical contexts in which they operate.<sup>226</sup> If, then, there is always the problem that the police will disregard limitations imposed on them, this may help to explain why the Royal Commission does not apply rigorous limitations on the police pre-trial practice in the first place. By providing exceptions and provisos to many of the pre-trial safeguards for suspects, the Royal Commission is perhaps implicitly recognising that the police will use such provisos etc. when necessary in any event, whether or not they are expressly provided for in a "Code of Practice". It may also help to explain why the Australian Commission, while imposing strict pre-trial limitations on the police, also adopts an exclusionary rule as a "backstop". It too may realise the practical futility of attempting to remould the role of the police socially. But the Australian Commission is artificial in this respect because, in not giving the police the powers

225. P. Devlin, *The Criminal Prosecution in England* (1960). P. Morris, *op.cit.supra* n.7, at p.12.

226. P. Morris, *op.cit.supra* n.7, at p.8.

they will use anyway, they are, at the same time, "ultra-libertarian"<sup>227</sup> in their protection of the suspect.

In conclusion, it is submitted that there is only one alternative left, namely to legitimise and formalise the inquisitorial procedure which today exists at the pre-trial stage of the criminal process. This could be done by having a formal examining magistrate or inquisitor. Failing that, the Australian Commission's proposal for a third party's presence at the interrogation is essential at the very least.<sup>228</sup> Should this recommendation ever be implemented, then of course the Royal Commission's general rule of admissibility for confessions could and should accompany it. But only when the examining magistrate is introduced can the concept of a "fundamental balance" between the rights of the suspect and the interests of the community in justice be considered. Until such time, the imposing but necessary role of the police cannot be ignored.

227. K. Amarasekara, *op.cit.supra* n.194.

228. ALRC Report, para.160.

### CHAPTER THREE

#### "Privilege in Academia: A Consideration of the Power to Resist Disclosure of Information Obtained by Academics in Confidence"



# PRIVILEGE IN ACADEMIA: A CONSIDERATION OF THE POWER TO RESISTS DISCLOSURE OF INFORMATION OBTAINED BY ACADEMICS IN CONFIDENCE

by Suzanne B. McNicol \*

## INTRODUCTION

While the general subject of privilege is accorded detailed treatment in the standard text and periodical literature on evidence, the specific application of its general principles to particular classes of persons other than those upon whom are conferred recognized privileges (the clients of lawyers and patients of doctors, for example) has been largely ignored. The aim of the present article is to remedy that defect in the existing literature in relation to two classes of potential claimant; academic researchers and those who supply them with information.<sup>1</sup> The subject is an important one, for in the course of their research and professional work academics may receive information on a confidential basis, that is, on the basis that the information will not be disclosed to others, or else will not be disclosed except for certain purposes. That information may not infrequently be relevant to issues raised for determination in courts of law or administrative tribunals, or to inquiries by boards or commissions of inquiry.

Section 1 of this article will consider the powers of courts, tribunals and other administrative agencies to compel the giving and production of evidence. The sanctions for non-compliance with a subpoena issued by a court of law or administrative body will also be examined. Briefly stated, failure to comply with a subpoena requiring the attendance of witnesses,

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<sup>1</sup> There has, however, been a small amount of research in America on this topic, see for example, L A Day, 'In Search of a Scholar's Privilege' (1983) 5 *Communications and the Law* 3; J Graham Mathune, 'Forced Disclosure of Academic Research' (1984) 37 *Vanderbilt Law R* 585; P. Nejelski and L Miller Leiman, 'A Research-Subject Testimonial Privilege: What to do before the Subpoena arrives' [1971] *Wisc LR* 1085; R M O'Neill, 'Scientific Research and the First Amendment: An Academic Privilege' (1983) 16 *Univ Calif Davis LR* 837 and 'Protection from Discovery of Researchers Confidential Information' (1977) 9 *Connecticut LR* 326.

the production of documents and the answering of questions can be a criminal offence and/or punished as contempt of court.

There are, however, certain circumstances in which witnesses are excused from the duty to produce the evidence sought of them. If, for example, a witness can claim protection under the rules of privilege, then the witness can still refuse to answer questions (or produce certain documents) even though he or she is a compellable witness at law. Such circumstances will be examined in sections 2, 3 and 4. It will be seen in those sections that the privileges recognized at common law and conferred by statute are few in number and that unless the academic researcher can clearly satisfy the court that the evidence is protected by a privilege recognized by law, he or she will be forced to disclose all knowledge no matter how confidential that information may be.<sup>2</sup> The recent proposals of the Australian Law Reform Commission for reform of the relevant law will also be considered in section 2.

Finally, even when no privilege is available to a witness, a court (or other body having power to require the giving of evidence) may still have the power to restrict, in various ways, the use made of communications disclosed under compulsion of law. Such powers, such as the power to hear in camera, to allow production of evidence on a limited basis, not to insist on evidence being given or to grant protective orders are considered in detail in section 5.

# 1. OBLIGATION OF RESEARCHER TO DISCLOSE BY COMPULSION OF LAW.

## (a) Duty to disclose confidential information.

There is a normal obligation of a citizen to provide the judicial arm of the state with the information and documents which are required for the determination of litigation.<sup>3</sup> A witness is competent if the witness may lawfully be called to give evidence. Nowadays most people are competent witnesses.<sup>4</sup> A witness is compellable if the witness can lawfully be obliged to give evidence. The general rule is that all competent witnesses are compellable with very few exceptions.<sup>5</sup> In Australia it has been clear law since 1940 that very few categories of people are entitled to refuse to disclose to the courts information acquired in confidential circumstances.<sup>6</sup>

<sup>2</sup> P K Waight and C R Williams, *Cases and Materials on Evidence*, 2nd ed., Law Book Co., 1985, 64.

<sup>3</sup> D M Byrne and J D Heydon, *Cross on Evidence*, Butterworths, 3rd Aust ed., 1986, 612.

<sup>4</sup> *Ibid*, 308.

<sup>5</sup> *Ibid*.

<sup>6</sup> Exceptions in specialized circumstances have been made for spouses (eg *Crimes Act* 1958 (Vic) s 400, attorneys (eg legal professional privilege) jurors (eg *Jackson v Williamson*

The result of this is that journalists have been sentenced to gaol for failure to disclose their sources, many psychologists and social workers are said to keep dummy files, one for their own use and one for the courts and doctors have had their patients' notes subpoenaed in criminal and family law proceedings.<sup>7</sup>

## (b) Powers of Courts

By the process of subpoena a party may secure the attendance of a person before the court for the purpose of giving evidence or producing a document or of doing both those things.<sup>8</sup> Under the new *Rules of the Supreme Court of Victoria*<sup>9</sup>, in civil cases a subpoena is in the nature of an order of the court for attendance of the person to whom the subpoena is addressed. Essentially there are two kinds of subpoena - a subpoena to give evidence and a subpoena for production.<sup>10</sup> The first is an order in writing requiring the person to whom the order is addressed to attend as directed by the order for the purpose of giving evidence, and a subpoena for production is an order in writing requiring the person to whom the order is addressed to attend as directed by the order for the purpose of producing a document or thing for evidence.<sup>11</sup>

The difference between a subpoena to give evidence and a subpoena for production is significant in the area of privilege (which will be considered in detail below). A witness who is intending to rely on privilege must still respond to the court subpoena to give evidence and, being called and sworn, may then object to answer specific questions on grounds the sufficiency of which may be determined by the court.<sup>12</sup> If the recipient fails to respond to the subpoena to give evidence then that

(1788) 2 Term Rep 281, 100 ER 153, 13) and in some states, doctors and priests (eg *Evidence Act* 1958 (Vic) s 28).

<sup>7</sup> I Freckelton, 'Social Scientists in the Witness Box' [1986] *LJ* 1096, 1097. Note, however, the creation of a special statutory privilege for journalists in England, s 10 *Contempt of Court Act* 1981. See also *Secretary of State for Defence v. Guardian Newspapers* [1985] AC 339 and *In re an Inquiry under the Company Securities (Insider Dealing) Act* [1988] 1 All ER 203.

<sup>8</sup> N J Williams, *Supreme Court Civil Procedure Victoria*, Butterworths, 1987, 257 para 17.21.

<sup>9</sup> The *General Rules of Procedure in Civil Proceedings* 1986 by the Supreme Court (*Rules of Procedure Act* 1986 (Vic) have ratified, validated and approved Chap I of the Rules of the Supreme Court, see N J Williams, *ibid*, ix.

<sup>10</sup> N J Williams, *ibid*, 257. The subpoena to give evidence corresponds to the former *Subpoena ad testificandum* (duty to testify before a court or tribunal) and the subpoena for production corresponds to the former *subpoena duces tecum* (duty to produce documents to a court or tribunal) N J Williams, *ibid*, 258.

<sup>11</sup> Order 42.01, *ibid*, 258.

<sup>12</sup> *Scanlon v. Swan* [1984] 1 Qd R 21; *Price v McCabe* (1984) 55 ALR 319, 325; *Commissioner for Railways v Small* (1938) 38 SR (NSW) 564; *Rochfort v Trade Practices Commission* (1983) 153 CLR 134, 143.

person may be guilty of contempt of court or alternatively, the court may serve an order of attendance on the witness which may be enforced by committal if the person served does not obey or, further, the court may issue a warrant to apprehend the witness and bring her or him before the court.<sup>13</sup> On the other hand, a person who is required by subpoena to produce a document to the court is entitled to refuse to produce the document on the ground that the document is privileged. If the recipient does make such an objection to produce the documents, that person should state her or his grounds of objection on oath so that the court may determine the sufficiency of those grounds.<sup>14</sup>

Similarly, in criminal cases in Victoria, witnesses may be compelled to attend at a preliminary examination into an indictable offence (often described as 'committal proceedings') either by summons or warrant<sup>15</sup> and to give evidence on oath.<sup>16</sup> To ensure their presence to give evidence at the accused's trial, material witnesses may be bound over on a recognizance.<sup>17</sup> Witnesses not so bound over are subject to being called upon to give evidence at the trial on a notice signed by a crown prosecutor or the Director of Public Prosecutions, and failure to so attend is punishable by a fine.<sup>18</sup> Witnesses who refuse to be bound over to appear at the trial may be imprisoned to await the trial of the accused<sup>19</sup>, or arrested if they attempt to absent themselves.<sup>20</sup>

There are also various search and seizure powers under the *Crimes Act* 1958 in Victoria and other related Acts. For instance, the police are authorized to search with a warrant under a number of Australian State and Commonwealth Acts.<sup>21</sup> In general, in order to be valid, search warrants must identify the offence or offences in relation to which they are issued and must, with reasonable certainty and particularity, delimit the

<sup>13</sup> *R v Daye* [1980] 32 KB 333, Orders 40.12, 60.05, 66.10, *Evidence Act* 1958 (Vic) s 150. These three alternatives are all discussed in para 17.22, N J Williams, *op cit* 258.

<sup>14</sup> N J Williams, *ibid*, para 17.26, 259.

<sup>15</sup> *Magistrates' Courts Act* 1971 (Vic) s 22A(d). The following information in the text concerning the powers of courts in criminal cases is taken from R G Fox, *Victorian Criminal Procedure*, Monash Law Book Co-operative Ltd, 6th Edition, 1988, 65-66, 128-132.

<sup>16</sup> *Magistrates (Summary Proceedings) Act* 1975 (Vic) ss 53 and 54.

<sup>17</sup> Material witnesses may be bound over on a recognizance of \$200 each to give evidence at the accused's trial, *Magistrates (Summary Proceedings) Act* 1975 (Vic) s 63.

<sup>18</sup> *Ibid*, s 64.

<sup>19</sup> *Ibid*, s 66.

<sup>20</sup> *Ibid*, s 67. See also *Crimes Act* 1958 (Vic), s 415.

<sup>21</sup> For example, *Crimes Act* 1914 (Cwth) s 10 and 82; *Extradition Act* 1988 (Cwth) s 14 and 31; *Community Welfare Services Act* 1970 (Vic) s 81; *Crimes Act* 1958 (Vic) ss 465, 469A, 470; *Drugs Poisons and Controlled Substances Act* 1981 (Vic) s 81; *Liquor Control Act* 1968 (Vic) s 117; *Lotteries Gaming and Betting Act* 1966 (Vic) s 45; *Magistrates (Summary Proceedings) Act* 1975 (Vic) s 13. For a complete list of the legislation see R G Fox, *op cit* n 15, 65.

thing or class of things the search and seizure of which is authorized.<sup>22</sup> In any event, under s. 459A(1) of the *Crimes Act* 1958 (Vic), the police are authorized to enter and search any place without a warrant for the purpose of arresting persons who, on reasonable grounds, are believed to be there and to have committed a serious indictable offence or to have escaped from legal custody. Furthermore, a warrant to apprehend a person is broadly defined to authorize the breaking, entering and searching of the places specified in the warrant as ones in which the person named is suspected to be found.<sup>23</sup>

Police have no general common law power to seize goods solely for the purpose of preserving them as evidence in a prosecution which they intend to launch.<sup>24</sup> However, at common law, whenever police are authorized to arrest a person for an indictable offence, whether with or without a warrant, they may, at the time of the arrest and as an incident of it, seize all the material documents and articles found on the arrested person or under her or his control.<sup>25</sup> However, it will be seen below in section 3 that documents whose confidentiality would be protected in the courts by the doctrine of legal professional privilege cannot be seized under a search warrant unless the statute under which the warrant is issued expressly or by necessary implication excludes the doctrine.<sup>26</sup> For instance, in the case of s 10 *Crimes Act* 1914 (Cwth) it has recently been held by the Federal Court of Australia that s 10 must be construed as excluding from the 'things' it authorizes to be inspected or seized, documents whose confidentiality would be protected in the courts by legal professional privilege.<sup>27</sup> Finally, in some instances, legislation may also specifically allow legal practitioners to resist search and seizure under warrant where the relevant documents contain privileged communications.<sup>28</sup>

### (c) Powers of Tribunals and other Non-Curial Bodies

Most administrative and non-curial bodies such as royal commissions, tribunals and boards of inquiry<sup>29</sup> have statutory powers similar to those of

<sup>22</sup> *Arno v Forsyth* (1986) 65 ALR 125; *Trimboli v Onley* (1981) 37 ALR 38; *Trimboli v Onley* (No 2) (1981) 37 ALR 364.

<sup>23</sup> *Magistrates (Summary Proceedings) Act* 1975 (Vic) s 13 (1)(a).

<sup>24</sup> *Levine v O'Keefe* [1930] VLR 70. R G Fox, *op cit* n 15, 66.

<sup>25</sup> *Field v Sullivan* [1923] VLR 70.

<sup>26</sup> *Arno v Forsyth* (1986) 65 ALR 125; *Baker v Campbell* (1983) 49 ALR 385.

<sup>27</sup> *Arno v Forsyth*, *ibid*, (per Lockhart J).

<sup>28</sup> For instance, *Companies (Victoria) Code* 1981, s 16. R G Fox, *op cit* n 15, 66.

<sup>29</sup> In Victoria and New South Wales statutory provision has been made for the appointment, by executive act, of *ad hoc* bodies of inquiry having powers similar to royal commissions. In Victoria, these bodies are called boards of inquiry, see *Evidence Act* 1958 (Vic) ss 14-16 and in New South Wales special commissions of inquiry, see *Special Commissions of Inquiry Act* 1983 (NSW). E Campbell, *Contempt of Royal Commissions*, Contemporary Legal Issues No 3, Faculty of Law, Monash University, 1984, 5.

the courts to require the attendance of witnesses, the production of documents and the answering of questions. Where such a statutory power exists, it is invariably the case that failure or refusal to attend on summons, failure or refusal to produce documents and failure or refusal to answer are declared to be criminal offences. For instance, all Australian statutes on royal commissions confer the power on royal commissions to require the attendance of persons to give evidence and to produce documents.<sup>30</sup> Sanctions are imposed for disobedience to summonses and for failure or refusal to answer questions a witness is obliged to answer.<sup>31</sup> The Commonwealth, New South Wales, Queensland and Western Australian Acts also permit the chairman of a royal commission, on proof that a summons has been served, to issue a warrant for the arrest of a person who has been summoned to appear and has failed to attend at the appointed time and place, and the detention of that person in custody.<sup>32</sup>

Similarly, in proceedings before royal commissions a witness may refuse to produce documents or answer questions on the ground of privilege, unless the governing legislation has abrogated the relevant privilege, expressly or by necessary implication.<sup>33</sup> To avoid the risk of being prosecuted for refusing to answer a question which he or she cannot be compelled to answer (because, for example, of privilege) the witness should take objection at the hearing before the commission. Otherwise it may be too late.<sup>34</sup>

Finally, it should be noted that the Australian Law Reform Commission recommended in their Report on *Contempt* that the offence of prevarication or refusal to answer a question should be created in

<sup>30</sup> Cwth: *Royal Commissions Act* 1902, ss 2, 7A; NSW: *Royal Commission Act* 1923, ss 8, 10; Qld: *Commissions of Inquiry Acts* 1950 to 1954, ss 5, 7; SA: *Royal Commission Act* 1917-1982, ss 10(2)(3), 12; Tas: *Evidence Act* 1910 s 14; Vic: *Evidence Act* 1958 ss 14, 17, 20A; WA: *Royal Commissions Act* 1968 ss 9, 10; NSW: *Special Commissions of Inquiry Act* 1983, s 14. E Campbell *Ibid*, 11. Hereafter, notes referring to particular provisions in these Acts will be in short form, eg Cwth s 6.

<sup>31</sup> Cwth s 3; NSW ss 4, 19; Qld ss 7, 9; SA ss 11, 12(2); Tas s 16; Vic ss 16, 19; WA ss 13, 18; NSW *Special Commissions of Inquiry Act* 1983, ss 17, 24, 25 26. See also *Evidence Act* 1958 (Vic) s 16 re boards of inquiry, s 19 re commissions and s 20.

<sup>32</sup> Cwth s 6B; NSW s 16; Qld ss 3, 8; WA s 1. See also NSW *Special Commissions of Inquiry Act* 1983 ss 21 and 22. E Campbell *ibid*, 11-12.

<sup>33</sup> An example of very broad powers to require the giving of information where the privilege against self incrimination has been excluded is the legislation considered recently in *Attorney-General for the Northern Territory v. Maurice* (1986) 65 ALR 230 (FCA) and (1987) 61 ALJR 91 (HCA). Under the *Aboriginal Land Rights (NT) Act* 1976 (Cwth) s 54 the Land Commissioner has the power to compel 'any person whom he believes to be capable of giving information relating to a matter being inquired into by the Commissioner in carrying out his functions' to answer questions. Not even the privilege against self-incrimination applies, s 54(3).

<sup>34</sup> E Campbell, *op cit*, 34.

partial substitution for contempt in the face of the court. This new offence would apply in cases where there is no privilege exonerating the witness (who, for example, may be a journalist or academic researcher concerned to protect confidential sources) from the obligation to answer questions and where the presiding judge or magistrate insists upon an answer and where the answer is or may reasonably be expected to be of substantial importance for the proceedings in question.<sup>35</sup>

## 2. TESTAMENTARY PRIVILEGES: GENERAL

### (a) Nature of Privilege

There is no rule of law which allows a witness in court proceedings to refuse to give evidence or disclose information merely because the evidence was supplied to the witness in confidence. However, in certain circumstances a witness can claim privilege and this means that certain information which is otherwise relevant to the issues to be tried and which the witness would otherwise be under an obligation to disclose may be withheld from the court or administrative tribunal. A successful claim to privilege relieves the claimant of the obligation to answer *particular* questions or to produce *particular* documents to a court, tribunal or other person. It does not confer a right to refuse to attend before that tribunal and to give any evidence whatsoever.<sup>36</sup> A witness who therefore intends to rely on privilege must respond to the court subpoena and, being called and sworn, must object to answer specific questions on a ground of privilege which must be made apparent to the court.<sup>37</sup> However, it should also be noted that privilege is often claimed in interlocutory proceedings at the stage of discovery, that is, at the early stage of production of documents in a party's possession or in answering interrogatories, before the actual trial of a civil action.

There are certainly situations in which academic researchers particularly those involved in human sciences such as psychologists, criminologists and anthropologists, would be loath to produce all their field notes or research data for public examination. As Freckelton suggests<sup>38</sup>, social scientists such as anthropologists may have been particularly 'privileged' to receive certain information from their subject/informant or there may even have been strings of secrecy attached to it on whose condition it was imparted. There are three testamentary privileges which are potentially available to such academic researchers - legal professional privilege, medical professional privilege and the privilege against self-incrimination. All three heads of privilege are

<sup>35</sup> Australian Law Reform Commission, *Contempt: Disruption, Disobedience and Deliberate Interference* 1987.

<sup>36</sup> D M Byrne and J D Heydon, *Cross on Evidence*, *op cit*, 612.

<sup>37</sup> *Scanlon v Swan* [1984] 1 Qd R 21; *Price v McCabe* (1984) 55 ALR 319, 325.

<sup>38</sup> I Freckelton, 'The Anthropologist on Trial' (1985) 15 MULR 360, 383.

discussed in the next section although it is suggested that legal professional privilege is the only privilege likely to be successfully invoked by the academic researcher.

- (b) Absence of any special privilege based on confidential relationship of researcher and subject/informant.

It will be seen in section 3 below that there is a special legal professional privilege recognized by law which covers confidential communications between client and legal adviser in the course of obtaining advice. Such a professional privilege has never, however, been extended to other relationships, despite claims in the past for special common law protection to be given to confidential communications between friends<sup>39</sup>, between an accountant and his client<sup>40</sup>, between a newspaper proprietor or journalist and his source of information<sup>41</sup> and between a social scientist and Aboriginal communities.<sup>42</sup> It is clear then that no special privilege based on the confidential relationship of academic researcher and subject/informant has or will be recognized by the law. As Dixon J stated in *McGuinness v. Attorney-General of Victoria*, except for the restricted categories of relationships already established by statute<sup>43</sup> or the common law, an inflexible rule had been

established that no obligation of honour, no duties of non-disclosure arising from the nature of a pursuit or calling, could stand in the way of the imperative necessity of revealing the truth in the witness box.<sup>44</sup>

In a comprehensive study by the Australian Law Reform Commission in 1985<sup>45</sup> on the question whether professional privilege should be extended to other relationships such as doctor and patient, psychotherapist and client, cleric and communicant, social worker and client, newsmen and their sources, spousal communications etc, the conclusion was reached that no new special categories of privilege should be created.

<sup>39</sup> *Duchess of Kingston's Case* (1716) 20 State Trials 355.

<sup>40</sup> *Chantrey Martin & Co v Martin* [1953] 2 QB 286.

<sup>41</sup> *McGuinness v Attorney-General of Victoria* (1940) 63 CLR 73; *A G v Mulholland* [1963] 2 QB 477; *Andrews and Anor v John Fairfax and Sons Ltd* [1978] 2 NSWLR 300; *In re an Inquiry under the Company Securities (Insider Dealing) Act 1985* (HL) [1988] 1 All ER 203.

<sup>42</sup> *Attorney-General for the Northern Territory v Maurice* (FCA) (1986) 65 ALR 230; See I Preckelton, *op cit*, n 7, 1098.

<sup>43</sup> There is today in England a special statutory privilege protecting journalists from disclosing 'in court proceedings' their sources of information: s 10 *Contempt of Court Act* 1981 (UK). There is also a medical professional privilege created by statute in Victoria, Tasmania and the Northern Territory. See s 28(2) *Evidence Act* 1958 (Vic); s 96(2) *Evidence Act* 1910 (Tas); s 12(2) *Evidence Act* 1939 (NT).

<sup>44</sup> (1940) 63 CLR 73, 102-3.

<sup>45</sup> Law Reform Commission (Australia), *Evidence Report No 26* (Interim) 1985.

However, what the Commission did propose was that all claims to withhold confidential communications and records be dealt with as a matter of discretion.<sup>46</sup> The Commission stated that such an approach has the benefit of introducing greater flexibility in allowing the courts to assess the individual merits of each case and that the judicial discretion would be available 'to protect any communications and records of them made in circumstances where one of the parties is under an obligation (whether legal, ethical or moral) not to disclose them.'<sup>47</sup> Furthermore, the Commission believed it was preferable that the court concentrate on the quality and nature of the whole relationship rather than simply on the nature of the precise obligation to preserve the confidence.<sup>48</sup> This proposal for a judicial discretion to protect confidential communications generally, has, however, met with mixed reactions and in its 1987 Report on *Evidence* the Australian Law Reform Commission noted that many of those involved in the prosecution of offences were strongly opposed to any such proposal.<sup>49</sup>

Nevertheless the Commission used a similar approach in its report on *Aboriginal Customary Law* (1986)<sup>50</sup> where the more particular question whether a special privilege should be created in respect of confidential

<sup>46</sup> The Draft Bill included in *Evidence Report* (Interim) (1985) contains the following clause:-

Confidential communications and records

103(1) Where on the application of a person who is an interested person in relation to a confidential communication or a confidential record, the court finds that, if evidence of the communication or record were to be given in the proceeding, the likelihood of -

(a) harm to an interested person;

(b) harm to the relationship in the course of which the confidential communication was made or the confidential record prepared; or

(c) harm to relationships of the kind concerned, together with the extent of that harm, outweigh the desirability of admitting the evidence, the court may direct that the evidence not be given.

(2) For the purpose of sub-section (1), the matters that the court shall take into account include -

(a) The importance of the evidence in the proceeding;

(b) if the proceeding is a criminal proceeding - whether the evidence is adduced by the defendant or by the prosecutor;

(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceedings; and

(d) any means available to limit publication of the evidence *ibid* paras 909, 917-8, 923-4, 939-41, 947, 954-6.

<sup>47</sup> *Ibid* para 909.

<sup>48</sup> *Ibid*.

<sup>49</sup> Law Reform Commission (Australia) *Evidence Report No 38*, 1987 para 202, p 116.

<sup>50</sup> Law Reform Commission (Australia) *Report on the Recognition of Aboriginal Customary Laws* 1986.



communications between anthropologists and their clients/informants was dealt with. The Commission believed that the creation of such an absolute privilege protecting only anthropologist-informant relationships was inappropriate because other groups, such as linguists and community advisers, may also be entrusted with Aboriginal secrets and it would be unfair to leave such groups unprotected. The Commission was also satisfied that in the context of particular legal or administrative processes (eg land claim hearings) in which anthropologists play a role, reports or other material prepared by anthropologists for the purpose of preparing a claim would already be protected by legal professional privilege, even though it was conceded that the doctrine of waiver of privilege may also operate in this area.<sup>51</sup>

It appears that as a result of the recent Federal Court decision in *AG (NT) v Maurice* that moves have been made towards recognising the importance of confidentiality when Aboriginal customs and lifestyles are the subject of study by social scientists.<sup>52</sup> However, because the Federal Court declined to guarantee any special 'privileged' protection for the relationship between social scientist and Aboriginal communities, commentators such as Freckelton have concluded rather dismayfully:

In practice, this means that anthropologists and linguists doing post graduate research or assisting in land claim proceedings cannot be confident that their notes and recordings will not be subpoenaed at some later stage. This places them in the same uncertain position as other professionals such as doctors, ministers of religion, psychologists and journalists.<sup>53</sup>

It is suggested that for present purposes (that is, until such time as a general judicial discretion to protect confidential communications is introduced or, although unlikely, until a special privilege is created to protect confidential communications between an academic researcher and subject) that the advice of Professor Cross be adopted. Cross argued that the non-recognition by the law of privilege of other relationships (compared with the 'peculiar treatment by English law of the lawyer-client relationship') is not as unsatisfactory as it may seem at first. He stated that it is a mistake to suppose that the choice lies between a privilege of complete secrecy on the one hand, and on the other hand, compulsory disclosure without restriction.<sup>54</sup> On the contrary, it is possible and sometimes desirable that the claimant to the privilege should decline to produce documents or give evidence until ordered to do so by the court.<sup>55</sup>

<sup>51</sup> *Ibid* para 661.

<sup>52</sup> I Freckelton, *op cit* n 7, 1097-8.

<sup>53</sup> *Ibid* 1098.

<sup>54</sup> Sir R Cross, *Cross on Evidence*, Butterworths, London 5th ed, 1979, 294. See also R Cross and C Tapper, *Cross on Evidence*, Butterworths, London, 6th ed, 1985, 403.

<sup>55</sup> *Ibid*.

This refusal would be based not on the grounds that the claim is totally privileged but because when the court does order disclosure it may be on restricted terms, for example, on terms that no use will be made of the information disclosed outside the particular proceedings before the court. The court's power to impose restrictions will be examined below in section 5. It is recommended here by the present author that such procedure should be adopted by an academic researcher who has been entrusted with confidential information from his subject or informant and who is reluctant to reveal such information for public scrutiny.

### (c) Availability of Privileges in Non-curial Proceedings.

In Australia it has been decided that both legal professional privilege<sup>56</sup> and the privilege against self-incrimination<sup>57</sup> are not merely rules of evidence applicable in judicial or quasi-judicial proceedings, but are fundamental principles capable of applying in non-judicial proceedings. After some equivocation as to the status of the doctrine of legal professional privilege, the High Court in *Baker v Campbell*<sup>58</sup> decided, by a four to three majority, that the privilege is available not only in court proceedings but in proceedings before other bodies which have statutory power to require the giving of information. Furthermore the majority of the High Court held that documents covered by legal professional privilege could not be properly made the subject of a search warrant unless the statutory authority which issues the warrant specifically abrogates the privilege. This extension of the scope of the privilege in Australia<sup>59</sup> is to be strongly contrasted with the common law position in England, where legal professional privilege has been regarded as a mere rule of evidence, and applied only to prevent compulsory disclosure either by way of pre-trial discovery (that is, at the early stage of production of documents in a party's possession or in answering interrogatories before the actual trial of a civil action), or in the actual course of judicial or quasi-

<sup>56</sup> *Baker v Campbell* (1983) 57 ALJR 749 overruling *O'Reilly v The Commissioners of the State Bank of Victoria* (1982) 57 ALJR 130.

<sup>57</sup> *Sorby and Another v The Commonwealth of Australia and Others* (1983) 57 ALJR 248 and *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 57 ALJR 236. Such extension will also apply to public interest immunity, see *Bercove v Hermes (No 3)* (1983) 51 ALR 109, 115-6. It is not entirely clear, however, whether such extension will also apply in the case of medical professional privilege (in those jurisdictions where such a privilege in a limited form has been held to exist eg *Evidence Act (Vic) s 28*).

<sup>58</sup> (1983) 57 ALJR 749; 49 ALR 385.

<sup>59</sup> Some of the practical difficulties that can arise once the broad view of legal professional privilege from *Baker v Campbell* is accepted are exhibited in recent cases. See, eg *Brewer v Castles (No 3)* (1984) 52 ALR 582; *Arno v Forsyth* (1986) 65 ALR 125 and the article by A J Sing, 'Search Warrants and Legal Professional Privilege' (1986) 10 Crim LJ 32. It appears from the decision in *Arno v Forsyth, ibid*, that in certain cases the question of privilege should be raised at the early stage of issue of the warrant rather than at the later stage of execution.

judicial proceedings.<sup>60</sup> The English common law position has, however, recently been altered as a result of the enactment of the *Police and Criminal Evidence Act 1984* (U.K.).<sup>61</sup>

(d) Waiver of Privilege

Privilege is personal in that it attaches to a particular person or class of persons. The person entitled to the protection of the privilege can waive the privilege by disclosing the material the subject of the privilege to the other side or to the court. The privilege may be waived expressly or impliedly, deliberately or inadvertently.<sup>62</sup> The consequence of waiver is that the person becomes subject to the normal requirements of disclosure of the communication.<sup>63</sup>

It is important to stress the fact that privilege is personal - for example, where legal professional privilege applies, the privilege will attach to the client. The particular privilege-holder may be a witness in proceedings in which case he or she may waive the privilege automatically, by disclosing the privileged material to the other side or to the court. On the other hand, the privilege-holder may be a third party, who is not giving evidence in the proceedings, in which case the witness *must* refuse to answer questions or produce documents unless the third party has consented to the waiver of the privilege. In the specific context of the academic researcher who is called as a witness at trial or required under subpoena to produce documents to the court, it is submitted that the position would be as follows. If the documents were protected by legal professional privilege and the academic is regarded as an agent of the supplier of the information, then it is arguable that the academic, as the *alter ego* of the supplier, could waive the privilege.<sup>64</sup> This position is not, however, firmly established and there are some who would argue<sup>65</sup> that even in this situation an intermediary who is the agent of the supplier cannot properly waive the privilege. If, however, the documents were privileged and the

<sup>60</sup> Diplock LJ in *Parry-Jones v Law Society* [1969] 1 Ch 1, 9, [1968] 1 All ER 177, 180.

<sup>61</sup> Since the enactment of the *Police and Criminal Evidence Act 1984* (U.K.), the privilege now appears to have a much broader application in England as the Act expressly excepts 'items subject to legal privilege' from material which can be seized with or without a warrant. The combined effects of ss 8-10, 18, 19 and 78 of the English Act have arguably rendered nugatory some of the more drastic effects of the decision in *Parry-Jones*. See also T R S Allan, 'Legal Privilege and the Principle of Fairness in the Criminal Trial', [1987] Crim LR 449 at 452.

<sup>62</sup> D M Byrne and J D Heydon, *op cit*, 614.

<sup>63</sup> *Ibid.*

<sup>64</sup> Refer section 3(a) below - this is discussed as the first method by which legal professional privilege is likely to be available to academics.

<sup>65</sup> See, for example, Woodward J in *Attorney-General (NT) v Maurice* (FCA) (1986) 65 ALR 230, 235.

academic is regarded as a third party then the academic cannot waive the privilege without the consent of the client.

### Partial Disclosure

Where a document deals with a single subject-matter, it has been held that it would be unfair to allow the party entitled to the privilege to disclose part of the document and claim privilege as to the remainder.<sup>66</sup> The reasoning behind the rule against partial disclosure is explained by Professor Wigmore:

... when [a privileged person's] conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or disclose, but after a certain point his election must remain final.<sup>67</sup>

### Waiver of Associated Material

In the decision of *General Accident Corporation Ltd v Tanter*<sup>68</sup>, Hobhouse J affirmed the doctrine of waiver of related or associated material and also restricted its scope. This doctrine, which is sometimes referred to as waiver by implication or associative waiver, states that documents mentioned in or connected with a document for which privilege has been waived themselves become liable to disclosure.<sup>69</sup> Hobhouse J in *Tanter's* case attempted to limit the doctrine of waiver of associated material by stating that the doctrine only applies when the document for which privilege has been waived has been adduced in evidence at the trial. In such a situation, only the 'deploying in court' of evidence which would otherwise be privileged has the effect of also waiving the privilege attaching to any document related to the topics dealt with in the disclosed document.

This distinction, which has been heavily criticized by Phipson<sup>70</sup>, again came up for close scrutiny in the recent High Court decision of *A G (NT) v Maurice*.<sup>71</sup> In the course of the hearing of the Warumungu Land Claim

<sup>66</sup> *Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 529 approved in *Attorney General (NT) v Maurice* (HCA) (1987) 61 ALJR 92, 94.

<sup>67</sup> *Wigmore on Evidence*, McNaughton rev, vol VIII, para 2327.

<sup>68</sup> [1984] 1 WLR 100; 1 All ER 35.

<sup>69</sup> *Phipson on Evidence*, 13th edn 1st suppl (1984) para 15-20, quoted by Dawson J in *Maurice* (HCA) (1987) 61 ALJR 92, 101.

<sup>70</sup> *Phipson on Evidence*, 13th edn 1st suppl (1984) para 15-20, quoted by Dawson J in *Maurice* (FCA) (1987) 6 ALJR 92, 101. FCA (1986) 65 ALR 230, 242.

<sup>71</sup> (1987) 61 ALJR 92.



before the then Aboriginal Land Commissioner, Justice Kearney, the Central Land Council sought to tender a document entitled the 1982 Claim Book. The Claim Book had been prepared by several anthropologists and linguists (who had been employed to assist the Aboriginal claimants' lawyers to prepare and present the land claim) and copies of the Claim Book were distributed to those participating in the land claim hearing, including the lawyers representing other parties. Objection was taken to the tendering of the Claim Book but Kearney J never formally ruled on the question whether the tender was accepted or rejected. The hearing before Kearney J was eventually adjourned and in 1985 the hearing resumed *de novo* before Maurice J. The claimants at this resumed hearing did not rely on the 1982 Claim Book (which was neither filed nor tendered) but instead filed a document described as a 'guide book', which was a shorter version of the 1982 Claim Book. The Attorney-General sought disclosure of some of the documents that provided source material for the 1982 Claim Book. Maurice J held that the claimants had waived any legal professional privilege attaching to the 1982 Claim Book itself, when they filed, exchanged and tendered it in the first proceedings before Kearney J. However, Maurice J also held that that waiver did not extend to the background and source materials (such as the field notes and working reports of anthropologists and linguists) on which the Claim Book had been based. The Full Court of the Federal Court affirmed the decision of Maurice J that production and distribution of the 1982 Claim Book did not effect an associative waiver of legal professional privilege attaching to the background and source material. The Attorney-General for the Northern Territory then appealed to the High Court on the specific question of whether there had been an associative waiver of the source materials. The High Court dismissed the appeals and held that the Aboriginal claimants had no intention to waive, and had not waived privilege in the source materials and that no such waiver could be implied.

In dismissing the appeals of the Attorney-General (NT), all five justices of the High Court tended towards a fairness test in rejecting the application of associative waiver. Indeed, Gibbs CJ<sup>72</sup> stated that the same fairness test which is used for partial disclosure (as set out by Wigmore above) must be used in deciding whether associative waiver applies.<sup>72</sup> In applying that test, His Honour held that it was not unfair or misleading, nor would it otherwise prejudice or embarrass the appellant in the conduct of the case, to lodge the Claim Book with the Land Commissioner and to disclose it to the other parties without also disclosing the source materials from which it was derived.<sup>73</sup> Although Gibbs CJ did not go so far as to reject Hobhouse J's test in *Tanter's* case, His Honour stated that such an inflexible test is not decisive.<sup>74</sup>

<sup>72</sup> *Ibid*, 94.

<sup>73</sup> *Ibid*, 95.

<sup>74</sup> *Ibid*, 94.

In a similar fashion, Mason and Brennan JJ also considered it to be relevant but not conclusive that the Claim Book had 'never found its way into evidence'.<sup>75</sup> On the contrary, it is clear that their Honours based their decision not to impute a waiver of the source materials on the fact that there had been no unfairness or prejudice to the appellants in the distribution of the Claim Book. Deane J also adopted a fairness test although it is arguable that part of his judgment came quite close to applying Hobhouse J's test.<sup>76</sup> Finally, Dawson J approved, in *obiter dicta*, a fairness criterion to be applied in cases of potential associative waiver although His Honour held that there was no basis for the application of the doctrine of associative waiver on the immediate facts because there had been no waiver of privilege in respect of a privileged communication in the first place.<sup>77</sup>

### 3. TESTAMENTARY PRIVILEGES: SPECIFIC PRIVILEGES WHICH MAY BE AVAILABLE TO ACADEMICS.

#### (a) Legal Professional Privilege

It is a substantive general principle of the common law and not a mere rule of evidence that, subject to defined qualifications and exceptions, a person is entitled to preserve the confidentiality of confidential statements and other materials which have been made or brought into existence for the sole purpose of his or her seeking or being furnished with legal advice by a practising lawyer or for the sole purpose of preparing for existing or contemplated judicial or quasi-judicial proceedings.<sup>78</sup> This rule is most commonly applied to communications between a client and her or his legal adviser. In this context it is important to note that such communications also include communications between the legal adviser and an agent of the client. However, legal professional privilege is not confined to communications between a client (or his agents) and his legal adviser. It can also cover -

- (a) communications between a lawyer and third parties if made for the purpose of actual or contemplated litigation; and
- (b) communications between a client (or her or his agents) and third parties if made for the purpose of obtaining information for the client's lawyer in order to obtain advice on actual or contemplated litigation.<sup>79</sup>

<sup>75</sup> *Ibid*, 97.

<sup>76</sup> *Ibid*, 98.

<sup>77</sup> *Ibid*, 101.

<sup>78</sup> *Ibid*, 97 (per Deane J).

<sup>79</sup> For evidence that the two heads of privilege (ie Lawyer-Client Communications and Third Party Communications) should be treated separately, see *Kennedy v Lyell* (1883) 23 Ch D 387 at 404 (Cotton LJ); *Anderson v Bank of British Columbia* (1876) 2 Ch D 644 at

It has been seen above that, by statute and common law, certain confidential relationships are privileged but that there is no recognized privilege based on the confidential relationship of researcher/academic and subject/informant. However, there are two possible methods by which legal professional privilege may be available to academics when they appear as witnesses and are asked to divulge information conveyed to them in confidence. First, the academic could be regarded as an agent either of the client or of the solicitor. This is, in fact, the manner in which Woodward J in *A-G (NT) v Maurice*<sup>80</sup> treated the anthropologist Mr Reyburn in that case. The advantage of treating the academic as an agent of the client (or, for that matter, as an agent of the solicitor) is that legal professional privilege will then attach to any communications made solely for the purpose of enabling or obtaining legal advice or for the purpose of obtaining information necessary for actual or contemplated litigation. As Woodward J stated in *A-G (NT) v Maurice*:

- (1) legal professional privilege attaches to communications for purposes of litigation or advice passing from a client to his solicitor through an intermediary who is the agent of one or other of them (in this case an anthropologist);
- (2) the privilege is that of the client and neither the solicitor nor the intermediary can properly waive the privilege, or be compelled to answer questions about the communications, or produce documents dealing with them, without the consent of the client;
- (3) the powers and duties of the solicitor and the agent are not affected by the termination of the solicitor - client relationship or the agency;
- (4) since the agent could not be compelled to answer questions about things he learnt while carrying out his agency role, he cannot be compelled to produce notes which he later made, for his own purposes, about those matters ... In my view the position of Mr. Reyburn, as a former agent of the solicitor or the claimants, is no different from that of a solicitor or former solicitor of the claimants.<sup>81</sup>

It can be seen from the above that this method of treating the academic as an agent of either the client or the legal adviser would enable the privilege to operate widely. In fact, it would be possible for the

656 (James LJ), 658 (Mellish LJ) *Southwark and Vauxhall Water Co v Quick* (1878) 3 QBD 315 at 320 (Brett LJ); *Aydin v Australian Iron and Steel Pty Ltd* [1984] 3 NSWLR 684 at 689 (Hodgson J); *Waterford v The Commonwealth* (1987) 61 ALJR 350 at 360 (Deane J).

<sup>80</sup> (1986) 65 ALR 230, 235.

<sup>81</sup> *Ibid.*

privilege to attach to communications between an academic and informant if made for the purpose of seeking or being furnished with legal advice even where no litigation is pending or contemplated. It seems further that communications of this class are not confined to communications between a lawyer and an agent of the client but also extend to reports to the client from his agent.<sup>82</sup> Hence a report or manuscript prepared by an academic acting as an agent of the client and which is submitted to the client for the purpose of seeking legal advice will attract privilege.

The second method by which legal professional privilege may be available to academics is where the academic is treated as a third party and the communication is made in contemplation of existing or anticipated litigation.<sup>83</sup> Third parties are persons who are not the agents of the client or the solicitor.<sup>84</sup> In the case of *Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd*<sup>85</sup> Wood J confirmed that legal professional privilege protects communications between third parties and the lawyer or the client. The privilege will extend to documents and reports prepared by third parties but only when they are prepared for or in contemplation of litigation or for the purpose of giving advice or obtaining evidence with reference to such litigation. Wood J also explained clearly the distinction between documents or communications from third parties acting as agents of the client seeking advice, and from third parties not acting as agents.<sup>86</sup>

#### SOLE PURPOSE TEST IN AUSTRALIA

In Australia, legal professional privilege is confined to communications or documents which are brought into existence for the sole purpose of their being submitted to legal advisers for advice or for use in legal proceedings. A document which would in any event have been brought into existence for another purpose is not privileged from production on that ground. In the case of *Grant v Downs*<sup>87</sup> the High Court rejected a

<sup>82</sup> *Wheeler v Le Marchant* (1881) 17 Ch D 675; *Grant v Downs* (1976) 135 CLR 674 - see D M Byrne and J D Heydon, *op cit*, 638.

<sup>83</sup> *Wheeler v Le Marchant*, *ibid*, *Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd* (1985) 3 NSWLR 44. Note that litigation must either have commenced or have been contemplated by the client. It is not sufficient that there was some mere vague apprehension of litigation: *Lawrenson v Wellington City Corporation* [1927] NZLR 510 at 511; *Warner v The Women's Hospital* [1954] VLR 410; *Zammitt v Lazenby & Anor* (1986) Tas SC (unrep'd).

<sup>84</sup> D M Byrne and J D Heydon, *op cit*, 638.

<sup>85</sup> (1985) 3 NSWLR 44.

<sup>86</sup> *Ibid*, 53-4.

<sup>87</sup> (1976) 135 CLR 674. The majority's 'sole purpose' test of *Grant v Downs* has been referred to and applied in many subsequent Australian cases, often resulting in the rejection of a claim to legal professional privilege. See eg *Electrona Carbide Industries Pty Ltd v Tasmanian Government Insurance Office* (1982) Tas R 21; *Wade v Jackson's*

claim to privilege made with respect to certain reports made by hospital employees of the Department of Public Health following the death of a patient in a Psychiatric Centre. A majority of the High Court (Stephen, Mason and Murphy JJ) held that only those documents which are brought into existence for the sole purpose of submission to legal advisers or for use in legal proceedings are entitled to privilege. This means that if a document is brought into existence for a plurality of purposes then it will not be privileged. In the case of *Grant v Downs* an affidavit was sworn to the effect that the documents prepared by certain employees of the Department of Public Health were brought into existence for a number of purposes and hence the documents could not attract privilege. Barwick CJ, on the other hand, preferred a more liberal 'dominant purpose' test but even when His Honour applied this test to the facts of the case, he was unable to conclude that the dominant purpose of producing the report was to obtain advice or to aid the conduct of litigation then in reasonable contemplation.<sup>88</sup> Jacobs J, who, along with Stephen, Mason and Murphy JJ preferred to narrow the scope of the privilege, simply stated,

I think that the question which the court should pose to itself is this - does the purpose of supplying the material to the legal adviser account for the existence of the material?<sup>89</sup>

It is arguable that the introduction of the 'sole purpose' test in Australia has both narrowed the ambit of the privilege and has caused difficulty in application in some cases.<sup>90</sup> When it is also considered that the relevant purpose is that for which the documents were brought into existence and not that for which they were delivered to the legal adviser<sup>91</sup> then it becomes even more apparent that the privilege may be limited in scope. Gibbs CJ recently demonstrated the narrowing effect of the 'sole purpose' test when His Honour pointed out, in *obiter dicta* that the '1982 Claim Book' in the *Maurice* decision was never privileged in the first

*Transport Services Pty Ltd* [1979] Tas R 215; *Commonwealth v Frost* (1982) 41 ALR 626; *Packer v Deputy Commissioner of Taxation (Qld)* (1984) 55 ALR 242; *Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd* (1985) 3 NSWLR 44; *Cahill & Anor, ex parte McGregor* (1985) 61 ACTR 7; *Attorney-General (NT) v Maurice* (1987) 61 ALJR 92; *Handley v Baddock* (1987) WAR 98; *Waterford v The Commonwealth* (1987) 61 ALJR 350.

<sup>88</sup> *Ibid*, 677-8. Note that Barwick CJ's test has been adopted in England: *Waugh v British Railways Board* [1980] AC 521; *Guinness Peat Properties Ltd v Fitzroy Robinson* [1987] 2 All ER 716; *Re Highgrade Traders Ltd* [1984] BCLC 151.

<sup>89</sup> This test of Jacobs J was also used by Woodward J in *A G (NT) v Maurice* (1986) 65 ALR 230, 236.

<sup>90</sup> D M Byrne and J D Heydon, *op cit*, 640-1 list three situations where difficulty may arise - where the document is brought into existence by a company, where it is brought into existence as part of a routine procedure and in the case of third party communications.

<sup>91</sup> *National Employers Mutual General Insurance Association Ltd v Waind* (1979) 24 ALR 86, 141 CLR 648, 654; *R v King* [1983] 1 All ER 929; *R v Justice of the Peace for Peterborough; Ex parte Hicks* [1978] 1 All ER 225. Note however Woodward J's attempt to limit the effect of *Waind's* case in *Maurice* (FCA) (1986) 65 ALR 230, 235.

place.<sup>92</sup> However, in the present author's opinion, the difficulties in gleaning a purpose (for example where the document is a routine or corporate document) will arise whether the test be a 'dominant' or 'sole' purpose test.<sup>93</sup>

#### OTHER RESTRICTIONS ON THE PRIVILEGE

For legal professional privilege to apply there must be in existence an identifiable legal adviser on the one hand and a client who is the holder of the privilege on the other. The relationship of lawyer-client must be in existence or at the very least contemplated.<sup>94</sup> It is not sufficient that the documents merely pass through the hands of solicitors or are handed to solicitors for safekeeping.<sup>95</sup> Legal professional privilege will apply to protect confidential, professional communications made for the purposes of litigation or advice which are fairly referable to the relationship of lawyer-client.<sup>96</sup> Communications made before the client contemplated obtaining legal advice on the matter in question are not privileged.<sup>97</sup> Recent judicial statements have also indicated that the legal adviser must be both competent and independent<sup>98</sup> although the precise extent to which

<sup>92</sup> (1986) 61 ALJR 92, 93. See also Dawson *J ibid*, 100 who, agreeing with Gibbs CJ on this point, stated: 'it (the 1982 Claim Book) is not in any sense a confidential communication nor is it intended to be. In those circumstances I am unable to see how it is a document to which legal professional privilege attaches'.

<sup>93</sup> The difficulty, for example, which faced Hodgson J in *Aydin v Australian Iron and Steel Pty Ltd* [1984] 3 NSWLR 684 because the document was a routine document created by a company was not attributable to the High Court's adoption of a 'sole purpose' test. Even in the English cases where the 'dominant purpose' test applies, the difficulties in gleaning a corporate purpose or in gleaning the purpose for creating a routine document still arise. The only difference it seems is that in the English cases the purpose which is ultimately discovered is more likely to be held a privileged one than in the Australian cases. See also *Registrar of the Worker's Compensation Commission of New South Wales v F A I Insurance Ltd* [1983] 3 NSWLR 362; *Young v Quin* (1984) 5 ALR 168; *Waterford v The Commonwealth* (1987) 61 ALJR 350 at 362 and 365 (Deane J).

<sup>94</sup> *Minter v Priest* [1930] AC 558 at 568.

<sup>95</sup> *Cheng Kui v Quinn* (1986) 67 ALR 231 at 234 (Fox J); A F Smith, 'Erosion of the Doctrine of Privilege' (1982) 56 LJ 461 at 464.

<sup>96</sup> 'In order to attract that privilege [viz legal professional privilege], the communications must be confidential and the legal adviser must be acting in his professional capacity': Dawson J in *Waterford v The Commonwealth* (1987) 61 ALJR 350 at 366 citing *Minet v Morgan* (1873) 8 Ch App 361; *Wheeler v Le Marchant* (1881) Ch D 675; *Smith v Daniel* (1874) LR 18 Eq 649; *Bullivant v Attorney-General of Victoria* [1901] AC 196; *Jones v Great Central Railway Company* [1910] AC 4; *O'Rourke v Darbishire* [1920] AC 581.

<sup>97</sup> D M Byrne and J D Heydon, *op cit*, 642.

<sup>98</sup> 'If the purpose of 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 he gives or the fairness of his conduct of

the legal adviser must be independent of his client and not his employee for communications between them to be privileged has recently been seriously questioned by the High Court in *Waterford v The Commonwealth*.<sup>99</sup>

#### (b) Medical Professional Privilege

In several jurisdictions and in certain very limited situations, an academic researcher who is compelled to produce documents or to testify in court may object to such production and may refuse to answer specific questions by claiming medical professional privilege. At common law there is no such privilege as would protect a patient's confidential communications to her or his doctor.<sup>100</sup> However, in Victoria, Tasmania<sup>101</sup> and the Northern Territory<sup>102</sup> a statutory privilege is created arising out of the doctor-patient relationship. In Victoria, s 28(2) *Evidence Act* 1958 states:

28(2) No physician or surgeon shall without the consent of his patient divulge in any civil suit action or proceeding any information which he has acquired in attending the patient and which was necessary to enable him to prescribe or act for the patient.

The privilege is conferred on the patient and of course can be waived only by her or his consent, express or implied.

Apart from the obvious limitation that this statutory privilege does not apply in criminal proceedings, there are several phrases in s 28(2), such as 'physician or surgeon', 'information acquired' and 'attending the patient'

litigation on behalf of his client': Brennan J in *Waterford v The Commonwealth* (1987) 61 ALJR 350 at 355.

<sup>99</sup> (1987) 61 ALJR 350.

<sup>100</sup> *Duchess of Kingston's Trial* (1776) 11 St Tr 198, 143; *Wilston v Rastall* (1792) 4 Term Rep 753, 759-60; *Falmouth v Moss* (1822) 11 Price 455, 470-1; *Broad v Pitt* (1828) 3 Car + P 578, 579; *Greenough v Gaskell* (1833) 1 My and K 98, 103; *Greenlaw v King* (1838) 1 Beav 137, 145; *Russell v Jackson* (1851) 9 Hare 387, 391; *Wheeler v Le Marchant* (1881) 17 Ch D 675, 681; *R v Gibbons* (1823) 1 C + P 97; *Garner v Garner* (1920) 36 TLR 196, 197; *Nuttall v Nuttall and Tynman* (1964) 108 Sol J 605 (re a psychiatrist) and *Parry-Jones v The Law Society* [1969] 1 Ch 1, 9. Despite the lack of a common law privilege, the courts, particularly the United Kingdom courts, have disapproved of the volunteering of medical evidence of a confidential nature and have not always compelled a witness to attend court and testify in breach of confidence: *Seyfang v G D Searle & Co* [1973] QB 148; *McAuliffe v McAuliffe* (1973) 4 ACTR 9, 10-11; *Hunger v Mann* [1974] QB 767. See The Law Reform Commission (Australia), *Evidence*, op cit n 45, Vol 2, 248.

<sup>101</sup> *Evidence Act* 1910 (Tas) s 96(2).

<sup>102</sup> *Evidence Act* 1939 (NT) s 12(2).

which, upon interpretation, also tend to have a limiting effect on the scope of the privilege.

The first limitation in the context of academic research is that the researcher would have to be a 'physician or surgeon' for the statutory privilege to apply. This is, however, subject to Norris J's opinion in *Hare v Riley*<sup>103</sup> that the privilege extends to communications made to persons performing paramedical services. The second limitation is the use of the phrase 'information acquired'. This was originally interpreted to mean only statements made by patients.<sup>104</sup> However, it is now recognised as including all knowledge, howsoever acquired, whether from medical examination or from statements by the patient.<sup>105</sup> It also covers verbal confidences communicated to the physician by other medical practitioners or by persons providing paramedical services for the treatment of the patient.<sup>106</sup>

The third and most serious limitation on the application of the statutory privilege is the requirement that the doctor must be 'attending the patient' when he or she acquires the information. In *National Mutual Life Association of Australasia Ltd v Godrich*<sup>107</sup> Griffith CJ stated that the phrase 'attending the patient' suggests 'a period co-extensive with the continuance of the relation of personal confidence which may be assumed to exist between the physician and the patient' and that a person is not constituted a patient within the meaning of the section just because a physician or surgeon prescribes or operates on him.<sup>108</sup> This is to be compared with O'Connor J who, in the same case, decided that 'attendance' should not be interpreted as requiring a relation of personal confidence.<sup>109</sup> At the very least, however, the information or communication must take place at a time when there exists a relationship of doctor and patient, and thus no privilege is created, for example, by a compulsory medical examination.<sup>110</sup>

It is submitted that even if a broad interpretation of the phrase 'attending the patient' is taken, it is unlikely that an academic researcher, even one engaged in human science research, will be treated as one who is 'attending the patient' whilst he is conducting his research and liaising with his informant/patient.

<sup>103</sup> [1974] VR 577, 582.

<sup>104</sup> *Warnecke v The Equitable Life Assurance Society of the United States* [1906] VLR 482 (A'Beckett ACJ).

<sup>105</sup> *National Mutual Life Association of Australasia Ltd v Godrich* (1910) 10 CLR 1, 3-4, 9. *Warnecke v The Equitable Life Assurance Society of the United States*, *ibid*, 486; *Hare v Riley & A M P Society* [1974] VR 577, 582.

<sup>106</sup> *Hare v Riley & A M P Society*, *ibid*, 582 (Norris J).

<sup>107</sup> (1910) 10 CLR 1.

<sup>108</sup> *Ibid*, 10.

<sup>109</sup> *Ibid*, 28.

<sup>110</sup> *X v Y (No 1)* [1954] VLR 708; *Johnston v Commonwealth* [1974] VR 638.



## (c) Privilege Against Self-Incrimination

The only remaining privilege which should be briefly mentioned in this article is the privilege against self-incrimination.<sup>111</sup> It is, however, suggested that it is unlikely that the privilege against self-incrimination will be available to academic researchers who appear as witnesses or are asked to divulge information conveyed to them in confidence. This is because the privilege can only be invoked whenever a person is compelled by law to answer any question or produce any document and the supplying of such answer or document would tend to expose *that person* to the risk of a criminal conviction, the imposition of a penalty or to establish the forfeiture of an estate.<sup>112</sup> It is difficult, therefore to envisage a situation where an academic researcher who has merely *received* or *obtained* information from another in confidence will expose himself or herself to criminal punishment or a penalty if he or she reveals that information. As Gibbs CJ, Mason and Dawson JJ recently stated: 'the privilege is not a privilege against incrimination; it is a privilege against self-incrimination'.<sup>113</sup>

## 4. PUBLIC INTEREST IMMUNITY

It is possible that on some occasions information supplied to academics may be protected from compulsory disclosure in court proceedings, or in proceedings before other bodies having the power to coerce the giving of evidence, through the application of the doctrine of public interest immunity. The governing legal principle is that otherwise relevant evidence must be excluded if its disclosure would be injurious to the public interest. This doctrine operates differently from the other rules of privilege considered in this article. In the case of public interest immunity the court is obliged in each individual case to balance competing public interests. As Gibbs ACJ said in *Sankey v Whitlam*,

... the public interest has two aspects which may conflict... There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the

<sup>111</sup> This privilege is a right inherent in the common law and it is expressly preserved in the Evidence Acts of all the States (and Territories) of Australia except South Australia. ACT: Evidence Ordinance 1971 s 57; NSW: Evidence Act 1898 s 9; NT: Evidence Act 1939 s 10; Qld: Evidence Act 1977-1984 s 10; Vic: Evidence Act 1958 ss 26 and 29; WA: Evidence Act 1906-1982 ss 11 and 24; Tas: Evidence Act 1910 ss 87 and 101.

<sup>112</sup> *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 45 ALR 609; 57 ALJR 236; *Sorby v The Commonwealth of Australia* (1983) 46 ALR 237; 57 ALJR 248. Emphasis added.

<sup>113</sup> In *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 59 ALJR 254, 257.

administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done.<sup>114</sup>

Thus, in each individual case the court is called upon to determine whether the public interest is better served by disclosure or non-disclosure and a determination of that kind *does* require the courts to actively engage in a balancing exercise.<sup>115</sup> In contrast, in the case of privileges such as legal professional privilege the issue of where the public interest lies has been 'pre-determined as a matter of law'<sup>116</sup> and has 'hitherto been concluded in favour of confidentiality'.<sup>117</sup> This difference in operation of the doctrine which requires in effect the court to reopen the question of public interest from case to case makes it more difficult to state with precision the limits of the doctrine and renders it even more difficult to state with certainty the rationale of the doctrine which may also appear to vary from case to case.

## CLASS CLAIMS AND CONTENTS CLAIMS

An objection may be made to the production of a document on the ground that it would be injurious to the public interest to disclose its 'contents', or because it belongs to a 'class' of documents which in the public interest ought not to be produced, irrespective of whether it would be injurious to the public interest to disclose the contents of the particular document.<sup>118</sup> The 'class' claim<sup>119</sup> is based on the fact that the documents in question belong to an identifiable class of documents, common examples of which are Cabinet papers, minutes of discussion between heads of department, diplomatic despatches and documents relating to the framing of government policy at a high level<sup>120</sup>, whereas the 'contents'

<sup>114</sup> (1978) 142 CLR 1, 38.

<sup>115</sup> *A-G (NT) v Kearney* (1985) 61 ALR 55 at 77 (Dawson J).

<sup>116</sup> *Ibid.*

<sup>117</sup> *Waterford v The Commonwealth* (1987) 61 ALR 350 at 368 (Dawson J). Note that McMullin J also stated in relation to legal professional privilege in *R v Uljee* [1982] 1 NZLR 561 at 576, 'It is not now a question of weighing the public interest in each case to see whether the rule should be applied. Whether the principle operates as a bar to the emergence of the truth and to the overall public detriment is not now a relevant legal consideration'.

<sup>118</sup> *Sankey v Whitlam* (1978) 142 CLR 1, 39 (Gibbs ACJ).

<sup>119</sup> Note that with a class claim the burden of securing the exclusion of documents is a heavy one and the court will examine such a claim with great care: *Rogers v Home Secretary* [1973] AC 388 at 400; *Sankey v Whitlam* (1978) 53 ALJR 11 at 31; *R v Robertson*; *ex parte McAulay* [1983] 21 NTR 11.

<sup>120</sup> Less familiar examples are those based on the character of the source of the information eg police informers etc.: *Cain v Glass (No 2)* [1958] 3 NSWLR 230; *Blayney v Barrow and Stobart* (1987) Vic Sup Ct (unrep'd); *Neilson v Laugharne* [1981] QB 736; *Hehir v Commissioner of Police of the Metropolis* [1982] 2 All ER 335; *Tipene v Apperley*

claim is based purely on the fact that a particular document or documents should be immune from production because sensitive material which is damaging to the interests of state is contained therein.

#### DETERMINING THE VALIDITY OF THE CLAIM

An objection in a proceeding that the disclosure of information relevant to the questions in dispute would injure the public interest may be taken by a party, by the Crown or by the court itself.<sup>121</sup> Where the public interest objection is made by the Crown, the objection should be supported by evidence on affidavit made by the responsible Minister for the Crown or departmental head.<sup>122</sup> The affidavit should state precisely the grounds on which it is contended that disclosure would prejudice the public interest and identify the documents for which the claim is made.<sup>123</sup> Recent Australian decisions have consistently exhibited a distaste for vague, amorphous or deficient affidavits.<sup>124</sup> On the other hand, it could be argued that the overriding power of the court in relation to the doctrine of public interest immunity (which was firmly established in the decision of *Sankey v Whitlam*) may have correlatively diminished the importance of the requirement that a formal claim be made.<sup>125</sup> It is the function of the court to decide whether public interest immunity should be granted and a certificate or affidavit from the responsible Minister can never be conclusive in itself.<sup>126</sup> The court's duty is to engage in a balancing

[1978] 1 NZLR 761; *Marks v Beyfus* (1890) 25 QBD 494; *Alister v The Queen* (1983) 50 ALR 41.

<sup>121</sup> *Butes Gas & Oil Co v Hammer (No 3)* [1980] 3 All ER 475, 499.

<sup>122</sup> N J Williams, *op cit*, n 8, 195-6.

<sup>123</sup> *Sankey v Whitlam*, *op cit*, 44, 62, 96.

<sup>124</sup> *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 75 ALR 353.

See also appeal to the High Court (although not relevant to this issue) (1987) 61 ALJR 612 (Deane J) and (1988) 62 ALJR 344 (Full Court); *R v Robertson; ex parte McAulay* (1983) 21 NTR 11; *Alister v R* (1983) 50 ALR 41 at 45, 78, 81; *Barton v Csidei* [1979] 1 NSWLR 524. In the latter case the New South Wales Court of Appeal went so far as to state that 'certificates' signed by the Minister claiming public interest immunity have no evidentiary value and that such a practice should not be countenanced by the court. *Ibid.*, at 535.

<sup>125</sup> As Stephen J pointed out in *Sankey v Whitlam*, 'a claim to Crown privilege, supported by whatever material may be thought appropriate to the occasion, does no more than draw the court's attention to what is said to be the entitlement to the privilege and provide the court with material which may assist in determining whether or not Crown privilege should be accorded. A claim to the privilege is not essential to the invoking of Crown privilege.' (1978) 53 ALJR 11 at 29.

<sup>126</sup> *Sankey v Whitlam*, *op cit* 38 (Gibbs ACJ). Note, however, recent legislation in New South Wales (*Evidence Act 1898* Pt VI, amended in 1979) and in the Northern Territory (*Evidence Act 1939*, Pt IVA amended in 1982) which provides that the Attorney-General may certify that a certain communication relating to the business of government at a senior level is confidential and that its disclosure is not in the public interest. Such a certificate, once issued, is conclusive. See also *Alister v R* (1983) 50 ALR 41; *Sankey v Whitlam*, *op cit*,

exercise weighing the public interest in the judicial process which requires disclosure against the risk that disclosure would be injurious to the state interest. In order to assist it in its balancing task, the court may privately inspect the documents, particularly if the court were of the preliminary view that the balance of the public interest required disclosure.

#### PUBLIC INTEREST IMMUNITY IN NON-CURIAL PROCEEDINGS

There has been no judicial decision which has faced directly the issue of whether public interest immunity can apply in non-curial proceedings such as in administrative, executive and investigative proceedings, in the extra judicial processes of search and seizure and in proceedings before bodies which have statutory power to require the giving of information. In the Federal Court decision of *Aboriginal Sacred Sites Protection Authority v Maurice*<sup>127</sup>, Bowen CJ expressed the view that it is 'not entirely clear' whether the rules relating to public interest immunity apply to proceedings other than court proceedings. Nevertheless on the facts of the case before him, his Honour stated that it was 'common ground' that the rules relating to public interest immunity did apply to proceedings before the Aboriginal Land Commissioner.<sup>128</sup> In England, the courts have proceeded on the assumption that public interest immunity is capable of applying in non-judicial proceedings and appear to have decided *sub silentio* in a number of cases that public interest immunity does operate to exclude relevant evidence from forensic investigation not only in a court of law.<sup>129</sup>

In the author's view, there are very strong grounds for arguing that the doctrine of public interest immunity should be capable of applying in non-judicial proceedings.<sup>130</sup> First there is the general argument (which has

46; *Australian National Airlines Commission v The Commonwealth* (1975) 132 CLR 582, 592.

<sup>127</sup> (1986) 65 ALR 247 at 250.

<sup>128</sup> *Ibid.*

<sup>129</sup> In *Science Research Council v Nassé* [1980] AC 1028 all the Law Lords treated the question of public interest immunity as relevant to 'courts and tribunals'. See, for example, at 1071 where Lord Salmon states, 'In most cases, whether before the High Court, the county court or an industrial tribunal, there has been discovery of documents with no claim for privilege or immunity from production.' See also *D v NSPCC* [1978] AC 171 at 221 (Lord Hailsham) and *Rogers v Home Secretary* [1973] AC 388 at 410-411 (Lord Salmon).

<sup>130</sup> Note that statutes which create administrative tribunals and other non-curial bodies commonly provide that these bodies shall not be bound by the rules of evidence, that is, the rules of evidence which must be applied in courts of law. Provisions of this kind, do not, however, necessarily have the effect of making public interest immunity inapplicable to proceedings before those tribunals. The public policies which have been held to require the exclusion of certain evidence, otherwise relevant to proof of facts in issue before courts of law, on the ground that its disclosure would be contrary to the public interest, may apply



been used in relation to private privileges to support their use in non-curial proceedings<sup>131</sup>) that it would be strange for a court to be in a weaker position than a tribunal in securing relevant evidence. This argument was recently used by Slade LJ in the English Court of Appeal to argue that a journalist claiming a statutory privilege which applied expressly to 'court proceedings' should be in no worse position because the inspectors before whom he appeared were not a court of law.<sup>132</sup> Second and more importantly, public interest immunity is not a private testimonial privilege. It is not dependent upon a claim being made by one of the parties. If there is a recognised public interest to be protected then it must be raised by the chairman or judge if not taken by the parties or the crown. Furthermore it can never be waived.<sup>133</sup> The fact that the public interest requires certain documents to be withheld from forensic scrutiny and the secondary evidence of those documents must also be withheld in the public interest indicates that the whole doctrine of public interest immunity would be rendered nugatory if it were not also to apply in non-judicial forums. The rationale of public interest immunity applies with no less force to tribunals and other bodies outside the ordinary court system.<sup>134</sup> Logic and common sense dictate that a doctrine designed to protect the public interest should be capable of applying in both curial and non-curial arenas.

with no less force to tribunals outside the ordinary court system; see *Bercove v Hermes* (No 3) (1983) 51 ALR 109 at 115-6.

<sup>131</sup> *A M & S Europe Ltd v E C Commission* [1983] QB 878 at 896.

<sup>132</sup> *In re an Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] BCLC 76. Note that the appeal against the Court of Appeal decision by the journalist to the House of Lords was dismissed: [1988] 1 All ER 203. Note that the statutory privilege concerned was created under S 10 *Contempt of Court Act 1981* (UK) entitling journalists in 'court proceedings' to refuse to disclose their sources of information. The inspectors before whom the journalist appeared were appointed under the *Financial Services Act 1986* (UK).

<sup>133</sup> *Science Research Council v Nassé* [1980] AC 1028 at 1074 (Lord Edmund-Davies); *Neilson v Laugharne* [1981] QB 736 at 753.

<sup>134</sup> In practice, however, the question whether the rules which operate in the ordinary courts regarding public interest apply in a given tribunal will often fall to be determined by reference to the legislative provisions which define the tribunal's power to compel attendance and to administer an oath and which prescribe penalties for failure to give evidence. If the tribunal's power to require the giving of evidence is qualified by a provision that a person shall not be obliged to give evidence or produce documents which he could not be compelled to give or produce in proceedings before a court of law, the provision will generally have the effect of picking up any common law exclusionary principle. Clauses which qualify a statutory duty to answer questions or produce documents in terms such as 'without lawful excuse', 'without reasonable excuse' or 'without just cause' will generally have the same effect' *Signorotto v Nicholson* [1982] VR 413 (cf *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 59 ALJR 254). In some situations the application to a tribunal of the public interest immunity doctrine is placed beyond doubt by the inclusion of an express statutory provision on the subject, for example, *Administrative Appeals Tribunal Act 1975* (Cwth) ss 28(2), (3), 36, 36A, 37, 39, 43(3) and 46.

There is, however, the practical problem of the judicial balancing test which must be performed by the court. As Lord Pearson stated in *Rogers v Home Secretary*<sup>135</sup>

The Court has to balance the detriment to the public interest on the administrative or executive side, which would result from the disclosure of the document or information, against the detriment to the public interest on the judicial side, which would result from non-disclosure of a document or information which is relevant to an issue in legal proceedings. Therefore the court, though naturally giving great weight to the opinion of the appropriate Minister conveyed through the Attorney-General or his representative, must have the final responsibility of deciding whether or not the document or information is to be disclosed.

In the present author's view, where the evidence falls into a recognised class of public interest immunity, for example, state documents relating to national security, then there will be no difficulty in recognising that such evidence must be immune from production in non-curial proceedings. Where, however, the evidence falls into a doubtful class of public interest immunity, or where, to use Lord Simon's words<sup>136</sup>, the

evidence may fall into a class which has not previously received judicial recognition; or it may be questionably of a previously recognised class; or it may fall outside any class of evidence which should be excluded in the public interest

then it is submitted that there may be problems with the application of the doctrine of public interest immunity in non-curial forums. In many of these situations, however, the matter may ultimately find its way to a court hearing, just as the original decisions of both the National Society for Prevention of Cruelty to Children<sup>137</sup> and the Gaming Board<sup>138</sup> to withhold documents in the public interest found their way into the judicial appellate process, in which case the judge will be able to adequately perform the balancing test of competing public interests.

#### EXTENSION OF THE SCOPE OF PUBLIC INTEREST IMMUNITY

The public interest which justifies the suppression of relevant information in proceedings before courts of law bears several aspects and it was stated by Lord Hailsham in *D v National Society for the Prevention*

<sup>135</sup> [1973] AC 388 at 406.

<sup>136</sup> *Rogers v Home Secretary* [1973] AC 388 at 407.

<sup>137</sup> *D v NSPCC* [1978] AC 171.

<sup>138</sup> *Rogers v Home Secretary* [1973] AC 388.

of *Cruelty to Children* that the categories of public interest which may call for protection are not closed and may indeed change with social attitudes.<sup>139</sup> The traditional protection of 'state interest' was concerned with the 'higher levels of state' matters, the disclosure of which would be injurious to national security or to the proper functioning of government business at the highest level.

However, there has been a recent, marked extension of the scope of public interest immunity, and this extension is evident in cases such as *D v NSPCC*<sup>140</sup>, *Rogers v Home Secretary*<sup>141</sup> and *Alfred Crompton Amusement Machines Ltd v Commissioners of Customs and Excise (No 2)*<sup>142</sup> in the United Kingdom and *Aboriginal Sacred Sites Protection Authority v Maurice and Others*<sup>143</sup> in Australia. For a start, it seems that the doctrine of public interest immunity may now be invoked to protect documents which are not in the possession of the Crown and which are brought into existence by another party when those documents contain confidential information supplied by the Crown.<sup>144</sup> Second, the House of Lords has recognized that the immunity will extend beyond the protection of internal communications between different departments of government to communications between members of the public and the State.<sup>145</sup> Such latter cases have been described by Tapper as the 'lower level cases'<sup>146</sup> mainly because they are not so directly connected with the actual interests of the State or central government.

Most often the objection to disclosure in these lower level cases is based on the necessity of maintaining confidentiality of communications with persons upon whose information the public service or a statutory authority relies for the effective discharge of its duties.<sup>147</sup> Also, it is usually the case that the objection is based on the need to preserve the confidentiality of a 'class' of documents. Common arguments employed are that disclosure would impair or substantially impede the proper functioning of a 'limb of government' or that the machinery of government or the public service would be impeded (with consequent detriment to the public) by a lack of reliable information if informants were unable to rely on the absolute confidence of the state as to their identity or to the

<sup>139</sup> [1978] AC 171, 230. Hereinafter referred to as *D v NSPCC*.

<sup>140</sup> [1978] AC 171.

<sup>141</sup> [1973] AC 388.

<sup>142</sup> [1974] AC 405.

<sup>143</sup> (1986) 65 ALR 247.

<sup>144</sup> *Australian National Airlines Commission v Commonwealth* (1975) 132 CLR 582, 591 (Mason J).

<sup>145</sup> *Rogers v Home Secretary* [1973] AC 388; *Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1974] AC 405; although such extended protection was denied in *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133.

<sup>146</sup> R Cross and C Tapper, *op cit*, 419.

<sup>147</sup> For a list of bodies to which protection in these lower level cases has been extended, see N J Williams, *op cit*, 194 para 15.23.

character of their information.<sup>148</sup> However, confidentiality is not a separate head of privilege<sup>149</sup> and hence the fact that information has been communicated by one person to another in confidence is not, of itself, a sufficient reason for protecting from disclosure the information or its source if such disclosure would assist the court to find the relevant facts.

#### THE CASE FOR EXTENSION BY ANALOGY

It appears from the House of Lords decision in *D v NSPCC* that public interest immunity will extend to protect information coming into the possession of statutory bodies which are not accurately described as government departments or organs of central government, provided that the claim to immunity is clearly analogous to a previously recognized head of public policy. In that case the National Society for Prevention of Cruelty to Children received information about the alleged ill-treatment of a fourteen month old girl. An inspector of the Society thereupon visited the house of the parents of the child where they found no evidence of such alleged ill-treatment. The mother of the child later brought an action against the Society for damages for personal injuries resulting from the Society's negligence. The Society defended the action and sought an order that there should be no discovery or inspection of any documents which revealed the identity of the informant. The Society's argument which was ultimately successful in the House of Lords was that the proper performance by the Society of its duties under its charter and the relevant statute requires that absolute confidentiality of information given in confidence should be maintained, that if disclosure were ordered the Society's sources of information would dry up and that that would be contrary to the public interest. The House of Lords was unanimous in deciding three important principles:

- (1) There is no rule of law which protects documents from production or information from disclosure merely because they are given in confidence.
- (2) The categories giving rise to immunity are not closed but they may only be extended by analogy and legitimate extrapolation.
- (3) Information about child abuse, provided to organisations concerned with protection of children, falls within the concept of public interest immunity as a legitimate extension of the immunity

<sup>148</sup> Such arguments will not succeed, however, if the documents are relevant to a defence in criminal proceedings. Public interest immunity may not be claimed in such a situation: *Cain v Glass (No 2)* (1985) 3 NSWLR 230. See also *Alister v R* (1983) 56 ALR 415.

<sup>149</sup> *Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1974] AC 405, 433 (Lord Cross); *Science Research Council v Nassé* [1980] AC 1928, 1065; *Sankey v Whillam* (1978) 142 CLR 1, 42-3; *Aboriginal Sacred Sites Protection Authority v Maurice* (1986) 65 ALR 247, 251.

already given to informants to the police: see also *Rogers v Home Secretary*.<sup>150</sup>

It was generally recognized by the House of Lords in *D v NSPCC* that there are two possible methods of extending the doctrine of public interest immunity - the 'narrow' approach (which was ultimately approved by the House of Lords in that case) and the 'broad' or 'wide' approach. The 'narrow' method of extension is simply to find a clear analogy with a known category of public interest exception.<sup>151</sup> On the other hand, the 'broad' approach to extending public interest immunity is to recognise that 'wherever a party to legal proceedings claims that there is a public interest to be served by withholding documents or information from disclosure in those proceedings, it is the duty of the court to weigh that interest against the countervailing public interest in the administration of justice in the particular case and to refuse disclosure if the balance tilts that way'.<sup>152</sup> This broad approach to extending the immunity has not yet received the endorsement of the United Kingdom<sup>153</sup> or the Australian courts although at least one Australian judge, Woodward J in *Aboriginal Sacred Sites Protection Authority v Maurice* was prepared to recognize a fresh category of public interest (in the protection of minority rights) and clearly disapproved of the 'narrow' analogy approach.<sup>154</sup>

#### The 'Maurice' Decision

The case of *Aboriginal Sacred Sites Protection Authority v Maurice* was concerned with a claim by the Aboriginal Sacred Sites Protection Authority for public interest immunity in respect of documents prepared by its employees and persons under contract to it (anthropologists, linguists and others) in relation to the Warumungu land claim to have sacred sites recorded under the *Aboriginal Sacred Sites Act*. The Aboriginal Land Commission (Justice Maurice) had issued orders under s 54 of the *Aboriginal Land Rights (Northern Territory) Act 1976* for the production of these documents prepared for the Aboriginal Sacred Sites Authority in the course of the land claim hearing. The Authority objected to the production of these documents on the ground that disclosure would

<sup>150</sup> [1973] AC 388; *Aboriginal Sacred Sites Protection Authority v Maurice* (1986) 65 ALR 247, 268 (Toohey J).

<sup>151</sup> [1978] AC 171, 219.

<sup>152</sup> *Ibid*; *Aboriginal Sacred Sites Protection Authority v Maurice* (1986) 65 ALR 247, 267 (Toohey J).

<sup>153</sup> The subsequent case of *Science Research Council v Nassé* [1980] AC 1028 rejected a claim to public interest immunity and most of the members of the House of Lords were concerned to point out that 'here there was no such analogy to a recognized form of public interest immunity as there had been in *D v NSPCC*'; D M Byrne and J D Heydon, *op cit*, 677.

<sup>154</sup> (1986) 65 ALR 247, 255-6.

be injurious to the public interest in that it would involve revelation of information conveyed in confidence by Aboriginal informants. The relevant public interest was said to be that of 'fostering a relationship between Aboriginal informants on the one hand, and the Authority and its agents on the other, in order to enable the Authority to effectively perform its functions'.<sup>155</sup>

Bowen CJ and Woodward J held that public interest immunity could be claimed by the Authority in respect of documents sought to be produced. However, they held that when the public interest in the suppression of the documents was weighed against the public interest in favour of disclosure, the balance was in favour of disclosure subject to restrictions.<sup>156</sup> Toohey J on the other hand held that public interest immunity did not attach to the class of documents sought to be protected by the Authority although His Honour conceded that there might be, in respect of a particular document, an aspect of public interest immunity which the court must balance against the public interest in favour of disclosure.

Bowen CJ attempted to isolate the factors which are of critical importance in deciding whether public interest immunity should attach to the 'lower level' cases - that is, cases of statutory bodies which have been created by governments in vast profusion in recent years in order to perform various functions. Essentially Bowen CJ isolated four main factors:

- (i) the confidentiality of the material (although on its own this is never sufficient);
- (ii) the fact that disclosure may dry up a source of information;
- (iii) the protection of informers against disclosure; and
- (iv) if the information is necessary for the statutory body to perform its functions whether these involve the prosecution of offenders or not (although it is not entirely clear whether the informer will be protected in this situation).<sup>157</sup>

In the present case, Bowen CJ found that all four factors would be detrimentally affected if the Aboriginal Sacred Sites Protection Authority were obliged to disclose the information and hence the Authority could claim public interest immunity (particularly as the categories of public interest were not closed and that extension by analogy was an acceptable, but not the only, method of proceeding). In the final result, however,

<sup>155</sup> *Ibid*, 254 (Wood J) quoting the Land Commissioner in that case, Maurice J.

<sup>156</sup> Bowen CJ and Woodward J were not prepared to interfere with Maurice J's balancing exercise as no error had been shown by Maurice J in engaging in it.

<sup>157</sup> *Ibid*, 251.

Bowen CJ agreed with the Land Commissioner that upon balancing the public interest in favour of suppression against the countervailing elements of public interest in favour of disclosure, the latter should prevail subject to restrictions.

Of the three Federal Court judges in the *Maurice* decision, Woodward J was the most prepared to extend the scope of the doctrine of public interest immunity. After analysing the more liberal approach towards public interest immunity taken by Lord Hailsham in *D v NSPCC* and referring to Stephen J's judgment in *Sankey v Whitlam*, Woodward J openly disapproved of the 'narrow' analogy approach and added,

It is my opinion that, in this country, a fresh category of public interest immunity should be recognized, covering secret and sacred Aboriginal information and beliefs. Just who should be entitled to invoke such a category need not be decided in the present case.<sup>158</sup>

This indeed represents a significant extension of the doctrine of public interest immunity by the creation of this new aspect of the public interest. It may be, also, that had the public interest in the disclosure of all material in the land claim proceedings not been so manifestly weighty as it was in that case<sup>159</sup>, then this new 'public interest' might have prevailed over the traditional public interest in the disclosure of all relevant material necessary for a just result in litigation. It is also important to note Woodward J's somewhat adventurous opinion that for public interest immunity to apply it is not necessary that the party claiming its protection be connected in any way with central government.<sup>160</sup>

The third judgment in the case, that of Toohey J, is to be contrasted to a certain extent with that of Woodward J. This is particularly so with Toohey J's view that public interest immunity exists to protect information necessary for the proper workings of the government of the state.<sup>161</sup> Toohey J was prepared to concede that public interest immunity may exist in the case of statutory bodies as well as departments or organs of central government. However His Honour was also quick to rely on Lord Scarman's warning that 'We are in the realm of public law, not private

<sup>158</sup> *Ibid.*, 255-6.

<sup>159</sup> In the *Maurice* decision there were said to be substantial public interest arguments in favour of disclosure of the materials which may serve to test the validity of claims: 'Many people would be affected ... by the granting of the substantial areas claimed - particularly the residents of Tennant Creek, local miners and graziers and their families, and commercial enterprises which have invested in the area.' *Ibid.*, 257.

<sup>160</sup> *Ibid.*, 256 cf *Science Research Council v Nassé* [1980] AC 1028 where the House of Lords refused to recognize public interest immunity as the interest of the employers was of a private and not of a public nature. The House of Lords used the analogy approach in that case.

<sup>161</sup> *Ibid.*, 270.

right'.<sup>162</sup> Furthermore, Toohey J relied on the fact that in the case of *Sankey v Whitlam*, much emphasis was placed on the relationship between the public interest and the proper functioning of government.<sup>163</sup> Toohey J thereupon rejected the concept of public interest immunity in the case of documents which were generally in the possession of the Authority and was content to rely on the strict protective measures which were to be attached to the disclosure of the documents.

#### THE ACADEMIC RESEARCHER AND PUBLIC INTEREST IMMUNITY

In conclusion, it is submitted that if the academic researcher were to claim public interest immunity in respect of documents or information which he or she has received from an informant on a confidential basis, the argument would have to be presented as follows. First, the academic researcher would have to argue that disclosure of the information would be detrimental to *some* aspect of the public interest. It is suggested that at this point the academic researcher should argue in favour of the 'public interest' that sources of valuable and important information necessary for academic research do not dry up and the 'public interest' in the candour and effective functioning of tertiary institutions or universities (and particularly in the research conducted by such bodies). Another possible factor which could be raised is that it is in the 'public interest' to preserve confidentiality, although it has been seen that this aspect of the public interest, whilst a material consideration, alone cannot be a sufficient ground of public interest. Second, the academic researcher would have to argue that, on balance, this public interest in favour of suppression outweighs the public interest in the administration of justice (that a court of justice or administrative tribunal should not be denied access to relevant evidence).<sup>164</sup>

On the present state of the law, it is submitted that the academic researcher will find that neither of these two steps will be easy to satisfy. Although two of the three judges in the Federal Court decision in *Maurice* were prepared to recognize a 'public interest' in the 'fostering of the relationship between Aboriginal informants and the Aboriginal Sacred Sites Protection Authority'<sup>165</sup>, it is submitted that the threshold requirement that the academic researcher identify a 'public interest' which will be adversely affected if disclosure is ordered will be the most difficult.

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*, 251 (Bowen CJ) but quare Lord Hailsham's words in *D v NSPCC* where His Lordship said, 'There are however cases when confidentiality is itself a public interest... This is one of those cases... Whether there be other cases, and what these may be, must fall to be decided in the future.' [1978] AC 171, 225.

<sup>165</sup> See the list of five factors which were relevant to the existence of this public interest, *ibid.*, 251 (Bowen CJ). Note, however, that this 'recognized' public interest was later outweighed by the public interest in favour of disclosure.



It is of course obvious that the researcher must rely on what has been described as the 'lower level cases' because the researcher's claim will be presumably unconnected with the affairs of central government. In particular, the researcher should rely on the decisions in *D v NSPCC* (especially the judgments of Lords Hailsham and Edmund-Davies) and *Maurice* (the judgment of Woodward J and, to a lesser extent, that of Bowen CJ). We have seen from *D v NSPCC* that the 'narrow' approach to the extension of categories of public interest may occur by 'analogy and legitimate extrapolation'<sup>166</sup> from known categories of exception. Such an approach may be difficult in the researcher's case.<sup>167</sup> If, however, the so-called 'broad' approach is adopted then the researcher may be more successful in identifying a category of public interest favouring suppression. For example, Lord Edmund-Davies, in supporting the broad approach in *D v NSPCC* stated that wherever a confidential relationship exists (other than that of lawyer and client) and disclosure would be in breach of some ethical or social value involving the public interest, the court has a discretion to uphold a refusal to disclose relevant evidence provided it considers that, on balance, the public interest would be better served by excluding such evidence.<sup>168</sup>

It may be that such a 'broad' approach to the extension of categories of public interest could be favoured by the courts in the future. Nevertheless, even if such a broad approach were adopted, it is not clear whether the courts would ever be prepared to extend the protection of public interest immunity beyond statutory bodies to private bodies or individuals. There are indeed some judges who today are still concerned to connect the relevant 'public interest' as closely as possible to the proper workings of the government of the state or at least to a recognized limb of government or the public sector.<sup>169</sup> In contrast with this approach, Woodward J in the *Maurice* decision has conceded, albeit in *obiter dicta*, that public interest immunity may also protect, in certain specialised situations, 'private foundations' as well as public statutory bodies<sup>170</sup> and Lord Edmund-Davies in *D v NSPCC* stated that

the presence (or absence) of the involvement of the central government in the matter of disclosure is not conclusive either way, though in practice it may affect the cogency of the argument against disclosure.<sup>171</sup>

<sup>166</sup> [1978] AC 171, 226 (Lord Hailsham).

<sup>167</sup> See, for instance, Toohey J's attempt to apply the 'narrow' analogy approach in *Maurice*, *op cit*, 268.

<sup>168</sup> [1978] AC 171, 245.

<sup>169</sup> Lord Scarman in *Science Research Council v Nassé* [1980] AC 1028, 1087 and Toohey J in *Maurice*, *ibid*, 270. Note also that Toohey J is now a member of the High Court of Australia.

<sup>170</sup> *Op cit*, 256.

<sup>171</sup> [1978] AC 171, 245.

Overall, however, given the current judicial attitudes to the concept of 'public interest', it is suggested that the academic researcher should be careful to argue that disclosure would impede the effective functioning of the University as an institution (which is arguably part of the public sector or a function of government)<sup>172</sup> and that it is in the public interest that valuable and important sources of information to the University's employees or persons under contract to it do not dry up.

## 5. RESTRICTING THE USE MADE OF COMMUNICATIONS DISCLOSED UNDER COMPULSION OF LAW

In situations where an academic is compelled to supply confidential information by process of law and where there is either no established privilege in existence or the academic makes an unsuccessful claim to be privileged from disclosing the information, there may still be certain measures which the court may adopt in order to limit disclosure in the interests of justice. In the last two decades there has been a movement, particularly by the English courts, to attempt to preserve the privacy and confidentiality of information even where the law demands compulsory disclosure.<sup>173</sup> The preferred approach of these courts has been to attempt to elicit the evidence in an alternative way, if that is reasonably possible.

There are three main methods by which the confidential nature of a communication may be reconciled with the conflicting policy under the law which requires disclosure. First, the court may have a special discretion not to insist on evidence being given if, for example, embarrassment would be caused to the witness or a violation of his or her code of ethics would result.<sup>174</sup> Second, the court has an inherent power to impose restrictions on the use to be made of the information, for example, to order that the evidence be produced on a limited basis or that the proceedings be heard in camera. Third, disclosure may be protected as an incident of the court process.

<sup>172</sup> By analogy with the arguments used in the *Railways* case: (1906) 4 CLR 488. (*Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic Employees Association*). See in particular the judgment of Griffith CJ at 538-9.

<sup>173</sup> *Attorney-General v Clough* [1963] 1 QB 773; *Attorney-General v Mulholland* [1963] 2 QB 477; *British Steel Corporation v Granada* [1981] QC 1096; *Attorney-General v Lundin* (1982) 75 CR App R 90; *Secretary of State for Defence v Guardian Newspapers* [1984] 1 All ER 453; *In re an Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] 1 All ER 203. See Y Cripps, 'Judicial Proceedings and Refusal to Disclose the Identity of Sources of Information' (1984) 43 *Camb LJ* 266.

<sup>174</sup> D M Byrne and J D Heydon, *op cit*, 650.

## (A) DISCRETION NOT TO INSIST ON EVIDENCE BEING GIVEN.

In a court of law a witness is not excused from answering questions relevant to the issues to be determined simply because, by answering, he would be betraying confidences - in breach of a moral obligation or perhaps even in violation of a legal duty to another - for the public interest in discovering the truth prevails over the private duty to respect confidences.<sup>175</sup> However it may be that the judge has a special residual discretion not to insist on the evidence being given.<sup>176</sup> It seems that this discretion only arises when a witness makes an unsuccessful claim to be privileged from answering a question.<sup>177</sup> As Lord Denning MR pointed out in *Attorney-General v Mulholland*<sup>178</sup> one circumstance in which a court might properly exercise its discretion not to require answers would be a case in which a professional person was asked to betray confidences not protected by the law of privilege. Donovan LJ, in the same case, observed that:

there may be considerations, impossible to define in advance, but arising out of the infinite variety of fact and circumstances which a court encounters, which may lead a judge to conclude that more harm than good would result from compelling a disclosure or punishing a refusal to answer ... [I]t would be wrong to hold that a judge is tied hand and foot in such a case ...<sup>179</sup>

Two years after the decision in *Mulholland*, however, the New South Wales Supreme Court in *Re Buchanan*<sup>180</sup> held that the court did not possess a discretion to excuse a witness from answering questions in such a situation. There has, since then, been very little close attention given to the existence of the discretion in Australia. Meanwhile, however, in the

<sup>175</sup> E Campbell, *Contempt of Royal Commissions*, *op cit*, n 29, 28. Note also that a witness appearing before a non-curial body could not claim any greater privileges against disclosure than he would be allowed were he appearing as a witness before a court of law unless he can point to some special provision, E Campbell *ibid*. See, for example, s 21A *Evidence Act* 1958 (Vic). See, however, the recent statutory protection given to journalists in the United Kingdom - *Contempt of Court Act* 1981 (UK) s 10 - under this section it is no longer contempt of court or of a tribunal of inquiry for a journalist to refuse to disclose his source unless it is established that disclosure is necessary in the interests of justice, or national security or for the prevention of crime or disorder.

<sup>176</sup> The uncertainty results from the lack of clear authority in Australia and at least one authority which is against the existence of the discretion - see *Re Buchanan* [1964-5] NSWLR 1379, 1381. But see also *McGuiness v Attorney-General of Victoria* (1940) 63 CLR 73, 104.

<sup>177</sup> R Cross and C Tapper, *ibid*, 180.

<sup>178</sup> [1963] 2 QB 477, 490.

<sup>179</sup> *Ibid*, 492; approved in *British Steel Corporation v Granada Television Ltd* [1981] AC 1096.

<sup>180</sup> (1964-5) NSWLR 1379, 1381; (1964) 65 SR (NSW) 9, 11.

United Kingdom the discretion has gained strength. Lord Hailsham, in *D v National Society for the Prevention of Cruelty to Children*<sup>181</sup> supported the existence of the discretion and accepted the views of the English Law Reform Committee on privilege in civil proceedings that a judge has a 'wide discretion to permit the witness ... to refuse to disclose information where disclosure would be a breach of some ethical or social value and non-disclosure would be unlikely to result in serious injustice in the particular case in which it is claimed'.<sup>182</sup>

## (B) THE COURT'S POWER TO IMPOSE RESTRICTIONS.

The court has inherent power to relieve a party of the obligation to disclose or produce documents for inspection or to limit that obligation in order to prevent an abuse of process or to avoid injustice.<sup>183</sup> The right under the Rules of the Supreme Court of Victoria to discovery and inspection of documents is not absolute.<sup>184</sup>

The Australian Law Reform Committee's *Report on Aboriginal Customary Law*<sup>185</sup> provides a good summary of the various ways in which a court may impose restrictions on the use to be made of information disclosed under compulsion of law. In that Report the Commission deals with the ways and means by which evidence of those secrets is relevant. Reference is made by the Commission to the existing legal powers which enable courts and tribunals to preserve secrecy or confidentiality: powers to 'regulate judicial procedure, to hear evidence in camera, to allow production of evidence on a restricted basis, to grant protective orders including orders suppressing publication of proceedings'.<sup>186</sup>

The courts exercise the power to prevent unnecessary disclosure in various ways - it is often said to depend on the 'good sense and sensitivity of the trial judge'.<sup>187</sup> Examples would be a direction by the judge that no

<sup>181</sup> [1978] AC 171 with whom Lord Kilbrandon agreed. The House of Lords was equally divided but in *British Steel Corporation v Granada Television Ltd* [1981] AC 1096, 1113 Megarry VC believed that the balance favoured Lord Hailsham's view.

<sup>182</sup> 16th Report, Law Reform Committee, *Privilege in Civil Proceedings* para 1, quoted in R Cross and C Tapper, *op cit*, 181. It should be noted however that Lord Justice Slade in *In re an Inquiry Under the Company Securities (Insider Dealing) Act 1985* was not in favour of retaining a wide and flexible discretion in respect of journalists not disclosing their sources, particularly since the enactment of s 10 of the *Contempt of Court Act* 1981 which in any event conferred a statutory privilege on journalists: [1988] BCLC 76.

<sup>183</sup> N J Williams, *op cit* n 8, 205 para 15.46.

<sup>184</sup> *Ibid*.

<sup>185</sup> *Op cit* n 50.

<sup>186</sup> *Ibid*, para 653.

<sup>187</sup> D M Byrne and J D Heydon, *op cit* 618.



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<sup>183</sup> N J Williams, *op cit* n 8, 205 para 15.46.

<sup>184</sup> *Ibid.*

<sup>185</sup> *Op cit* n 50.

<sup>186</sup> *Ibid.*, para 653.

<sup>187</sup> D M Byrne and J D Heydon, *op cit* 618.

use will be made of the information outside particular proceedings<sup>188</sup>, that the names of the parties and certain material not be published, that only a limited group of people (for example, the judge, associate and counsel) have access to the material or, in rare cases, a direction that the hearing take place in camera. It has also been claimed that even when no power to give such directions exists, the press will normally act upon the 'advice' of a judge that certain material not be published.<sup>189</sup>

The court's inherent jurisdiction to ensure that the ambit of discovery is not wider than necessary to dispose fairly of the action or to prevent an abuse of process or a contempt of court will also be invoked if, for example, discovery or inspection of documents is used, not for the purpose of the instant litigation, but for a collateral purpose or if discovery is directed exclusively to the credit of the other party. The English Court of Appeal in the case of *Church of Scientology of California v Department of Health and Social Security*<sup>190</sup> confirmed the general power of the court to impose restrictions on inspection, if, for example, there was a real risk of the right of unrestricted inspection being used for a collateral purpose.

(C) PROTECTED DISCLOSURE AS AN INCIDENT OF COURT PROCESS.

The case of *Riddick v Thomas Board Mills Ltd*<sup>191</sup> confirmed the principle that the fruits of discovery may be used only in the proceeding in which the discovery was employed.<sup>192</sup> In that case the Court of Appeal stated that it was an abuse of the court process to rely upon a document obtained on discovery in one proceeding either as the basis for or as evidence in support of a cause of action in another proceeding.<sup>193</sup> Furthermore it was held in *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd*<sup>194</sup> that there is an implied undertaking made by a party to whom documents are produced on discovery not to use the documents for any collateral or ulterior purpose without the consent of the party giving discovery. The enduring character of this implied undertaking was established in *Home Office v Harman*.<sup>195</sup> The House of Lords there held that the implied undertaking continues to bind the party even after the documents in question have been read out in open court. *Harman's* case has, however, been criticized because the protection given to the party giving discovery which is a natural incident of the court process has now

<sup>188</sup> *Chantrey Martin & Co v Martin* [1953] 2 QB 286. Non-compliance with the order would constitute a contempt of court, D M Byrne and J D Heyson, *ibid*, 650.

<sup>189</sup> D M Byrne and J D Heyson, *ibid*, 618.

<sup>190</sup> [1979] 3 All ER 97.

<sup>191</sup> [1977] 3 All ER 677.

<sup>192</sup> N J Williams, *op cit*, 205, para 15.47.

<sup>193</sup> This principle was extended by Goulding J in *Medway v Doublelock Ltd* [1978] 1 All ER 1261.

<sup>194</sup> [1975] 1 All ER 41.

<sup>195</sup> [1982] 1 All ER 532.

been rendered illusory simply because of the public nature of court proceedings.<sup>196</sup>

In conclusion, it should be cautioned that there are two possible disadvantages associated with a witness relying on the court's power to impose restrictions or to order disclosure on a limited basis. The first is that just referred to in *Harman's* case. Although the powers of the court to impose restrictions upon access to information are wide, the value of those powers is sharply reduced once the confidential information is disclosed at trial.<sup>197</sup> The second disadvantage may be only a marginal or theoretical one but is nonetheless hinted at by Freckelton in his article 'Social Scientists in the Witness Box'.<sup>198</sup> Freckelton there reviewed the decision of the Federal Court in *Attorney-General (NT) v Maurice*<sup>199</sup> that the anthropologists and linguists in that case, together with the Aboriginal Sacred Sites Protection Authority by which they were employed, were not able to withhold information supplied to them by Aborigines which was relevant to land claim hearings. It is suggested by Freckelton that in reaching this decision, the Court was influenced by the fact that the Land Commissioner, Justice Maurice, had undertaken that only he, his associate, the barristers involved and possibly his consulting anthropologist and researcher would have access to the material.<sup>200</sup>

If this is correct and the court was so influenced then it may be that to place too much emphasis on the court's power to impose restrictions on the use of evidence disclosed by compulsion of law will be counter-productive. It would, for instance, surely be unsatisfactory for a witness to have his valid claim to withhold confidential information sacrificed on the altar of compromise simply because the court was aware that it could 'keep everyone happy' by ordering restricted disclosure on a limited basis. Nevertheless, it seems clear that Woodward J in *Maurice* was of the opinion that a court's procedural decision to restrict access to a limited group of people would reduce the strength of the substantive argument against disclosure on the grounds of public interest.<sup>201</sup>

#### CONCLUSION

It can be seen from this article that the power of the common law to compel a person to produce information and documents to a court or tribunal is extremely extensive. There are very few categories of persons who are entitled to refuse to disclose to judicial bodies information acquired in confidence. The academic researcher certainly does not fall

<sup>196</sup> D M Byrne and J D Heydon, *op cit*, 617.

<sup>197</sup> *Ibid.*

<sup>198</sup> *Op cit*, n 7.

<sup>199</sup> (1986) 65 ALR 247.

<sup>200</sup> *Op cit* n 7, 1097.

<sup>201</sup> (1986) 65 ALR 247, 256-7.

into any specialized or exceptional category and hence is in no special position to resist disclosure. However, the academic researcher who is reluctant to disclose information received in confidence may overcome some of the difficulties inherent in the harshness of the common law's requirement of compulsory disclosure by resort to the law of privilege.

Although the law of privilege has been traditionally perceived as applying to recognized classes of claimants in the general areas of the law of evidence and civil procedure, it nonetheless remains an untapped source for other claimants who do not fall easily into any of the common law's recognized classes. In this article, it has been seen that the academic researcher may, in certain situations, claim legal professional privilege, medical professional privilege, public interest immunity and to a lesser extent, the privilege against self-incrimination in order to resist disclosure of information to a court or non-curial body. Further, if these substantive claims to privilege are unsuccessful, there are various procedural methods which may be adopted whereby the court or other body may order disclosure on a restricted basis. It may be, therefore, that the law of privilege as a whole is merely awaiting invocation in other areas and by other potential claimants who also do not fall into any of those categories which have been treated traditionally by the courts as having safely secured a foothold of recognition at common law.

## CHAPTER FOUR

“Corporations and the Privilege Against Self-Incrimination: The High Court Rules”

# The High Court rules

## Corporations and the privilege against self-incrimination

by Suzanne B. McNicol

In a landmark decision, the High Court in *Environment Protection Authority v. Caltex Refining Co. Pty. Ltd.*<sup>1</sup> held that a corporation, unlike a natural person, cannot claim the privilege against self-incrimination.

**C**altex was charged with polluting water with discharged oil and grease under s.16(1) of the *Clean Waters Act* 1970 and with breaching a pollution control licence under s.17D of the *State Pollution Control Commission Act* 1970 (N.S.W.). A year after the prosecution had been commenced the State Pollution Control Commission (the predecessor of the Environment Protection Authority) served upon Caltex two notices requiring the production of identical documents: a notice pursuant to s.29(2)(a) of the *Clean Waters Act* 1970 (N.S.W.) and a notice to produce in accordance with the rules of the Land and Environment Court.

Caltex applied to the Land and Environment Court for a ruling that it was not obliged to comply with either notice, that the service of the notices after the prosecution had commenced was unauthorised and that, in any event, Caltex was privileged from producing the documents on the ground of self-incrimination. Stein J. held that a corporation could not claim the privilege against self-incrimination and that in any event s.29(2) impliedly abolished the privilege. The Court of Criminal Appeal reversed Stein J.'s orders, holding that the privilege against self-incrimination does apply to corporations and that in any event the s.29 notice was invalid, having been issued for use in a pending prosecution.

### THE DECISION

The High Court held, by a majority of 4 to 3, that the privilege against self-incrimination is not available at common law to corporations and accordingly the respondent Caltex could not claim the privilege in answer to a valid notice issued under s.29(2)(a) of the *Clean Waters Act* 1970

(N.S.W.). All four judges in the majority, Mason C.J. and Toohey J. (in a joint judgment), Brennan and McHugh JJ. carefully analysed the rationales of the privilege against self-incrimination and decided that those rationales, while appropriate for the protection of the rights, dignity and privacy of individuals, had no application to artificial entities such as incorporated companies. The High Court also held that the appellant Environment Protection Authority did have the power to issue and serve a notice under s.29(2)(a) of the *Clean Waters Act* to obtain material for use in a prosecution which was pending before the Land and Environment Court, and that the service of the notice to produce pursuant to the rules of the Land and Environment Court could not be set aside as an abuse of the process of the court. It is proposed to analyse only those aspects of the High Court judgments which relate to the important issue of corporations and the privilege against self-incrimination.

### MASON C.J. AND TOOHEY J.

Mason C.J. and Toohey J. first noted that the privilege against self-incrimination is available at common law to corporations in England, Canada and New Zealand<sup>2</sup> (although the privilege has been severely criticised recently in England), and that the privilege is not available to corporations in the United States. Mason C.J. and Toohey J. reviewed the historical basis of the privilege, stating that the privilege was not initially developed with corporations in mind and that corporations are not able to suffer the wrongs associated with the ex officio oath of the ecclesiastical courts and the Court of Star Chamber, namely excommunication and physical punishment.<sup>3</sup> However, more recently the privilege is seen as one of many internationally-recognised human rights,<sup>4</sup> based on the desire to protect personal freedom, privacy and human dignity. This perception of the privilege was a "less than convincing argument" for holding that corporations should enjoy privilege.<sup>5</sup>

Their Honours considered Gleeson C.J.'s<sup>6</sup> principal bases for making the privilege available to corporations, namely that it assists in "maintaining the fair state-individual balance" and that it is a significant element in "maintaining the integrity of our accusatorial system of criminal justice".<sup>7</sup> The

first reason of Gleeson C.J. was reject Their Honours without hesitation principle because a corporation is usually in a str position, vis-a-vis the state, than i individual, especially in respect of resources and the advantages stemming incorporation.<sup>8</sup> Mason C.J. and Too then stated that the second reason was on the two common law principles th onus rests on the Crown of proving beyond reasonable doubt and that no ac person can be compelled by process of admit the offence with which he or charged. Their Honours noted that the fundamental principles of the commc would "remain unimpaired"<sup>9</sup> if the co law privilege against self-incrimination not extended to the production of docu Indeed, in relation to corporations, their and documents constitute the best ev of their business transactions and activit that it "makes no sense at all to ma privilege available to a corporation in i of these books and documents when c of the corporation are bound to testify : the corporation unless they are able to the privilege personally".<sup>10</sup>

Mason C.J. and Toohey J. conclu holding that the privilege agains incrimination "in its entirety" is not a to corporations and they relied heav support on the fact that statutory pro regulating the affairs of corporation often interfered with or abrogat privilege, particularly in relation production of corporate document extent of statutory abrogation indi recognition that the privilege is not "formidable obstacle"<sup>11</sup> to the disco the true facts surrounding corporate ac but it also actively operates to corporate criminal activity".<sup>12</sup>

### BRENNAN J.

Brennan J. first of all held that s.29 the *Clean Waters Act* impliedly abrog privilege against self-incrimination, or not the person to whom the n produce documents is given is a corp because, following *Pyneboard*,<sup>13</sup> it frustrate the purpose for which the : conferred to excuse an occupier of the from the obligation to produce do when required to do so under s.2. Brennan J. then considered the avail the privilege to corporations which :





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with a statutory power compulsorily to obtain access to a corporation's documents. Brennan J. contrasted the United States and Canadian approach (where the privilege does not extend to corporations) with the view of the English courts, in particular the view of *du Parc L.J.* in the Court of Appeal that although a company "cannot suffer all the pains to which a real person is subject," it can still be "convicted and punished, with grave consequences to its reputation and to its members".<sup>15</sup> Brennan J. appropriately pointed out that the privilege against self-incrimination was never designed to ameliorate any of these specific "pains" which a company can suffer. His Honour then held that neither principle nor practice supports the proposition that corporations are entitled to claim the privilege and that accordingly the power conferred by s.29(2)(a) may be exercised against corporations according to the unqualified terms of that provision.<sup>16</sup>

Brennan J. then analysed the principle on which a court will lend its coercive powers

to compel a person to furnish evidence that incriminates that person.<sup>17</sup> Having already decided that the rationale of the privilege has no application to corporations, Brennan J. had no trouble deciding that in the context of judicial proceedings, *Caltex*, being a corporation, cannot claim the privilege against self-incrimination in response to the obligation imposed by the service of the notice under the Rules of the Land and Environment Court.

However, Brennan J. went on to hold that the privilege against self-exposure to a civil penalty (the penalty privilege), which is a different privilege from the privilege against self-incrimination, is available to corporations which are faced with an obligation imposed by a court which is exercising its powers to compel the furnishing of information.<sup>18</sup>

Brennan J. remarked that the courts made no distinction between corporations and natural persons when they refused to lend their process to compel discovery in actions to recover a civil penalty.<sup>19</sup> However, now that it is considered that the privilege against self-incrimination can only be claimed by natural persons, Brennan J. argued that it would be incongruous for a court to allow discovery against a corporation in proceedings for the conviction of the corporation while refusing discovery in proceedings for a civil penalty and it would be "no less incongruous to allow discovery against a corporation in proceedings for a civil penalty and deny discovery against a natural person in similar proceedings".<sup>20</sup> Accordingly, Brennan J. held that, since penalties may be imposed on a corporation either in criminal or in civil proceedings, corporations are exempt from an obligation to give discovery in any proceedings brought to enforce a liability to a penalty, whether criminal or civil, unless a statute or rule of court otherwise provides expressly or by necessary intendment.<sup>21</sup>

Brennan J. concluded by stating that there is no reason, generally speaking, why the penalty privilege should be applied outside the area in which its rationale — the limitation placed by the court on the exercise of its powers to obtain evidence — warrants its application even if the privilege against self-incrimination could be applied beyond curial proceedings as a fundamental bulwark of liberty for the individual.<sup>22</sup>

#### McHUGH J.

The fourth judge in the majority was McHugh J. His Honour noted that the "tacit assumption of the Australian legal profession" is that the privilege is available to corporations in Australia<sup>23</sup> although so far as the High Court is concerned, the issue is free of binding authority.<sup>24</sup>

McHugh J. transposed the existing rationales for the privilege to the immediate context of corporations. First, His Honour found that when the privilege against self-incrimination is viewed as a human right protecting the dignity of the accused, it obviously does not apply to corporations.<sup>25</sup> Secondly, McHugh J. found that corporations

ought not necessarily have the same rights of privacy as other citizens given the qualitative differences between corporations and individuals.<sup>26</sup> In particular, McHugh J. stated that given the benefits of incorporation, the better view is that corporations should not also have the benefit of protection of their privacy when that would conceal criminal activity.<sup>27</sup> Thirdly, McHugh J. held that, in contrast to the two earlier rationales, the rationale which states that the privilege is necessary to preserve the integrity of the adversary system is a powerful reason for allowing a corporation to claim the privilege.<sup>28</sup> In fact, to deny the privilege to a corporation would "significantly weaken the forensic position of a corporation and significantly strengthen the forensic position of the prosecution"<sup>29</sup> in the adversary system.

McHugh J. decided that when all the contemporary rationales are not fully applicable to corporations, "it would be wrong to apply the principle against self-incrimination in favour of corporations mechanically without considering the reasons which tell against applying the principle."<sup>30</sup> In His Honour's view, one of the strongest reasons against granting the privilege to corporations is the public interest in having all relevant and material evidence in judicial proceedings.<sup>31</sup> When all the difficulties in obtaining relevant independent evidence against corporations are considered, it is clear that granting the privilege to a corporation is "much too high a price to pay"<sup>32</sup> for preserving the integrity of the adversary system of justice.

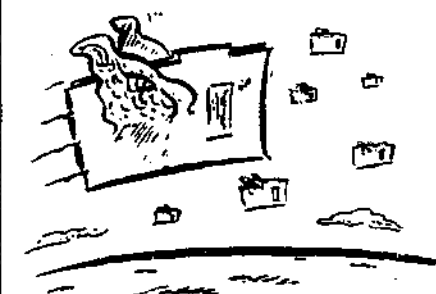
#### THE MINORITY

Deane, Dawson and Gaudron JJ. delivered a dissenting judgment. Their Honours traced the history of the privilege against self-incrimination and observed that it is merely one of many inter-related rights and immunities which have "become woven into the law, particularly the criminal law".<sup>33</sup>

Their Honours considered that the privilege cannot be said to rest exclusively upon notions of personal freedom and human dignity. Rather the privilege reflects a much broader context in which the inquisitorial approach is emphatically rejected and where there is a "deep-seated belief that those who allege the commission of a crime should prove it themselves and should not be able to compel the accused to provide proof against himself".<sup>34</sup> Their Honours stated that this broader justification for the privilege does apply to corporations and to make an exception in the case of corporations merely because a corporation "has no body to be kicked or soul to be damned"<sup>35</sup> is not a sufficient reason. In Their Honours' view, it should be up to the legislature to formulate any exceptions because the legislature is both capable of confining the exceptions to the requirements of the particular situation and is also able to confer other protections against the use of incriminating material.

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#### IMPLICATIONS — NEW AND OLD RATIONALE

First, it is clear that the underlying rationale for the privilege against self-incrimination is being reassessed. It is now much clearer that the privilege is tied to notions of human rights, especially the rights to dignity, freedom and privacy. It is also clear however that these newly-articulated justifications for the privilege are not exhaustive. They have not supplanted the "older" justifications. The privilege is also still strongly reflected in the so-called "adversarial" justification — namely the notion that those who allege a crime must prove it (i.e. it is up to the Crown to prove the guilt of the accused) and the allied notion that an accused person should not be compelled to prove guilt against herself or himself. All the members of the High Court stressed the rationale of the integrity of the adversary system as fundamental despite the fact that the privilege is now also justified as a human right protecting dignity, freedom and privacy.

#### PRACTICAL EFFECT

Secondly, the majority decision of the High Court that corporations cannot claim the privilege may not be as drastic or as far-reaching as might originally have been contemplated. In practice a corporation cannot be a witness in any event. Nor can an officer of the company claim the privilege against self-incrimination on behalf of the company.

The effect of the decision will focus on the areas of the production of documents or the answering of interrogatories because, as Deane, Dawson and Gaudron JJ. pointed out, these are the things which a corporation itself might be required to do.<sup>36</sup> The actual practical effects of the majority decision are anticipated in the decision of McHugh J.,<sup>37</sup> one of which is the fact that the prosecution in a criminal case will now be able to obtain documents from the corporation by way of subpoena without the limitations inherent in the case of a search warrant. Another effect will be that a corporation will be required to discover incriminating documents and to give incriminating answers to interrogatories in civil proceedings. These documents and answers could then be used in subsequent proceedings.<sup>38</sup>

#### OTHER EFFECTS

Thirdly, a beneficial and indirect effect of the majority decision will be that the technical and procedural questions of how a corporation might claim the privilege will be avoided. The effect of the majority decision in *Caltex* is that it will be less likely that the courts must face such technical questions as to whom the subpoena is addressed. Further, even if such questions must be addressed, the courts must be acutely aware that if they interpret the subpoena as being addressed to the corporation itself (rather than the individuals as individuals named on the face of the subpoena) there will no longer be any possibility of the corporation being able to

claim the privilege against self-incrimination.<sup>39</sup>

#### OTHER COLLECTIVE BODIES

Fourthly, the High Court has left open the position of other collective bodies. Can, for example, an unincorporated association or partnership claim the privilege in the future? It is submitted that it would be paradoxical to deny corporations the ability to claim the privilege and yet to allow other collective entities and organisations the ability to suppress information and documents on the ground of self-incrimination. If the High Court regards the "human right" rationale for the privilege against self-incrimination as today the predominant rationale for the privilege then there is every reason to extend the majority decision in *Caltex* (that corporations cannot claim the privilege) to other collective and amorphous bodies which also cannot suffer violations of their human dignity and personal freedom. In modern times many corporations are one or two-person or family companies<sup>40</sup> and there seems little justification for distinguishing these types of companies from larger unincorporated bodies. There are even recent proposals to amend the Corporations Law in Australia so that a corporation can consist of merely one individual. If this amendment were implemented it seems even more unlikely (and inequitable) that unincorporated bodies should be allowed the privilege when sole persons operating as a "company" should be denied the privilege. The question, of course, remains open in Australia and awaits the authoritative attention of the High Court.

#### PENALTY PRIVILEGE

Fifthly, the High Court has left unresolved the position with regard to the penalty privilege. It is overly simplistic to suggest that there was a majority in *Caltex* (Mason C.J., Toohey, McHugh and Brennan JJ.) who decided that corporations cannot claim the privilege against exposure to a crime but there was a technical majority (Brennan, Deane, Dawson and Gaudron JJ.) in favour of the proposition that corporations can still claim the penalty privilege.<sup>41</sup> For a start, the minority judges (Deane, Dawson and Gaudron JJ.) did not discuss the penalty privilege. Further, Brennan J. did not hold that corporations can at all times claim the penalty privilege.

It is clear that Brennan J. made a point of distinguishing the privilege against self-incrimination from the penalty privilege, particularly because of the differing rationales for these two privileges. But this did not entail Brennan J. preserving the penalty privilege for corporations in all cases. Brennan J. tied the penalty privilege to its rationale, namely the limitation placed by the court on the exercise of its powers to obtain evidence.<sup>42</sup> In so doing, Brennan J. held that a corporation could claim the penalty privilege in order to resist the exercise of a court's coercive powers. Hence, where there is a judicial power to produce documents and furnish information

corporation. But where there is a statutory power to compel information, a corporation cannot claim the penalty privilege.<sup>43</sup> Brennan J. also preserved the rule for corporations that discovery will be refused in actions for a penalty and extended it to criminal as well as civil actions.<sup>44</sup>

Brennan J.'s position on the penalty privilege should be contrasted with the position of the other majority judges (e.g. Mason C.J. and Toohey J. held that the reasons for denying the privilege against self-incrimination to corporations apply with equal force to the privilege against exposure to a penalty<sup>45</sup> and McHugh J. held that it is now difficult, if not impossible, to distinguish the rationale of the penalty privilege from the privilege against self-incrimination<sup>46</sup>), but there is no reason to suppose that Brennan J.'s position should be aligned with the unstated position of Deane, Dawson and Gaudron JJ. to form an artificial technical majority in favour of the (inaccurate) proposition that corporations can still claim the penalty privilege.

#### LEGAL PROFESSIONAL PRIVILEGE

Sixthly, the majority decision in *Caltex* may have serious implications for the doctrine of legal professional privilege. Legal professional privilege and the privilege against self-incrimination are both fundamental common law privileges. In 1982, when the High Court decided<sup>47</sup> that the privilege against self-incrimination was not merely a rule of evidence applicable in judicial proceedings but was a fundamental principle capable of applying in non-judicial proceedings, it was pointed out that it was a "strange paradox" that legal professional privilege (in *O'Reilly's case*<sup>48</sup>) was confined to judicial and quasi-judicial proceedings while the privilege against self-incrimination was not.<sup>49</sup> It did not take long, however, for the paradox to be removed and for the two privileges to be placed on an equal footing. In *Baker v. Campbell*<sup>50</sup> the High Court reversed its finding six months earlier in *O'Reilly* and reinstated legal professional privilege as a fundamental doctrine not confined to judicial and quasi-judicial proceedings but capable of application to non-judicial proceedings. It may be that the scope of one privilege is closely connected with the scope of the other.

It should be remembered that one of the principal reasons for the High Court's decision to limit the doctrine of legal professional privilege in *Grant v. Downs*<sup>51</sup> to a "sole purpose" test was because the recent proliferation of companies and corporate litigants had brought with it the need to reassess the privilege and apply it to modern conditions. Clearly, the High Court was uncomfortable with legal professional privilege being claimed too easily by corporate clients and with legal professional privilege travelling "beyond the underlying rationale to which it is intended to give expression".<sup>52</sup> Could it be

that legal professional privilege will again emulate the privilege against self-incrimination and be refused as a privilege to corporate clients in the future? This is, of course, something for the High Court to consider in the future.

#### STATUTORY ABROGATION

Seventhly, the majority decision in *Caltex* would suggest that the widespread legislative practice of abrogating the privilege against self-incrimination in relation to corporations<sup>53</sup> is no longer necessary. However, it is submitted that Parliament should continue to adopt the practice of abrogation *ex abundanti cautela* in order to make the position clear and incontrovertible. For many years before *Caltex* was decided, the Parliament was abrogating a privilege for corporations which did not exist at common law. Or, perhaps more accurately, as Mason C.J. and Toohey J. stated, if it ever was the common law in Australia that corporations could claim the privilege against self-incrimination in relation to the production of documents, it is no longer the common law.<sup>54</sup> This legislative practice of abrogating the privilege did not deter the High Court from deciding that corporations could not claim the privilege.

#### A CLOSE DECISION

Eighthly, it is submitted that the decision in *Caltex* that corporations cannot claim the privilege against self-incrimination could very easily have gone the other way. This is not merely because it was a close 4:3 decision of the High Court. It is also because McHugh J., as the fourth majority judge, engaged in a balancing exercise which led His Honour to conclude that the public interest in the adduction of relevant evidence outweighs the detriments associated with refusing to allow corporations to claim the privilege.<sup>55</sup> McHugh J. had held (in contrast to Mason C.J. and Toohey J.) that denial of the privilege to a corporation would undermine a corporation's position in the adversary system. Hence if it had not been for the ultimate balancing of public interests engaged in by McHugh J. it may have been the case that His Honour could have allowed corporations to claim the privilege at common law. Arguably, the judicial practice of balancing the public interests from case to case should be a judicial practice reserved exclusively for the doctrine of public interest immunity.□

#### Footnotes

- (1993) 68 A.L.J.R. 127. 2. At 134. 3. At 135. 4. At 135, citing Art. 14(3)(9) of the International Covenant on Civil and Political Rights. 5. At 136. 6. *Caltex* in the Court of Criminal Appeal (1991) 25 N.S.W.L.R. 118 at 127; At 136. 7. At 136. 8. At 136. 9. At 137. 10. At 138. 11. At 138. 12. At 138. 13. *Pyneboard Pty. Ltd. v. Trade Practices Commission* (1983) 152 C.L.R. 328. 14. At 142. 15. At 144, citing *Triplex Safety Glass Co. v. Lancagay Safety Glass* (1934) Ltd. [1939] 2 K.B. 395 at 409. Note that the difference between the common law position in Canada and the position under the Canadian Charter of Rights and Freedoms accounts for the discrepancies between the High Court judgments on their reviews of the Canadian position — Compare *Caltex* at 134, at 143 and at 158.

- At 145. 17. At 146. 18. At 146. 19. At 147. 20. At 147. 21. At 147. 22. At 148. 23. At 157. 24. At 159. 25. At 162. 26. At 163. 27. At 163. 28. At 163. 29. At 164. 30. At 165. 31. At 165, citing *Sankey v. Whitlam* (1978) 142 C.L.R. 1 per Mason J. at 95-96. Query whether it is appropriate to analogise with public interest immunity on this point — see point 8 of implications in this article above. 32. At 166. 33. At 150. 34. At 153. 35. At 153 per Lord Denning M.R. in *British Steel v. Granada Television* [1981] A.C. 1096 at 1127. 36. At 155. 37. At 164. 38. At 164: See also Brennan J. at 143 and Deane, Dawson and Gaudron JJ. at 155 on this point. 39. It is conceded, however, that it will still be necessary to construe subpoenas to be addressed in the future to the corporation itself in order to overcome the problem of a corporation's inability to give evidence. See *Rochford v. Trade Practices Commission* (1982) 43 A.L.R. 659, *Penn-Texas Corp v. Murar Anstalt* [1964] 2 Q.B. 647 at 663 and McNicol, *Law of Privilege* at 156. 40. See Gleeson C.J. (with whom Mahoney J.A. and McLelland J. agreed) in *Caltex Refining Co. Pty. Ltd. v. State Pollution Control Commission* (1991) 74 L.G.R.A. 46 at 53-54. 41. Carvan, J., "Privilege Against Self-Incrimination — *EPA v. Caltex Refining Co. Pty. Ltd.*" [1994] ALMD Advance 271-398 (28 February 1994) at 3. 42. *Caltex* at 146-148. 43. This was also based on his decision that corporations cannot claim the privilege against self-incrimination which is a bulwark of liberty. 44. *Caltex* at 147. 45. At 138. 46. At 161 and at 164. 47. In *Pyneboard Pty. Ltd. v. TPC* (1983) 152 C.L.R. 328 and in *Sorby v. Commonwealth* (1983) 152 C.L.R. 281. 48. *O'Reilly v. Commissioners of State Bank (Vic.)* (1982) 44 A.L.R. 27. 49. Weinberg, M., "Recent developments in identification evidence, confessions and privilege" (1983) 57 L.I.J. 1090 at 1094. 50. (1983) 153 C.L.R. 52. 51. (1976) 135 C.L.R. 674. 52. At 688. 53. For example, Corporations Law 1989, s.1316A, *Australian Securities Commission Act 1989* (Cth.), s.68, *Pollution Control Act 1970* (N.S.W.). Query whether the facts of *Pyneboard's* case, *op. cit.*, would arise today given the majority decision in *Caltex*. 54. *Caltex* at 140. 55. At 166.

## CHAPTER FIVE

### "Professional Privilege Spreads Its Wings"

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## FEATURE

# Professional privilege spreads its wings

by SUZANNE B McNICOL

In the past two years the established doctrine of legal professional privilege has been substantially altered.

This is due not so much to the nature of the doctrine both at common law and under the *Evidence Act 1995* (Cth), but to the manner in which the doctrine has been applied by the courts. The traditional classification of legal professional privilege as either a confidential communication between a lawyer and client for the sole purpose of advice or litigation, or a confidential communication between a lawyer or client and a third party for the sole purpose of litigation,<sup>1</sup> has not changed.

However, the doctrine has been extended by a redefining of the lawyer/client relationship. This is particularly apparent in the context of the emerging doctrine of joint privilege and to a lesser extent the doctrine of common interest privilege.

What has now become important is identifying who is the client (and how many clients there are); and who is the lawyer of that client (and how many lawyers there are). Where, for example, the client is a company, there may be subsidiaries, parent companies, holding companies or shareholders who are the agents of the company etc. Even where the client is not a company, there may be a management agreement, a joint venture agreement or some other agreement which somehow justifies treating a number of bodies, for advice purposes, as the one entity (for the purpose of joint privilege) or as having a "common interest" (for the purpose of common interest privilege). For example, where a client company (Company A) is a defendant and is being sued on a debt and the client is in the process of selling all its shares to another company (Company B), does Company B have a common interest with the client, Company A?



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In *Network Ten Ltd v Capital Television Holdings Ltd*,<sup>2</sup> Giles J in the NSW Court of Appeal held that although both companies were concerned to assess the position of the claim for the debt being made against the client company A, they were each concerned for their own individual purposes. Hence there was insufficient commonality of interest for common interest privilege to operate. Similarly, when asking who are the lawyers of the client, how do we classify quasi-lawyers, in-house lawyers working for banks and merchant banking companies who offer experienced, professional financial advice? The High Court in *Waterford v Commonwealth*<sup>3</sup> was clear in its extension of legal professional privilege to in-house lawyers. However, it is still not entirely resolved how far this extension will apply to other analogous situations.

This article proposes to identify the essential features of joint privilege and common interest privilege and their differences. The concept of waiver under the *Evidence Act 1995* (Cth) and at common law will also be discussed, as this is particularly significant when considering the differences between joint privilege and common interest privilege.

## ESSENTIAL FEATURES

### 1. Common interest privilege

In *Somerville v Australian Securities Commission*,<sup>4</sup> Lockhart J in the Federal Court defined common interest privilege as a "privilege in aid of anticipated litigation in which several persons have a common interest. It often happens in litigation that a plaintiff or defendant has other persons standing alongside him – who have the self-same interest as he – and who have consulted lawyers on the self-same points as he – but these others have not been made parties to the action".<sup>5</sup>

The first thing to note is that a common interest holder is not necessarily a client of the lawyer. In *Pioneer Concrete (NSW) Pty Ltd v Webb*,<sup>6</sup> the defendant, Mr Webb, was a director of a company, CH Webb Bros Pty Ltd, now in liquidation. Simos J held that the defendant was entitled to claim common interest privilege, even if he was not a client of the lawyers, on the basis that he had a common interest in the legal advice with the company which had retained the lawyers.

The second thing to note is that retention of a common solicitor is not essential for common interest privilege to apply. In *Bulk Materials (Coal Handling) Services Pty Ltd v Coal & Allied Operations Pty Ltd*,<sup>7</sup> an underwriter had not yet extended, but was likely to extend, indemnity to a plaintiff/insured and otherwise had interests in the litigation identical with those of the plaintiff/insured.

**Legal professional privilege has recently been expanded at common law, particularly by the development of joint privilege and common interest privilege.**

Giles J in the NSW Supreme Court held that there was a common interest apt for the application of common interest privilege to documents and copy documents passing from underwriter to insured. While retention of a common solicitor might be a factor – and in some circumstances a significant factor – in the existence of common interest privilege it was not essential if the common interest were to be found elsewhere. Giles J concluded that the result of a successful claim to common interest privilege is that each of those with a common interest can avail him or herself of the legal professional privilege enjoyed by the other.

The third thing to note is that there may be significant evidentiary problems associated with establishing or proving a "sufficient identity or commonality of interest". In *Theiss Contractors Pty Ltd v Terokill Pty Ltd*,<sup>8</sup> Derrington J in the Queensland Supreme Court stated that for the purpose of common interest privilege, the interests need only be "common" and not necessarily "identical". In that case, the insurer and the insured (plaintiff) had an interest in recovering money in the same cause of action. The insurer had commissioned an expert report prior to the institution of proceedings. After the proceedings were instituted, the insurer conducted the action in the plaintiff's name. Derrington J held that as the plaintiff and insurer had a common interest in the litigation, the privilege was not defeated by a copy of the report being given by the insurer to the plaintiff. While *Theiss Contractors* appears to give flexibility to the scope and application of common interest privilege,<sup>9</sup> there are other cases which have been extremely strict in requiring the "self-same" interest to be held by the different entities for the doctrine of common interest privilege to apply. For example, in *Ampolex v Perpetual Trustee Co*,<sup>10</sup> Giles CJ said: "Two persons interested in a particular question will not have a common interest for the purpose of common interest privilege if their individual interests in the question are selfish and potentially adverse to each other. In such a case there will not be the neces-

sary identity of interest".<sup>11</sup> In *Ampolex*, County NatWest Securities Aust (Ltd) (County NatWest) alleged a common interest with GPG Nominees and Allied Mutual Holdings Pty Ltd (Allied). County NatWest relied on:

the fact of and terms of an agreement dated 25 May 1995 revealing a relationship between GPG Nominees and County NatWest in connection with GPG Nominees' purchase of 6,000,000 unsecured convertible notes from Ampolex Ltd;

the dates and description of the documents evidencing the agreement;

evidence on information and belief that a director of County NatWest (Mr Clayhill) assumed that at the time the documents were provided to GPG Nominees and Allied they had a similar interest to County NatWest and that the documents would be kept confidential; and the fact that junior counsel providing advice to County NatWest was briefed in the proceedings on behalf of GPG Nominees and Allied.

They argued, from these four points, that County NatWest, GPG Nominees and Allied therefore had a common interest in the rate at which the notes were convertible and that GPG Nominees, Allied and the director came into possession of the documents in furtherance of that common interest.

Giles CJ in the NSW Supreme Court held that there was no common interest privilege and that the agreement did not enable inferences to be drawn as to a common interest. His Honour added that the identity of interest was not sufficient for common interest privilege to apply and that any common interest was but speculation. He stated: "Let it be inferred that both County NatWest and GPG Nominees and Allied had an interest in legal advice in relation to conversion of the notes, with a view to a commercial arrangement such as that which was ultimately recorded in the agreement of 25 May 1995. Their individual interests may have been such that County NatWest saw fit to involve GPG Nominees and Allied in the process of getting advice and to disclose the advice to them, but each had its or their individual interest in advice upon the conversion of the notes, advice which might guide it or them in what was done or not done *vis-à-vis* the others or other. Regard to the dates and descriptions of the documents in question does not lead to a different view, Mr Clayhill's [i.e. the director's] assumption takes the matter no further, and the fact

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that junior counsel advising County Nat-West now appears for GPG Nominees and Allied is unsurprising, given the structure of and nature of practice at the Bar".<sup>12</sup>

## 2. Joint privilege

The following are two features of the doctrine of joint privilege which have emerged from the cases to date.

First, there are again significant evidentiary problems, just as with common interest privilege, associated with establishing a joint privilege. There appear to be at least three ways of proving joint privilege.

The most obvious and conclusive method would be to show a "formal joint retainer" of the lawyer by the clients. This would be achieved by proving the existence of a contract (presumably express or implied) between the clients and its legal advisers. Such a contract would clearly identify the clients who were entitled to the joint privilege.

The second method would be to show a "factual joint privilege" between the lawyer and the clients. In *Pioneer Concrete (NSW) Pty Ltd v Webb*,<sup>13</sup> Simos J found, as a matter of fact, that two clients jointly sought and received legal advice from a lawyer. A finding of a joint privilege "as a matter of fact" can occur, despite the fact

that there may be a contract for legal advice between only one of the clients and the legal advisers. Simos J in *Pioneer Concrete* said: "The true substance of the arrangements between the lawyers and the company was to the effect that the lawyers would advise as clients both the company and the former directors in their personal capacities, although all legal fees were to be paid by the company".<sup>14</sup> In making this finding, Simos J relied heavily on affidavit material on information and belief from the defendant and his fellow directors as to their stated desire to obtain advice as to their personal liability as directors, and to the fact that such advice was in fact given.

Similarly, in the recent decision of *Farrow Mortgage Services Pty Ltd v Webb*,<sup>15</sup> the majority of the NSW Court of Appeal upheld a joint privilege in respect of legal information sought jointly by a company and its directors. Sheller JA and Waddell AJA held that joint privilege applied, despite the fact that the legal advice had been provided under a contract between the company only and its legal advisers. In so doing, the majority judges upheld the decision of Young J at first instance,<sup>16</sup> that although the legal advice had not been jointly commissioned by the company and its directors, it was, never-

theless, subject to joint privilege because it had been sought on behalf of the company and its directors. It should, however, be noted that Meagher JA delivered a strong dissent in the appeal case, stressing that there should be no joint privilege because the legal advice had been obtained by the company, paid for by the company and provided for by a solicitor retained by the company. Meagher JA was of the view that the directors could not claim any legal interest in the legal advice and therefore they could not factually assert the protection of joint privilege.

The third method of claiming a joint privilege is by proving a "believed joint privilege" or a joint privilege on the basis of a "reasonably held belief" on the part of the client. Again, in *Pioneer Concrete (NSW) Pty Ltd v Webb*, Simos J upheld a joint privilege where the client shows again, usually through affidavit material, that the client believes on reasonable grounds that the lawyers, in giving their advice, were acting for both the client and the other body as joint clients.

Hence, on the facts of *Pioneer Concrete*, the defendant, Mr Webb, was able to show that he believed on reasonable grounds that the lawyers were giving their advice in their capacity as lawyers to both the de-

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fendant and the company as clients.

Likewise, in *Global Funds Management (NSW) Ltd v Rooney*,<sup>17</sup> Young J stated, in a case where a manager and a trustee were receiving advice from the same solicitor, that if the client believes on reasonable grounds that the other is the client's solicitor, then legal professional privilege exists up until the time that the belief is exploded.

The second feature to note regarding joint privilege is that, as a consequence of the *Pioneer Concrete* decision and its finding of a "factual joint privilege", there can now be a joint privilege even where only one of the joint clients pays all the legal costs of the legal advisers.

### SIGNIFICANT DIFFERENCES

It appears that joint privilege is wider than common interest privilege. In most cases this means that it will be easier to invoke joint privilege than common interest privilege. Furthermore, common interest privilege will be more easily lost than joint privilege because waiver is more likely to be imputed in the case of common interest privilege than joint privilege.

First, for common interest privilege to apply, litigation needs to be contemplated, anticipated or pending. While none of the cases actually articulate this as an essential precondition for the application of common interest privilege, it is apparent from a scrutiny of all the cases that there is an assumption that litigation must be contemplated. This should be contrasted with joint privilege where pure legal advice is sufficient for this privilege to operate.

Second, while the *Evidence Act* 1995 (Cth) does not appear to differentiate between common interest privilege and joint privilege where waiver is concerned (see s122(5)(b) with respect to common interest privilege and s122(5)(a) with respect to joint privilege), there appears to be a sharp difference at common law with respect to waiver. In the case of joint privilege, all those entitled to the privilege must consent to waiver of the privilege.<sup>18</sup> In *Re Nika Management Services Pty Ltd (In Liq)*,<sup>19</sup> Cohen J held that where joint privilege applies, it was sufficient as against third parties if only one of the parties claimed the privilege, but all must agree for the purpose of waiving it.

This should be contrasted with the situation where common interest privilege applies. Fairness may well require that if one holder of the privilege, in prosecuting the common interest for the benefit of all, waives legal professional privilege, then

there is a consequential waiver on the part of the other holders.<sup>20</sup> For example, in *Ampolex* Giles CJ stated that, assuming that the documents in the hands of GPG Nominees and Allied were privileged, the privilege was lost when GPG Nominees and Allied alleged that they had purchased the convertible notes in the belief induced by Ampolex that the notes were convertible on the basis set out in the trust deed. Therefore, GPG Nominees and Allied "opened up for investigation" and "testing" the source of and basis for their belief – they "exposed for scrutiny" their "corporate states of mind" and the legal advice is likely to have contributed to their states of mind. Therefore, once they made allegations raising as an issue their own state of mind (to which their legal advice is likely to have contributed), they cannot claim legal professional privilege for that advice. Nonetheless, County NatWest argued that if it had a common interest privilege with GPG Nominees and Allied, then a waiver by GPG Nominees and Allied did not destroy the privilege (because all must consent to the waiver and therefore County NatWest could still maintain the privilege).

Giles CJ rejected this argument by County NatWest and held that there was a consequential waiver. The nature of common interest privilege entails that the identity of interest means that each holder of the privilege is exposed to the consequences of the acts of the other. Giles CJ stated: "If, in prosecuting the interest for the benefit of both one holder waives legal professional privilege, fairness may well require that the act impact upon the other".<sup>21</sup> Therefore, "if there were a common interest privilege between County NatWest and GPG Nominees and Allied, then County NatWest shared with GPG Nominees and Allied the obtaining of advice and will share with GPG Nominees and Allied a commercial benefit or detriment according to the outcome of these proceedings – County NatWest's fortunes 'are relevantly linked' with those of GPG Nominees and Allied".<sup>22</sup>

Finally, in *Re Nika Management* it was also held that if, however, there are proceedings between the persons having the joint privilege, then neither can claim the privilege against the other. Cohen J cited *McCormick on Evidence* which states:

"But it will often happen that the two original clients (within the original 'charmed circle') will fall out between themselves and become engaged in a controversy in which the communications at their joint consultation with the lawyer may be vitally

material. In such a controversy it is clear that the privilege is inapplicable".<sup>23</sup> This situation is clearly contemplated by s124(2) of the *Evidence Act* 1995 (Cth) which provides that one party to a joint privilege may adduce evidence in a civil proceeding of a communication made by any one of them to the lawyer. According to the commentary to the *Evidence Act* 1995 (Cth), s124(2) would apply to a situation where joint venturers consult a solicitor about a joint venture and they later "fall out" and commence litigation about the joint venture.<sup>24</sup>

### CONCLUSION

It can be seen from the above discussion that joint privilege and common interest privilege are both relatively recent doctrines which are presently being developed by the courts. The courts are tinkering with the structure of legal professional privilege and to that extent they need to tread carefully. Yet, clearly changes are being made and are needed in order for legal professional privilege to continue to serve its rationale and also to reflect the commercial and legal reality of transactions. ■

#### Notes

- This article arose out of a seminar on legal professional privilege at Mallesons Stephen Jaques on 9 September 1996 which was co-presented by the author and Mark Darian-Smith, a partner in the Commercial Disputes and Litigation Group at Mallesons Stephen Jaques. 1. *Baker v Campbell* (1983) 49 ALR 385; *Carter v Managing Partner, Northmore Hale Davy and Leake* (1995) 129 ALR 593. Under ss118-9 of the *Evidence Act* 1995 (Cth) the test is a "dominant purpose" one. 2. (1995) 16 ACSR 138. On the issue of the importance of identifying who is the "client" under the *Evidence Act* 1995 (Cth) s117(1)(13), see *Times Properties Pty Ltd v Challenge Bank* [1996] ATPR 41,572. 3. (1987) 163 CLR 54. 4. (1995) 18 ACSR 236. 5. *ibid* at 246. 6. (1995) 18 ACSR 418. 7. (1988) 13 NSWLR 689. 8. [1993] 2 Qd R 341. 9. See also *Bulk Materials (Coal Handling) Services Pty Ltd v Coal and Allied Operations Pty Ltd* (1988) 13 NSWLR 689; *Pioneer Concrete (NSW) Pty Ltd v Webb* *op cit*, and *Farrow Mortgage Services Pty Ltd v Webb* (1996) 14 ACLC 1240 where claims to common interest privilege were successful. 10. (1995) 37 NSWLR 405. 11. *ibid* at 410. 12. *ibid*. Similarly, in *Network Ten*, Giles CJ held that there must be sufficient commonality of interest for common interest privilege to operate. See also the unsuccessful claim to common interest privilege in *Somerville v Australian Securities Commission* *op cit*, where Lockhart J stated that the Australian Securities Commission does not have the "self-same" interest as the client who is the party to litigation commenced under s50 of the *Australian Securities Commission Law*. Lockhart J further held that the client is the plaintiff in whose name the proceeding has been brought and is entitled to the fruits of the action and not the Australian Securities Commission. 13. *op cit*. 14. *ibid* at 423. 15. (1996) 14 ACLC 1240. 16. (1995) 13 ACLC 329. 17. (1994) 36 NSWLR 122. 18. *Farrow Mortgage Services Pty Ltd v Webb*, *op cit* and *Re Nika Management Services Pty Ltd (In Liq)* (1996) 14 ACLC 326. 19. *ibid*. 20. *Ampolex v Perpetual Trustee Co* *op cit*. 21. *ibid* at 413. 22. *ibid*. 23. *op cit* at 330. 24. *Commonwealth Evidence Law* with commentary by G Bellamy and P Meibusch, AGPS, 1995, para [124.3] page 112.

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## CHAPTER SIX

### “Privilege Under the Evidence Act 1995 (Cth)”

## PRIVILEGE UNDER THE EVIDENCE ACT

S.B. McNicol

In this paper I shall be examining the various privileges as set out in Part 3.10 of the *Evidence Act* 1995 (Cth). Division 1 (ss 117-126) is the most important for the purposes of this seminar and it deals with the statutory doctrine of "Client legal privilege". Sections 117-120 inclusive deal with the definition, nature and scope of client legal privilege. Sections 121 to 126 deal with the significant area of "loss of client legal privilege". These sections cover exceptions such as the common law "crime/fraud" exception (s 125) as well as the doctrine of waiver of privilege (s 122), although the term "waiver" is not used under the Act. Division 2 (ss 127-128) deals with religious confessions (s 127) and the privilege against self-incrimination (s 128). It should be noted at the outset that s 128 adopts a certification procedure whereby a witness who objects to giving evidence on the grounds of self-incrimination may be required to give evidence but be given a certificate which provides for use immunity (direct and indirect) for any evidence given (s 128(7)). Further, s 128 should be read in conjunction with s 187 of the *Evidence Act* 1995 (Cth) which abolishes the privilege against self-incrimination for bodies corporate, consistent with the common law position under *EPA v Caltex Refining Co Pty Ltd* (1994) 178 CLR 477.

Division 3 (ss 129-131) is headed "Evidence excluded in the public interest". Under this Division evidence of unpublished reasons for judicial or arbitration decisions are excluded (s 129), matters of state are excluded (s 130) (and it should be noted that s 130 retains many of the essential elements of the common law doctrine of public interest immunity, in particular the curial balancing exercise) and evidence of settlement negotiations are excluded (s 131). It should be noted that the common law doctrine of without prejudice privilege is extended slightly under s 131, particularly in relation to negotiations with a third party. Division 4 deals with general procedural matters relating to privilege claims, including the judge's obligation to inform a witness or party of their rights to make application under Part 3.10 (s 132), the court's right to inspect any document in relation to which a question has arisen under Part 3.10 (s 133) and a provision which declares that any evidence which must not be adduced or given in a proceeding, because of the operation of Part 3.10, is not admissible in the proceeding.

There are two general introductory observations which should be noted. First, the language of all the provisions contained within Part 3.10 is predicated on curial proceedings. Most of the sections begin with the words, "Evidence is not to be adduced if, on objection by a client or party, the court finds that adducing the evidence would ...". All of the words which I have emphasised/underlined indicate that the privilege is confined to a courtroom or judicial arena. A literal interpretation of the sections would therefore suggest that the privileges which are covered by the *Evidence Act* 1995 (Cth) are considerably narrower in their scope than the equivalent common law privileges. There has already been a substantial amount of caselaw devoted to this question (see, eg, *Trade Practices Commission v Port Adelaide Wool Co Pty Ltd* (1995) 132 ALR 645; *Sparron v Apand* (1996) 138 ALR 735; *Telstra Corp Ltd and News Corporation Ltd v Australia Media Holdings Pty Ltd* (1997) 41 NSWLR 277; *Re Z* (1996) FLC 92-694; *BT Australasia Pty Ltd v State of NSW* (1996) 140 ALR 268) and some of these will be considered below. Second, it will be necessary in this paper to refer to the relevant common law doctrines of privilege, particularly where there has been a sharp divergence between the statutory doctrine and the common law doctrine. An example of such sharp divergence is s 123 of the *Evidence Act* 1995 (Cth) which provides an exception for client-legal privilege for the benefit of a defendant in a criminal proceeding (see *R v Pearson*, Sup Ct, NSW, 5 March 1996). This provision effectively reverses the effect of *Carter v Managing Partner, Northmore Hale Davy and Leake* (1995) 129 ALR 593 which decision abolished the "Barton" exception of "documents establishing innocence" at common law.

#### Client-Legal Privilege Under the *Evidence Act* 1995 (Cth)

Like legal professional privilege at common law, the *Evidence Act* 1995 (Cth) divides client legal privilege into two distinct heads. The first head, the "Legal Advice" head, covers: (a) confidential communications between the client and a lawyer; (b) confidential communications between two or more lawyers acting for the client; and (c) the contents of a confidential document prepared by the client or a lawyer; for the dominant purpose of providing legal advice to the client (section 118, *Evidence Act* 1995 (Cth)). The second head, the "Litigation" head, covers: (a) confidential communications between the client or lawyer and "another person"; and (b) the contents of a confidential document prepared; for the dominant purpose of the client being provided with professional legal services relating to an actual, anticipated or pending proceeding. For three reasons it appears that client legal privilege under the *Evidence Act* 1995 (Cth) is wider than legal professional privilege at

common law. First, the most obvious difference is the adoption of a "dominant purpose" test under the Act. Therefore a document which has been prepared for the "dominant purpose" of the client being provided with professional legal services will be privileged under the Act and this is clearly wider than the common law test (see the facts of *Hardie Finance Corp Pty Ltd v CCD Australia Pty Ltd* (Federal Court Australia, Nicholson J, 14 July 1995) re s 119(b) of the *Evidence Act* 1995 (Cth)). Second, an extremely wide definition of client has been adopted by s 117 of the *Evidence Act* 1995 (Cth). Under that section, "clients" are those who instruct the lawyer and includes an employer (not being a lawyer) of a lawyer and the client's employees or agents. (Section 117(1)(a) of the *Evidence Act* 1995 (Cth): for a common law equivalent to this situation, see *Waterford v Commonwealth* (1987) 163 CLR 54. Section 117(1)(b) of the *Evidence Act* 1995 (Cth): see *Times Properties Pty Ltd v Challenge Bank Ltd* [1996] ATPR 41,572 which looked at the question who is a "client" under s 117(1)(b)). Third, it is harder to waive or lose the privilege under the *Evidence Act* 1995 (Cth) than at common law. Basically, s 122 of the *Evidence Act* 1995 (Cth) adopts a quantitative test whereas the common law test is clearly qualitative (*Goldberg v Ng* (1996) 185 CLR 83; *Attorney-General (NT) v Maurice* (1986) 65 ALR 230. See also G.B. Roberts, "Client Legal Privilege - Some Practical Considerations" (1996) 70 LIJ 54) and this will be dealt with below.

On the other hand, for two reasons it appears that client legal privilege under the *Evidence Act* 1995 (Cth) is narrower than legal professional privilege at common law. First, the language of the statute indicates that client legal privilege is limited to curial proceedings. For example, section 118 states that "Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in...". Clearly, the words used (as emphasised in this text) in section 118 (and in section 119) suggest a courtroom setting. If this is correct, then client-legal privilege is an extremely narrow privilege and the question arises as to what is the status of documents prepared pre-trial or, for that matter, in any non-curial setting. This problem was partially addressed and answered in *Trade Practices Commission v Port Adelaide Wool Co Pty Ltd* ((1995) 132 ALR 645 where Branson J held that "logic dictates" that the same test (ie the "dominant purpose" test) applies both pre-trial and at trial. (For four more recent decisions on this issue, see *Telstra Corp Ltd and News Corp Ltd v Australis Media Holdings Pty Ltd* (1997) 41 NSWLR 277; *Tallglen Pty Ltd v Pay TV Holdings Pty Ltd*, unreported 3 March 1997 (NSW Sup Ct, Hunter J); *Sparron v Apand* (1996) 138 ALR 735 where Branson J appears to be taking a different view from the one she took in the Port Adelaide Wool case; and *Alphapharm v Eli* (unreported 14 August 1996, NG

432/96) Moore J). Second, section 118 does not mention litigation. Does this mean that only communications between lawyers and their clients made for the dominant purpose of advice are protected under the Act? In other words, are communications made between a lawyer and her or his client for the dominant purpose of litigation not privileged? This would indeed seem ludicrous and it may be that the way around this problem will be to include "client" and "lawyer" within the meaning of the phrase "another person" in section 119. This interpretation would be helpful in that clearly communications between lawyers and clients made for the purpose of litigation should be included in the definition of client legal privilege. However, it would be preferable to state expressly in the Act that such communications be covered rather than to extend the meaning of the phrase "another person" to lawyers and clients when the original meaning of "another person" was surely a "third party" in the sense this is used at common law.

### Loss of Client Legal Privilege: Consent and Related Matters

Under s 122(2) of the *Evidence Act* 1995 (Cth), subject to certain exceptions listed in s 122(2) itself, the privilege created by ss 118-120 will be lost where the client or party has "knowingly and voluntarily disclosed to another person the substance of the evidence".

It appears from s 122 that for the privilege to be lost, the disclosure must be both "knowing" and "voluntary". Furthermore, the disclosure itself must be made by "the client or party" and the disclosure must be of "the substance of the evidence". For many reasons, therefore, it would be much more difficult to lose the privilege under the Act compared to at common law. If, for example, the facts of *Goldberg v Ng* (1996) 185 CLR 83 (a case where imputed waiver occurred) were applied to s 122(2), it may well be that Mr Goldberg would not be taken to have waived the privilege because he did not "knowingly" disclose the substance of the evidence.

First, presumably a "knowing" disclosure would mean that the client or party "knows" that waiver will occur, that is that privilege will be lost. It would follow that a disclosure would be "knowing" when the person who discloses the documents understands, comprehends and acquiesces in the waiver.

Second, under s 122(2), the disclosure must also be "voluntary". What does this mean? Presumably it suggests that an "inadvertent" or "accidental" disclosure would not result in

the loss of privilege. Furthermore, if one analogises with the law of confessions, voluntariness means of one's own free will, without inducement or oppression. In the recent case of *Meltend Pty Ltd v Restoration Clinics of Australia Pty Ltd* (1997) 145 ALR 391 Goldberg J did, however, hold that voluntary disclosure under s 122 of the *Evidence Act* does not exclude disclosure by mistake where formal discovery is made. In that case, each party to the proceedings was ordered to give discovery and inspection to each opposite party. Following the order the respondent filed a list of documents and mistakenly included in Part 1 of Schedule 1 (ie, the discoverable documents) a copy of a letter from S to the respondent (Doc No 8.017). Y, a solicitor for the applicant, inspected the documents contained in Part 1 of Schedule 1, including the letter. The respondent's solicitors then claimed the letter was covered by legal professional privilege, having been included in Part 1 of Schedule 1 by mistake and that it should have been included in Part 2 of Schedule 1 (ie, documents privileged from production on the grounds of legal professional privilege). Goldberg J held that imputed waiver had occurred and that disclosure of the letter was a voluntary disclosure as part of the formal process of discovery and inspection. Goldberg J stated that waiver will be imputed where the person entitled to claim the privilege has performed some act which renders it unfair to another party that the privilege be maintained. The principle is not limited only to cases of partial or limited disclosure of the contents of the documents. In this case Goldberg J held that once documents have been disclosed to an opposite party as part of the formal process of discovery and inspection, in circumstances involving no criticism of that party, then fairness requires that the party be not disadvantaged in the use it can make of the documents.

Third, under s 122(2), the disclosure must be made by a "client or party". Presumably this is a reference to the "client" in the lawyer/client relationship which led to the documents becoming privileged in the first place.

Finally, under s 122(2), a disclosure of the "substance of the evidence" must be made to another person. This is a quantitative assessment of waiver. How do we determine whether a client or party has disclosed the "substance" of the evidence?

It remains to be seen how the waiver provisions of the *Evidence Act* 1995 (Cth) will apply in the future. There are, however, some general comments that can be made about s 122(2) as it presently appears to operate. One observation would be that s 122(2) embodies a very tightly worded and rigid test for waiver. There appears to be little room for fairness or flexibility



under its present wording. It may be, however, that a robust court will be prepared to inject a notion of "fairness" into s 122 in the future. There are several ways in which a court might attempt to do this and a recent attempt was in fact made by Kirby J in *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1996) 70 ALJR 603. In that case Kirby J held that a public reference by Ampolex in a Part B Statement (relating to a takeover offer) to "supporting legal advice" did amount to a waiver of the "substance of the evidence" under s 122(2) of the *Evidence Act 1995* (Cth). This meant that the precise content of the "supporting legal advice" was no longer privileged. Kirby J explained that on the one hand, "A mere reference to the existence of legal advice would not amount to a waiver of its contents". But, on the other hand, on the facts before him, Ampolex's assertion in the Part B Statement which was publicly published to the shareholders as to the "likely outcome of litigation" which was "made on legal advice" did amount to waiver of the precise content of the legal advice on that point.

In my view, Ampolex's case is an example of a sub silentio injection of "fairness" into s 122(2) of the *Evidence Act 1995* (Cth). Although Kirby J confined himself to the precise wording of s 122(2) and, in particular, to the interpretation of the phrase "substance of the evidence", his Honour could really be taken as saying that fairness dictates that the privilege be lost. The upshot of Kirby J's reading of s 122(2) is that Ampolex cannot "have it both ways", ie, they cannot both publish the gist of legal advice (ie the likely outcome of certain litigation) and also resist production of the legal advice on the grounds of legal professional privilege.

It is of course open to the courts to interpret other phrases of s 122(2) of the *Evidence Act 1995* (Cth) (for example, "knowing" and "voluntary") broadly so as to allow for the concept of fairness to operate. This certainly appears to be the approach taken by Goldberg J in the *Meltend* case (see also *MGICA (1992) Ltd v Kenny & Good Pty Ltd (No 2)* (1996) 61 FCR 236). Another way of overcoming the present rigidity of s 122 would be to amend the wording of s 122 by adding other types of waiver to the section, for example, waiver "by operation of law" or "imputed" waiver. This would have the advantage both of flexibility and of bringing the statutory position more in line with the common law.

In conclusion, it must be said that there are, as yet, many unresolved issues relating to privilege under the *Evidence Act 1995* (Cth). It is clear that client legal privilege has been made wider in scope and application under the *Evidence Act 1995* (Cth) and presumably many more documents will be covered by client legal privilege under the Act than at common

law. However, other privileges have been omitted altogether, such as the limited doctor-patient privilege as it applies under s 28(2) of the *Evidence Act 1958* (Vic) in Victoria. However, for the reasons argued by the present author in her book on the *Law of Privilege* (LBC 1992 at p 349-50) it is preferable to have no doctor-patient privilege at all than the narrow, statutory and unworkable privilege that exists in civil proceedings in Victoria.

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## CHAPTER SEVEN

“Legal Privilege — How It Is Won and Lost”

## Legal Privilege: How It Is Won And Lost

by  
Suzanne B. McNicol

### Introduction - 'Winning and Losing' Privilege

As the title of this Graduate Lecture suggests, the central theme of the lecture is both how legal professional privilege is established and how it is lost. This involves an analysis of the ways in which legal privilege both "attaches" to documents and the ways in which legal privilege loses its "attachment" to documents. In practice, however, legal practitioners and in particular commercial and corporate litigators are more concerned about the latter situation, namely, how confidential professional communications in documentary form can lose their privileged status. For example, persons who hold the benefit of privilege are constantly concerned that, by handing over the privileged documents to a third party or external consultant, the privilege in the document has been waived or lost. Hence the doctrines of waiver and fairness will become of central concern throughout this lecture, in particular because these doctrines help to determine when privilege is lost.

This lecture falls naturally into five parts. First, it is proposed to explain how legal professional privilege is established (or "won") at common law. This will involve defining the privilege and then exploring the recent expansion by the courts of the scope of privilege by the ingenious use of "common interest privilege" and "joint privilege". Second, an explanation of how "client legal privilege" under the *Evidence Act 1995* (Cth) is established will be necessary. Comparisons between legal professional privilege at common law and client legal privilege under the *Evidence Act 1995* (Cth) will also be made and important differences will be highlighted. Third, the "losing" of privilege at common law will be analysed. This will involve an evaluation of the recent High Court decision in *Goldberg v Ng*<sup>1</sup> where by a 3:2 majority, the High Court decided that at common law privilege can be lost and imputed waiver will be deemed to have occurred wherever "fairness" dictates it. Fourth, an analysis of how privilege is lost under the *Evidence Act 1995* (Cth) will be undertaken. Again, a contrast will be made between the third and fourth sections insofar as the doctrine of waiver is concerned. In particular, it will be seen that the concept of waiver can change its meaning depending upon whether the common law or the *Evidence Act 1995* (Cth) applies. The fifth and final section will attempt to draw together the essential features of the lecture and relate these to practical issues on office management. In other words, the final section will address some areas which lawyers and other professional and corporate bodies should turn their minds to as a consequence of the present state of the law on legal professional privilege and its application.

### How Privilege is Won at Common Law

The nature of legal professional privilege at common law is expressed in the following passage:

"In civil and criminal cases, confidential communications passing between a lawyer and her or his client, which have been made for the sole purpose of seeking or being furnished with legal advice or for the sole purpose of

<sup>1</sup> (1996) 185 CLR 83

preparing for actual or contemplated litigation, need not be disclosed in evidence or otherwise revealed. This rule also extends to communications passing between a lawyer or client and third parties if made for the purpose of actual or contemplated litigation."<sup>2</sup>

This traditional definition still applies at common law and it consists of two distinct heads — the first head which is known as the "communications privilege" encourages candour between lawyer and client and protects individual rights, and the second head which is known as the "third party litigation privilege" protects the freedom of the lawyer to make investigations and collect materials for her or his brief in an adversary system of litigation.<sup>3</sup> The importance of the privilege has been reaffirmed recently by the High Court<sup>4</sup> and the preferred rationale appears to be the human rights rationale. As Kirby J recently stated in *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd*:<sup>5</sup>

"The law of legal professional privilege is an important branch of the law protecting the basic rights of persons in a society such as ours. Those rights include the right to approach lawyers without concern that matters disclosed, and advice received, in confidence will ordinarily enjoy the protection of the law".

While the traditional definition of legal professional privilege is still of central importance, the doctrine of legal professional privilege itself has recently been expanded by the emergence of the doctrines of common interest privilege and joint privilege. No longer, therefore, will it suffice to merely ask the question "who is the lawyer?" and "who is the client?". In addition, it will be essential to inquire (a) whether there are any other persons who have a "common interest" with the original client in the outcome of anticipated litigation to which the benefits of the doctrine of legal professional privilege will also apply (via common interest privilege)<sup>6</sup> and (b) whether there are any other persons who jointly sought and received legal advice or who entertained a "reasonably held belief" that the lawyers, in giving their advices, were acting for both the client and the other body as joint clients.<sup>7</sup> Again, in this latter case, the joint client will be entitled to the benefits of legal professional privilege via the doctrine of joint privilege.

<sup>2</sup> S. McNicol and D. Mortimer, *Evidence* (Butterworths) 1996, p 51; *Baker v Campbell* (1983) 49 ALR 385; *Carter v Managing Partner, Northmore Hale Davy & Leake* (1995) 129 ALR 593.

<sup>3</sup> For further discussion of the rationale of legal professional privilege see S. McNicol, *Law of Privilege* (Law Book Co) 1992, pp 46-52.

<sup>4</sup> *Commissioner, Australian Federal Police v Propend Finance Pty Ltd* (1996) 141 ALR 545.

<sup>5</sup> (1996) 70 ALJR 605.

<sup>6</sup> *Somerville v Australian Securities Commission* (1995) 18 ACSR 236; *Bulk Materials (Coal Handling) Services Pty Ltd v Coal & Allied Operations Pty Ltd* (1988) 13 NSWLR 689; *Theiss Contractors Pty Ltd v Terokill Pty Ltd* [1993] 2 Qd R 341; *Ampolex v Perpetual Trustee Co* (1995) 37 NSWLR 405; *Network Ten Ltd v Capital Television Holdings Ltd* (1995) 16 ACSR 138.

<sup>7</sup> *Pioneer Concrete (NSW) Pty Ltd v Webb* (1995) 18 ACSR 418; *Farrow Mortgage Services Pty Ltd v Webb* (1996) 14 ACLC 1240; *Global Funds Management (NSW) Ltd v Rooney* (1994) 36 NSWLR 122.

It is important to isolate the essential features of joint privilege and common interest privilege, the circumstances to which these doctrines can extend and the differences between joint privilege and common interest privilege. Only when this is done can the question be asked whether the doctrine of legal professional privilege has travelled too far beyond its original rationale by including within its ambit the doctrines of common interest privilege and joint privilege. The essential features of common interest privilege to date are that: (1) a common interest holder is not necessarily a client of the lawyer; (2) retention of a common solicitor is not essential for common interest privilege to apply; and (3) there may be serious evidentiary problems with establishing sufficient "identity or commonality of interest".<sup>8</sup> Similarly, in relation to joint privilege, it is clear that: (1) there can be joint privilege even where only one of the joint clients pays all the legal costs of the lawyers;<sup>9</sup> and (2) there can be joint privilege by showing a "formal joint retainer" of the lawyer by the clients, a "factual joint privilege" between the lawyer and the clients, or a joint privilege on the basis of a "reasonably held belief" on the part of the client.<sup>10</sup> Furthermore it appears that joint privilege is wider than common interest privilege because joint privilege is capable of applying in a "pure legal advice" situation whereas for common interest privilege to apply litigation needs to be contemplated, anticipated or pending.

#### How Privilege is Won under the *Evidence Act 1995* (Cth)

Like legal professional privilege at common law, the *Evidence Act 1995* (Cth) divides client legal privilege into two distinct heads. The first head, the "Legal Advice" head, covers: (a) confidential communications between the client and a lawyer; (b) confidential communications between two or more lawyers acting for the client; and (c) the contents of a confidential document prepared by the client or a lawyer; for the dominant purpose of providing legal advice to the client.<sup>11</sup> The second head, the "Litigation" head, covers: (a) confidential communications between the client or lawyer and "another person"; and (b) the contents of a confidential document prepared for the dominant purpose of the client being provided with professional legal services relating to an actual, anticipated or pending proceeding. For three reasons it appears that client legal privilege under the *Evidence Act 1995* (Cth) is wider than legal professional privilege at common law. First, the most obvious difference is the adoption of a "dominant purpose" test under the Act. Therefore a document which has been prepared for the "dominant purpose" of the client being provided with professional legal services will be privileged under the Act and this is clearly wider than the common law test.<sup>12</sup> Second, an extremely wide definition of client has been adopted by s 117 of the *Evidence Act 1995* (Cth). Under that section,

<sup>8</sup> These features and the cases which illustrate them are all dealt with in S. McNicol, "Professional Privilege Spreads Its Wings" (1996) 70 LIJ 32.

<sup>9</sup> *Pioneer Concrete (NSW) Pty Ltd v Webb* (1995) 18 ACSR 418.

<sup>10</sup> *Farrow Mortgage Services Pty Ltd v Webb* (1996) 14 ACLC 1240; *Pioneer Concrete (NSW) Pty Ltd v Webb* (1995) 18 ACSR 418. Again, this is dealt with in more detail in S. McNicol, "Professional Privilege Spreads Its Wings" (1996) 70 LIJ 32 at 34.

<sup>11</sup> Section 118, *Evidence Act 1995* (Cth).

<sup>12</sup> See the facts of *Hardie Finance Corp Pty Ltd v CCD Australia Pty Ltd* (Federal Court Australia, Nicholson J, 14 July 1995) re s 119(b) of the *Evidence Act 1995* (Cth).

"clients" are those who instruct the lawyer and include an employer (not being a lawyer) of a lawyer<sup>13</sup> and the client's employees or agents.<sup>14</sup> Third, it is harder to waive or lose the privilege under the *Evidence Act 1995* (Cth) than at common law. Basically, s 122 of the *Evidence Act 1995* (Cth) adopts a quantitative test whereas the common law test is clearly qualitative<sup>15</sup> and this will be dealt with in the third and fourth sections below. On the other hand, for two reasons it appears that client legal privilege under the *Evidence Act 1995* (Cth) is narrower than legal professional privilege at common law. First, the language of the statute indicates that client legal privilege is limited to curial proceedings. For example, section 118 states that "Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in...". Clearly, the words used (as emphasised in this text) in section 118 (and in section 119) suggest a courtroom setting. If this is correct, then client-legal privilege is an extremely narrow privilege and the question arises as to what is the status of documents prepared pre-trial or, for that matter, in any non-curial setting. This problem was partially addressed and answered in *Trade Practices Commission v Port Adelaide Wool Co Pty Ltd*<sup>16</sup> where Branson J held that "logic dictates" that the same test (ie the "dominant purpose" test) applies both pre-trial and at trial. Second, section 118 does not mention litigation. Does this mean that only communications between lawyers and their clients made for the dominant purpose of advice are protected under the Act? In other words, are communications made between a lawyer and her or his client for the dominant purpose of litigation not privileged? This would indeed seem ludicrous and it may be that the way around this problem will be to include "client" and "lawyer" within the meaning of the phrase "another person" in section 119.<sup>17</sup>

<sup>13</sup> Section 117(1)(a) of the *Evidence Act 1995* (Cth). For a common law equivalent to this situation, see *Waterford v Commonwealth* (1987) 163 CLR 54.

<sup>14</sup> Section 117(1)(b) of the *Evidence Act 1995* (Cth). See *Times Properties Pty Ltd v Challenge Bank Ltd* [1996] ATPR 41,572 which looked at the question who is a "client" under s 117(1)(b). In that case the documents supported an inference that the receiver was acting as agent of the mortgagee bank. This inference was however rebutted by a condition in the mortgage document itself which stated that the receiver was the agent of the mortgagor.

<sup>15</sup> *Goldberg v Ng* (1996) 185 CLR 83; *Attorney-General (NT) v Maurice* (1986) 65 ALR 230. See also G.B. Roberts, "Client Legal Privilege - Some Practical Considerations" (1996) 70 LJ 54.

<sup>16</sup> (1995) 132 ALR 645. For more recent decisions on this issue, see *Telstra Corp Ltd and News Corp Ltd v Australis Media Holdings Pty Ltd*, (1997) 41 NSW LR 277; *Tallgren Pty Ltd v Pay TV Holdings Pty Ltd*, unreported 3 March 1997 (NSW Sup Ct, Hunter J); *Sparrow v Apand* (1996) 138 ALR 735; where Branson J appears to be taking a different view from the one she took in the Port Adelaide Wool case; *Alphapharm v Eli* (unreported 14 August 1996, NG 432/96) Moore J; and *BT Australasia Pty Ltd v State of NSW* (1996) 140 ALR 268.

<sup>17</sup> This interpretation would be helpful in that clearly communications between lawyers and clients made for the purpose of litigation should be included in the definition of client legal privilege. However, it would be preferable to state expressly in the Act that such communications be covered rather than to extend the meaning of the phrase "another person" to lawyers and clients when the original meaning of "another person" was surely a "third party" in the sense this is used at common law.

## How Privilege is Lost at Common Law

Privilege is lost in a document when the holder of the privilege "waives" the privilege. An understanding of the doctrine of waiver is critical to an understanding of privilege itself:

"Waiver is an 'act of conduct' which amounts to the foregoing of a right to keep certain information confidential. The immediate result of waiver is the release or disclosure of information which was formerly protected."<sup>18</sup>

A solicitor who discloses privileged information to a court or to any other person in any circumstances without the consent of the client will be acting in breach of her or his duty to her or his client to keep the privileged communication confidential.<sup>19</sup> On the other hand, legal advisers of a client have ostensible authority to bind the client in any matter which arises in, or is incidental to, litigation.<sup>20</sup>

There are many types of waiver. For example, waiver can be express, implied, intentional, unintentional, imputed, consequential, associative, "knowing and voluntary"<sup>21</sup>, partial or conditional. The common law has not always resolved adequately the question of whether waiver has occurred in a given situation. Quite often a series of events will have occurred, for example, a set of documents may have been summarised, a document may have been handed over to a third party who photocopies and distributes it to another party etc, and the court will be asked whether privilege has survived the particular events or whether privilege has been "waived".

Perhaps because of the difficulty with finding a clear definition of waiver which could be applied universally, the courts have traditionally been extremely reluctant to find that waiver has occurred. The common law cases are replete with statements such as "once privileged, always privileged",<sup>22</sup> "the client's privilege will endure for the benefit of his or her successors in title, which is usually the client's legal personal representative after the client's death",<sup>23</sup> or "once the privilege has attached to a particular document, it continues after the client's death, the only question being by whom that privilege may be waived".<sup>24</sup> More recently, however, the concept of

<sup>18</sup> S. McNicol, *Law of Privilege* (Law Book Co) 1992, p 21.

<sup>19</sup> *Re Stanhill Consolidated Ltd* [1967] VR 749 at 752; *Attorney-General (NT) v Maurice* (1986) 65 ALR 230, 235.

<sup>20</sup> *Great Atlantic Insurance Co v Home Insurance Co* [1981] 2 All ER 485; *Causton v Mann Egerton (Johnsons) Ltd* [1974] 1 All ER 453; S. McNicol, *Law of Privilege* (Law Book Co) 1992, p 23.

<sup>21</sup> Section 122(2) *Evidence Act 1995* (Cth).

<sup>22</sup> *Hobbs v Hobbs and Cousens* [1960] p 112; *Giannarelli v Wraith* (1991) 98 ALR 1, 7.

<sup>23</sup> *Lake Cumberland Pty Ltd v Effem Foods Pty Ltd (Uncle Bens)* (1994) 126 ALR 58; S. McNicol, *Law of Privilege* (Law Book Co) 1992, p 81.

<sup>24</sup> *Prus-Grzybowski v Everingham* (1986) 44 NTR 7, 12; S. McNicol, *Law of Privilege* (Law Book Co) 1992, p 81.



"fairness" has been used by the courts as a method for finding that privilege has been lost and that imputed waiver has been found to exist.<sup>25</sup>

There may be many reasons why fairness dictates that the privilege is lost. For example, the courts have recently held that if the contents of a privileged communication becomes the subject of a legitimate and reasonable issue in litigation, the privilege is lost.<sup>26</sup> In this situation it appears that it does not matter whether the issue is raised by the party claiming the privilege or by the party seeking to override it, providing the issue fairly arises in the litigation.<sup>27</sup> Similarly, it has been recently held that if a party, by pleadings or evidence, expressly or impliedly makes an assertion about the content of confidential communications, then fairness to the other party may mean this assertion is a waiver.<sup>28</sup> The courts have not always been consistent, however, with the application of a fairness test to the doctrine of waiver. For example, where the doctrine of common interest privilege operates, fairness may well require that if one holder of the privilege, in prosecuting the common interest for the benefit of all, waives legal professional privilege, then there is a consequential waiver on the part of the other holders.<sup>29</sup> On the other hand, where the doctrine of joint privilege applies, all those who are entitled to the benefit of joint privilege must consent to the disclosure of the information before waiver can be said to have occurred.<sup>30</sup>

The most important recent application of the "fairness" test to the doctrine of waiver at common law is the case of *Goldberg v Ng*.<sup>31</sup> In that case a majority of the High

<sup>25</sup> *Goldberg v Ng* (1996) 185 CLR 83; *Attorney-General (NT) v Maurice* (1986) 65 ALR 230; *Independent Commission Against Corruption v Cripps* (NSW Supreme Court, Sully J, 13 August 1996); *State Bank of SA v Smoothdale No 2 Ltd* (Supreme Court, SA, Doyle CJ, Prior and Williams JJ, 13 December 1995); *Newcrest Mining (WA) Ltd v Commonwealth* (1993) 113 ALR 370 (FCA, French J); *Mancorp Pty Ltd v Boulderstone Pty Ltd* (1991) 57 SASR 87 (SA Supreme Court, DeBelle J); *Argyle Brewery Pty Ltd v Darling Harbourside (Sydney) Pty Ltd* (1993) 120 ALR 537 (FCA, Beaumont J); *Lake Cumberland Pty Ltd v Effem Foods Pty Ltd (Uncle Bens)* (1994) 126 ALR 58 (FCA, Tamberlin J); *Network Ten Ltd v Capital Television Holdings Ltd* (1995) 16 ACSR 138 (NSW Supreme Court, Giles J); *Standard Chartered Bank of Australia Ltd v Antico* (1993) 36 NSWLR 87 (NSW Supreme Court, Hodgson J); *Optus Communications Pty Ltd v Telstra Corp Ltd* (FCA, Lockhart J, 27 April 1995).

<sup>26</sup> *Wardrope v Dunne* [1996] 1 Qd R 224.

<sup>27</sup> *Ibid.* See also *Ampolex v Perpetual Trustee Co* (1995) 37 NSWLR 405 where Giles CJ held that once GPG Nominees and Allied alleged that they had purchased the convertible notes in the belief induced by Ampolex that the notes were convertible on the basis set out in the trust deed, then they waived the privilege. Giles CJ explained that the allegations by GPG Nominees and Allied raised as an issue their own corporate "belief" or "state of mind" (to which their legal advice is likely to have contributed) and hence they cannot claim legal professional privilege for that advice.

<sup>28</sup> *Standard Chartered Bank of Australia Ltd v Antico* (1993) 36 NSWLR 87.

<sup>29</sup> *Ampolex v Perpetual Trustee Co* (1995) 37 NSWLR 405 at 413; *State of South Australia v Peat Marwick Mitchell* (1995) 65 SASR 72.

<sup>30</sup> *Re Nika Management Services Pty Ltd (In Liq)* (1996) 14 ACLC 326; *Farrow Mortgage Services Pty Ltd v Webb* (1996) 14 ACLC 1240.

<sup>31</sup> (1996) 185 CLR 83.

Court propounded a test which essentially states that privilege will be lost wherever disclosure is "incompatible with the retention of confidentiality". This test appears to have the benefit of enormous flexibility, although it could also be argued that its breadth (ie privilege will be lost "wherever fairness dictates it") may increase the uncertainty surrounding the doctrine of waiver in the future. It is necessary, therefore, to consider the facts of *Goldberg's* case before the common law position is contrasted with the position under the *Evidence Act 1995* (Cth).

In *Goldberg v Ng* there were two sets of proceedings. First, the "Supreme Court proceedings" in which Goldberg, a solicitor, and his wife were being sued by Ng for the recovery of money paid to Goldberg's wife as part of a compromise arrangement. Second, the "Law Society proceedings" under which Ng had complained to the Law Society of New South Wales with respect to an alleged defalcation by Goldberg. In the "Law Society proceedings", Goldberg had disclosed privileged documents to the Law Society on the express basis that they would not be shown to anyone else. In the meantime, Ng sought to subpoena the documents for use in the "Supreme Court proceedings". Goldberg claimed legal professional privilege for the documents and Ng argued that the privilege had been waived by Goldberg.

A majority of the High Court (Deane, Dawson and Gaudron JJ, Toohey and Gummow JJ dissenting) held that there had been an imputed waiver and that as a matter of fairness, the documents should be disclosed to Ng. The majority found that there had been no express or intentional general waiver of privilege by Goldberg because Goldberg had expressly disclosed the documents to the Law Society for the limited purpose of dealing with its inquiries in relation to the complaint against him. Nevertheless, the delivery of the documents to the Law Society was an "act inconsistent with the maintenance of the privilege" and where such an act had occurred the court had to consider whether it was fair that the privilege should cease. In this case, the majority found that waiver as against the client had arisen as an imputation by operation of law.

In contrast, Toohey J held in dissent that the issue in the case was one of limited or partial disclosure and, as such, it was not to be determined by questions of fairness or unfairness. Gummow J, also in dissent, ironically did appear to apply a fairness test but reached a different conclusion from the majority. Gummow J held that there was no reason, as a matter of fairness, for denying the solicitor the protection of legal professional privilege, even allowing for the advantage he had sought by the disclosure. It is proposed in the next section to consider how the law would apply to the facts of *Goldberg's* case if the *Evidence Act 1995* (Cth) had applied and not the more flexible common law position.

#### How Privilege is Lost under the *Evidence Act 1995* (Cth)

Under s 122(2) of the *Evidence Act 1995* (Cth), subject to certain exceptions listed in s 122(2) itself, the privilege created by ss 118-120 will be lost where the client or party has "knowingly and voluntarily disclosed to another person the substance of the evidence".

It appears from s 122 that for the privilege to be lost, the disclosure must be both "knowing" and "voluntary". Furthermore, the disclosure itself must be made by "the client or party" and the disclosure must be of "the substance of the evidence". For many reasons, therefore, it would be much more difficult to lose the privilege

under the Act in contrast to the position at common law. If the facts of *Goldberg's* case are applied to s 122(2), one should ask, was Goldberg's disclosure to the Law Society "knowing"? Was it "voluntary"? Was Goldberg a "client or party"? Did Goldberg disclose "the substance of the evidence" to the Law Society?

First, presumably a "knowing" disclosure would mean that the client or party "knows" that waiver will occur, that is that privilege will be lost. It would follow that a disclosure would be "knowing" when the person who discloses the documents understands, comprehends and acquiesces in the waiver. On the facts of *Goldberg's* case, clearly Goldberg did not understand that a waiver would occur, nor did Goldberg want or acquiesce in the loss of privilege. On the contrary, Goldberg expressly wanted to retain the privilege for all purposes other than for the limited purpose of the complaint against him.

Second, under s 122(2), the disclosure must also be "voluntary". What does this mean? Presumably, it suggests that an "inadvertent" or "accidental" disclosure would not result in the loss of privilege. Furthermore, if one analogises with the law of confessions, voluntariness means of one's own free will, without inducement or oppression.<sup>32</sup> On the facts of *Goldberg's* case, clearly Goldberg "freely" and "deliberately" handed over the documents to the Law Society, ie there was a voluntary disclosure by Goldberg.<sup>33</sup> Indeed, in *Goldberg's* case itself the majority of the High Court held that Goldberg's disclosure was voluntary and made for the calculated purpose of demonstrating the reliability of his denial of the allegation of failure to account. The majority of the Court also went on to say, however, that, at common law, fairness requires that the privilege should cease, irrespective of the intention of the holder of the privilege.

Third, under s 122(2), the disclosure must be made by a "client or party". Presumably this is a reference to the "client" in the lawyer/client relationship which led to the documents becoming privileged in the first place. Obviously Goldberg was not the client in a lawyer/client relationship. Goldberg was, on the contrary, the lawyer and Ng was the client. And quite correctly, s 122 of the *Evidence Act 1995* (Cth) does not allow for a lawyer, *qua* lawyer, being able to waive the privilege without the consent of her or his client. Nor does Goldberg appear to have been a "party" to litigation at the time he conditionally released the privileged documents to the Law Society.

Finally, under s 122(2), a disclosure of the "substance of the evidence" must be made to another person. This is a quantitative assessment of waiver. How do we determine whether Goldberg had disclosed the "substance" of the evidence? In any event, was the material which Goldberg released to the Law Society "evidence" at all?

<sup>32</sup> See, eg, *McDermott v R* (1948) 76 CLR 501 at 512 and *Collins v R* (1980) 31 ALR 257 at 305-11.

<sup>33</sup> Presumably a voluntary disclosure which is made under a mistaken belief as to what is being disclosed would not result in the loss of privilege. This situation would, however, probably be held to be a "non-knowing" disclosure. In the recent case of *Meltend Pty Ltd v Restoration Clinics of Australia Pty Ltd* (1997) 145 ALR 391 Goldberg J did, however, hold that voluntary disclosure under s 122 of the *Evidence Act 1995* (Cth) does not exclude disclosure by mistake where formal discovery is made.

It can be seen from the above that there are many unanswered questions concerning waiver of privilege under s 122(2) of the *Evidence Act 1995* (Cth). Only a few of these have been touched upon in this lecture. Clearly, Goldberg would not have been taken to have waived the privilege if the *Evidence Act 1995* (Cth) had applied in his case. Although his disclosure was "voluntary", it was arguably not "knowing". Goldberg was not a client or party and it may not have been "the substance of the evidence" which he disclosed.<sup>34</sup>

It remains to be seen how the waiver provisions of the *Evidence Act 1995* (Cth) will apply in the future. There are, however, some general comments that can be made about s 122(2) as it presently appears to operate. One observation would be that s 122(2) embodies a very tightly worded and rigid test for waiver. There appears to be little room for fairness or flexibility under its present wording. It may be, however, that a robust court will be prepared to inject a notion of "fairness" into s 122 in the future. There are several ways in which a court might attempt to do this and a recent attempt was in fact made by Kirby J in *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd*.<sup>35</sup> In that case Kirby J held that a public reference by Ampolex in a Part B Statement (relating to a takeover offer) to "supporting legal advice" did amount to a waiver of the "substance of the evidence" under s 122(2) of the *Evidence Act 1995* (Cth). This meant that the precise content of the "supporting legal advice" was no longer privileged. Kirby J explained that on the one hand, "A mere reference to the existence of legal advice would not amount to a waiver of its contents". But, on the other hand, on the facts before him, Ampolex's assertion in the Part B Statement which was publicly published to the shareholders as to the "likely outcome of litigation" which was "made on legal advice" did amount to waiver of the precise content of the legal advice on that point.

In my view, Ampolex's case is an example of a *sub silentio* injection of "fairness" into s 122(2) of the *Evidence Act 1995* (Cth). Although Kirby J confined himself to the precise wording of s 122(2) and, in particular, to the interpretation of the phrase "substance of the evidence", his Honour could really be taken as saying that fairness dictates that the privilege be lost. The upshot of Kirby J's reading of s 122(2) is that Ampolex cannot "have it both ways", ie, they cannot both publish the gist of legal advice (ie the likely outcome of certain litigation) and also resist production of the legal advice on the grounds of legal professional privilege.<sup>36</sup>

<sup>34</sup> The facts of *Goldberg's* case are, however, atypical of the general cases dealing with waiver. This is because in *Goldberg's* case, the conflict was within the lawyer/client relationship, ie, the client was arguing that waiver had occurred whereas the lawyer was arguing for retention of the privilege. Usually in cases of waiver, an opponent or third party argues that waiver has occurred as against both the lawyer and the client who argue for retention of the privilege. See, for example, *Dingwall v The Commonwealth* (1992) 39 FCR 521 and *Harbour Inn Seafoods Ltd v Switzerland General Insurance Co Ltd* (1990) 2 NZLR 381.

<sup>35</sup> (1996) 70 ALJR 603.

<sup>36</sup> For another recent example of the injection of fairness into s 122, see *MGICA (1992) Ltd v Kenny and Good Pty Ltd (No 2)* (1996) 61 FCR 236. In that case Lindgren J held that fairness requires that legal professional privilege is lost where a witness, including an expert witness, has refreshed his memory for the purpose of giving evidence by reading a document to which privilege attaches, and is called to give evidence by the party

It is of course open to the courts to interpret other phrases of s 122(2) of the *Evidence Act 1995* (Cth) (for example, "knowing" and "voluntary") broadly so as to allow for the concept of fairness to operate. This certainly appears to be the approach taken recently by Goldberg J in the Federal Court decision of *Meltend Pty Ltd v Restoration Clinics of Australia Pty Ltd*.<sup>37</sup> Another way of overcoming the present rigidity of s 122 would be to amend the wording of s 122 by adding other types of waiver to the section, for example, waiver "by operation of law" or "imputed" waiver. This would have the advantage both of flexibility and of bringing the statutory position more in line with the common law.

### Conclusion: Practical Issues concerning Office Management

It has been seen above that at common law legal professional privilege has been expanded. The doctrines of common interest privilege and joint privilege have been used to assist in this expansion together with the reaffirmation by the courts of the fundamental importance of legal professional privilege as a basic human right. Similarly, under the *Evidence Act 1995* (Cth), the doctrine of client legal privilege operates broadly by adopting a "dominant purpose" test and by its wide definition of "client" under s 117. Further, the apparent limitation of client legal privilege to a curial setting seems to have been overcome by recent decisions of the Federal and New South Wales Supreme Courts.<sup>38</sup>

The real problem has now become how to determine when legal professional privilege or client legal privilege is lost. It has been seen above that waiver at common law is predicated upon a test of fairness and that this allows for flexibility and for the doctrine of waiver to reflect the commercial reality of transactions. On the other hand, under the *Evidence Act 1995* (Cth) it may be more difficult to "lose" privilege because of a tightly worded and rigid test embodied in s 122(2). The discrepancy between the common law and statutory positions on waiver may, of course, lead to difficulties in practice. If, for example, a junior solicitor or secretary inadvertently gives privileged documents to the Australian Taxation Office in response to a notice to produce under s 264 of the *Income Tax Assessment Act 1936* (Cth), is the privileged status of those documents lost? Under the common law the privilege may well be lost because it would be unfair (and/or misleading conduct) to the Australian Taxation Office to now insist on the privilege. In contrast, under the *Evidence Act 1995* (Cth), the privilege will be preserved in the documents because there has not been a "knowing" disclosure.<sup>39</sup>

What lessons can be learnt for practitioners from the legal position outlined above? Surely there should be some safeguards put into place within the legal office to ensure that privileged documents retain that status. Examples might be the creation of a code of practice to be implemented both within the legal office and at the client's

benefited by the privilege. Note, however, that s 122(6) already states that privilege is lost in this "refreshing memory" situation.

<sup>37</sup> (1997) 145 ALR 391.

<sup>38</sup> *Trade Practices Commission v Port Adelaide Wool Co Pty Ltd* (1995) 132 ALR 645 and refer to the other cases in note 16 in the present text.

<sup>39</sup> Furthermore, constructive waiver is not possible because of s 122(3) of the *Evidence Act 1995* (Cth).

premises. Such a code could provide: (1) a checklist to be used by all persons who handle the documents to minimise the loss of privilege in the documents; (2) restrictions on the number of people who would have access to the documents and on the number of copies being made of the documents; (3) that written instructions be obtained from the client before any release or waiver of privilege is to occur; (4) that letters and faxes should contain a cautionary paragraph at the top, not only concerning the privileged status of the document, but also concerning the doctrine of waiver and ways in which privilege might be lost; and (5) when files go into storage, that privileged documents should be separated out and subjected to additional security.

These procedures are particularly necessary because a lawyer is under a duty to her/his client to invoke and maintain the privilege in the client's interests. Lawyers and law firms may be unnecessarily subjecting themselves to a claim by the client for breach of contract and/or professional negligence if some procedures of this type are not adopted. It is imperative therefore that legal practitioners gain an awareness both of the ways in which legal professional privilege attaches to documents and the ways in which legal professional privilege loses its attachment to documents. Such an awareness should then lead to the adoption of procedures which operate to prevent anxiety and concern amongst commercial and corporate litigators about how and when confidential professional communications can lose their privileged status.

## **CHAPTER EIGHT**

**“Unresolved Issues Arising from the Guidelines  
Between the Australian Federal Police and the Law  
Council of Australia”**

# UNRESOLVED ISSUES ARISING FROM THE GENERAL GUIDELINES BETWEEN THE AFP AND THE LAW COUNCIL OF AUSTRALIA\*

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*New Guidelines between the Australian Federal Police and the Law Council of Australia have come into effect relating to the "boxing" of documents which are the subject of a search warrant but for which legal professional privilege has been claimed. The recent view of Gaudron J in Propend's case that "contrary to their objective, the Guidelines do not preserve legal professional privilege" is correct insofar as the Guidelines permit the handing over of privileged documents. However, there are far more serious uncertainties and practical problems within the Guidelines which can operate as major obstacles to investigative officers who attempt to execute a search warrant in relation to documents which may not, in fact, be privileged.*

On 3 March 1997 the *General Guidelines Between the Australian Federal Police and the Law Council of Australia as to the Execution of Search Warrants on Lawyers' Premises, Law Societies and Like Institutions in Circumstances Where a Claim of Legal Professional Privilege is Made* (the Guidelines) became effective. Amongst other things, these Guidelines allow for the "boxing" (or placing in a sealed container) of documents which are the subject of a search warrant issued to a member of the Australian Federal Police (AFP) but for which legal professional privilege has been claimed by a lawyer. The 1997 Guidelines replace earlier Guidelines agreed between the Australian Federal Police and the Law Council of Australia in June 1990. The June 1990 Guidelines<sup>1</sup> were basically the same as those that had been previously published in 1986,<sup>2</sup> following the majority High Court decision in *Baker v Campbell*<sup>3</sup> that s 10 of the *Crimes Act 1914* does not authorise the seizure of documents to which legal professional privilege attaches. The main change in the present Guidelines is that s 10 of the *Crimes Act 1914* has now been replaced by s 3E of the *Crimes Act 1914*, s 3E(1) of which provides for the issue of warrants to search premises, s 3E(2) provides for the issue of warrants to search persons (ordinary or frisk), s 3E(6) provides for the issue of warrants to seize things specified in relation to an offence to which the warrant relates and s 32x preserves the common law relating to legal professional privilege.<sup>4</sup>

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## UNRESOLVED ISSUES ARISING FROM THE GENERAL GUIDELINES

It was not without prescience that Brennan J (as he then was) predicted practical problems with allowing common law privileges to be claimed in derogation of the exercise of powers of search and seizure. Brennan J predicted insuperable pragmatic obstacles with extending both the privilege against self-incrimination<sup>5</sup> and legal professional privilege<sup>6</sup> to the non-curial arena. In his dissenting judgment in *Baker v Campbell*, Brennan J stated:

"If the privileges which affect the obligation to testify or to produce documents in judicial proceedings are to be engrafted upon and to modify powers conferred on investigative agencies, some procedure for determining the validity of a claim of privilege has to be devised.... If the power of search and seizure conferred by a s 10(b) warrant does not extend to privileged documents, there is no judicial procedure prescribed to resolve contested claims. Declaratory relief or prosecution seem to be the only avenues of judicial resolution."<sup>7</sup>

Some 14 years later, in the recent case of *Commissioner, Australian Federal Police v Propend Finance Pty Ltd*,<sup>8</sup> Brennan CJ has remarked (as his Honour has also done in cases since *Baker v Campbell*) that although the view that legal professional privilege is not merely a rule of evidence applicable in judicial and quasi-judicial proceedings but a fundamental doctrine of the common law is not his Honour's "preferred view", he is "bound now to accept it".<sup>9</sup> In *Propend's* case, Brennan CJ stated that the majority decision in *Baker v Campbell*:

"necessitated the devising of some procedure for determining a claim of privilege if it should be raised during the execution of a warrant. Such a procedure was not devised by the courts, but the Law Council of Australia and the Australian Federal Police agreed upon 'General Guidelines'.<sup>10</sup>

Although the Guidelines generally seem to have worked well in practice,<sup>11</sup> there are still several unresolved issues. The first is not so much a practical issue as a fundamental objec-

tion. In *Commissioner, Australian Federal Police v Propend Finance Pty Ltd*, Gaudron J pointed out quite starkly that, "contrary to their objective, the guidelines do not preserve legal professional privilege".<sup>12</sup> Her Honour explained that the guidelines proceed upon the basis that warrants will issue in terms which encompass privileged documents. On the facts of *Propend's* case, the authority given by the warrants was to search a solicitor's (Mr Dunkel's) premises and seize documents "in accordance with the procedure set out" in the General Guidelines. Yet, strangely enough, *Baker v Campbell* had decided that s 10 of the *Crimes Act 1914* does not authorise the seizure of documents to which legal professional privilege attaches. Furthermore, ironically, the Guidelines were designed to preserve legal professional privilege and to provide for the return of seized documents if and when the privilege is established.<sup>13</sup> Gaudron J commented that:

"it may be that it would have been more appropriate for the respondents to seek review of the decision to issue that warrant on the ground that it purported to authorise the seizure of privileged documents. However, no point has been taken as to the nature of the review sought."<sup>14</sup>

It is submitted by the present author that Gaudron J's point is well taken and it may be that search and seizure warrants which are issued in the future "in accordance with the procedure set out" in the General Guidelines will be challengeable as contrary to the decision in *Baker v Campbell*. However, in the meantime, at least it can be said that, at present, whilst the guidelines might (wrongfully) permit the "handing over" of privileged documents, they do not allow the inspection by the police of any document potentially within the warrant until such time as the lawyer is given the opportunity to claim legal professional privilege.<sup>15</sup> Furthermore, where a lawyer or Law Society has made such a claim, no member of the police search team can inspect a document the subject of the claim until such time as the claim is abandoned or dismissed by a court.<sup>16</sup>

Another important general observation to make about the Guidelines is that they are not rules of law. They are merely procedures that have been agreed upon between the Australian Federal Police and the Law Council of Australia.<sup>17</sup> This means, of course, that a "breach" or "violation" of the Guidelines, which will be difficult to determine in itself, will have little or no sanction attached to it in practical or legal terms. If one of the parties to the "agreed" Guidelines fails to comply with one or more of the Guidelines, who is it who will (a) decide that there has been a failure to comply; and (b) what adverse consequences flow from a breach of the agreement? It is surely difficult to argue that there is a binding legal contract between the Australian Federal Police and the Law Council of Australia, since (a) an intention to enter into legal relations, (b) an intention to be bound by contract and (c) the existence of consideration, are at least three of the requirements for the existence of a legal contract, none of which appears to be present in this case.<sup>18</sup> Once, then, it is realised that the status of the Guidelines is that of agreed procedures only, then guidelines such as Guideline 9 which states that an executing officer must be "mindful of and comply with the relevant statutory and/or common law obligations attaching to the execution of the search warrant in question" become of little or no benefit or effect in practice.

A further general observation is that the "overview" and "objective" of the Guidelines, as stated in Guideline 5, is not consistent with the "effect" of the Guidelines, as stated in Guidelines 12 and 13. In Guideline 5 it is stated that:

"It is seen as desirable that an agreed procedure should be laid down which, if followed, will negate or reduce the risks of documents which may be the subject of legal professional privilege being seized pursuant to section 3E search warrants" (emphasis added).

Yet, Guideline 12 states that the effect of the guidelines is that:

"no member of [the police search] team will

inspect any document identified as potentially within the warrant until the lawyer or Law Society has been given the opportunity to claim legal professional privilege in respect of any of the documents so identified" (emphasis added).

Similarly, Guideline 13 states that:

"Where a claim is made in such circumstances, no member of the police search team will inspect any document the subject of the claim until either (a) the claim is abandoned or (b) the claim is dismissed by a court" (emphasis added).

It is submitted that there is a basic distinction between the "seizing" of documents and the "inspecting" of documents. It may well be that the "boxing" of documents is a compromise between the two positions of "seizing" on the one hand and "inspecting" on the other. However true this may be, surely the stated effect of the Guidelines in Guideline 12 or Guideline 13 should include a reference to the fact that documents which are the subject of s 3E search warrants will be "boxed" until such time as a claim to privilege has been resolved? It is not clear how a statement that no member of a police search team will inspect a document the subject of a claim to privilege will meet the objective of negating or reducing the risks of documents which may be the subject of privilege being seized pursuant to a s 3E warrant.

It is proposed to work through the Guidelines and to highlight the more specific omissions, loopholes and problems which arise from some of them. First, Guideline 4 sets out s 3E(1), s 3E(2) and s 3zx of the *Crimes Act 1914*. Yet, ss 3E(1) and 3E(2) only relate to the search of premises and the search of persons respectively. For the sake of accuracy and completeness, there should also be a reference to ss 3E(6), 3E(7) and 3E(1) because these provisions relate to the seizure of things specified in relation to an offence to which the warrant relates. As the new Guidelines presently stand, there is a reference to the fact that s 3E of the *Crimes Act 1914* replaces the old s 10 of the *Crimes Act 1914*. In fact, however, the old s 10(1) covered entry, search and seizure and hence, to be accurate, it

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should be made clear that s 10 is now replaced by a combination of ss 3E(1), (2), (6), (7) and s 3F(1).<sup>19</sup>

Secondly, Guideline 20 states that a "reasonable time" should be allowed to the lawyer to enable him or her to consult with his or her clients and/or for the lawyer to obtain legal advice. Similarly, Guideline 21 states, *inter alia*, that when warrants are executed outside normal working hours, allowances should be made for "delays" should the lawyer wish to contact his or her client or for the lawyer to take legal advice. There is obviously scope for dispute between the parties here as to what constitutes a "reasonable time" and what constitutes a "delay". If the later Guidelines allow for defined periods of time (such as "3 working days" in Guideline 31), why is the phrase "reasonable time" inserted into Guideline 20 without any guidance as to what is reasonable. Naturally, what is "reasonable" will vary from case to case but who determines what is "reasonable"?

Thirdly, Guideline 24 states:

"Where the lawyer or Law Society agrees to assist the search team the procedures set out below should be followed:

- (a) in respect of all documents identified by the lawyer or Law Society and/or further identified by the executing officer as potentially within the warrant, the executing officer should, before proceeding to further execute the warrant (by inspection or otherwise) and to seize the documents, give the lawyer or Law Society the opportunity to claim legal professional privilege in respect of any of those documents;
- (b) if the lawyer or Law Society asserts a claim of legal professional privilege in relation to any of those documents then the lawyer or Law Society should be prepared to indicate to the executing officer the grounds upon which the claim is made and in whose name the claim is made; and

- (c) in respect of those documents which the lawyer or Law Society claim are subject to legal professional privilege, the search team shall proceed in accordance with the guidelines as follows. In respect of the remaining documents, the search team may then proceed to complete the execution of warrant."

This Guideline is extremely important. In respect of Guideline 24(a), the executing officer, before executing the warrant, should give the lawyer the opportunity to claim legal professional privilege in respect of *any* of the documents. Does this mean that the executing officer must ask with respect to each and every document (which has been "located" as potentially within the warrant under Guideline 22), the following question: "Do you want to claim legal professional privilege?" Is this overly suggestive? Will circumstances conspire to compel the lawyer to say "yes" when otherwise he or she may not have done so, either because he or she had not directed their minds to it in the first place or had decided initially not to claim it?

In respect of Guideline 24(b), if the lawyer asserts legal professional privilege then he or she should be prepared to indicate "the grounds upon which the claim is made AND in whose name the claim is made". There are several problems with Guideline 24(b). What if, for example, the grounds are not stated? How far (and with what particularity) must the lawyer state the grounds? Where is the follow up to Guideline 24(b) in relation to either where the grounds are not stated or even where they are stated? (Guideline 25 simply states that *all* documents which the lawyer *claims* are subject to legal professional privilege shall be placed in a sealed container.) There is also an interesting and ironical contradiction in Guideline 24(b). If *all* the documents for which legal professional privilege is claimed will end up, *à la* Guideline 25, in a sealed container, is it in the lawyer's interest to state the grounds for the privilege at that time? Ironically, if the grounds are stated by the lawyer with sufficient particularity and a genuine attempt is made to indicate the reasons why *individual* documents are privileged, the

less likely it will be that an executing officer would or could challenge the validity of the claim and insist that the documents be placed in a sealed container. If, on the other hand, the lawyer simply makes a broad or blanket claim to privilege for all the documents and refuses to expand or particularise on the basis for the claim to privilege, the more likely that an executing officer would and could challenge the validity of the claim and insist that the documents be placed in a sealed container. In other words, there seems to be a gap in the Guidelines right at this point. Why is there no mention of a challenge to the validity of the claim to privilege to be made by the executing officer? To put the question in another way, why do *all* documents for which privilege is claimed have to be placed in a sealed container? Surely there will be some documents in respect of which the claim to privilege is more contentious than others? In practice, could a lawyer refuse to place the documents in the "box" because the documents are clearly privileged? If so, how does the executing officer physically "get" the documents into the "box"?

Fourthly, Guidelines 25, 26 and 27 proceed on the basis that all the documents for which privilege is claimed are "boxed", with the lawyer being able to take photocopies under the supervision of the executing officer before they are "boxed" and with a list being prepared by the search team which shows general information as to the nature of the documents. (An unresolved question arises here as to what "general information" should be included here.) Guidelines 28, 29 and 30 provide for the "box" and the list to be handed over into the custody of the magistrate or justice who issued the warrant or other independent party (referred to below as the third party) agreed upon by the lawyer and the executing officer pending resolution of the disputed claims. A question arises here as to why and in what circumstances an independent third party would be used here and not the magistrate or justice who issued the warrant. This question is important because Guidelines 32 and 33 suggest that the documents held by the third party are not actually read by the third party but are ultimately delivered to the Registrar of the Court if proceedings are instituted or they are released

to the executing officer if proceedings are not instituted or agreement is reached between the parties as to the disclosure of the documents. If either the Guideline 32 or Guideline 33 consequence occurs, then the role of the third party is negligible.

Fifthly, Guideline 31 states:

"If within 3 clear working days (or such longer period as is reasonable which may be agreed by the parties) of the delivery of the documents into the possession of the third party, the lawyer or Law Society has informed the executing officer or his/her agent and the third party or his/her agent that instructions to institute proceedings forthwith to establish the privilege claimed have been received from the client/s on whose behalf the lawyer asserted the privilege, or from the person or person/s on whose behalf the claim has been made by the Law Society, then no further steps shall be taken in relation to the execution of the warrant until either:

- (a) a further period of 1 clear working day (or such further period as may reasonably be agreed) elapses without such proceedings having been instituted; or
- (b) proceedings to establish the privilege have failed; or
- (c) an agreement is reached between the parties as to the disclosure of some or all of the documents subject to the claim of legal professional privilege."

This Guideline clearly places an onus on the lawyer to contact his or her client and receive instructions to institute proceedings within three days and then to inform the executing officer and the third party that such instructions have been received. If the lawyer fails to do this (and, for example, no proceedings are instituted within four days — see Guideline 31(a) — by the lawyer), then the warrant can be executed. But what if the lawyer is unable to contact the client? What if the client is unavailable, overseas, cannot be found, etc? Can the lawyer act with the implied authority of the client? What if the lawyer no longer acts for the client? What if

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the client is bankrupt? What if the lawyer does not want to institute proceedings on behalf of the client for any of these reasons? Should he or she be compelled to do so? There are innumerable unresolved difficulties with this Guideline.

Sixthly, Guideline 33 states:

"Where proceedings to establish the privilege claimed are not instituted within 3 clear working days (or such further period as may have been agreed) of the delivery of the documents into the possession of the third party, or where an agreement is reached between the parties as to the disclosure of some or all of the documents, then the parties shall attend upon the third party and shall advise him/her as to the happening of those matters and shall request him/her, by consent, to release into the possession of the executing officer all the documents being held by the third party or, where the parties have agreed that only some of the documents held by him/her should be released, those documents."

This Guideline seems to suggest that if Guideline 31(a) or Guideline 31(c) is satisfied (that is, proceedings are not instituted within the relevant time frame or an agreement is reached as to the disclosure of some or all the documents) then the executing officer can "break open" the box. But where does the executing officer get his or her legal authority to "break open" the box from? Surely the original warrant to search the particular premises has expired by this stage and, in any event, does not extend to the documents in the possession of the third party?<sup>20</sup> Guideline 33 does not have the status of law so it cannot act as a rule of law conferring authority equivalent to the power under a warrant to enter the premises of a third party and seize documents. If the warrant refers to "the Guidelines" in the actual warrant (as in *Propend's* case), can the guidelines be "elevated" by being given the status of a warrant and allowing further seizure at the third party's premises? If not, can a new warrant be issued in these circumstances? Surely this is a crucial omission. Furthermore, what procedure is to be adopted if Guideline 31(b) (that is, proceedings have failed) occurs? Do these documents auto-

matically get delivered up by court order to the executing officer? The Guidelines are silent on this.

In conclusion, it can be seen from the above discussion that there are many unresolved issues and gaps in the Guidelines. At first blush the Guidelines appear simple and straightforward. However, a closer reading reveals many unanswered and possibly unanswerable questions. At best then, the Guidelines can provide an overall framework or structure within which the members of the Australian Federal Police and lawyers can operate. When it is also considered that lawyers are often worried about handing over documents which may be privileged for fear of waiving the privilege that arguably attaches to them,<sup>21</sup> there is an even stronger reason for arguing that the Guidelines should be made clearer and that workable mechanisms be devised for allowing access to documents which are not *in fact* privileged (as opposed to documents for which privilege has been claimed).

## Endnotes

- <sup>1</sup> (1990) 25 (1) *Australian Law News* 58-59.
- <sup>2</sup> (1986) 21 (11) *Australian Law News* 21-24.
- <sup>3</sup> (1983) 153 CLR 52.
- <sup>4</sup> See also the *Crimes Act* 1914 (Cth), s 3F.
- <sup>5</sup> *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; *Sorby v Commonwealth* (1983) 152 CLR 281.
- <sup>6</sup> *Baker v Campbell* (1983) 153 CLR 52.
- <sup>7</sup> *Ibid* at 105.
- <sup>8</sup> (1997) 71 ALJR 327.
- <sup>9</sup> *Ibid* at 329.
- <sup>10</sup> *Ibid*.
- <sup>11</sup> This view was indorsed recently by several members of the audience at the above seminar at the Director of Public Prosecution's office. Query however whether this view is widely held amongst other investigative agencies.
- <sup>12</sup> (1997) 71 ALJR 327 at 347.
- <sup>13</sup> *Ibid*.
- <sup>14</sup> *Ibid*.
- <sup>15</sup> Guideline 12.
- <sup>16</sup> Guideline 13. Note, importantly, that the earlier Guidelines also stated that inspection might also occur where the claim is "waived". Waiver has been omitted from Guideline 13 in the recent (1997) Guidelines.
- <sup>17</sup> See Guideline 6.
- <sup>18</sup> Arguably, a "signing of the guidelines" by the

Commissioner of the Australian Federal Police (M Palmer) and the Secretary-General of the Law Council of Australia (P Levy) is insufficient for the creation of a legally binding contract in this context.

<sup>19</sup> The *Crimes Act* 1914, s 3F(1) states:

"A warrant that is in force in relation to premises authorises the executing officer or a constable assisting:

- (a) to enter the warrant premises and, if the premises are a conveyance, to enter the conveyance, wherever it is; and
- (b) to search for and record fingerprints found at the premises and to take samples of things found at the premises for forensic purposes; and
- (c) to search the premises for the kinds of evidential material specified in the war-

rant, and to seize things of that kind found at the premises; and

- (d) to seize other things found at the premises in the course of the search that the executing officer or a constable assisting believes on reasonable grounds to be:

- (i) evidential material in relation to an offence to which the warrant relates; or

- (ii) evidential material in relation to another offence that is an indictable offence."

<sup>20</sup> This question was raised by Mark Pedley, Deputy Director, Commonwealth Director of Public Prosecutions, Melbourne Office, at the above seminar.

<sup>21</sup> See McNicol, "Legal Privilege: How It Is Won and Lost" 1998 (Law at the Leading Edge: Monash Graduate Lecture Series, forthcoming).

"GENERAL GUIDELINES BETWEEN THE AUSTRALIAN FEDERAL POLICE AND THE LAW COUNCIL OF AUSTRALIA AS TO THE EXECUTION OF SEARCH WARRANTS ON LAWYERS' PREMISES, LAW SOCIETIES AND LIKE INSTITUTIONS IN CIRCUMSTANCES WHERE A CLAIM OF LEGAL PROFESSIONAL PRIVILEGE IS MADE"

## Preliminary

(1) For the purpose of these guidelines, 'Law Society' means a Law Society, a Bar Association, a Law Institute and any similar professional body of lawyers, and includes a body or tribunal established for the purpose of receiving or investigating complaints involving issues of professional standards or relating to the delivery of professional legal services against barristers and solicitors or for the purpose of disciplining barristers or solicitors.

## Background

(2) Difficulties are sometimes experienced on the occasions that it becomes necessary for an AFP officer to obtain and execute a search warrant directed at the office of a solicitor, the chambers of a barrister, or the premises of a Law Society.

(3) In *Baker v Campbell* (1983) 153 CLR 52 the question posed in the case stated was:

"In the event that legal professional privilege attaches to and is maintained in respect of ... documents held by (a lawyer) can those

documents be properly made the subject of a search warrant issued under s 10<sup>1</sup> of the *Crimes Act*?"

The question was answered 'No'.

## Legislation

(4) The *Crimes Act* 1914 provides that:

- (a) an issuing officer may issue a warrant to search premises if the officer is satisfied by information on oath that there are reasonable grounds for suspecting that there is, or there will be within the next 72 hours, any evidential material at the premises [section 3E(1)];<sup>2</sup>

- (b) an issuing officer may issue a warrant authorising an ordinary search or a frisk search of a person if the officer is satisfied by information on oath that there are reasonable grounds for suspecting that the person has in his or her possession, or will within the next 72 hours have in his or her possession, any evidential material [section 3E(2)]; and

- (c) Part 1AA of the *Crimes Act* does not affect the law relating to legal professional privilege (section 3Zx).

\*LBC Information Services and the author of this article thank the Law Council of Australia for permission to republish these Guidelines which appeared in (1997) 32 (4) *Australian Lawyer* 29.



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## Overview

(5) It is seen as desirable that an agreed procedure should be laid down which, if followed, will negate or reduce the risks of documents which may be subject of legal professional privilege being seized pursuant to section 3E search warrants.

(6) Accordingly, and subject to the provisions of the *Crimes Act* 1914 (Cth), these general guidelines have been agreed between the Commissioner of the Australian Federal Police on the one hand and the Law Council of Australia on the other.

(7) While focussing on search warrants issued pursuant to the *Crimes Act*, the guidelines are to be interpreted as applying to search warrants issued under other Commonwealth legislation on lawyers' premises or Law Societies where a claim of legal professional privilege is made.

(8) The Law Council through its constituent bodies, the Bar Associations and the Law Societies in all of the Australian States and internal Territories, represents the great majority of Australia's practising lawyers.

(9) The discussions which led to the initial guidelines relating to lawyers' premises were convened by the Commonwealth Director of Public Prosecutions (DPP) and representatives of the Office of the DPP have been involved in the subsequent discussions.

## Professional privilege

(10) The matter of legal professional privilege (ie, concerning communications passing between a lawyer and his/her client/s, and, in some circumstances, a third party, for the purpose of the lawyer providing legal advice to the client/s) is subject to various statutory provisions [eg, the *Evidence Act* 1995 (Cth),<sup>2</sup> the *Evidence Act* 1995 (NSW)] and the common law.

(11) As indicated in the footnote, the common law rules apply before the commencement of court proceedings. From a Commonwealth perspective, the common law rules will apply prior to the start of proceedings, but also during proceedings if those proceedings are conducted in a State court which is not subject to legislation similar to the Commonwealth and NSW Evidence Acts.

## Effect of Guidelines

(12) The effect of these guidelines, in summary, is that, where the lawyer or Law Society is prepared to co-operate with the police search team, no member of that team will inspect any document identified as potentially within the warrant until the lawyer or Law Society has been given the opportunity to claim legal professional privilege in respect of any of the documents so identified.

(13) Where a claim is made in such circumstances, no member of the police search team will inspect any document the subject of the claim until either (a) the claim is abandoned or (b) the claim is dismissed by a court.

(14) It is agreed that application for a search warrant shall only be made after consultation with the Office of the DPP.

(15) These guidelines proceed on the assumption that any particular warrant to which they relate has been duly issued and is good on its face. It is recognised that a lawyer or Law Society upon whose premises the search warrant is to be executed may want to take legal advice as to those matters.

## Procedures in detail

(16) Upon attendance at the premises of the lawyer or Law Society, the executing officer should explain the purposes of the search and invite the lawyer or representative of the Law Society to co-operate in the conduct of the search. If the lawyer, a partner or employee, or the Law Society or an employee, is suspected of involvement in the commission of the alleged offence the executing officer should say so.

(17) Identification of the executing officer and all other members of the search team should be provided to the lawyer or representative of the Law Society. The search team should be kept to the lowest number of persons reasonably necessary in all the circumstances.

(18) If no lawyer, or representative of the Law Society, is in attendance at the premises the subject of the search warrant then, if practicable, the premises or relevant part of the premises should be sealed and execution of the warrant deferred for a period which the executing officer in his/her discretion considers reasonable in all the circumstances to enable any

lawyer or responsible person connected with the premises to attend or, if that is not practicable, to enable arrangements for another person to attend the premises.

(19) The executing officer or Constable/s assisting must be mindful of and comply with the relevant statutory and/or common law obligations attaching to the execution of the search warrant/s in question, and to the provisions of Part 1AA of the *Crimes Act* 1914 in particular in respect to search warrants issued pursuant to that Act.

(20) A reasonable time should be allowed to the lawyer to enable him/her to consult with his/her client/s or to the Law Society to enable it to consult with the legal representatives of the person/s to whose affairs the documents relate, and/or for the lawyer or Law Society to obtain legal advice.

(21) For this reason, it is desirable that warrants be executed only during normal working hours. However, when warrants are executed outside normal working hours, allowances should be made for delays should the lawyer wish to contact his/her client or the Law Society to contact legal representatives, or for either the lawyer or Law Society to take legal advice.

(22) Having informed his/her client/s of the position or the Law Society having informed the legal representative/s of the person/s to whose affairs the documents relate of the position, and/or either having obtained legal advice, the lawyer or Law Society should, consistent with his/her client's/clients' instructions or the instructions of the legal representatives of the person/s to whose affairs the documents relate, co-operate with the police officers by assisting them in locating all documents which may be within the warrant.

(23) If the executing officer requires access to the office records systems the lawyer or Law Society should assist if necessary by explaining the records system to the police officer.

(24) Where the lawyer or Law Society agrees to assist the search team the procedures set out below should be followed:

- (a) in respect of all documents identified by the lawyer or Law Society and/or further identified by the executing officer as potentially within the warrant, the executing officer should, before proceed-

ing to further execute the warrant (by inspection or otherwise) and to seize the documents, give the lawyer or Law Society the opportunity to claim legal professional privilege in respect of any of those documents;

- (b) if the lawyer or Law Society asserts a claim of legal professional privilege in relation to any of those documents then the lawyer or Law Society should be prepared to indicate to the executing officer the grounds upon which the claim is made and in whose name the claim is made; and

- (c) in respect of those documents which the lawyer or Law Society claim are subject to legal professional privilege, the search team shall proceed in accordance with the guidelines as follows. In respect of the remaining documents, the search team may then proceed to complete the execution of warrant.

(25) All documents which the lawyer or Law Society claims are subject to legal professional privilege shall under the supervision of the executing officer be placed by the lawyer and/or his/her staff, or the Law Society and/or its representatives, in a container which shall then be sealed.

(26) In the event that the lawyer or Law Society desires to take photocopies of any of those documents the lawyer or Law Society shall be permitted to do so under the supervision of the executing officer and at the expense of the lawyer or Law Society before they are placed in the container.

(27) A list of the documents shall be prepared by the search team, in co-operation with the lawyer or Law Society, on which is shown general information as to the nature of the documents.

(28) That list and the container/s in which the documents have been placed shall then be endorsed to the effect that pursuant to an agreement reached between the lawyer or Law Society and the search team, and having regard to the claims of legal professional privilege made by the lawyer on behalf of his/her client/s or the Law Society on behalf of the person/s to whose affairs the documents relate, the warrant has not been executed in respect of

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the documents set out in the list but that those documents have been sealed in the container, which documents are to be given forthwith into the custody of the magistrate or justice who issued the warrant or other independent party (referred to below as the 'third party') agreed upon by the lawyer or Law Society and the executing officer pending resolution of the disputed claims.

(29) The list and the container/s in which the documents have been sealed shall then be signed by the executing officer and the lawyer or a representative of the Law Society.

(30) The executing officer and the lawyer or representative of the Law Society shall together deliver the container forthwith, along with a copy of the list of the documents, into the possession of the third party, who shall hold the same pending resolution of the disputed claims.

(31) If within 3 clear working days (or such longer period as is reasonable which may be agreed by the parties) of the delivery of the documents into the possession of the third party, the lawyer or Law Society has informed the executing officer or his/her agent and the third party or his/her agent that instructions to institute proceedings forthwith to establish the privilege claimed have been received from the client/s on whose behalf the lawyer asserted the privilege, or from the person or person/s on whose behalf the claim has been made by the Law Society, then no further steps shall be taken in relation to the execution of the warrant until either:

- (a) a further period of 1 clear working day (or such further period as may reasonably be agreed) elapses without such proceedings having been instituted; or
- (b) proceedings to establish the privilege have failed; or
- (c) an agreement is reached between the parties as to the disclosure of some or all of the documents subject to the claim of legal professional privilege.

(32) Where proceedings to establish the privilege claimed have been instituted, arrangements shall forthwith be made to deliver the documents held by the third party into the possession of the Registrar of the Court in which the said proceedings have been commenced.

The document shall be held by the Registrar pending the order of the Court.

(33) Where proceedings to establish the privilege claimed are not instituted within 3 clear working days (or such further period as may have been agreed) of the delivery of the documents into the possession of the third party, or where an agreement is reached between the parties as to the disclosure of some or all of the documents, then the parties shall attend upon the third party and shall advise him/her as to the happening of those matters and shall request him/her, by consent, to release into the possession of the executing officer all the documents being held by the third party or, where the parties have agreed that only some of the documents held by him/her should be released, those documents.

(34) In those cases where the lawyer or Law Society refuses to give co-operation, the executing officer should advise that the search will proceed in any event and that, because the search team is not familiar with the office systems of the lawyer or Law Society, this may entail a search of all files and documents in the lawyer's or Law Society's office in order to give full effect to the authority conferred by the warrant.

(35) The lawyer or Law Society should also be advised that a document will not be seized if, on inspection, the executing officer considers that the document is either not within the warrant or privileged from seizure. The search team should then proceed forthwith to execute the warrant.

(36) These guidelines, which replace those last agreed between the Australian Federal Police and the Law Council of Australia in June 1990, commence with effect from 3 March 1997.

[Signature]

M Palmer  
Commissioner  
Australian Federal  
Police

[Signature]

P Levy  
Secretary-General  
Law Council of  
Australia"

## Endnotes

<sup>1</sup> Section 10 has now been replaced by the *Crimes Act 1914*, s 3E.

<sup>2</sup> The privilege provided by s 118, and the privileges provided by ss 119 and 120 (of the Commonwealth

Evidence Act] only apply in relation to proceedings in a federal court or ACT court (s 4(1)). The common law rules of legal professional privilege [*Grant v Downs* (1976) 135 CLR 674] continue to apply in relation to, among other things, the exercise of investigative powers under Commonwealth or ACT law. Thus the range of communications protected by the privilege at the stage of an

investigation (by the common law sole purpose test) may be narrower than that protected in subsequent, related, proceedings (by the dominant purpose test in the Act). [Commonwealth Evidence Law — commentary by G Bellamy and P Meibusch, Civil Law Division, Attorney-General's Department 1995 (para 118.14)].



## **CHAPTER NINE**

**“Client Legal Privilege and Legal Professional  
Privilege: Considered, Compared and Contrasted”**

## Articles

# Client Legal Privilege and Legal Professional Privilege: Considered, Compared and Contrasted

*S B McNicol\**

## Introduction

In *Esso Australia Resources Ltd v Federal Commissioner of Taxation*<sup>1</sup> the Full Federal Court of Australia, by a 3:2 majority, held that ss 118 and 119 of the Evidence Act 1995 (Cth) only apply to evidence adduced in court and hence those sections do not apply to the production or disclosure of documents at the stage of discovery. The majority judges (Black CJ, Sundberg and Finkelstein JJ) overruled the decision of the Full Court of the Federal Court in *Adelaide Steamship Co Ltd v Spalvins*<sup>2</sup> which had held that ss 118 and 119 of the Evidence Act 1995 (Cth) had the effect of modifying, by analogy, the common law relating to legal professional privilege so as to make that privilege available where the dominant, rather than the sole, purpose of a communication is the obtaining of legal advice. The effect of the majority decision in *Esso* is that the plain language of ss 118 and 119 dictates that the "dominant purpose" test for client legal privilege should be applied in a court room (in proceedings to which the Act applies) while the common law "sole purpose" test of legal professional privilege from *Grant v Downs*<sup>3</sup> should be applied to all processes ancillary to proceedings in which the evidence is sought to be adduced (including pre-trial processes of discovery or the production of documents on subpoena or summons).<sup>4</sup>

There are several important issues which arise from the decision in the *Esso* case. Prior to the enactment of the Evidence Act 1995 (Cth), legal professional privilege was governed by a sole purpose test at common law due to the 1976 decision of the High Court in *Grant v Downs*.<sup>5</sup> Then, since 1983 in Australia, legal professional privilege has applied in not only curial and quasi-curial contexts but also in non-curial contexts, such as administrative and investigative proceedings, and in the extra-judicial processes of search and

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1 (1998) 159 ALR 664.

2 (1998) 152 ALR 418.

3 (1976) 135 CLR 674.

4 It should be noted that special leave to appeal to the High Court has been granted to Esso Australia Resources Ltd by McHugh, Kirby and Callinan JJ of the High Court on 14 May 1999. See also *R v Young* (unreported, CCA(NSW), 7 July 1999) where a five member court (Spiegelman CJ, Beazley JA, Abadee, James and Barr JJ) followed the *Esso* Federal Court decision.

5 Above n 3.

seizure and in proceedings before bodies having the statutory power to require the giving of information.<sup>6</sup> This was mainly due to the landmark 4:3 decision of the High Court in *Baker v Campbell*<sup>7</sup> which proclaimed legal professional privilege as more than just a mere rule of evidence capable of applying in judicial proceedings but as a fundamental and substantive common law principle capable of applying to all forms of compulsory disclosure, unless some legislative provision expressly or impliedly abrogated it. Then in 1995, the Evidence Act 1995 (Cth) created a privilege, known as client legal privilege, with a dominant purpose test that applies only to the "adducing of evidence" in a curial context (in the Federal courts to which the Act applies) and remained silent on other, especially pre-trial contexts. Such a course of action has led to both much litigation and confusion, especially on the question whether the Act has an indirect or implied effect on pre-trial contexts.

As was pointed out by the Full Federal Court in *Adelaide Steamship Co v Spalvins*<sup>8</sup> there have been three quite distinct positions taken in the judgments on the approach to client legal privilege under the Evidence Act 1995 (Cth). The first has been to apply the principles of the Act "derivatively" to ancillary processes, modifying the common law so as to accord with the Act: eg, *Telstra Corp v Australis Media Holdings (No 1)*.<sup>9</sup> The second accepts that it is appropriate to have regard to the principles of the Act when exercising relevant discretions under rules of court regulating ancillary processes, eg, O 15 r 15 of the Federal Court Rules: see *Trade Practices Commission v Port Adelaide Wool Co Pty Ltd*,<sup>10</sup> and the third is to hold that as the Act does not apply to ancillary processes, the common law is preserved unmodified and is to be applied: *Esso Australia Resources Ltd v Federal Commissioner of Taxation*.<sup>11</sup> At the time of writing obviously the third position is the governing position under both the Evidence Act 1995 (Cth) and the Evidence Act 1995 (NSW), although there is even more litigation awaited.<sup>12</sup>

It is submitted that the majority decision in the *Esso* case is surely correct in that a literal and plain interpretation of the Evidence Act 1995 (Cth) dictates that the Act was only ever intended to apply to the adduction of evidence in a courtroom. This view is indeed supported by the available extrinsic evidence, as was pointed out by Black CJ and Sundberg J in their joint judgment. This view is also supported by the recent High Court decision in *Northern Territory v GPAO*<sup>13</sup> which held, inter alia, that the Evidence Act 1995 (Cth) is concerned with the adducing of and admissibility of evidence, proof and certain ancillary matters. The High Court further held in that case that the Evidence Act does not deal with the obligations of a party to whom a subpoena is addressed to produce documents nor with the grant of leave to

<sup>6</sup> Per *Baker v Campbell* (1983) 49 ALR 385.

<sup>7</sup> Ibid.

<sup>8</sup> Above n 2.

<sup>9</sup> (1997) 41 NSWLR 277.

<sup>10</sup> (1995) 132 ALR 645.

<sup>11</sup> (1997) 150 ALR 117 (Foster J at first instance) and now Full Federal Court (1998) 159 ALR 664.

<sup>12</sup> That is, special leave to appeal granted by the High Court in the *Esso* case: above n 4.

<sup>13</sup> (1999) 73 ALJR 470.

inspect documents produced in response to a subpoena.<sup>14</sup>

It is proposed in this article to analyse separately and in turn each of the sections of the Evidence Act 1995 (Cth) which relate to client legal privilege, ie ss 117 to 126. Each section will first be considered and evaluated (by outlining any difficulties encountered with the sections), and second, the differences between each section and the common law doctrine of legal professional privilege will be highlighted. In the present author's opinion, it is most unsatisfactory to have two sets of law relating to the lawyer-client privilege operating concurrently. It is hoped that by highlighting the differences between the law in the "Evidence Act jurisdictions" (ie, the Federal Courts, High Court and Family Courts, NSW Courts and ACT Courts) and the "non-Evidence Act jurisdictions" that law reformers will make an effort to assimilate some of these differences and work toward uniformity in privilege and evidence law but not at the cost of making "bad" law.<sup>15</sup>

## Definitions — s 117

### Content

Section 117 of the Evidence Act 1995 (Cth) states that a "client" includes the following:

- (a) an employer (not being a lawyer) of a lawyer
- (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) a manager, committee or person acting in respect of the person, estate or property of a person of unsound mind
- (e) a personal representative of a client
- (f) a successor to the rights and obligations of a client.

A "confidential communication" and a "confidential document" are defined respectively as: a communication and a document made or prepared in such circumstances that, when it was made or prepared, the person who made or prepared it, or the person to whom or for whom it was made or prepared, was under an express or implied obligation not to disclose its contents.

A "lawyer" is said to include "an employee or agent of a lawyer".

A "party" is said to include:

- (a) an employee or agent of a party
- (b) a manager, committee or person acting in respect of the person, estate or property of a person of unsound mind
- (c) a personal representative of a party
- (d) a successor to the rights and obligations of a party (subsection (1)).

The phrase "commission of an act" is said to include a "failure to act" (subs (2)).

<sup>14</sup> Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ (Kirby J not deciding).

<sup>15</sup> By "bad" law here, I mean law which is confusing, anomalous, unclear and/or leading to difficulties of application in practice.

### Discussion and difficulties

Section 117 provides definitions of five key concepts for the purposes of Div 1 of Pt 3.10 of the Evidence Act 1995 (Cth) on client legal privilege. Two of the concepts ("confidential communication" and "confidential document") are defined in full and the other three concepts ("client", "lawyer" and "party") are given non-exhaustive (or inclusory) definitions. The phrases "confidential communication" and "confidential document" are given very similar definitions and the thrust of the definition is to provide a meaning to the word "confidential" (ie, essentially a "communication" or a "document" will be "confidential" if the person making the communication or document or the person to whom it was made was under an express or implied obligation not to disclose its contents). There is no supplementary definition of "communication" provided by the Commonwealth Act. On the other hand, however, "document" is further defined in the Dictionary to the Evidence Act, Pt 1, as meaning "any record of information" and is followed by an inclusory definition (eg, anything on which there is writing,<sup>16</sup> and anything on which there are marks, figures, symbols or perforations etc.<sup>17</sup>) Further, a reference to a document includes "any part of a document" or "any copy, reproduction or duplicate of the document".<sup>18</sup>

The word "client" is given a broad inclusory definition and includes private employers of a lawyer (who are not lawyers themselves) (para (a) of s 117(1)) and governmental employers of lawyer (para (c) of s 117(1)). It is not clear why the private employer must not be a lawyer while the governmental employer does not have a similar restriction. The word "lawyer" is given a limited inclusory definition as s 117(1) merely states "lawyer" includes an employee or agent of a lawyer. The Dictionary, however, purports to supplement this by giving a full definition. Part 1 of the Dictionary states "lawyer" means a barrister or a solicitor.

The word "party" is given an inclusory definition which includes employees or agents. It does not, however, purport to define what a "party" is.

### Differences between s 117 and the common law "non-Evidence Act" jurisdictions

Some of the definitions in s 117 are merely declaratory of common law and some of the definitions are slightly broader than the equivalent definitions under the common law. For instance, the definition of "document" under the Commonwealth Act (as supplemented by the Dictionary) is largely declaratory of the definition of "document" in s 3(1) of the Evidence Act 1958 (Vic). In contrast, the definition of "client" under s 117(1) is slightly broader than the equivalent definition of "client" in common law jurisdictions. As stated above, paras (a) and (c) of the definition of "client" in s 117(1) make it clear that client (for the purposes of client legal privilege) will include private employers of a lawyer and governmental employers of a lawyer respectively.

<sup>16</sup> Para (a) of Dictionary definition of "document".

<sup>17</sup> Para (b) of Dictionary definition of "document".

<sup>18</sup> Pt 2, cl 8(a) and (b) of Dictionary.

The case of *Waterford v Commonwealth*<sup>19</sup> has decided that "client" (for the purposes of legal professional privilege) will include governmental employers of a lawyer but it has not firmly established that "client" will include private employers of a lawyer (Dawson and Deane JJ decided that it does, Brennan J held that it does not and Mason CJ and Wilson J did not decide). The definition of "lawyer" which is provided in the Dictionary to the Commonwealth Act simply states "lawyer" means a barrister or a solicitor. At common law it may be the case that "lawyer" (for the purposes of legal professional privilege) means a *practising* barrister or solicitor. This is because the term "legal adviser", not "lawyer", is used by the High Court in *Waterford's* case: see, for example, Deane J who suggested that (for the purposes of legal professional privilege) in order to place "salaried legal advisers" on the same footing as legal advisers in independent practice on their own account, the salaried legal advisers should be "persons who, in addition to any academic or other practical qualifications, were listed on a roll of current practitioners, held a current practising certificate, or worked under the supervision of such a person".<sup>20</sup>

### Legal advice — s 118

#### Content

Section 118 of the Evidence Act 1995 (Cth) provides that 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 two or more lawyers acting for the client, or
- (c) the contents of a confidential document (whether delivered or not) prepared by the client or a lawyer

for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.

#### Discussion and difficulties

Section 118 creates a "legal advice" privilege, ie, a privilege for (i) confidential *communications* made between a client and a lawyer or between two or more lawyers acting for the client; and (ii) the contents of confidential *documents* which are made or prepared for the dominant purpose of the lawyer providing *legal advice* to the client. The privilege operates if the client objects and results in the privileged information not being adduced in evidence in a court.

<sup>19</sup> (1987) 163 CLR 54.

<sup>20</sup> (1987) 61 ALJR 350 at 360. See also, for example, isolated definitions under statute in Victoria which use the term "legal practitioner" (not "lawyer"): eg s 464(2) of the Crimes Act 1958 (Vic) which defines "legal practitioner" as a person who is enrolled as a barrister and solicitor of the Supreme Court. (This definition is given for the purposes of a suspect being detained in custody having the right to communicate with a legal practitioner. Such communications would, however, normally be covered by legal professional privilege.)

There have been a number of difficulties concerning the application of s 118. First, s 118 is expressed as applying only in a court, ie, "evidence is not to be adduced if . . . the court finds that . . .". If this is interpreted literally, then a dominant purpose test would apply during the court proceedings while a common law sole purpose test would apply pre-trial. There have been several cases which have addressed this issue and, at present (as stated above), the decision of the Full Federal Court in *Esso Resources Ltd v Federal Commissioner of Taxation*<sup>21</sup> has held that s 118 (with its dominant purpose test) should be given its plain meaning so that it will only apply to evidence adduced in court while the common law sole purpose test of *Grant v Downs*<sup>22</sup> should be applied to processes ancillary to a proceeding in which the evidence is sought to be adduced.

Second, having "documents" in the definition of privilege in s 118(c) is wider than the common law doctrine of privilege, the latter of which generally only includes "communications".<sup>23</sup> There are two important consequences of having "documents" in the definition of the privilege in s 118(c). The first is that there is a danger that para (c) relating to "documents" will be interpreted widely and there will be little need to rely on paras (a) and (b) of s 118 which relate to "communications". McLelland CJ in Equity in the *Telstra Corp* case<sup>24</sup> referred to this problem and read down the meaning of s 118(c) to include only documents containing advice or a record of the advice given or to be given to a client. The second is that the "Propend" issue of whether copies of non-privileged documents are privileged will be easier to resolve under the Commonwealth Act, provided such copies satisfy s 118(c). At common law, a majority of the High Court in *Commissioner, Australian Federal Police v Propend Finance Pty Ltd*<sup>25</sup> held that "it is the communication and not the document that needs and is given protection".<sup>26</sup> This view necessitated an inquiry into the purpose for which the document came into existence and a determination that the document will be privileged *only* if the purpose was for the communicating of legal advice (or the communicating of information to be used in litigation). In contrast, a copy of a non-privileged document under the Evidence Act 1995 (Cth) will be privileged if the contents of the document were prepared for the dominant purpose of legal advice. (There is, however, the possibility that the word "contents" in s 118(c) will be read down to mean contents for the purpose of "communicating").

Third, the omission of "professional legal services relating to a proceeding"

21 (1998) 159 ALR 664.

22 (1976) 135 CLR 674.

23 See *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1998) 153 ALR 393 at 422-3; *Pioneer Concrete (Vic) Pty Ltd v Catchlin Pty Ltd* [1988] 475 FCA (6 May 1998, Finn J, p 5 of 7); *Telstra Corp v Australia Media Holdings* (1997) 41 NSWLR 147 at 149 (McLelland CJ in Equity); *Newcastle Wallsend Coal Co v Court of Coal Mines Regulation* (1997) 42 NSWLR 351; G Roberts, *Evidence: Proof and Practice*, 1998 LBC, Sydney, p 219; Scrutiny of Acts and Regulations Committee, *Review of the Evidence Act 1995 (Cth)*, Melb Govt Printer, 1996, p 54; S Odgers, *Uniform Evidence Law*, 3rd ed, Law Bk Co, 1998, pp 341-2.

24 (1997) 41 NSWLR 147 at 149. See also the *Newcastle Wallsend Coal* case (1997) 42 NSWLR 351 at 389.

25 (1997) 141 ALR 545.

26 *Ibid.*, at 583 (McHugh J).

or "litigation" in s 118 has meant that communications between client and lawyer that are for the purpose of preparing for actual or contemplated litigation but which do not entail the giving of legal advice will not be privileged.<sup>27</sup>

Fourth, s 118 indicates that it is the "client" who must object for the privilege to be invoked. At common law, the client is the holder of the privilege but most often it is the lawyer who invokes the privilege.<sup>28</sup>

Fifth, the last line of s 118 reads "for the dominant purpose of the lawyer . . . providing legal advice to the client". It is submitted that it would be preferable to state: "for the dominant purpose of the client seeking or being furnished with or obtaining legal advice from the lawyer". This would accord with s 119 ("for the dominant purpose of the client being provided with professional legal services"). This would also be more consistent with the title and nature of the privilege, ie a "client legal privilege". Further, the present wording of the last paragraph of s 118, namely, "for the dominant purpose of the lawyer . . . providing legal advice to the client" tends to suggest that only the lawyer's intention would be relevant. However, as Odgers states,<sup>29</sup> it is the intention of the client or lawyer at the time of the making of the communication or the preparation of the document which is determinative, ie, the client where the client makes the communication or prepares the document; the lawyer where the lawyer makes the communication or prepares the document, citing *Dyno Nobel Asia Pacific Ltd v Sunny Shore Shipping Finance Inc*.<sup>30</sup> It is submitted that this position (ie, the client or lawyer's intention) should be reflected in s 118 itself.

### Differences between the "advice" head of client legal privilege and "communications" head of legal professional privilege

There are five relevant differences between the "advice" head of client legal privilege under s 118 and the "communications" head of the common law doctrine of legal professional privilege. First, the most obvious difference is the adoption of a "dominant purpose" test under s 118. This is clearly wider than the common law "sole purpose" test. Second, client legal privilege under s 118 applies to both "communications" and the contents of "documents". This again is wider than the common law doctrine which is stated to cover only "communications". Third, a "client" under s 118 clearly covers private and governmental employers of a lawyer (by reference to s 117) and again this is wider than the presently unresolved position from *Waterford's* case<sup>31</sup> at common law. Fourth, the language of s 118 indicates that client legal privilege is limited to curial proceedings.

This makes client legal privilege a much narrower privilege than the

27 G Roberts, above n 23, p 219; *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1998) 153 ALR 393 at 420; McNicol, "Legal Privilege: How It Is Won and Lost", Monash Graduate Lecture Series, p 8.

28 T Smith, "The Evidence Act 1995 — An Overview" (1995) 18 UNSWLJ 1 at 28.

29 Odgers, above n 23, p 345 and at fn 502.

30 Unreported, Fed Ct, Tamberlin J, 309 of 1997, 24 October 1997.

31 (1987) 163 CLR 54.



substantive doctrine of legal professional privilege at common law which applies in non-curial, quasi-curial and pre-trial arenas.<sup>32</sup> Efforts (albeit largely unsuccessful) have been made, however, to extend "derivatively" the statutory client legal privilege to processes ancillary to court proceedings.<sup>33</sup> Fifth, s 118 does not mention litigation or professional legal services relating to a proceeding. This makes client legal privilege narrower than the common law doctrine of legal professional privilege because only communications (and documents) between lawyers and their clients made for the dominant purpose of legal advice will be protected under s 118 whereas communications made between a lawyer and her or his client for the dominant purpose of litigation will not be privileged under s 118. As Roberts states,<sup>34</sup> "not all communications between lawyer and client with reference to the conduct of litigation will require the lawyer to give legal advice: they may simply contain requests for information or provide information. Nevertheless it would be strange if such communications were not privileged" (under s 118).

### Litigation — s 119

#### Content

Section 119 of the Evidence Act 1995 (Cth) provides that 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 a proceeding (including anticipated or pending proceedings) in which the client is or may be a party.

#### Discussion and difficulties

Section 119 creates a "litigation" privilege, ie, a privilege for (i) confidential *communications* between the client and another person or between a lawyer and another person, and (ii) the contents of confidential *documents* which are made or prepared for the dominant purpose of the client being provided with professional legal services relating to litigation. The privilege operates if the client objects and results in the privileged information not being adduced in evidence in a court.

There have been a number of difficulties and comments concerning the application of s 119. First, s 119 is expressed as applying only in court, ie, "evidence is not to be adduced if . . . the court finds that . . .". As with s 118 discussed above, there has been an enormous amount of litigation on whether

the Act has a "derivative" effect on processes ancillary to a proceeding in which the evidence is sought to be adduced, such as discovery or the production of documents on subpoena or summons. The current position is that the Act *does* not have such a "derivative" effect and therefore for the purposes of s 119, a "dominant" purpose test would not apply to such ancillary processes.<sup>35</sup> Second, having "documents" in the definition of privilege in s 119(b) is wider than the common law doctrine of privilege, the latter of which generally only includes "communications".<sup>36</sup> It should be noted that s 119(b) is potentially extremely broad and unless it is read down by reference to the qualifications expressed in s 119(a), it could include *any* confidential document made for the dominant purpose of the relevant litigation, whether or not a third party were involved. Third, there are difficulties with the meaning of the phrase "another person". This phrase has not been defined in s 117 or anywhere else in the Act. Does the phrase "another person" include a client or a lawyer? It is stated by Odgers<sup>37</sup> that it does, so that "communications between the client and a lawyer or communications between two or more lawyers" would be included under s 119(a). This interpretation is helpful because clearly communications between lawyers and clients made for the purpose of litigation *should* be included in the definition of client legal privilege (either under s 118 or s 119). However, the problem is that s 119 simply does not make it clear that "another person" includes the client or the lawyer. The intended meaning of "another person" is surely a "third party" in the sense this is used at common law.<sup>38</sup> Fourth, s 119 indicates that it is the "client" who must object for the privilege to be invoked. At common law, the client is the holder of the privilege but most often it is the lawyer who invokes the privilege.<sup>39</sup> Fifth, s 119 does not appear to refer to documents which come into existence for the purpose of *use* in legal proceedings such as are covered by the second limb of *Grant v Downs*<sup>40</sup> unless it be accepted that the reference to the client "being provided with professional legal services" relating to anticipated or pending proceedings is a reference to the *use* of the documents by the client's lawyer in those proceedings.<sup>41</sup>

#### Differences between "litigation" head of client legal privilege and "third party litigation" head of legal professional privilege

There are six relevant differences between the "litigation" head of client legal privilege under s 119 and the "third party litigation" head of legal professional privilege. First, the most obvious difference is the adoption of a "dominant purpose" test under s 119. This is clearly wider than the common law "sole purpose" test. Second, client legal privilege under s 119 applies to *both*

<sup>32</sup> *Baker v Campbell* (1983) 49 ALR 385.

<sup>33</sup> *Adelaide Steamship Company Pty Ltd v Spalvins* (1998) 152 ALR 418; *Telstra Corp v Australia Media Holdings (No 1)* (1997) 41 NSWLR 277.

<sup>34</sup> G Roberts, above n 23, p 219.

<sup>35</sup> *Eso Australia Resources Ltd v Federal Commissioner of Taxation* (1998) 159 ALR 664.

<sup>36</sup> *AC&CC v Australian Safeway Stores Pty Ltd* (1998) 153 ALR 393 at 422-3.

<sup>37</sup> Odgers, above n 23, para 119.4, p 349.

<sup>38</sup> See McNicol, above n 27, p 8 and fn 17, and the persuasive argument by Roberts, above n 23, p 219, to the effect that "another person" is a marked term and clearly does not include lawyers or clients.

<sup>39</sup> See above n 28, at 28.

<sup>40</sup> (1976) 135 CLR 674.

<sup>41</sup> *AC&CC v Australian Safeway Stores Pty Ltd* (1998) 153 ALR 393 at 420 (Goldberg J).

"communications" (s 119(a)) and the contents of "documents" (s 119(b)). This again is wider than the common law doctrine which is stated to cover only "communications".<sup>42</sup> Third, a "client" under s 119 clearly covers private and governmental employers of a lawyer (by reference to s 117) and this is wider than the presently unresolved position from *Waterford's* case<sup>43</sup> at common law. Fourth, the language of s 119 is limited to curial proceedings. This makes client legal privilege a much narrower privilege than the substantive doctrine of legal professional privilege at common law which applies in non-curial, quasi-curial and pre-trial arenas: see *Baker v Campbell*.<sup>44</sup> Efforts (albeit largely unsuccessful) have been made, however, to extend "derivatively" the statutory client legal privilege to processes ancillary to court proceedings.<sup>45</sup> Fifth, it is not clear whether "another person" under s 119(a) includes a lawyer or a client. If "another person" does *not* include a lawyer or a client (which is the view of the present writer) then communications between a client and a lawyer for the purpose of litigation (ie, for the purpose of being provided with professional legal services relating to an Australian or overseas proceeding) are *not* protected under s 119 (and nor are they protected under s 118). This makes client legal privilege clearly narrower than the common law doctrine of legal professional privilege because some communications between lawyer and client with reference to the conduct of litigation will not necessarily require the lawyer to give legal advice.<sup>46</sup> Sixth, the concluding words of s 119 state that the proceedings covered by s 119 are proceedings in which the "client is or may be, or was or might have been, a party". Although it is usual for the client to be a potential or contemplated "party" to litigation, under the third party litigation limb of legal professional privilege at common law it is not a requirement at common law. This means that client legal privilege could be narrower than the doctrine of legal professional privilege if a situation arose where a client was "involved" in litigation but not necessarily a "party" to such litigation.

### Unrepresented parties — s 120

#### Content

Section 120 of the Evidence Act 1995 (Cth) provides that evidence is not to be adduced if, on objection by an unrepresented party, the court finds that adducing the evidence would result in disclosure of:

- (a) confidential communication between the party and another person, or
- (b) the contents of a confidential document (whether delivered or not) that was prepared by the party for the dominant purpose of preparing for or conducting the proceeding (subs (1)).

<sup>42</sup> *Commissioner, Australian Federal Police v Propend Finance Pty Ltd* (1997) 141 ALR 545 at 583.

<sup>43</sup> (1987) 163 CLR 54.

<sup>44</sup> (1983) 49 ALR 385.

<sup>45</sup> See, eg, *Adelaide Steamship Co Pty Ltd v Spalvins* (1998) 152 ALR 418.

<sup>46</sup> Roberts, above n 23, p 219.

A reference to a party includes a reference to persons referred to, in relation to a client, in paras (b), (d), (e) and (f) of the definition of "client" in s 117(1) (subs (2)).

### Discussion and difficulties

Section 120 creates a "litigation" privilege for unrepresented litigants, ie, a privilege for (i) confidential communications between the litigant/party and another person, and (ii) the contents of confidential documents prepared by the litigant/party for the dominant purpose of preparing for or conducting the proceeding. The privilege operates if the client objects and results in the privileged information not being adduced in evidence in a court.

There have not been any difficulties to date concerning the application of s 120. Certain comments have been made, however, to the effect that s 120 does not provide for a privilege in relation to an anticipated proceeding.<sup>47</sup> As Roberts notes:

this privilege is more limited than the privilege for third party communications because it is confined to those made for the purpose of actual litigation as opposed to actual or contemplated litigation.<sup>48</sup>

### Differences between s 120 and the common law

In non-Evidence Act jurisdictions there is no privilege for unrepresented parties or litigants. The common law does not recognise such a privilege.<sup>49</sup> Section 120 is therefore "wholly novel" in creating a litigation privilege for unrepresented parties. Furthermore, in three non-Evidence Act jurisdictions the only protection which was said to be available to the unrepresented litigant, namely the "own case" privilege, has been abolished.<sup>50</sup>

### Loss of client legal privilege: generally — s 121

#### Content

Section 121 of the Evidence Act 1995 (Cth) provides that the privileges under ss 118, 119 and 120 are lost in the following three situations, namely, where there is:

- (1) evidence relevant to a question concerning the intentions, or competence in law, of a client or party who has died;
- (2) evidence where, if it is not adduced, it could reasonably be expected that the court would be prevented from enforcing an order of an Australian court; and
- (3) evidence of a communication or document that affects a right of a person.

<sup>47</sup> Bellamy and Meibusch, *Commonwealth Evidence Law*, Attorney-General's Department, 1995, p 107.

<sup>48</sup> Roberts, above n 23, p 220.

<sup>49</sup> McNicol, *Law of Privilege*, Law Bk Co, Sydney, 1992, p 80; M Groves, "Any Privilege for the Unlucky — Unrepresented Prisoners and Legal Documents" (1997) 22 *Alt LJ* 3 at 5.

<sup>50</sup> In Victoria, Evidence Act 1958 (Vic) s 32A; in Queensland, Evidence Act 1977 (Qld) s 14(2) and in Tasmania, Supreme Court Civil Procedure Act 1932 (Tas) s 11(9).

## Discussion and difficulties

Section 121 creates three "exceptions" to the client legal privilege under ss 118, 119 and 120 for (1) evidence about the intentions or competence of a client or party who has died, (2) evidence where, if it is not adduced, it could reasonably be expected that the court would be prevented from enforcing an order of an Australian court, and (3) evidence of a communication or document that affects the right of a person.<sup>51</sup>

There have been some negative comments made in some judgments particularly about the wording or drafting of s 121(2) and s 121(3). For example, in the case of *In the Matter of Strikers Management Pty Ltd; Australian Securities Commission v Peter Dimitri*<sup>52</sup> Burchett J stated:

The section is very curiously drafted, and the comments of the ALRC are of very little assistance. The difficulty is that the subsection is couched in terms of the effect upon proceedings of the rejection of the evidence, rather than in terms of the nature of that evidence. Does this mean that the same evidence would be admissible or not admissible, depending on whether without it the enforcement proceeding would actually fail or succeed? If so, when is the ruling on admissibility to be given? Fortunately, these questions can be left for another day, since s 125(1)(a) is a sufficient basis for my order.

Further, in *Adelaide Steamship Co Ltd v Spalvins*,<sup>53</sup> Olney, Kiefel and Finn JJ referred specifically to s 126 and to the "difficultly worded" s 121(3), which provisions "may in a given instance result in the loss of privilege in circumstances where the common law would have procured a like outcome". In *BT Australasia Pty Ltd v State of NSW (No 7)*,<sup>54</sup> Sackville J referred to the ALRC Report No 38, para 196 in which it is stated that s 121(3) was intended to cover situations where a communication between the client and the lawyer has had the result of creating, limiting or terminating a person's rights (and the illustration given in the fn 13 is a communication creating a secret trust). Sackville J indirectly predicted some uncertainty surrounding s 121(3) by dismissing the subsection and stating, "Whatever the scope of s 121(3) of the Evidence Act, it does not apply to communications between BT and their legal advisers [in this case]".<sup>55</sup>

## Differences between s 121 and the common law

The common law doctrine of legal professional privilege does not expressly recognise the three situations listed in s 121 as exceptions to legal professional privilege. However, the case of *R v Bell; Ex parte Lees*<sup>56</sup> which held that the

51 As to whether the word "exception" should be used compared with stating that an element of the privilege has not been satisfied in the first place, see the discussion by Deane J in *Carter v Northmore, Hale, Davy & Leake* (1995) 69 ALJR 572 at 578.

52 [1997] 1434 FCA (18 November 1997). Burchett J was referring to ALRC, Interim Report on Evidence, No 26, Vol 1, para 885.

53 (1998) 152 ALR 418 at 429.

54 (1998) 153 ALR 722 at 742.

55 Note also, in *KC v Shiley* (unreported, Fed Ct, 11 July 1997) Tamberlin J referred to the scope of s 121(3).

56 (1980) 146 CLR 141.

privilege does not apply where its operation would impede the enforcement of a child custody order under the Family Law Act 1975 would be covered by s 121(2).

## **Loss of client legal privilege: consent and related matters — s 122**

### **Content**

Section 122 of the Evidence Act 1995 (Cth) provides that the privileges under ss 118, 119 and 120 are lost where:

- (1) The client or party consents.
- (2) The client or party knowingly and voluntarily discloses to another person the substance of the evidence and the disclosure was not made:
  - (a) in the course of making or preparing a confidential communication or document, or
  - (b) as a result of duress or deception, or
  - (c) under compulsion of law, or
  - (d) by an official or statutory body to a Minister with relevant ministerial responsibility.
- (3) By an employee or agent of the client, party or lawyer who was not authorised to make the disclosure (subs (3)).

The section further provides that the privileges under ss 118, 119 and 120 are lost where:

- (4) The client or party expressly or impliedly consents to the disclosure of the substance of the evidence to another person other than (a) a lawyer acting for the client or party, or (b) a Minister with relevant ministerial responsibility.

Section 122(5) provides that the privileges under ss 118, 119 and 120 are *not* lost if the disclosure is made:

- (a) by a client to another person for whom the lawyer is providing professional legal services to both concerning the same matter, or
- (b) to a person with whom the client or party had, at the time of the disclosure, a common interest in an actual, anticipated or pending proceeding.

Section 122(6) provides that the privileges under ss 118, 119 and 120 do not apply to a document that a witness has used to try to revive her or his memory in court under s 32 or that a police officer has read or been led through under s 33.

### **Discussion and difficulties**

Section 122 sets out the statutory doctrine of “waiver” of client legal privilege in two forms — waiver by consent and waiver by disclosure. Section 122(1) states that client legal privilege is lost where the client or party consents. Section 122(2) states that client legal privilege is lost where the client or party knowingly and voluntarily discloses to another person the substance of the

evidence and the disclosure was not made in the four situations listed above (see s 122(2)(a)-(d)). Section 122(3) states that client legal privilege is not lost (under s 122(2)) where an employee or agent of the client, party or lawyer was not authorised to make the disclosure. Section 122(4) states that client legal privilege is lost where the client or party expressly or impliedly consents to the disclosure of the substance of the evidence to another person other than a lawyer acting for the client or party (subs (4)(a)) or a Minister with relevant ministerial responsibility (subs (4)(b)). Section 122(5) states that client legal privilege is not lost (under s 122(2) or s 122(4)) if the disclosure is made by a client to another person who shares a joint privilege with the client (subs (5)(a)) or if the disclosure is made to a person who shares a common interest privilege with the client or party (subs (5)(b)). Section 122(6) states that client legal privilege is lost in respect of documents from which a witness has used to attempt to revive her or his memory under s 32 or which a police officer has read or been led through under s 33.

There has been a number of difficulties concerning the application of s 122 and there have been many judgments in which varying opinions have been given concerning its interpretation and scope. Problems have been encountered, in particular, with the question whether the common law test of fairness<sup>57</sup> can be injected into the section, despite the fact that it is never mentioned. The manner in which s 122 is drafted suggests an inflexible and rigid test for waiver of privilege and there appears to be little room for flexibility or fairness.<sup>58</sup> The advantage of the common law fairness test is that it allows a court to decide that there has been an "imputed" waiver of privilege despite the fact that there has not been an express or intentional general waiver of privilege. In the case of *Adelaide Steamship Pty Ltd v Spalvins*<sup>59</sup> Olney, Keifel and Finn JJ stated that s 122 was not concerned with any principle of fairness such as that developed by the common law and by which waiver may be imputed. The Full Federal Court further decided that the so-called "issue waiver" cases<sup>60</sup> amount to no more than "examples of disclosure waiver of the *Maurice* variety and, perhaps more usually, of implied consent waiver. These two manifestations of waiver have, in our view, now been displaced directly and derivatively for ancillary purposes by s 122(2) and (4) and s 122(1) of the Act".<sup>61</sup> Sackville J followed the *Adelaide Steamship* case in *BT Australasia v State of NSW (No 7)*<sup>62</sup> by deciding that the "issue waiver" cases are to be determined by the "derivative" application of the principles stated in s 122 and that the test to be applied is whether there has been express or implied consent to the privileged communications being disclosed (s 122(1), (4)) or a knowing and voluntary disclosure of the substance of the privileged communications (s 122(2)). Sackville J stated that the *Adelaide Steamship* case has meant that

<sup>57</sup> *Goldberg v Ng* (1996) 185 CLR 83.

<sup>58</sup> See McNicol, above n 27, p 9 and Roberts, above n 23, p 230, who describes the provisions of s 122 as "somewhat cluttered and inelegant" (p 205) and as "somewhat verbose" (p 230).

<sup>59</sup> (1998) 152 ALR 418 at 425.

<sup>60</sup> Eg, *Thomason v Campbelltown Municipal Council* (1939) 39 SR(NSW) 347; *Hongkong Bank of Australia v Murphy* [1993] 2 VR 419; *Pickering v Edmunds* (1994) 63 SASR 357. *Ibid*, at 429.

<sup>61</sup> *Op cit* (1998) 152 ALR 418 at 429.

<sup>62</sup> (1998) 153 ALR 722.

the "quantitative" test for waiver under s 122(2) and (4) has displaced any principle of "fairness" by which waiver could be imputed.<sup>63</sup> Sackville J added:

It may be that another Full Court will hold that the unfairness test, as previously applied in issue waiver cases, has survived the enactment of the Evidence Act. But I think that that step, if it is to be taken, is not the province of a trial judge.<sup>64</sup>

At the time of writing, the appeal from Sackville J's judgment has been reported — see *Telstra Corporation Ltd v BT Australasia Pty Ltd*<sup>65</sup> and by majority (Branson and Lehane JJ with Beaumont J dissenting), the Federal Court has held that s 122(1) covers express, implied and imputed consent and that there is therefore not much difference (at least in "consent" cases) between the position at common law and under the Act.<sup>66</sup> Branson and Lehane JJ stated that s 122(1) is to be construed as reaching to cases in which the client or party is "deemed" to have consented to the disclosure of the otherwise privileged material and that the test to be applied is: "has the litigant put in contest, by reason of its pleaded cause of action, an issue incapable of fair resolution without reference to the relevant legal advice received by them?" Their Honours left open the position in "partial disclosure" cases.<sup>67</sup>

It should be noted however that in the recent decision of *Equuscorp Pty Ltd v Kamisha Corp Ltd*<sup>68</sup> Heerey J refused to follow the majority approach of Branson and Lehane JJ in the *Telstra Corporation* case. Heerey J stated that Branson and Lehane JJ had taken the view that the applicant in the *Telstra Corporation* case, by pleading reliance on the respondent's alleged misrepresentation contrary to s 52 of the Trade Practices Act 1974 (Cth), had opened up the question of its corporate state of mind and had thereby, within the meaning of s 122(1) of the Evidence Act 1995 (Cth), consented to the disclosure of any legal advice relating to their negotiations with the respondents. In disagreeing with the majority view in the *Telstra Corporation* case, Heerey J stated:

In claims under s 52 where the misleading and deceptive conduct alleged takes the form of misrepresentations to the plaintiff, it will usually be essential to plead reliance. This will be an essential link in the chain of reasoning establishing that the plaintiff suffered loss and damage "by the conduct of" the defendant so as to be entitled to damages under s 82. If the view of the majority in *Telstra* is correct, it would seem to follow inexorably that the mere pleading of reliance would remove privilege in respect of all legal advice which the plaintiff received concerning the conduct complained of. I do not think that can be right. The bare fact of asserting reliance does not expressly or impliedly assert that the plaintiff relied, or did not rely, on some privileged communication. As Beaumont J points out, it is not possible to predict the course a trial may take. A privileged communication may be subsequently referred to in a way that makes its continued protection unfair. But, at the moment, I have to consider the issue at an interlocutory stage. It is true that legal advice could be relevant in determining whether a plaintiff in fact relied on the misrepresentations complained of. But the whole point of legal professional

<sup>63</sup> *Ibid*, at 739.

<sup>64</sup> *Ibid*.

<sup>65</sup> (1998) 156 ALR 634.

<sup>66</sup> *Ibid*, at 649.

<sup>67</sup> *Ibid*, at 648-9.

<sup>68</sup> [1999] FCA 681 (21 May 1999, Heerey J).



privilege is that, for public policy reasons, material is excluded which might be relevant, indeed highly relevant. No balancing exercise is involved. If legal professional privilege applies, privilege trumps relevance.<sup>69</sup>

Other difficulties with s 122 involve the meaning of the phrase "substance of the evidence" in s 122(2) and (4) and the meaning of a "knowing and voluntary" disclosure under s 122(2). In particular, difficulties have arisen as to whether the fact that the disclosure must be "voluntary" means that an "inadvertent" or "accidental" disclosure would not result in the loss of privilege.<sup>70</sup> Finally, in the present writer's opinion, s 122 has inherent problems because it attempts to combine two discrete concepts, namely "consent" and "disclosure" within the one section.

### Differences between statutory waiver under s 122 and common law waiver

There are several differences between the statutory doctrine of waiver under s 122 and the common law test for waiver as exemplified in *Attorney-General (NT) v Maurice*<sup>71</sup> and *Goldberg v Ng*.<sup>72</sup> First, the doctrine of waiver under s 122 has been described as a "quantitative" one<sup>73</sup> whereas the common law test for waiver has been described as a "qualitative" one.<sup>74</sup> Essentially this is because s 122(2) and (4) of the Act require the "substance" of the evidence to be disclosed for waiver to occur whereas the common law "fairness" test dictates that privilege will be lost wherever disclosure is "incompatible with the retention of confidentiality".<sup>75</sup> Second, the statutory doctrine is stated to only apply in a court room whereas the common law doctrine applies in both judicial and non-judicial arenas. Efforts have been made, however, to "adapt" the common law so that the statutory waiver doctrine can at least apply to ancillary processes.<sup>76</sup> Third, the "consent" that is mentioned under s 122 appears to be confined to "express" consent under s 122(1) and to "express or implied" consent under s 122(4). This is to be compared with the common law position which covers express, implied, imputed (including unintentional and inadvertent) waiver. Recent efforts, however, have been made by the Federal Court to read into s 122 the words express, implied and imputed consent. For example, in *Telstra Corporation Ltd v BT Australasia*<sup>77</sup> Branson and Lehane JJ stated that the cases use the terms "implied" and "imputed" interchangeably and that "once it is accepted that consent for the purposes of the section (ie s 122(1)) extends beyond express consent, we think it should be taken to extend to imputed consent".

<sup>69</sup> Ibid, unreported judgment, pp 3 of 4 and 4 of 4.

<sup>70</sup> *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1996) 40 NSWLR 12 at 22, compared with *Meltend Pty Ltd v Restoration Clinics of Australia Pty Ltd* (1997) 145 ALR 391 at 450.

<sup>71</sup> (1986) 161 CLR 475.

<sup>72</sup> (1996) 185 CLR 83.

<sup>73</sup> *Adelaide Steamship Co Pty Ltd v Spalvins* (1998) 152 ALR 418 at 426.

<sup>74</sup> Roberts, "Client Legal Privilege: Some Practical Considerations" (1996) 70 LJ 54 at 56.

<sup>75</sup> *Goldberg v Ng* (1996) 185 CLR 83.

<sup>76</sup> See the *Adelaide Steamship* case as applied in *Telstra Corporation Ltd v BT Australasia* (1998) 156 ALR 634.

<sup>77</sup> (1998) 156 ALR 634 at 649.

## Loss of client legal privilege: defendants — s 123

### Content

Section 123 of the Evidence Act 1995 (Cth) provides that the privileges under ss 118, 119 and 120 are lost if the evidence is adduced by a defendant in a criminal proceeding, unless it is evidence of:

- (a) a confidential communication made between an associated defendant and his or her lawyer; or
- (b) the contents of a confidential document prepared by an associated defendant or his or her lawyer in connection with the prosecution of the associated defendant.

*Note:* Associated defendant is defined in the Dictionary as a person charged with (1) an offence which arises out of the same incident as gave rise to the charge against the defendant, or (2) an offence that relates to the charge against the defendant.

### Discussion and difficulties

Section 123 creates an "exception" to the client legal privilege under ss 118, 119 and 120 for the benefit of an accused person in a criminal proceeding. The only restriction on this "exception" is where there is a confidential communication made between an associated defendant and his or her lawyer or a confidential document prepared by an associated defendant or his or her lawyer in relation to the prosecution of the associated defendant. In the latter situation the client legal privilege will not be lost.

There have been some negative comments concerning the actual wording of this section. For example, Roberts states, "This piece of legislation (ie s 123) affords a good example of the way in which 'plain English' drafting is not synonymous with good drafting".<sup>78</sup> Roberts makes the important point that the Dictionary definition of "associated defendant" does not necessarily presuppose joint trials. This means that if the associated defendant is being tried separately it will not be possible for the associated defendant to "object" to the adduction of evidence by a defendant (of a communication made between the associated defendant and her solicitor) "unless the associated defendant has reason to expect that the evidence will be led and takes steps accordingly".<sup>79</sup> Roberts also argues that because the language of s 123 maintains the courtroom character of the privilege the desired effect of abrogating the privilege for the benefit of an accused person is rendered useless to an accused person. This is because the phrase "adducing evidence" refers specifically to the eliciting of evidence in the courtroom and, as Roberts states, "But before evidence can be elicited its existence must be known and it is helpful to have had prior access to it".<sup>80</sup> Roberts concludes therefore that the abrogation will rarely assist an accused person to obtain privileged third party material in the first place because in most cases the time for obtaining such material is pre-trial.

<sup>78</sup> Roberts, above n 23, p 226.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid, at 225.

### Differences between s 123 and the common law

The High Court decision in *Carter v Northmore Hale Davy & Leake*<sup>81</sup> held by majority that there is no exception (in the common law of Australia) to legal professional privilege in respect of documents which further the defence of the accused or tend to establish the accused's innocence. Hence s 123 reverses the common law position.<sup>82</sup>

### Loss of client legal privilege: joint clients — s 124

#### Content

Section 124 of the Evidence Act 1995 (Cth) provides that the privileges under ss 118, 119 and 120 are lost in civil proceedings where two or more parties have, before the commencement of the proceeding, jointly retained a lawyer in relation to the same matter and one of the parties adduces evidence of:

- (a) a communication made by any one of them to the lawyer, or
- (b) the contents of a confidential document prepared by any one of them

in connection with that matter.

#### Discussion and difficulties

Section 124 attempts to create an "exception" to the client legal privilege under ss 118, 119 and 120 in cases where there are civil proceedings between two or more parties who, prior to the proceedings, have held a joint privilege. The "exception" operates by allowing one of the joint privilege holders to waive the privilege against the other joint privilege holder by adducing evidence of (a) a communication made by any one of them to the lawyer, or (b) the contents of a confidential document prepared by any one of them.

There have been some comments made about the wording of s 124. Heydon, for example, states that it is questionable whether the language of s 124 adequately expresses the intention underlying s 124.<sup>83</sup> Heydon quotes from a letter written by Mr D Kerr, the Minister for Justice to Senator B Cooney, Chairman of the Senate Standing Committee on Legal and Constitutional Affairs, where it is stated:

Clause 24 is only concerned with civil proceedings between two or more parties who, prior to the proceedings, jointly retain the one lawyer in relation to a matter. I consider that the parties, in subsequent litigation between them, should not be able to prevent each other, by the making of a client legal privilege claim, from leading evidence of relevant evidence (eg, a false or misleading statement made by one of them during a conference with the lawyer).

Heydon states that s 124 does not achieve this objective because the:

language suggests that the civil proceedings to which the section applies must have a connection with the matter in relation to which the lawyer was jointly retained. It

<sup>81</sup> (1995) 183 CLR 121.

<sup>82</sup> See the statement to this effect by the New South Wales Court of Criminal Appeal in *R v Pearson* (unreported, 5 March 1996, Gleeson CJ, Smart and Sully JJ).

<sup>83</sup> Heydon, *A Guide to the Evidence Acts 1995*, 2nd ed. Butterworths, Sydney, 1997, p 59.

does not distinguish, as the Minister's explanation seems to, between a first set of civil proceedings and subsequent litigation.<sup>84</sup>

In the present writer's opinion, the wording of s 124 is unclear but it is, by the same token, not necessary to distinguish between a "first set of civil proceedings" and "subsequent litigation". What is necessary is that there be either on foot, pending or anticipated civil proceedings between persons who hold a joint privilege. The exception in s 124 should then operate so that neither party can claim the privilege against the other. Two sets of proceedings will not always be necessary because the joint privilege may have arisen initially in a non-litigious context.

Other comments made concern the fact that the provision uses the term "communication" while the privileges to which it is an exception only apply to "confidential" communications.<sup>85</sup> Odgers simply states that the reason for this is unclear.<sup>86</sup> Odgers also states that the term "matter" is not defined and the courts may have some difficulty in determining its content.<sup>87</sup>

### Differences between s 124 and the common law

The common law doctrine of legal professional privilege, which includes the relevant law relating to joint privilege, applies in all the non-Evidence Act jurisdictions. Joint privilege at common law cannot be lost without the consent of all who share the privilege.<sup>88</sup> However, if there are proceedings between the persons having the joint privilege, then neither can claim the privilege against the other. As Cohen J in *Re Nika Management Services Pty Ltd (in liq)*<sup>89</sup> stated, quoting from *McCormick on Evidence*:<sup>90</sup>

But it will often happen that the two original clients will fall out between themselves and become engaged in a controversy in which the communications at their joint consultation with the lawyer may be vitally material. In such a controversy it is clear that the privilege is inapplicable.

### Loss of client legal privilege: misconduct — s 125

#### Content

Section 125 of the Evidence Act 1995 (Cth) provides that the privileges under ss 118, 119 and 120 are lost if the communication or document was:

- (a) made or prepared by a client or lawyer (or both) or a party in furtherance of a fraud, an offence or an act that renders a person liable to a civil penalty; or
- (b) made or prepared in furtherance of a deliberate abuse of a power and the client or lawyer (or both) or the party knew or ought reasonably to have known that it was so made or prepared (subs (1)).

<sup>84</sup> Ibid.

<sup>85</sup> Bellamy and Meibusch, above n 47, p 112; Odgers, above n 23, p 364.

<sup>86</sup> Ibid, Odgers, p 364.

<sup>87</sup> Ibid.

<sup>88</sup> *Farrow Mortgage Services v Webb* (1995) 13 ACLC; *Re Nika Management Services Pty Ltd (in liq)* (1996) 14 ACLC 326).

<sup>89</sup> (1996) 14 ACLR 326 at 330.

<sup>90</sup> *McCormick's Handbook of the Law of Evidence*, E W Cleary (ed), 2nd ed, 1972, p 128.

The section further provides that if the commission of the fraud, offence, act or abuse of power is a fact in issue and there are reasonable grounds for finding that the fraud, offence, act or abuse of power was committed and a communication was made or document prepared in furtherance of the commission of fraud, offence, act or abuse of power, the court may find that the communication was so made or the document so prepared (subs (2)). "Power" is defined as a power conferred by or under an Australian law (subs (3)).

### Discussion and difficulties

Section 125 creates a so-called "exception" to the client legal privilege under ss 118, 119 and 120 in cases where the communication or document was made or prepared by the client, lawyer or party in furtherance of the commission of a fraud, an offence or an act that renders a person liable to a civil penalty. The section also creates an "exception" to client legal privilege in cases where there has been a deliberate abuse of a power and the client, lawyer or party knew or ought reasonably to have known about the abuse.

The difficulties relating to this section mainly concern the extent to which s 125 is intended to reflect the common law. Sackville J in *BT Australasia Pty Ltd v State of NSW (No 13)*<sup>91</sup> stated that s 125 gives rise to a number of questions of construction. First, the question whether s 125 has a "derivative" effect on processes ancillary to a proceeding in which the evidence is sought to be adduced, such as discovery or the production of documents on subpoena. (Note that if s 125 does not have such a derivative effect, common law principles would govern most cases because allegations of fraud etc would normally occur pre-trial.) Second, the question whether s 125 reflects the common law cases of *Attorney-General (NT) v Kearney*,<sup>92</sup> *Williams v Spautz*<sup>93</sup> and *Commissioner Australian Federal Police v Propend Finance Pty Ltd*,<sup>94</sup> which cases reflect a more "expansive" view of concepts such as "abuse of process" than the more traditional interpretation of the common law categories of fraud or offence.<sup>95</sup> Third, the question arises as to whether the reference in s 125(2) to "reasonable grounds" incorporates the principles of *Attorney-General (NT) v Kearney* and *Propend's* case (namely, the principle of "prima facie case" and the principle of privilege is not displaced by making a mere charge of crime or fraud. Rather there must be something to "give colour to the charge"). Note also that Heydon notes that neither "fraud" nor "abuse of power" is defined.<sup>96</sup> Further, difficulties have arisen in relation to the need to establish "intention" in relation to fraud or improper purpose etc.<sup>97</sup>

91 Unreported, [1998] 1229 FCA (29 September 1998).

92 (1985) 158 CLR 500.

93 (1992) 174 CLR 509.

94 (1997) 188 CLR 501.

95 Sackville J also noted at 20 of 39 the "apparently restrictive language" of s 125(1)(a).

96 Heydon, op cit, at 60.

97 See *In the Matter of Moage Ltd (in liq); John Sheehan v Robert Pitterino* [1998] 183 FCA (unreported, 9 March 1998) and Odgers, above n 23, p 367.

### Differences between the statutory "misconduct" exception and the common law's crime/fraud exception

Section 125 is similar to, but not identical with, the common law position. There are three main differences. First, s 125 is wider than the common law position because it expressly includes the "commission of an act that renders a person liable to a civil penalty" as an exception to the privilege. At common law, the traditional "*Cox and Railton*" exception<sup>98</sup> held that communications between a lawyer and client which are made in the furtherance of a crime or fraud are not privileged. At common law, this "crime and fraud" exception was extended by the High Court to cases where there had been a deliberate abuse of statutory power.<sup>99</sup> In contrast, under s 125 the exception expressly relates to four categories: (1) fraud; (2) an offence; (3) civil penalties; and (4) deliberate abuses of a power. The second main difference between the common law position and s 125 is that under s 125 a distinction is drawn between the first three categories (ie, fraud, offences and civil penalties) and the fourth category (ie, abuse of power). Section 125(1)(a) indicates that the client or lawyer or party must be *involved* in the fraud, offence or civil penalty in the sense that at least one of them must have made the communication or prepared the document. On the other hand, s 125(1)(b) is silent on who *commits* the deliberate abuse of a power and stipulates only that the client or lawyer or party knew or ought reasonably to have known that it was committed.<sup>100</sup> The third main difference between the common law position and s 125 is that under s 125(2) the test of "reasonable grounds" for finding a fraud, offence, etc is confined to situations where the fraud, offence etc is a fact in issue. (Obviously that is so that a "court" can apply the test.) On the other hand, at common law the test from *Attorney-General (NT) v Kearney* and *Propend's* case relating to finding a prima facie case (or finding something to give colour to the charge) is not confined to situations where the fraud, offence etc is a fact in issue.<sup>101</sup>

### Loss of client legal privilege: related communications and documents — s 126

#### Content

Section 126 of the Evidence Act 1995 (Cth) provides that if, because of the application of ss 121, 122, 123, 124 or 125, Pt 3.10 Div 1 allows the adducing of evidence of a communication or the contents of a document, those sections also allow the adducing of evidence of another communication or document if it is reasonably necessary to enable a proper understanding of the communication or document.

98 (1884) 14 QBD 153.

99 *Attorney-General (NT) v Kearney* (1985) 61 ALR 55.

100 Note also that s 125(1)(b) is not confined to "statutory" powers.

101 Note also that the distinction made under s 125(1) relating to the first three categories of fraud, offence or civil penalty (s 125(1)(d) and the fourth category of statutory power (s 125(1)(b)) appears to have been abandoned under s 125(2).

### Discussion and difficulties

Section 126 sets out a statutory doctrine of "associative waiver" of client legal privilege. It provides that where client legal privilege is lost by virtue of ss 121, 122, 123, 124 or 125 and hence a communication or document is adduced under one of those sections, then a "related communication or document" may also be adduced if it is reasonably necessary to enable a proper understanding of the communication or document.

There have been a number of difficulties associated with s 126. Sackville J in *Towney v Minister for Land and Water Conservation for the State of NSW*<sup>102</sup> pointed out that s 126 does not specify whose "understanding" is to be considered, when determining whether or not a source document (ie a "related" document) is reasonably necessary to "enable a proper understanding" of a document adduced by reason of voluntary disclosure under s 122. Sackville J stated:

In my view, the legislation contemplates the application of an objective standard, rather than an assessment of the likely understanding of a particular individual, such as an expert witness who is to be called in the proceedings, or a party to the litigation. That an objective standard is contemplated is indicated by the phrase "reasonably necessary", and by the fact that the latter part of s 126 is drafted in the passive tense.

Sackville J also stated that the expression "proper understanding" in s 126 is "by no means narrow". The dictionary definition of "proper" includes "complete or thorough"; the definition of "understand" includes "to apprehend clearly the character and nature of" and "to grasp the significance, implications or importance of" (Macquarie Dictionary). It may or may not be correct to say that the test stated in s 126 is, or appears to be, narrower than the principles governing implied waiver under the general law.<sup>103</sup> Any precise assessment of the scope of s 126 must await further decisions.<sup>104</sup>

Roberts also makes two important (negative) comments concerning the application of s 126. First, Roberts points out that s 126 will be of no assistance if the disclosed document (ie disclosed under s 122) is "perfectly comprehensible" and "intelligible in its own right".<sup>105</sup> Hence, Roberts gives the example of a party having disclosed a document under s 122 which is comprehensible as it stands. However, the party has at home another document that has not been disclosed and that contradicts the first document. Here, the undisclosed document does not "enable a proper understanding" of the first document at all, it merely contradicts it. Therefore the undisclosed document could not be adduced under s 126. Second, Roberts states that the reference in s 126 to "another communication or document" does not meet the case where what is disclosed is part of a single document or communication. (This is sometimes referred to as "partial waiver").<sup>106</sup> Roberts gives the example of a partial disclosure of the contents of a privileged document

<sup>102</sup> (1997) 147 ALR 402 at 412.

<sup>103</sup> Ibid, at 413-14.

<sup>104</sup> J D Heydon, *Cross on Evidence*, 5th Aust ed, Butterworths, 1996, para 25300.

<sup>105</sup> Roberts, "Client Legal Privilege: Some Practical Considerations" (1996) 70 LJJ 54 at 56 and Roberts, above n 23, p 231.

<sup>106</sup> S McNicol, above n 49, pp 29-31.

insufficient to disclose the "substance" and a misleading impression has been thereby created. Roberts states that in this situation, s 126 has no operation at all because the document has not become admissible under s 122 and:

moreover, what is needed to correct the false impression in this situation is the disclosure of the remainder of the contents of the self-same document rather than the disclosure of "another" document, which is all that s 126 allows.<sup>107</sup>

Roberts concludes that:

s 126 is really not drafted in terms appropriate to questions of fairness: its concern is with disclosure sufficient to ensure "understanding" of the principal document.<sup>108</sup>

In the present author's opinion, there are two difficulties with s 126. First, it only covers cases where there are two separate documents or communications. The failure of s 126 to apply to *individual* documents or communications (where only part of the document or communication has been disclosed) means that an important area of implied waiver<sup>109</sup> is not covered by s 126. (It is conceded by the present writer that this area might be covered by s 122 although Branson and Lehane JJ in *Telstra Corporation Ltd v BT Australasia Pty Ltd*<sup>110</sup> expressly "left open" the question whether partial disclosure cases were covered by s 122.) Second, it does not appear to cover cases where it would be unfair or misleading to disclose only one out of a group of documents or communications. The test of "proper understanding" of the disclosed document precludes the operation of a broader test of unfairness which would allow for a consideration of *all* the documents and not merely the principal disclosed document.<sup>111</sup>

### Differences between s 126 and the common law test for waiver

The common law doctrine of waiver, embodied in cases such as *Attorney-General (NT) v Maurice*<sup>112</sup> and *Goldberg v Ng*<sup>113</sup> indicate that there are essentially two main types of implied waiver which are relevant to s 126. First there is "associative waiver" at common law. This applies usually where *one* document refers to *another* document (the related document) and the High Court has used a fairness test to determine whether waiver of the related or associated document has occurred (if the first document is waived).<sup>114</sup> Second, there is "partial disclosure" at common law. This applies where a document deals with a single subject matter and the High Court has approved a fairness test to determine whether a party should be allowed to disclose part of a

<sup>107</sup> Roberts, "Client Legal Privilege: Some Practical Considerations" (1996) 70 LJJ 54 at 56.

<sup>108</sup> Roberts, above n 23, p 231.

<sup>109</sup> Dealt with in McNicol, above n 49, pp 29-31.

<sup>110</sup> (1998) 156 ALR 634 at 649.

<sup>111</sup> For the test of whether the disclosure has been misleading or unfair, see *Attorney-General (NT) v Maurice* (1986) 69 ALR 31 and *Great Atlantic Insurance Co v Home Insurance Co* [1981] 2 All ER 485.

<sup>112</sup> (1986) 69 ALR 31.

<sup>113</sup> (1996) 185 CLR 83.

<sup>114</sup> See *Attorney-General (NT) v Maurice* (1986) 69 ALR 31.



document and claim privilege as to the remainder.<sup>115</sup> Section 126 does not cover the second category of cases (ie of partial disclosure) and only covers "associative waiver" (ie the first category) to the extent that the statutory test of being "reasonably necessary to enable a proper understanding" allows it.

### Conclusion

It can be seen from the above analysis that there are many differences between client legal privilege under the Evidence Act 1995 (Cth) and the common law doctrine of legal professional privilege which currently applies in all Australian "non-Evidence Act" jurisdictions. In the present author's opinion, uniformity between Australian jurisdictions in any area of law (whether it be corporations, tax, criminal, trade practices law etc) is a laudable and worthwhile objective. This objective must be tempered, however, with considerations which dictate that the law be coherent, consistent, logical and capable of practical application without producing absurd results. If the legislatures of the non-Evidence Act jurisdictions decide to adopt the uniform evidence law, I suggest that this decision be made in negotiation with the legislatures and law makers in the Evidence Act jurisdictions so that some desirable amendments can first be made to the provisions of the Evidence Acts.

There are, however, anomalies which have been brought about by the *Esso* decision which will apply even *within* the Evidence Act jurisdictions, ie a "sole" purpose test will apply for legal professional privilege at all pre-trial stages while a "dominant" purpose test will apply for client legal privilege at the trial itself. As was pointed out in the *Esso* case by Black CJ and Sundberg J, it was open to the ALRC to hold the view that it is "not unreasonable to have wider access in the investigative stage" (than at the trial itself).<sup>116</sup> It is conceded that there are those that hold the view that having two different tests, pre-trial and at trial, is not anomalous. For example, Finkelstein J in the *Esso* case held that: "Rather than creating confusion and disorder, the ascertainment of facts and information from documents not themselves admissible is often likely to lead to a just determination of a cause".<sup>117</sup> However, there is a strong body of opinion that it is illogical to have one test (ie, a sole purpose test) pre-trial and another test (ie, a dominant purpose test) at the trial.<sup>118</sup> It would be tempting for a final arbiter of appeal such as the High Court to "clean up" the mess by simply overruling its own decision in *Grant v Downs*. This would ensure that a "dominant" purpose test was applied consistently throughout the whole trial process. However, in the present author's opinion, this would be a mistake. The sole purpose test imposes some limits on a very broad doctrine of legal professional privilege.

<sup>115</sup> See *Attorney-General (NT) v Maurice* (1986) 69 ALR 31 approving *Great Atlantic Insurance Co v Home Insurance Co* [1981] 2 All ER 485.

<sup>116</sup> (1998) 159 ALR 664 at 669, citing ALRC, Final Report No 38 on Evidence.

<sup>117</sup> *Ibid*, at 715.

<sup>118</sup> See the judgments of Beaumont and Merkel JJ in the *Esso* case, *ibid*, at 678 and 679 respectively. See also the judgment of Branson J in *Trade Practices Commission v Port Adelaide Wool Co*.

The sole purpose test is more workable and easier to apply.<sup>119</sup> But even more importantly, as stated in the Introduction, it was the legislature which created the problem in the first place (by enacting the anomalous client legal privilege with a dominant purpose test under the Evidence Act 1995) and so it is the legislature (and not the High Court) who should remedy the problem! And, in the present writer's submission, this should be done by making two changes to ss 118-120 of the Evidence Act 1995 (Cth), first, extending its application to pre-trial contexts such as discovery and other interlocutory stages of curial proceedings, and second, changing the "dominant" purpose test to a "sole" purpose test.

<sup>119</sup> Both tests (ie. sole and dominant) require the judge to identify every purpose for which a document was originally created. As Goldberg J stated in *AC&CC v Australian Safeway Stores Pty Ltd* (1998) 153 ALR 393 at 412, "One does not look solely at the evidence or intention of the maker of a document to determine what was the dominant purpose, or indeed any purpose, for which the document came into existence". See also *Sparnon v Apand Pty Ltd* (1996) 138 ALR 735 at 740 (note however that the ALRC claimed that an examination of the document itself will often be sufficient for the sole purpose test but not for the dominant purpose test: ALRC 26, Vol 1, para 881, p 498). It is submitted, however, that from a practical point of view a "dominant" purpose test will be more difficult than a "sole" purpose test. For the sole purpose test to apply, each of the single identified purposes must be for legal advice or use in litigation. Hence, if one of the single identified purposes is not related to advice or litigation, the document will not be privileged. On the other hand, for the dominant purpose test to apply, a hierarchy of purposes must be constructed and the most important or "predominant" purpose must be for legal advice or use in litigation for the document to be protected. It may be simply impossible to rank one purpose as more "dominant" than the other: see McNicol, above n 49, p 71. Goldberg J in *AC&CC v Australian Safeway Stores Pty Ltd* preferred to use the word "significant" purpose rather than dominant purpose because the latter test was too difficult at times to apply, eg. Goldberg stated, *ibid*, at 42, "... it is difficult to ascribe a dominant purpose to the preparation of the anticipated proceedings before the evidence gathering process is well advanced and the evidence has been evaluated". Odgers, above n 23, p 346, cites *Sparnon v Apand* (1996) 138 ALR 735 at 741 for the proposition that if the two purposes were of equal weight, one would not dominate the other. This is undoubtedly true but the difficulty is the preliminary finding of fact that two purposes are of equal weight. Applying a dominant purpose test necessitates that one purpose is dominant while others are "ancillary or subservient" to this purpose (Goldberg J, *ibid*, at 413).



## CHAPTER TEN

Before the High Court:  
Esso Australia Resources Ltd v Federal  
Commissioner of Taxation

# *Before The High Court*

## *Esso Australia Resources Ltd v Federal Commissioner of Taxation*

SUZANNE B MCNICOL\*

The High Court has granted Esso Australia Resources Ltd special leave to appeal against the decision of the Full Federal Court in *Esso Australia Resources Ltd v Federal Commissioner of Taxation*.<sup>1</sup> The appeal raises an important and 'large question' as to the 'interrelationship of statute and common law'<sup>2</sup> and in particular the question whether a statute (in this case the *Evidence Act 1995* (Cth)) can modify the common law by analogy. It also presents the High Court with the opportunity of reviewing and possibly departing from, its own decision regarding the 'sole purpose' test for privilege laid down in *Grant v Downs*.<sup>3</sup> McHugh, Kirby and Callinan JJ heard oral argument in the case on 14 May 1999 and were very quick to grant special leave. McHugh J, when referring to the issue of revisiting *Grant v Downs*<sup>4</sup> and the question whether the common law should now be changed because of the changes made by statute to the limited area to which it applies, stated:

... the point has excited so much controversy throughout the nation, or at least in the places affected by it, that this Court should really deal with the problem and put an end to the debate one way or the other.<sup>5</sup>

It is proposed in this paper, first, to set out briefly the decision of the Full Federal Court in the *Esso* case. Here it is argued by the present writer that Esso's appeal to the High Court should endorse the majority decision of the Full Federal Court in the *Esso* case. Second, the facts of the *Esso* case are explained. Third, judgments of the majority of the Federal Court are analysed in detail. In Part 4, the two dissenting judgments of the Federal Court are discussed. Finally, Part 5 examines the important issues arising out of the appeal in this case and concludes with a strong plea to the High Court to embrace its previous decision in *Grant v Downs* and thereby to continue to adopt a 'sole purpose' test for legal professional privilege in Australia.

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<sup>1</sup> (1998) 159 ALR 664.

<sup>2</sup> These words were used by Kirby J at the application for special leave to appeal: see *Esso Australia Resources Ltd v Commissioner of Taxation of Cth of Australia* M17/1999, 14 May 1999 (McHugh, Kirby and Callinan JJ).

<sup>3</sup> (1976) 135 CLR 674.

<sup>4</sup> Ibid.

<sup>5</sup> Above n2, at the application for special leave to appeal (McHugh J).

### 1. *The Decision and Issues Arising from the Case*

In the *Esso* case, the Full Federal Court, by a 3:2 majority (Black CJ, Sundberg and Finkelstein JJ with Beaumont and Merkel JJ dissenting) held that sections 118 and 119 of the *Evidence Act* 1995 (Cth) only apply to evidence adduced in court and hence those sections do not apply to the production or disclosure of documents at the stage of discovery. In so doing, the majority judges overruled the decision of the Full Court of the Federal Court in *Adelaide Steamship Co Ltd v Spalvins*<sup>6</sup> which had held that sections 118 and 119 of the *Evidence Act* 1995 (Cth) had the effect of modifying the common law by analogy. The effect of the majority decision in *Esso* is that the plain language of sections 118 and 119 dictates that the 'dominant purpose' test for client legal privilege should be applied in a courtroom (in proceedings to which the Act applies) whilst the common law 'sole purpose' test of legal professional privilege from *Grant v Downs*<sup>7</sup> should be applied to all processes ancillary to proceedings in which the evidence is sought to be adduced (including pre-trial processes of discovery or the production of documents on subpoena or summons).

It is submitted that the majority decision was surely correct in that a literal and plain interpretation of the *Evidence Act* 1995 (Cth) dictates that the Act was only ever intended to apply to the adducing of evidence in a courtroom. This view is indeed supported by the available extrinsic evidence, as was pointed out by Black CJ and Sundberg J in their joint judgment.<sup>8</sup> This view is also supported by the recent High Court decision in *Northern Territory v GPO*<sup>9</sup> which held, inter alia, that the *Evidence Act* 1995 (Cth) is concerned with the adducing of and admissibility of evidence, proof and certain ancillary matters. Further, the High Court held that the *Evidence Act* does not deal with the obligations of a party to whom a subpoena is addressed to produce documents nor with the grant of leave to inspect documents produced in response to a subpoena.<sup>10</sup>

Furthermore, it is submitted that the majority view in the *Esso* case that the *Evidence Act* 1995 (Cth) has not modified the common law is also correct. As Black CJ and Sundberg J pointed out, there is but one common law in Australia and it seems impossible therefore to have a *common law* dominant purpose test applicable in New South Wales and other *Evidence Act* jurisdictions and a *common law* sole purpose test at all other times and in all other places.<sup>11</sup> As has been argued in the special leave application in the *Esso* case to the High Court, the idea of developing the common law by reference to statute only applies where there has been a development in one jurisdiction or in one area of the law and parliament has

6 (1998) 152 ALR 418 (hereinafter *Adelaide Steamship*).

7 (1976) 135 CLR 674.

8 See below.

9 [1999] HCA 8. See also *R v Young* (NSW Court of Criminal Appeal, 7 July 1999, Spigelman CJ, Beazley JA, Abadee, James and Barr JJ) where a five member court followed the *Esso* Federal Court decision.

10 Ibid, per Gleeson CJ and Gummow J at 16, Hayne J agreeing at 254, McHugh and Callinan JJ at 199, and Gaudron J at 145. (Kirby J not deciding).

11 Above n1 at 676.

not thought about its application in another, and the court reasoning, by analogy, decides that it is appropriate at common law to extend the statutory principles into the common law.<sup>12</sup> This view is surely correct in the present writer's view.

Finally, it will be argued below that the High Court should not overrule or otherwise depart from the majority decision in *Grant v Downs*.<sup>13</sup> It is conceded that if the sole purpose test of *Grant v Downs* were abolished by the High Court then a large amount of confusion and inconsistency in the application of (dominant or sole purpose) tests would be eradicated in the trial processes. However, it must be remembered that the sole purpose test imposes some limits on a very broad doctrine of legal professional privilege. And it must also be remembered that it was the legislature, and *not* the courts, which was responsible for creating the confusion in the first place, by introducing a 'dominant' purpose test for client legal privilege which was only applicable in the courtroom. Surely then it is for the legislature, and not the High Court, to rectify the problem.

### 2. *The Facts of the Case*

It is necessary then to consider the facts of the *Esso* case. The appellant, Esso, commenced proceedings in the Federal Court challenging certain assessments made by the respondent, the Federal Commissioner of Taxation, under the *Income Tax Assessment Act* 1936 (Cth). Esso resisted production of certain discovered documents on the basis that the documents were protected by client legal privilege because they had been prepared for the 'dominant' purpose of giving or receiving legal advice. By notices of motion the respondent Commissioner sought orders under O 19, r 2 of the Federal Court Rules that Esso produce for inspection the listed documents other than those which had been prepared for the 'sole' purpose of giving or receiving legal advice. Foster J ruled that the correct test for claiming legal professional privilege in relation to the production of discovered documents was the 'sole purpose' test formulated in *Grant v Downs*<sup>14</sup> and that the court did not have power to make an order pursuant to O 15, r 15 of the Federal Court Rules excluding from production discovered documents on the basis that such documents meet the 'dominant purpose' test as set out in sections 118 and 119 of the *Evidence Act* 1995 (Cth). Pursuant to leave granted by Foster J, the appellant, Esso, appealed to the Full Court of the Federal Court which by majority (Black CJ Sundberg and Finkelstein JJ, with Beaumont and Merkel JJ dissenting) upheld Foster J's ruling that the correct test for claiming legal professional privilege in relation to the production of discovered documents was the 'sole' purpose test of *Grant v Downs*.<sup>15</sup> The majority (Black CJ, Sundberg and Finkelstein JJ, with Beaumont and Merkel JJ not deciding) also held, differing slightly from Foster J's ruling on this point, that the court does have the power pursuant to O 15, r 15 of the Federal Court Rules to make an order excluding from production discovered

12 Mr GAA Nettle, QC in *Esso Australia Resources Ltd v Commissioner of Taxation of Commonwealth of Australia*, above n2.

13 (1976) 135 CLR 674.

14 Ibid.

15 Ibid.

documents on the basis of the 'dominant' purpose test, but that to exclude such documents for the reason that they meet the 'dominant' purpose test would be an improper exercise of the power. To exercise the power under O 15, r 15 to exclude documents protected by the 'dominant' purpose test would be an improper means of (i) extending the operation of sections 118 and 119 of the Evidence Act; and (ii) sidestepping the test laid down in *Grant v Downs* in favour of the 'dominant' purpose test rejected by the High Court in that case but now applied in different circumstances by sections 118 and 119.

### 3. *The Judgments of the Majority*

Black CJ and Sundberg J in a joint judgment identified three questions raised by the appeal:

The first is whether on their true construction sections 118 and 119 apply only to the adducing of evidence in court or whether they extend to pre-trial discovery. The other questions do not arise unless the sections apply only to the adducing of evidence in court. The second question is whether the sections can be used as the foundation for the modification of the common law stated in *Grant v Downs*. The third is whether it is a proper exercise of the power in O 15, r 15 of the Federal Court Rules for the court to exclude from production a discovered document for the reason that it meets the dominant purpose test in sections 118 and 119.<sup>16</sup>

On the first issue of construction, Black CJ and Sundberg J held that the plain language of sections 118 and 119 was confirmed by the only directly relevant extrinsic material (ie, Australian Law Reform Commission (ALRC), *Evidence Interim Report No 26* (1985) and *Evidence Report No 38* (1987)), which showed that Parliament intended that consequence. Their Honours disagreed with McLelland CJ in Eq's view in *Telstra Corp v Australis Media Holdings (No 1)*<sup>17</sup> that a position which allows a party to obtain on discovery a document which cannot be adduced in evidence because it is protected by client legal privilege is anomalous, conducive to confusion and disorder, verging on the absurd, or productive of impractical consequences.<sup>18</sup> Black CJ and Sundberg J pointed out:

For one thing, the test of discoverability is not admissibility, but whether it is reasonable to suppose that the document contains information which may either directly or indirectly enable the party requiring the discovery to advance its own case or damage the case of its adversary. A document will answer that description if it may fairly lead to a train of inquiry which might have either of those consequences: see *Commonwealth v Northern Land Council* (1991) 30 FCR 1 at 23; 103 ALR 267. Many documents which may assist the case of the party seeking discovery will thus come into that party's hands even though, for one reason or another (including privilege), they cannot be adduced in evidence: see *Meltend Pty Ltd v Restoration Clinics of Australia Pty Ltd* (1997) 145 ALR 391

<sup>16</sup> Above n1 at 667.

<sup>17</sup> (1997) 41 NSWLR 277 at 279-80.

<sup>18</sup> Above n1 at 669.

at 405 (*Meltend*) and *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1998) 153 ALR 393 at 418 (*Safeway*).<sup>19</sup>

Their Honours concluded their consideration of this issue by warning that courts should be very careful that arguments based on anomaly or incongruity are not allowed to obscure the real intention and choice of the Parliament.

On the second issue of the analogical use of the sections, Black CJ and Sundberg J held that such an approach is not acceptable in the present case. This was because the extrinsic material discloses a legislative awareness of the limited ambit of corrective legislation proposed by the ALRC and of the Commission's view that:

it is not "unreasonable to have different tests apply at the two stages of a proceeding. In enacting, without expanding, the sections drafted by the Commission, parliament has evinced an intention that sections 118 and 119 are not to apply to ancillary processes such as discovery. In our opinion that course is inconsistent with judicial freedom to apply the test in those sections to ancillary processes".<sup>20</sup>

Black CJ and Sundberg J also highlighted two particular difficulties with the statement from the *Adelaide Steamship* case that the 'sole purpose test of *Grant v Downs* ought not to be applied as part of the common law in Evidence Act jurisdictions'. The first is that it 'contemplates a common law which is applicable only in 'Evidence Act jurisdictions', namely, those covered by the Act and the New South Wales Act. However, unlike the position in the United States, there is but one common law in Australia<sup>21</sup> and it seems to us to be impossible to have a common law dominant purpose test applicable to discovery in New South Wales and in other parts of Australia when the issue arises in a federal court (as defined), and a common law sole purpose test at all other times and in all other places'. The second difficulty is that ultimately it is the High Court which declares the common law of Australia, and it is for the High Court to declare that the common law of Australia has been modified and to decide whether one of its previous decisions should no longer be followed. Hence Black CJ and Sundberg J decided that the Full Court in *Adelaide Steamship* was 'not free to hold that *Grant v Downs* ought not to be applied in Evidence Act jurisdictions. Black CJ and Sundberg J concluded:

... we are compelled to the conclusion that *Adelaide Steamship* was wrongly decided. We are conscious of the need for caution in departing from an earlier decision, but we consider that we should now do so. The issue decided in that case concerns an important area of law of great practical significance and with daily application. It is accordingly more important that the law should be correctly

<sup>19</sup> Ibid.

<sup>20</sup> Id at 675.

<sup>21</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-3; 145 ALR 96 at 108-9.

stated that the status quo constituted by *Adelaide Steamship* should be preserved in the interests of precedent.<sup>22</sup>

Finally, Black CJ and Sundberg J held on the third issue that it is not so much a question of power as to whether, under O 15, r 15 of the Federal Court Rules, a court could exclude from production a discovered document for the reason that it meets the dominant purpose test. Rather it is a question of whether it is a proper exercise of the power to exclude a document only for the reason that it satisfies the dominant purpose test. Here, their Honours held that it was not.<sup>23</sup>

The third judge in the majority was Finkelstein J. Finkelstein J begins his judgment with an interesting analysis of the question whether pure legal advice, which does not disclose the client's communications, should be privileged. Finkelstein J refers to Wigmore's argument that there is no occasion for protecting communications from a lawyer unless the disclosure would hamper freedom of communication by exposing the client's communications or by leading to inferences as to the terms of those communications.<sup>24</sup> Finkelstein J also refers to other limits on the extent and scope of legal professional privilege by cautioning that statements made in the course of a professional communication but which are 'unrelated to the obtaining of legal advice' are not privileged.<sup>25</sup>

Finkelstein J advanced several weighty reasons for refuting the contention that a purposive (and not a literal) approach to sections 118 and 119 should be adopted so that those sections would cover pre-trial procedures including the production of discovered documents. For example, Finkelstein J pointed to the general scheme of Pt 3.10 of the *Evidence Act* which suggests that it is not concerned with discovery or other methods of gathering information that may assist a party in the prosecution of his or her case.<sup>26</sup> Further, Finkelstein J indicated that there must be a very clear indication that the Parliament intended to impose even greater limits than those created by sections 118 and 119 on the ability of a party to properly and adequately conduct litigation, before a court would be justified in departing from the grammatical meaning of sections 118 and 119.<sup>27</sup> Finkelstein J expressed the view that the fundamental objective of sections 118 and 119 is not to protect from disclosure certain confidential communications. Rather it is to ensure that evidence of certain confidential communications is not to be *adduced* or *given* in a proceeding.<sup>28</sup> Finkelstein J strongly rejected the argument that the consequence of applying different principles to discovery and to the adducing of evidence is unjust or absurd. Finkelstein J stated that it is commonplace for a party who is preparing for a case to obtain a large quantity of documents, many of which are not

<sup>22</sup> Above n1 at 676.

<sup>23</sup> *Id* at 677-8.

<sup>24</sup> *Id* at 708, citing Wigmore JH, *Evidence in Trials at Common Law* (1961) at para 2320.

<sup>25</sup> *Id* at 711, citing *Balabel v Air India* [1988] Ch 317 at 331-2; *The Sarah C Getty Trust* [1985] QB 956 at 964-5.

<sup>26</sup> *Sarah C Getty Trust*, above n25 at 713.

<sup>27</sup> *Id* at 714.

<sup>28</sup> *Id* at 714-5.

capable of being tendered in evidence for one reason or another. Finkelstein J stated:

In a world where transactions are becoming increasingly complex there are many cases where a party, whether plaintiff or defendant, is not in a position to adequately advance or defend his or her case based on his or her own first-hand knowledge of the facts. Thus, rather than creating confusion and disorder, the ascertainment of facts and information from documents not themselves admissible is often likely to lead to a just determination of a cause.<sup>29</sup>

Finally, Finkelstein J rejected the 'far-reaching' submission<sup>30</sup> that the common law must adapt to take account of sections 118 and 119 and arrive at a new set of rules that would see the common law operate in harmony with sections 118 and 119. Finkelstein J expressed the view that the *Adelaide Steamship* decision (which had promoted this approach) was wrongly decided and should be overruled.<sup>31</sup> Finkelstein J pointed to the 'insuperable difficulty' that the suggested adaptation of the common law would require *Grant v Downs* to be overruled, and that this is a matter that can only be resolved by the High Court.<sup>32</sup> Finkelstein J also questioned how it could be that one piece of legislation could be 'said to bespeak a new policy that is sufficiently broad so as to inform the common law'.<sup>33</sup> Furthermore, Finkelstein J referred to the fact that the *Evidence Act* has encroached upon the common law test of *Grant v Downs* by extending the privilege. But his Honour added:

But it [ie, the *Evidence Act*] has done so in a limited fashion. It confined the extension to the adducing of evidence in a federal court. The Commonwealth Parliament had the power to, but did not, extend the privilege in other areas within its legislative competence. For example, it did not extend the privilege to the discovery process in a federal court. Nor did it extend the privilege to the production of documents on subpoena. Further, there are provisions in many Commonwealth enactments pursuant to which a citizen may be required to produce documents or provide information. Some are concerned with the investigation of criminal activity, some are concerned with the protection of the revenue and some exist for the purpose of ensuring compliance with the laws of the Commonwealth. The Parliament has chosen not to extend the privilege to any of these areas. This suggests that the Parliament did not necessarily regard the balance between competing policies struck by the High Court to be inappropriate except to the extent that sections 118 and 119 have provided to the contrary.<sup>34</sup>

<sup>29</sup> *Id* at 715.

<sup>30</sup> *Id* at 712.

<sup>31</sup> *Id* at 721.

<sup>32</sup> *Ibid*, citing *Ravenor Overseas Inc v Readhead* (1998) 152 ALR 416; 72 ALJR 671 at 672.

<sup>33</sup> *Id* at 720.

<sup>34</sup> *Ibid*.



#### 4. *The Dissenting Judgments*

Dissenting judgments were delivered by Merkel and Beaumont JJ. Merkel J held that the reasoning employed in the *Adelaide Steamship* case in arriving at the conclusion that the common law had been modified derivatively by reason of the enactment of the *Evidence Act* was wrong.<sup>35</sup> However, Merkel J went on to hold that the result reached in the *Adelaide Steamship* case was the correct one despite the erroneous reasoning.<sup>36</sup> The result in the *Adelaide Steamship* case could also be reached 'by a process of construction of sections 118 and 119'. Merkel J stated:

... the prohibition in sections 118 and 119 is to be construed as applying explicitly to evidence adduced in proceedings in the federal courts as defined and implicitly to any of the ancillary processes of the federal courts, including discovery, which serve the purpose of determining the evidence to be adduced in a proceeding. That construction gives effect to, rather than frustrates or defeats, a significant object and purpose of the Act, recognises the role of 'logic and common sense in matters of statutory construction' (*Agfa-Gevaert* at CLR 400-1) and ensures that the legal meaning of sections 4(1), 118 and 119 includes what is necessarily or properly implied so as to give effect to the legislative intention gleaned from the language used: see *Chorlton v Lings* (1868) LR 4 CP 374 at 387 per Willes J and Bennion, *Statutory Interpretation*, pp 361-8.<sup>37</sup>

Merkel J also relied on the fact that the ALRC *Evidence* Report No 38 did not assert that it was desirable for a different test to apply at the ancillary process stages (such as discovery) than at the court hearing itself. Beaumont J agreed with the judgment of Merkel J and stated that the legal professional privilege provisions of the *Evidence Act* should be construed as, in truth, intended to pick up *all* aspects of the litigious process concerned with the gathering of evidence, including discovery.<sup>38</sup> Beaumont J relied on the House of Lords decision in *Taylor v Director of Serious Fraud Office*<sup>39</sup> to reach his conclusion that it would be 'irrational and incoherent (and thus an unlikely parliamentary intention) to introduce a double standard in the present context - one at the stage of tender of evidence at the trial proper, and another at the pre-trial stage of compulsory disclosure of potential evidence'.<sup>40</sup>

#### 5. *Conclusion*

In the present writer's opinion, there are several important issues which arise from the decision in the *Esso* case. Prior to the enactment of the *Evidence Act* 1995 (Cth), the position was as follows. Legal professional privilege was governed by a

<sup>35</sup> *Id* at 696.

<sup>36</sup> *Id* at 705.

<sup>37</sup> *Id* at 704.

<sup>38</sup> *Id* at 678.

<sup>39</sup> [1998] 3 WLR 1040 at 1053.

<sup>40</sup> Above n1 at 679.

sole purpose test at common law due to the 1976 decision of the High Court in *Grant v Downs*.<sup>41</sup> Since 1983 in Australia, legal professional privilege has applied not only in curial and quasi-curial contexts but also in non-curial contexts, such as administrative and investigative proceedings, in the extra-judicial processes of search and seizure, and in proceedings before bodies having the statutory power to require the giving of information.<sup>42</sup> This was mainly due to the landmark 4:3 decision of the High Court in *Baker v Campbell*<sup>43</sup> which proclaimed legal professional privilege as more than just a mere rule of evidence capable of applying in judicial proceedings, but as a fundamental and substantive common law principle capable of applying to all forms of compulsory disclosure, unless some legislative provision expressly or impliedly abrogated it. Then in 1995, the *Evidence Act* 1995 (Cth) created a privilege, known as client legal privilege, with a dominant purpose test that applies only to the 'adducing of evidence' in a curial context (in the federal courts to which the Act applies) and remained silent on other, especially pre-trial contexts. Such a course of action has led to much litigation and confusion, especially on the question whether the Act has an indirect or implied effect on pre-trial contexts. This confusion has undoubtedly also made it difficult for the policy makers in the non-Evidence Act jurisdictions who are charged with the decision of whether or not to adopt the uniform evidence law.

There are, however, anomalies which have been brought about by the *Esso* decision which will apply even *within* the *Evidence Act* jurisdictions; for instance, a 'sole' purpose test will apply for legal professional privilege at all pre-trial stages whilst a 'dominant' purpose test will apply for client legal privilege at the trial itself. As was pointed out in the *Esso* case by Black CJ and Sundberg J, it was open to the ALRC to hold the view that it is 'not unreasonable to have wider access in the investigative stage' (than at the trial itself).<sup>44</sup> It is conceded that there are those who hold the view that having two different tests pre-trial and at trial is not anomalous. For example, Finkelstein J in the *Esso* case held that, 'Rather than creating confusion and disorder, the ascertainment of facts and information from documents not themselves admissible is often likely to lead to a just determination of a cause'.<sup>45</sup> However, there is a strong body of opinion that it is illogical to have one test (ie, a sole purpose test) pre-trial and another test (ie, a dominant purpose test) at the trial.<sup>46</sup> It would be tempting for a final arbiter of appeal such as the High Court to 'clean up' the mess by simply overruling its own (majority) decision in *Grant v Downs* and adopting the minority 'dominant' purpose test of Barwick CJ from that decision. This would ensure that a 'dominant' purpose test was applied consistently throughout the whole trial process. However, in the present author's

<sup>41</sup> Above n3.

<sup>42</sup> *Baker v Campbell* (1983) 153 CLR 52.

<sup>43</sup> *Ibid*.

<sup>44</sup> Above n1 at 669, citing ALRC, *Evidence* Final Report No 38 (1987).

<sup>45</sup> *Id* at 715.

<sup>46</sup> See the judgments of Beaumont and Merkel JJ in the *Esso* case: *id* at 678 and 679 respectively. See also the judgment of Branson J in *Trade Practices Commission v Port Adelaide Wool Co Pty Ltd & Sinclair* (1995) 132 ALR 645.

opinion, this would be a mistake. The sole purpose test imposes some limits on a very broad doctrine of legal professional privilege. The sole purpose test is more workable and easier to apply.<sup>47</sup> But even more importantly, as stated in the introduction to this article, it was the legislature which created the problem in the first place (by enacting the anomalous client legal privilege with a dominant purpose test under the *Evidence Act 1995*) and so it is the legislature (and not the High Court) which should remedy the problem! And, in the present writer's opinion, this should be done by making two changes to sections 118–120 of the *Evidence Act 1995* (Cth). First, Parliament should extend the application of these sections to pre-trial contexts such as discovery and other interlocutory stages of curial proceedings; and second, Parliament should change the 'dominant' purpose test to a 'sole' purpose test.

In conclusion, it is submitted that it is in the interests of the fair administration of justice that courts have all available evidence before them. It is true that one of the functions of a court of law is to determine and resolve disputes between the parties appearing before it, based on the evidence adduced by those parties. But, more importantly, it is also the function of a court to ascertain the truth. The rationale for the majority decision in *Grant v Downs* was that legal professional privilege was being used by too many corporate litigants to shield the truth. In an oft-quoted passage, Stephen, Mason and Murphy JJ stated that unless legal professional privilege were confined by a sole purpose test, legal professional privilege would travel beyond the underlying rationale to which it is intended to

47 Both tests (ie, sole and dominant) require the judge to identify every purpose for which a document was originally created. As Goldberg J stated in *AC&CC v Australian Safeway Stores Pty Ltd* (1998) 153 ALR 393 at 412, 'One does not look solely at the evidence or intention of the maker of a document to determine what was the dominant purpose, or indeed any purpose, for which the document came into existence'. See also *Sparron v Apand Pty Ltd* (1996) 138 ALR 735 at 740 (note however that the ALRC claimed that an examination of the document itself will often be sufficient for the sole purpose test but not for the dominant purpose test: ALRC, *Evidence (Interim)* Report No 26 (1985) at 498). It is submitted, however, that from a practical point of view a 'dominant' purpose test will be more difficult than a 'sole' purpose test. For the sole purpose test to apply, each of the single identified purposes must be for legal advice or use in litigation. Hence, if one of the single identified purposes is not related to advice or litigation, the document will not be privileged. On the other hand, for the dominant purpose test to apply, a hierarchy of purposes must be constructed and the most important or 'predominant' purpose must be for legal advice or use in litigation for the document to be protected. It may be simply impossible to rank one purpose as more 'dominant' than the other: see McNicol S, *Law of Privilege* (1992) at 71. Goldberg J in *AC&CC v Australian Safeway Stores Pty Ltd* preferred to use the word 'significant' purpose rather than dominant purpose because the latter test was at times too difficult to apply. For example, Goldberg stated, *id* at 42, '...it is difficult to ascribe a dominant purpose to the preparation of the anticipated proceedings before the evidence gathering process is well advanced and the evidence has been evaluated'. Odgers S, *Uniform Evidence Law* (3rd ed, 1998) at 346 cites *Sparron v Apand* (1996) 138 ALR 735 at 741 for the proposition that if the two purposes were of equal weight, one would not dominate the other. This is undoubtedly true but the difficulty is the preliminary finding of fact that two purposes are of equal weight. Applying a dominant purpose test necessitates that one purpose is dominant whilst others are 'ancillary or subservient' to this purpose: Goldberg J, *id* at 413.

give expression.<sup>48</sup> The sole purpose test was used as a means of limiting or contracting this unintended growth of the privilege. In a climate today where the privilege is often used by corporate litigants and where the privilege has been extended even further than its original definition,<sup>49</sup> judicial law makers should be cautious in expanding the doctrine again (by substituting a dominant purpose test at common law for a sole purpose test), especially if the sole (or even dominant!) reason for doing so would be to rectify a problem created by Parliament.

48 Above n3 at 688.

49 See, eg, the extension of legal professional privilege to copies of original unprivileged documents in *The Commissioner, Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, the abolition of the exception to legal professional privilege in respect of documents which further the defence of an accused or tend to establish the accused's innocence in *Carier v Managing Partner, Northmore Hale Davy & Leake* (1995) 183 CLR 121, and the growth of legal professional privilege via the doctrines of joint privilege and common interest privilege as discussed in McNicol S, 'Professional Privilege Spreads its Wings' (1996) 70 LIT 32.

## **CHAPTER ELEVEN**

Book Review: J Auburn,  
Legal Professional Privilege: Law and Theory

## BOOK REVIEW

### J AUBURN *LEGAL PROFESSIONAL PRIVILEGE: LAW AND THEORY*

(Hart Publishing Oxford 2000)

SUZANNE McNICOL\*

#### A INTRODUCTION

It is both unusual and refreshing to come across a legal textbook which argues soundly and logically for the erosion of legal professional privilege in appropriate cases. It is even more unusual, in the reviewer's opinion, to encounter one written by a current legal practitioner. Yet this is precisely the case with Jonathan Auburn's recent textbook, *Legal Professional Privilege: Law and Theory*. Auburn challenges us with the statement:

we should be more sceptical of the claims made for the privilege, and more willing to challenge its application in specific areas where this application appears to be producing unjust results. In appropriate circumstances more weight should be accorded to the values underlying the disclosure of evidence.<sup>1</sup>

However, Auburn stresses that the book is not advocating the abolition of the privilege. Rather, it is seeking a re-evaluation of its goals, needs and structure.<sup>2</sup>

The book is indeed a scholarly piece of work. Its style is incisive, thought-provoking and, at times, argumentative. It is certainly one that unearths many underlying problems with the privilege, and challenges existing assumptions about the privilege.<sup>3</sup> There is a thorough discussion of existing authority and a most comprehensive statement of the law and literature in the Commonwealth jurisdictions of England, Australia, Canada, New Zealand and South Africa. The book also includes a discussion of legal principles from European and US law.

The first chapter provides a brief conceptual and historical introduction. Auburn highlights flaws in Wigmore's virtually unchallenged view<sup>4</sup> that, first, the privilege was an immediate and natural exception to testimonial compulsion, and,

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<sup>1</sup> J Auburn *Legal Professional Privilege: Law and Theory* (Hart Publishing Oxford 2000) 261.

<sup>2</sup> *Legal Professional Privilege* (n 1 above) 9.

<sup>3</sup> See, eg the challenge to Wigmore's accepted instrumental rationale for the privilege in ch 2.

<sup>4</sup> JH Wigmore and JT McNaughton *Evidence in Trials at Common Law* (Little, Brown & Co Boston 1961).

second, that the early rationale for the privilege was a respect for the status or honour of the lawyer.<sup>5</sup> Auburn succeeds in exposing a mistake in Wigmore's view of the dates for the origin of the privilege, ie that testimonial compulsion began in the middle of the sixteenth century relates to common law courts only, and not to Chancery or ecclesiastical courts.<sup>6</sup> However, in the reviewer's opinion, it is not clear how Wigmore's failure to distinguish between compulsion and privilege in Chancery, as compared with the common law courts, affects the nature or structure of the privilege itself.

The first chapter also reveals that the book will neither be considering the litigation privilege, nor statutory abrogations from the privilege, which, in the reviewer's opinion, are significant omissions, particularly the former.

## B THEORETICAL FOUNDATIONS

The book falls into two main parts. The first part is, in the reviewer's opinion, the more interesting. It is entitled 'Theoretical Foundations', and covers six chapters, ranging from: 'Emerging Common Law Right', 'The Privilege under the European Convention of Human Rights', 'Confidentiality', 'Disclosure', to the 'Structure of the Privilege—Theory and Application'. In this part, several thoughtful, creative and cogent arguments are advanced.

### 1 The thesis: balancing and absoluteness

Auburn suggests that judges in Commonwealth courts are wedded to the view that legal professional privilege is 'absolute', which means that no derogations from the privilege should be allowed. Auburn exhorts judges to depart from this view. He argues that, in reality, the privilege is determined on a basic assessment of competing policy interests, and that it is still capable of accommodating changes in its scope<sup>7</sup> without undermining its essential function.

Auburn distinguishes between two types of judicial balancing processes: ad hoc balancing and rule balancing. Ad hoc balancing is another label for case-by-case balancing; that is, in the context of legal professional privilege, this would involve the balancing of the factors for confidentiality and the factors for disclosure as they apply to the circumstances of the individual case.<sup>8</sup> Rule balancing, on the other hand, involves the balancing of general factors for and against disclosure of a specified type of information or in a specified type of situation calling for disclosure.<sup>9</sup> Whilst the definition of rule balancing could perhaps be made clearer in the book,

<sup>5</sup> *Legal Professional Privilege* (n 1 above) 2.

<sup>6</sup> *Legal Professional Privilege* (n 1 above) 3.

<sup>7</sup> *Legal Professional Privilege* (n 1 above) 261.

<sup>8</sup> *Legal Professional Privilege* (n 1 above) 119–20.

<sup>9</sup> *Legal Professional Privilege* (n 1 above) 120.

it seems to be more concerned with the formation, scope and structure of the privilege rule generally, rather than the circumstances of the individual case. Rule balancing also appears to allow for the creation of new exceptions to the privilege, particularly where a competing public interest demands it.

Auburn<sup>10</sup> identifies cases<sup>11</sup> where judges reject both types of balancing, and argues that judges are mistaken when they reject rule balancing. The reason that they reject rule balancing is intrinsically bound up with the familiar 'balancing already done' reasoning, ie legal professional privilege is already a product of a balancing exercise between competing public interests.<sup>12</sup> A critical tenet of Auburn's argument is set out in the following passage:

Looking to the statements relating to the balancing being 'already done', it may be defensible for judges to say that the privilege is itself the result of a balancing process, and therefore that it is inappropriate to use another form of balancing in determining individual claims for privilege. However to say that the balancing exercise has been performed once and for all in the formation of the rule, and no further balancing can ever be carried out when considering proposed amendments to the rule is tantamount to declaring that the law can never change. What then is the basis for this latter insistence on judicial conservatism?<sup>13</sup>

Auburn then goes on to uncover a general fear among courts of creating 'exceptions' to the privilege, where 'exception' means something that overrides the privilege. There follows an excellent section on the distinction between 'privilege not arising' (which has become popular with the courts' treatment of the crime-fraud and other exceptions) and 'arising but being overridden'.<sup>14</sup> Auburn states that it is obvious that, in reality, the privilege does arise but is being overridden (for example, with the crime-fraud rule)<sup>15</sup> and hence it is inevitable that there will be an element of uncertainty in the operation of the rule. Why, then, do judges cling to the notion that the privilege never arises in such cases? Auburn argues forcefully that it is bound up with the client's state of knowledge at the time when the relevant information is imparted.<sup>16</sup>

<sup>10</sup> *Legal Professional Privilege* (n 1 above) 121.

<sup>11</sup> *Eg. Carter v The Managing Partner, Northmore Hale Davey & Leake* (1995) 183 CLR 121 (HCA) 135.

<sup>12</sup> *Legal Professional Privilege* (n 1 above) 121.

<sup>13</sup> *Legal Professional Privilege* (n 1 above) 122.

<sup>14</sup> *Legal Professional Privilege* (n 1 above) 123–93.

<sup>15</sup> *Legal Professional Privilege* (n 1 above) 160.

<sup>16</sup> *Legal Professional Privilege* (n 1 above) 150–72. Auburn argues: 'When judges state that the privilege "never arises" they are implicitly positing that there is no expectation of confidentiality in such situations . . . and so there is no danger of the purpose and operation of the privilege being frustrated. If the rule is examined in terms of the "overriding" of the privilege, then one may be forced to acknowledge that a client's expectations of the operation of the privilege have been frustrated in a manner beyond that client's control. . . . Such an acknowledgement would raise serious questions about the current justification for the privilege' (at 150).



## 2 Balancing and absoluteness: a closer look

As mentioned briefly above, Auburn's descriptive thesis is that Commonwealth judges insist on an 'absolute' privilege and that they refuse to engage in a process of rule balancing to recognise new derogations from it.<sup>17</sup> They also refuse to engage in ad hoc balancing.<sup>18</sup> Auburn's normative thesis is that Commonwealth judges should not regard the privilege as absolute, and that they should be encouraged to engage in rule balancing in order to recognise new derogations from it. However, a refusal to engage in ad hoc balancing is acceptable.<sup>19</sup>

Auburn defines 'absolute' as 'no derogations'.<sup>20</sup> But, at other times, Auburn defines 'absolute' more broadly as meaning 'no balancing'.<sup>21</sup> It is true that Auburn later breaks down the concept of 'balancing' into two components, ad hoc balancing and rule balancing. The term 'no rule balancing' appears to mean the same as 'no derogations'.<sup>22</sup> Auburn argues that rule balancing should be allowed so that new exceptions could be created in the future. However, earlier<sup>23</sup> he states that, in practice, balancing can take any form along the continuum between a pure discretion and a closely directed judgment based on hard or inflexible criteria. It is assumed that all these other forms of balancing, with the exception of rule balancing, are to be rejected by judges in Auburn's normative thesis. But where will this leave the term 'absolute'? Will the privilege become non-absolute if any other form of balancing is engaged in?

In the reviewer's opinion, the term 'absolute' may be redundant in Auburn's thesis. He can successfully make his case for judges engaging in rule balancing in the future (so that competing public policies can be weighed and new exceptions created) without obscuring this argument by resorting to the term 'non-absolute' (or 'absolute'). The confusion surrounding the term 'absolute' can be seen in the following passage: 'Newbold's stern defence of the traditional absolutist view of the privilege often goes beyond a rejection of ad hoc balancing to encompass a rejection of rule balancing as well'.<sup>24</sup>

Yet it has already been noted that Auburn himself defines 'absolute' as meaning something from which no derogation is allowed, where 'no derogation' means 'no rule balancing'. Furthermore, Auburn later gives an expanded definition of 'absoluteness'. In Chapter 6 he states:

<sup>17</sup> *Legal Professional Privilege* (n 1 above) 8.

<sup>18</sup> *Legal Professional Privilege* (n 1 above) 117.

<sup>19</sup> Hence, his statement, 'A refusal to engage in "balancing" is justifiable to the extent that it implies a rejection of ad hoc balancing. However a refusal to countenance any new exceptions to the privilege at all requires further justification': *Legal Professional Privilege* (n 1 above) 117.

<sup>20</sup> *Legal Professional Privilege* (n 1 above) 8.

<sup>21</sup> Hence, his statement, 'Commonwealth courts have, in the main, regarded the privilege as "absolute" and rejected the use of a "balancing" process': *Legal Professional Privilege* (n 1 above) 100.

<sup>22</sup> *Legal Professional Privilege* (n 1 above) 122.

<sup>23</sup> *Legal Professional Privilege* (n 1 above) 99-100.

<sup>24</sup> *Legal Professional Privilege* (n 1 above) 122.

There are many possible meanings for a statement such as 'the privilege is absolute'. It could mean that there are no limitations on its scope. Alternatively, it could mean that there are no exceptions to its operation. Another meaning could be that the privilege is mandatory, in that once it is shown to apply a judge cannot decide in his discretion nonetheless to require production of the privileged material. . . . it may be worth noting here that the interpretation usually intended by judges is the second of these possibilities: that is, that the privilege is absolute in the sense that there can be no exceptions to it.<sup>25</sup>

But it is not only the judges who 'usually intend' that 'absolute' means 'no exceptions'. Auburn himself provides the same definition for 'absolute'.<sup>26</sup> However, surely the third meaning, ie 'privilege is mandatory, in that once it is shown to apply a judge cannot decide in her discretion nonetheless to require production of the privileged material', could also be part of Auburn's definition of 'absolute'. The discretion involved could arguably include ad hoc balancing, and it has been noted that Auburn believes that Commonwealth judges do, and should refuse to, engage in ad hoc balancing, especially because it leads to uncertainty and unpredictability.<sup>27</sup>

There is an excellent section in Chapter 6 concerning the appropriate level of abstraction which one chooses in order to define the rights or interests being balanced. The important points are made that the same level of abstraction should be chosen for the interest in disclosure as is chosen for the competing interest in confidentiality,<sup>28</sup> and that the appropriate level may be different according to whether the rationale is rights-based or instrumental. Auburn argues that courts tend to view balancing on an overly particularised level of abstraction and that, if the Wigmorean instrumental rationale is adopted, the balancing test should probably be formulated in a more general fashion.

## 3 Rationale for the privilege

Chapter 2 considers the rationale for the privilege and, in particular, the move from the traditional 'instrumental' justification for the privilege to the more recent recognition of a 'common law right to privilege' in most Commonwealth jurisdictions. Auburn persuasively argues that judges have assumed that new applications of the privilege require a new rationale. Hence, the rights rationale in Australia, South Africa and possibly England and Wales, is 'inextricably bound up in the extension of evidentiary compulsion beyond the curial realm, and the need for courts to find a principle to justify the privilege's further reach'.<sup>29</sup> The instrumental rationale posits

<sup>25</sup> *Legal Professional Privilege* (n 1 above) 99.

<sup>26</sup> *Legal Professional Privilege* (n 1 above) 8.

<sup>27</sup> Another unnecessary use of the term 'absolute' is in the discussion on waiver. Auburn argues that the current rule of implied waiver seriously undermines the absoluteness and predictability of the privilege. However, when reading the section it becomes clear that it is predictability alone that is under threat: *Legal Professional Privilege* (n 1 above) 223.

<sup>28</sup> *Legal Professional Privilege* (n 1 above) 111.

<sup>29</sup> *Legal Professional Privilege* (n 1 above) 35.

that 'absolute confidentiality in legal communications is necessary for the maintenance of good lawyer-client relations; a goal taken to be important for the effective administration of justice'.<sup>30</sup>

This rationale is occasionally recast by Auburn from being completely objective and neutral, as between lawyer and client (eg the instrumental goal of 'maximising lawyer-client communications'<sup>31</sup> and the 'global advantage accruing to the entirety of legal relations'<sup>32</sup>), to being almost exclusively client-driven (eg 'maintaining client confidence in the secrecy of legal communications'<sup>33</sup>). This slight shift (or narrowing) in the description of the instrumental rationale appears to be necessary for Auburn's descriptive thesis that the current approach to the privilege is the principle relating to the 'timing of knowledge'; that is, all circumstances determining the validity of a claim to privilege are capable of being known at the time when the relevant legal communication is made.<sup>34</sup> Auburn later states that:

there is a very strong priority within the doctrine of legal professional privilege to have the criteria grounding the privilege's application assessed from the perspective of the client's state of knowledge at the time the relevant information is imparted. For example, communications made to a person whom the client subjectively but wrongly believes to be his lawyer or lawyer's agent may still be protected, even though no lawyer-client relationship exists between these people.<sup>35</sup>

### C PRACTICAL APPLICATIONS

The second part of the book deals with 'practical applications' of the theory expounded in the first part—the crime-fraud exception, criminal exculpatory evidence, loss of privilege based on intent and disclosure, fairness-based loss of privilege, and inadvertent disclosure. In particular, Auburn advances and applies his theoretical arguments to given 'derogations' from the privilege.

In Chapter 8, Auburn convincingly argues that the crime-fraud rule does operate as a true exception to the privilege rule. Auburn concludes: 'The crime-fraud rule represents a concession to the need for absolute confidentiality which is made in the interests of another competing public interest'.<sup>36</sup> Chapter 8 also contains an excellent discussion of the necessity for, and scope of, the lawyer-client relationship for the privilege. Chapter 9 argues strongly in favour of an 'innocence' exception, despite its rejection at common law in both England<sup>37</sup> and Australia.<sup>38</sup>

<sup>30</sup> *Legal Professional Privilege* (n 1 above) 13.

<sup>31</sup> *Legal Professional Privilege* (n 1 above) 105.

<sup>32</sup> *Legal Professional Privilege* (n 1 above) 114.

<sup>33</sup> *Legal Professional Privilege* (n 1 above) 78.

<sup>34</sup> *Legal Professional Privilege* (n 1 above) 117.

<sup>35</sup> *Legal Professional Privilege* (n 1 above) 124.

<sup>36</sup> *Legal Professional Privilege* (n 1 above) 172.

<sup>37</sup> *R v Derby Magistrates' Court, ex p B* [1996] 1 AC 507 (HL).

<sup>38</sup> *Carter v The Managing Partner, Northmore Hale, Davy and Leake* (1995) 183 CLR 121 (HCA).

Auburn argues that the recognition of this exception would be consistent with a rule balancing approach and would not necessarily resort to the offensive (for reasons of uncertainty) ad hoc balancing. Chapters 10 and 11 discuss the important area of 'waiver', although the term 'waiver' is criticised as unhelpful, and it is suggested that it be discarded.<sup>39</sup> Auburn argues that there is no such thing as 'waiver' in privilege law. Instead, there are 'numerous different exceptions to privilege which depend on different fairness considerations such as partial disclosure, problems arising from putting in issue and related rules such as the rule dealing with client-lawyer litigation'.<sup>40</sup> Chapter 12 is a rather over-lengthy analysis of the unresolved problem of *Calcraft v Guest*<sup>41</sup> and *Ashburton v Pape*.<sup>42</sup> Auburn argues that the broad values underpinning these two cases are not reconcilable, and that the whole area 'urgently needs to be reviewed by the House of Lords'.<sup>43</sup> In particular, Auburn successfully argues that the equitable rule of breach of confidence is inadequate to grant relief in cases of secondary evidence of privileged communications.

### D CONCLUSION

There is no doubt that the book is a thoughtful and thorough treatise. It is carefully worked in its argument, using a step-by-step approach, logically building on earlier arguments and progressing to a sound conclusion. There are only a few isolated omissions which could have made the work more cohesive and complete. For example, does Auburn have any suggestions or predictions as to what may be the areas where future derogations from the privilege should occur? Further, a discussion of the litigation privilege and its rationale may have enhanced the thesis, and may also have altered the central argument in Chapter 10 that equitable confidentiality is fundamentally different from privilege.<sup>44</sup>

Other areas deserving of inclusion are joint privilege,<sup>45</sup> copies of unprivileged documents, and the dominant purpose test.<sup>46</sup> The author will no doubt be pleased to see that, in Australia, the High Court in *Mann v Carnell*<sup>47</sup> has essentially agreed with his criticisms of *Goldberg v Ng*.<sup>48</sup> The discussion of the European Convention

<sup>39</sup> *Legal Professional Privilege* (n 1 above) 229.

<sup>40</sup> *Legal Professional Privilege* (n 1 above) 229.

<sup>41</sup> [1898] 1 QB 759 (CA).

<sup>42</sup> [1913] 2 Ch 469 (CA).

<sup>43</sup> *Legal Professional Privilege* (n 1 above) 258.

<sup>44</sup> In particular, the introduction of the litigation privilege may have cast doubt on the suggestion that privilege is concerned only with disclosure to a court or other investigative body, whereas the equitable confidentiality protects disclosure to the rest of the world: *Legal Professional Privilege* (n 1 above) 211.

<sup>45</sup> Although part of the rule is impliedly touched on in *Legal Professional Privilege* (n 1 above) 124.

<sup>46</sup> This test has recently been adopted in Australia in *Esso Australia Resources Ltd v FCT* (1999) 168 ALR 123 (HCA).

<sup>47</sup> (1999) 168 ALR 86 (HCA).

<sup>48</sup> (1996) 185 CLR 83 (HCA). See *Legal Professional Privilege* (n 1 above) 206.

on Human Rights is illuminating and novel. However, it is possible that more links with the common law privilege could be made, and more predictions for the future advanced with regard to domestic law, other than the mere opportunity to 'breathe new life into a rule that has ossified somewhat over the last decade'.<sup>49</sup>

In conclusion, it must be said that this profound and scholarly work advances the discussion of privilege law to another (higher) intellectual level. It is an ambitious and superbly executed book. It is hoped that the book will be read and absorbed by all those who are or will be affected in some way by legal professional privilege in the years to come. In particular, it is hoped that its reasoning and arguments will be understood and applied by judges and legislators throughout the Commonwealth in the future.

<sup>49</sup> *Legal Professional Privilege* (n 1 above) 56.

## CHAPTER TWELVE

### *Evidence*

#### Part A "Common Law Privileges" — Chapter 4

## Chapter 4

# Common Law Privileges

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### 1 Introduction

[4.1.1] It was stated in **Chapter 3** that in certain circumstances a witness who is both competent and compellable may claim privilege in respect of certain questions put to her or him. The effect of this is that in the context of an actual trial (civil or criminal), information which is otherwise relevant to the issues to be tried and which the witness would otherwise be under an obligation to disclose is withheld from the court or tribunal. Privilege is also often claimed prior to a trial, ie, in interlocutory proceedings at the stage of discovery and at other early stages of production of documents in a party's possession or in answering interrogatories. The result of a successful claim to privilege at both stages (ie, pre-trial and at the trial) is often identical, namely, evidence which is highly probative and vital to the proper administration of justice is suppressed because disclosure of such evidence would be 'abhorrent' to a particular relationship, a particular fundamental principle or a particular interest which the law has deemed worthy of protecting or fostering.

[4.1.2] This chapter will analyse three common law privileges, namely, the privilege against self-incrimination, legal professional privilege and without prejudice privilege. Legal professional privilege protects from disclosure communications between a client and a legal adviser and, in some cases, communications between a client or legal adviser and third parties at the instance of the client. This is said to promote an effective adversary system by fostering candour and trust in the lawyer-client relationship and by protecting the information of each party to adjudication from disclosure to the other side. The privilege against self-incrimination is said to encourage testimony for the proper functioning of the accusatorial system by promoting the common law principle that no person should be forced to utter one's own guilt from one's own lips. Without prejudice privilege dictates that neither party to a dispute can disclose communications which are genuinely aimed at settlement without the consent of the other. This is designed to reduce the amount of litigation by promoting the peaceful out-of-court settlement of disputes.

## 2 How Privilege Operates

[4.2.1] There must be a specific claim to privilege by the person who wishes to take advantage of the privilege in respect of *each individual* question asked or document sought: *National Crime Authority v S* (1991) 29 FCR 203 at 211–12. Privilege is personal in the sense that it provides an opportunity for a person to withhold certain information. The privilege-holder may waive that opportunity and, hence, may release or disclose the privileged information. The only person who can waive the privilege is the 'holder' of the privilege. It therefore becomes important to discover in any situation involving privilege who is the 'holder' of the privilege. For example, with legal professional privilege, the privilege belongs to the client and the client is the only person who can waive the privilege by releasing or consenting to the release of the protected information. The other party to the relationship is the lawyer who is under a duty at all times to invoke the privilege on behalf of her or his client if it exists: *Re Stanhill Consolidated Ltd* [1967] VR 749 at 755. Usually the holder of the privilege is the person for whose benefit the privilege exists and, hence, the person who conveys information or makes an admission or other statement is said to be the 'holder' of the privilege in a confidential or professional relationship: see McNicol, *Law of Privilege*, p 21. On partial waiver and waiver of associated material, see [4.4.52]–[4.4.53] below, under Legal Professional Privilege.

## 3 Privilege Against Self-incrimination

### Statement of the rule

[4.3.1] In the old case of *Redfern v Redfern* [1891] P 139 at 147, Bowen LJ stated:

It is one of the inveterate principles of English law that a party cannot be compelled to discover that which, if answered, would tend to subject him to any punishment, penalty, forfeiture or ecclesiastical censure.

See also Lord Goddard CJ in *Blunt v Park Lane Hotel Ltd* [1942] 2 KB 253 at 257.

[4.3.2] Today the privilege at common law is more accurately reflected in the statement that, in civil and criminal proceedings, a person is not obliged to answer any question or produce any document if the answer or the document would have a tendency to expose that person to a criminal conviction or the imposition of a penalty. Further, the High Court in *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 336, has held that the privilege against exposure to a civil penalty is 'distinct from, though often associated in discussion with, the privilege against exposure to conviction for a crime'.

[4.3.3] The privilege against self-exposure to forfeiture, which had its origin in feudal tenures and land rights, is now obsolete in relation to contemporary Australian law and the privilege against self-exposure to ecclesiastical censure which had its origin in the established Church in England is similarly irrelevant to Australian circumstances.

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### Real and appreciable danger test

[4.3.4] It was established in the case of *Brebner v Perry* [1961] SASR 177 that a mere assertion by a witness that he or she runs the risk of possible self-incrimination is not sufficient to found a claim of privilege. It must be shown to the court from the facts and circumstances of the case that the claim to the privilege is bona fide and that there is a reasonable ground that the witness may be implicated in a criminal offence by the answer. This is sometimes referred to as the 'real and appreciable danger' test.

[4.3.5] *Brebner v Perry* also established that not only must there be a real danger that criminal proceedings will result, but the witness must invoke the privilege in order to avoid that danger (ie, the danger of criminal proceedings) and not for some collateral purpose. In *Brebner v Perry*, a person named Seeley was called as a witness for the prosecution in criminal proceedings against Perry. Seeley had already made admissions to the police implicating himself and Perry in the commission of the offence charged, and yet at the trial Seeley claimed the privilege against self-incrimination. Mayo J stated that a claim to the privilege must be valid and legitimate, and in this case Seeley was not invoking the privilege for the bona fide purpose of protecting *himself* from exposure to criminal proceedings. On the contrary, Seeley appeared to be invoking the privilege for the collateral purpose of protecting his friend Perry. Hence, Mayo J disallowed Seeley's claim to the privilege.

### Non-judicial proceedings and statutory abrogation

[4.3.6] The privilege is not merely a rule of evidence applicable in judicial proceedings, but a fundamental common law principle capable of applying in non-judicial proceedings. In *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, notices were issued under s 155(1) of the Trade Practices Act 1974 (Cth) requiring two corporations to furnish information and produce documents in order to ascertain whether there had been a breach of s 45 of the Act. The two appellant corporations claimed the privilege against exposure to a civil penalty in response to these notices because a breach of s 45 of the Act would result in the corporations being liable to the imposition of a pecuniary penalty under ss 76–78 of the Trade Practices Act 1974.

[4.3.7] The High Court held first of all (with Brennan J dissenting on this point) that the privilege against self-incrimination was inherently capable of application in non-judicial proceedings and, hence, the fact that the Trade Practices Commission's powers and functions under s 155 of the Trade Practices Act were wholly investigative (rather than judicial or quasi-judicial) did not preclude the privilege from operating.

[4.3.8] Second, the High Court rejected the appellant corporations' argument that the express abrogation of the privilege against self-incrimination by s 155(7) of the Trade Practices Act meant that the privilege against self-exposure to penalties was impliedly preserved. *Pyneboard's* case also established that at *common law*, the privilege against self-exposure to civil

penalties continues to exist in Australia and that it is distinct from the privilege against exposure to a crime.

[4.3.9] Third, on the question of statutory abrogation of the privilege, the High Court stated that regard must be had to the language and character of the statute, and the purpose it is designed to achieve. Further, Mason ACJ, Wilson and Dawson JJ added (at 314) that 'it is necessary to bear in mind the general principle that a statute will not be construed to take away a common law right unless the legislative intent to do so clearly emerges, whether by express words or by necessary implication': D C Pearce, *Statutory Interpretation in Australia*, 2nd ed, 1981, paras 113–6; cf *Mitcham v O'Toole* (1977) 137 CLR 150. On the facts of *Pyneboard*, the High Court held that the purpose of conferring the power and imposing the obligation under s 155 was to enable the Trade Practices Commission to ascertain whether any contravention of the Act had taken place and to make the information furnished, the documents produced and the evidence given, admissible in proceedings under the Act — a purpose which would be defeated if the privilege were available. See *Australian Competition and Consumer Commission v The Daniels Corporation International Pty Ltd* [2001] FCA 244 which held that s 155(1) of the Trade Practices Act 1974 (Cth) impliedly abrogates legal professional privileges: see also [4.4.55] below.

[4.3.10] Finally, the High Court 'assumed without deciding' (at 335) that the privilege against self-incrimination is capable of being claimed by a corporation in Australia. However, the High Court has now decided in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, that a corporation, unlike a natural person, cannot claim the privilege against self-incrimination. This decision will be discussed below: see also *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96 in relation to the penalty privilege.

[4.3.11] In *Sorby v Commonwealth* (1983) 46 ALR 237, the High Court had to consider whether the privilege against self-exposure to criminal proceedings had been abrogated by two relevant statutes. In that case, an inquiry was being conducted by a Royal Commissioner, Justice Stewart, into the affairs and activities of a certain businessman. The inquiry was conducted under the authority of Letters Patent issued under both the Royal Commissions Act 1902 (Cth) and the Commissions of Inquiry Act 1950 (Qld). Under both these Acts, the Royal Commissioner had the power to summon witnesses to attend the Commission and give evidence on oath and to produce documents. Two witnesses claimed the privilege against self-incrimination when summoned before the Commission.

[4.3.12] The Royal Commissions Act 1902 (Cth), prior to its amendment in 1982, made it an offence under s 6 for a witness before a Commission to refuse to answer a relevant question, and under s 6DD conferred 'use-immunity' on a witness (in the sense that answers given before a Commission would not be admissible against that witness in any subsequent proceedings). In 1982 the Royal Commissions Act 1902 was amended by the insertion of s 6A which expressly abrogated the privilege against self-incrimination by stating that a person may not refuse to answer a question on the ground that the answer might incriminate that person. The Commissions

of Inquiry Act 1950 (Qld) made it an offence, under s 9(2)(ii), for a witness to fail to answer any relevant question, but s 10(4) recognised that a witness may have a 'reasonable excuse' for not answering a question. Section 14(2) of the Queensland Act also conferred 'use-immunity' on a witness by providing that any answers given would not be admissible in any subsequent civil or criminal proceedings.

[4.3.13] As in *Pyneboard's* case, the High Court held that the privilege against self-incrimination is inherently capable of applying in non-judicial proceedings and that the privilege had been preserved by the Royal Commissions Act 1902 (Cth), prior to the 1982 amendment: per Gibbs CJ and Murphy J; Mason, Wilson and Dawson JJ not deciding; Brennan J contra. Further, the High Court held that the privilege was abrogated by the Royal Commissions Act 1902 (Cth), as amended by the Royal Commissions Amendment Act 1982, but was preserved by the Commissions of Inquiry Act 1950 (Qld).

[4.3.14] In relation to the Royal Commissions Act 1902 (Cth) prior to its amendment in 1982, Gibbs CJ and Murphy J held that the presence of the 'use-immunity' provision, s 6DD, did not abolish the privilege. Whilst their Honours conceded that the presence of s 6DD was consistent with such abrogation, it did not manifest a clear intention to abrogate the privilege because the protection conferred by use-immunity fell short of the protection which a witness would enjoy if he or she were entitled to the privilege itself. As Murphy J stated (at 260), the use-immunity provision did not prohibit the admissibility of derivative evidence, ie, evidence obtained by using the testimony as a basis for investigation, and so did not remove the exposure to the danger of prosecution and conviction, which is precisely what the common law privilege is designed to protect.

[4.3.15] Mason, Wilson and Dawson JJ found it unnecessary to consider the effect of the Royal Commissions Act 1902 prior to its amendment in 1982, and Brennan J adhered to his finding in *Pyneboard's* case that the privilege against self-incrimination is limited to judicial proceedings.

[4.3.16] In relation to the Commissions of Inquiry Act 1950 (Qld), Mason, Wilson and Dawson JJ (at 259) and Brennan J (at 269) held that the privilege against self-incrimination was deeply ingrained in the common law and that the presence of a 'reasonable excuse' clause in s 10(4) was enough to save the privilege from otherwise being abrogated. Gibbs CJ (with whom Murphy J agreed on this point) was more influenced by the presence of the 'use-immunity' provision, s 14(2), which did not provide protection which was co-extensive or commensurate with the protection conferred by the common law privilege. However, his Honour added (at 250) that the 'argument that the privilege has not been abrogated is if anything stronger in relation to the Queensland statute' because of the existence of the 'reasonable excuse' clause: see also *F v National Crime Authority* (1998) 83 FCR 99.

[4.3.17] The landmark High Court decisions in *Sorby* and *Pyneboard* were followed in the High Court case of *Police Service Board v Morris and Martin* (1985) 58 ALR 1, where the High Court again considered the issue of statutory abrogation of the privilege. In *Morris's* case, two police officers

claimed the privilege in the course of an inquiry by a senior police officer into the performance of their duties. The relevant Police Regulations 1957 (Vic), reg 95A(7), required a member of the police force to 'obey lawful orders', but the Regulations did not contain a specific provision imposing an obligation to answer questions or produce documents. Section 88(1) of the Police Regulation Act 1958 (Vic) provided that any member of the force who was guilty of a breach of the regulations should be guilty of an offence.

[4.3.18] Again, the High Court held, in reliance on *Sorby* and *Pyneboard*, that the privilege against self-incrimination was capable of application in non-judicial proceedings. However, after a consideration of the language, object and character of the legislation, and the purpose which it is designed to achieve, the High Court held that the privilege was impliedly abrogated. Gibbs CJ stressed (at 5) that the character of the regulation indicated that the obligation to obey lawful orders was not intended to be subject to any unexpressed qualification. Wilson and Dawson JJ emphasised (at 8) the importance to the community of an efficient and well-disciplined police force which faithfully obeyed lawful orders, and Brennan J highlighted (at 11) the significance of the integrity of the members of the police force to the community's confidence in them: see also *Anderson v Sullivan* (1997) 78 FCR 380; *Hartmann v Commissioner of Police* (1997) 91 A Crim R 141.

[4.3.19] For a clear example of legislative abrogation of the privilege by 'express words' (and with an accompanying provision for use-immunity) see the High Court decision in *Hamilton v Oades* (1989) 85 ALR 1: see also *Smith v Papamihail* (1998) 29 ACSR 184 and *Re Italo-Australian Centre* (1999) 30 ACSR 388.

#### Self-incrimination only

[4.3.20] The case of *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 57 ALR 751 introduced an important qualification to the extending scope of the privilege against self-incrimination. In particular, the High Court stressed the importance of the privilege as a protection for the individual from self-disclosure (as opposed to incriminating disclosure which can occur independently of the individual who claims the privilege). An important contrast was also made in this case between the privilege against self-incrimination and legal professional privilege.

[4.3.21] In *Controlled Consultants*, the National Companies and Securities Commission, suspecting that the appellant company, Controlled Consultants Pty Ltd, was carrying on the business of dealing in securities without a dealer's licence, issued a notice in writing under s 8 of the Securities Industry (Vic) Code to the appellant company to produce all books, records, documents and any other working papers relating to certain dealings in securities. The appellant company declined to produce any books and the Commissioner for Corporate Affairs applied to the Supreme Court of Victoria for an order pursuant to s 149 of the Code requiring the appellant company to produce them. The appellant company claimed privilege against their production on the ground that they may have tended to incriminate it. This claim of privilege was rejected by the Supreme Court and later by the High Court which held that the privilege against self-incrimination was

clearly excluded by the terms of the Securities Industry (Vic) Code (in particular s 8) insofar as the actual production of books is concerned.

[4.3.22] What is significant, however, is that Gibbs CJ, Mason and Dawson JJ went on to hold that, *apart from statute*, the privilege against self-incrimination itself has no application to the seizure of documents or their use for the purpose of incrimination, provided they can be proved by some independent means. Hence, s 8 of the Code impliedly abolished the privilege, and s 9 of the Code (which gives power to search for and seize books under warrant) also became significant to their Honours. Gibbs CJ, Mason and Dawson JJ stated:

Whilst the privilege, apart from any statutory exclusion, would protect a person against a requirement that he produce or identify incriminating documents or reveal their whereabouts or explain their contents in an incriminating fashion, it has no application to the seizure of documents or their use for the purpose of incrimination provided they can be proved by some independent means. The privilege is not a privilege against incrimination: it is a privilege against self-incrimination: 57 ALR at 755-6.

The *Controlled Consultants* decision was applied in *Smith v Papamihail* (1998) 29 ACSR 184.

### Corporations

[4.3.23] In the landmark decision of the High Court in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 118 ALR 392, the High Court held, by a majority of 4:3, that a corporation, unlike a natural person, cannot claim the privilege against self-incrimination. All four judges in the majority, Mason CJ and Toohey J (in a joint judgment), Brennan and McHugh JJ, carefully examined the rationales of the privilege against self-incrimination and decided that those rationales, whilst appropriate for the protection of the rights, dignity and privacy of individuals, had no application to artificial entities such as corporations.

In that case, Caltex was charged with polluting water with discharged oil and grease under s 16(1) of the Clean Waters Act 1970 (NSW) and with breaching a pollution control licence under s 17D of the State Pollution Control Commission Act 1970 (NSW). A year after the prosecution had been commenced the State Pollution Control Commission (the predecessor of the Environment Protection Authority) served upon Caltex two notices requiring the production of identical documents: a notice pursuant to s 29(2)(a) of the Clean Waters Act 1970 (NSW) and a notice to produce in accordance with the rules of the Land and Environment Court. Caltex applied to the Land and Environment Court for a ruling that it was not obliged to comply with either the notice under s 29(2)(a) or the notice to produce and that Caltex was privileged from producing the documents on the ground of self-incrimination. Stein J held that a corporation could not claim the privilege against self-incrimination and that, in any event, s 29(2) impliedly abolished the privilege. The Court of Criminal Appeal reversed Stein J's orders, holding that the privilege against self-incrimination does apply to corporations and that the s 29 notice was invalid, having been issued for use in a pending prosecution. \*

[4.3.24] The majority of the High Court held that the privilege against self-incrimination is not available to corporations and, accordingly, Caltex could not claim the privilege in answer to a valid notice issued under s 29(2)(a) of the Clean Waters Act 1970 (NSW). Mason CJ and Toohey J reviewed the historical basis for the privilege and the present position in other jurisdictions (the privilege against self-incrimination is available to corporations in England, Canada and New Zealand, but not in the United States). Their Honours stressed (at 405) the 'human rights' rationale for the privilege as being a more recent perception of the privilege which was a 'less than convincing argument' for holding that corporations should enjoy the privilege. It was decided by their Honours (at 405-8) that the further rationale for the privilege, namely, that the privilege was essential in 'maintaining the integrity of our accusatorial system of criminal justice' would 'remain unimpaired' if the common law privilege were not extended to the production of documents.

[4.3.25] Brennan J held (at 418) that neither principle nor practice supports the proposition that corporations are entitled to claim the privilege and that, accordingly, the power conferred by s 29(2)(a) may be exercised against corporations according to the unqualified terms of that provision. However, Brennan J distinguished the 'crime' privilege from the privilege against self-exposure to a civil penalty (the 'penalty' privilege), the latter of which Brennan J held is available to corporations which are faced with an obligation imposed by a court exercising its powers to compel the furnishing of information. Brennan J stated:

The penalty privilege owes its existence *not* to the law's historical protection of human dignity but to the limitation which the courts placed on the exercise of their powers to compel the defendant in an action for the recovery of a penalty to furnish against himself the evidence needed to establish his liability: 118 ALR at 420-1. [Emphasis added]

Brennan J stated (at 423) that there is no reason, generally speaking, why the penalty privilege should be applied outside the area in which its rationale warrants its application even if the privilege against self-incrimination could be applied beyond curial proceedings as a fundamental bulwark of liberty. Hence Brennan J held that Caltex could claim the penalty privilege against the common law notice to produce but Caltex could *not* claim the penalty privilege against the s 29 notice. (Note, however, the decision in *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 123 ALR 503 where the Federal Court has held that corporations cannot claim the penalty privilege.)

[4.3.26] McHugh J was the fourth judge in the majority. His Honour transposed the existing rationales for the privilege to the immediate context of corporations. First, he found that when the privilege against self-incrimination is viewed as a human right protecting the dignity of the accused, it does not apply to corporations. Second, McHugh J found that corporations ought not necessarily have the same rights of privacy as other citizens given the qualitative differences between corporations and individuals. Third, McHugh J held (at 445) that the 'integrity of the adversary system' rationale is a powerful reason for allowing a corporation to claim the privilege. His Honour said (at 446) (in contrast to Mason CJ and Toohey J) that to deny the



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privilege to a corporation would 'significantly weaken the forensic position of a corporation and significantly strengthen the forensic position of the prosecution' in the adversary system. McHugh J concluded by stating (at 449) that the granting of the privilege to a corporation is 'much too high a price to pay' for preserving the integrity of the adversary system of justice.

[4.3.27] Deane, Dawson and Gaudron JJ delivered a dissenting judgment. Their Honours considered (at 430-1) that the 'integrity of the adversary system' rationale was of paramount importance and that the privilege cannot be said to rest exclusively upon notions of personal freedom and human dignity. In their Honours' view, it should be up to the legislature to formulate any exceptions: see also *Environment Protection Authority v Multi-Fill Pty Ltd* (1997) 93 LGERA 131; and *Australian Competition and Consumer Commission v J McPhee & Son Pty Ltd* (1997) 148 ALR 601.

### Statutory modifications

[4.3.28] The common law privilege against self-incrimination continues to operate unless expressly or impliedly abolished by statute, and in some Australian jurisdictions legislation exists which purports to alter or limit the privilege.

#### Victoria

[4.3.29] Section 26 of the Evidence Act 1958 (Vic) confirms the existence of the common law privilege against self-incrimination of witnesses in Victoria. It also preserves the position of the accused and the accused's spouse as a witness in criminal cases under ss 399 and 400 of the Crimes Act 1958 (Vic).

[4.3.30] Section 29 of the Evidence Act 1958 (Vic) operates to limit the extent of the common law privilege against self-incrimination in Victoria but only where the privilege is claimed in trials before a court where a question relevant *and* material to the issue is asked. In the latter situation the witness can only claim the privilege against exposure to 'punishment for treason or an indictable offence'. Section 29 has been interpreted very strictly by the courts. Hence, the more limited privilege (against exposure to treason or indictable offence) only operates in respect of claims to the privilege by witnesses in a trial before a court and not to claims to the privilege by a person answering interrogatories: *Hughes v Watson* [1917] VLR 398. Further, the more limited privilege under s 29 only applies where the question is 'relevant and material to the matter in issue'. Therefore, s 29 will not apply in respect of 'scandalous' questions or questions designed to shake the credit or veracity of a witness: *Smith v Powell* (1884) 10 VLR (L) 79. Insofar as s 29 does not apply, the full-blown common law privilege against self-incrimination continues to operate in Victoria.

[4.3.31] Section 30 of the Evidence Act 1958 (Vic) applies to non-curial bodies such as boards or commissions empowered by statute to summon witnesses. It operates to confer protection on witnesses compelled to answer questions before such bodies by providing for 'use-immunity' in respect of the witnesses' answers in subsequent proceedings and immunity from prosecution.

**Tasmania and Western Australia**

[4.3.32] In these jurisdictions the common law privilege is preserved (Evidence Act 1910 (Tas) s 101; Evidence Act 1906 (WA) s 24), but special certification procedures exist under which a judge can compel a witness to answer a question or interrogatory and then grant the witness an immunity certificate: Evidence Act 1910 (Tas) ss 87, 89; Evidence Act 1906 (WA) ss 11, 13. This procedure can be adopted wherever the judge considers it 'expedient for the ends of justice': Evidence Act (Tas) s 87; Evidence Act 1906 (WA) s 11. The immunity certificate states that the witness 'shall be freed from all criminal prosecutions and penal actions, and from all penalties, forfeitures, and punishments to which he was liable for anything done before that time in respect of the matters touching which he is so examined, except perjury': Tas: s 89; WA: s 13. Such a provision would prevent all criminal prosecutions and penal actions notwithstanding that derivative evidence may be discovered.

**South Australia, Northern Territory and Queensland**

[4.3.33] South Australia is silent on the question of statutory modification of the privilege. The Northern Territory and Queensland have endorsed the common law 'crime' privilege: Evidence Act 1939 (NT) s 10; Evidence Act 1977 (Qld) s 10. The forfeiture privilege has been abolished in civil proceedings in Queensland: Evidence Act 1977 (Qld) s 14(1)(a). Presumably the privileges against self-exposure to a penalty and forfeiture continue to exist at common law in the Northern Territory despite the fact that only the 'crime' privilege has been endorsed by statute.

**[4.3.34]**

	Crime privilege	Penalty privilege	Forfeiture privilege
<b>New South Wales</b>	Certification procedure: s 128(5) Evidence Act 1995 (NSW)	Certification procedure: s 128(5) Evidence Act 1995 (NSW)	—
<b>Queensland</b>	Endorsed: s 10	—	Abolished in civil proceedings: s 14(1)(a)
<b>South Australia</b>	—	—	—
<b>Tasmania</b>	Certification procedure: ss 87, 89	Certification procedure: ss 87, 89	Certification procedure: ss 87, 89
<b>Victoria</b>	Trials before court, questions relevant and material — only exposure to treason or an indictable offence: s 29	No application where trial before court and question relevant and material	No application where trial before court and question relevant and material
<b>Western Australia</b>	Certification procedure: ss 11, 13	Certification procedure: ss 11, 13	Certification procedure: ss 11, 13

	Crime privilege	Penalty privilege	Forfeiture privilege
<b>Northern Territory</b>	Endorsed: s 10	—	—
<b>Australian Territory</b>	Certification procedure: s 128(5) Evidence Act 1995 (Cth)	Certification procedure: s 128(5) Evidence Act 1995 (Cth)	—

**Note:** Where there is no entry, the common law privilege applies.

**4 Legal Professional Privilege****Statement of the rule**

[4.4.1] It is a fundamental principle of the common law that, in civil and criminal cases, confidential communications passing between a lawyer and her or his client, which have been made for the dominant purpose of seeking or being furnished with legal advice or for the dominant purpose of preparing for actual or contemplated litigation, need not be disclosed in evidence or otherwise revealed. This rule also extends to communications passing between a lawyer or client and third parties if made for the purpose of actual or contemplated litigation.

**Rationale of the rule**

[4.4.2] The first head of legal professional privilege protects lawyer-client communications made for the purpose of obtaining legal advice or for the purpose of obtaining information necessary for use in litigation. The rationale behind this head is the encouragement and fostering of trust and candour in the lawyer-client relationship: see *Grant v Downs* (1976) 135 CLR 674 at 685. This rationale still applies despite the fact that the sole purpose test of *Grant v Downs* was overruled in the High Court decision of *Esso Australia Resources Limited v Federal Commissioner of Taxation* (1999) 168 ALR 123.

[4.4.3] As with the privilege against self-incrimination in the *Caltex* case (*Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 118 ALR 392), the rationale of legal professional privilege has also been expanded to cover the importance of protecting individual rights of the citizen from the intrusion of the state: see Deane J in *Baker v Campbell* (1983) 49 ALR 385 at 435.

[4.4.4] The second head of legal professional privilege protects communications passing between third parties and the lawyer or the client if made in contemplation of litigation. The rationale for this head of the privilege was based on the importance in the conduct of litigation of keeping from the other side any information which a party or lawyer had gathered for an action: see *Baker v Campbell* (1983) 49 ALR 385 at 427.

[4.4.5] The broad rationale for legal professional privilege can, therefore, be stated as the promotion of the administration of justice through the maintenance of an effective adversary system of litigation.



### Nature of the privilege

[4.4.6] As with the privilege against self-incrimination, legal professional privilege is not merely a rule of evidence applicable in judicial proceedings, but a fundamental common law principle capable of applying in non-judicial proceedings.

[4.4.7] In the leading case of *Baker v Campbell* (1983) 49 ALR 385, the defendant, a member of the Australian Federal Police, attempted to seize documents of the plaintiff, a client of a firm of solicitors, by executing a valid search warrant under s 10(6) of the Crimes Act 1914 (Cth) at the solicitor's offices. It was assumed that the documents (which related to a scheme devised to minimise sales tax) were all privileged. Section 10(6) empowered a justice of the peace to grant a warrant to seize 'anything as to which there are reasonable grounds for believing that it will afford evidence as to the commission' of an offence. The question asked of the High Court, in a case stated, was: 'In the event that legal professional privilege attaches to and is maintained in respect of the documents held by the firm, can those documents be properly made the subject of a search warrant issued under s 10 of the Crimes Act?'

[4.4.8] A 4:3 majority of the High Court answered this question in the negative — s 10 did not abrogate the privilege and therefore it should be interpreted as excluding privileged documents from the things it authorised to be seized. All four majority judges (Murphy, Wilson, Deane and Dawson JJ) stressed the fact that legal professional privilege was a substantive common law principle which was capable of applying 'wherever compulsory disclosure of evidence is involved, whether in judicial proceedings or not': per Dawson J at 442.

[4.4.9] In contrast, a powerful minority consisting of Gibbs CJ, Mason and Brennan JJ, were not prepared to extend the privilege for the purpose of introducing an exception into s 10 of the Crimes Act 1914, mainly because, if the privilege were capable of applying in administrative proceedings or before a ministerial act, no procedure existed for determining the validity of the claim: per Gibbs CJ at 395; Mason J at 400; and Brennan J at 425; see also *Saunders v Commissioner, Australian Federal Police* (1998) 160 ALR 469.

### Dominant purpose test

[4.4.10] In the recent case of *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 168 ALR 123, a majority of the High Court held that at common law in Australia, the dominant purpose test applies to legal professional privilege. In so doing, the High Court in *Esso* overruled the majority decision in *Grant v Downs* (1976) 135 CLR 674 that a sole purpose test applied and followed what was said by Barwick CJ in dissent in *Grant v Downs*. Hence, prior to the *Esso* decision, at common law in Australia legal professional privilege had been confined to communications or documents which were brought into existence for the 'sole purpose' of seeking advice or for use in litigation. A document that would, in any

event, have been brought into existence for another purpose was not privileged from production.

[4.4.11] In *Grant v Downs*, three of the majority judges (Stephen, Mason and Murphy JJ) had proposed the following 'sole purpose' test:

Unless the law confines legal professional privilege to those documents which are brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings, the privilege will travel beyond the underlying rationale to which it is intended to give expression: 135 CLR at 688.

Their Honours explained (at 685-7) that the proliferation of companies in modern times had brought with it the need to reassess the privilege in its application to companies. Many corporate documents came into existence merely for the purpose of arming central management with actual knowledge of the conduct of its employees, and not necessarily for the purpose of advice or litigation.

[4.4.12] The fourth judge in the majority, Jacobs J, had proposed (at 692) the simple test: 'Does the purpose of supplying the material to the legal adviser account for the existence of the material?'

[4.4.13] In contrast, Barwick CJ had adopted a wider 'dominant purpose' test which allowed a document to be protected by privilege provided the dominant purpose of its author was to use it for legal advice or in litigation. Under the 'dominant purpose' test (which has been adopted in England by *Waugh v British Railways Board* [1980] AC 521 and more recently in *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership (a firm)* [1987] 2 All ER 716), the fact that the author of the document had in mind other uses of the document (a plurality of purposes) does not preclude the document from being accorded privilege. The 'dominant purpose' test has also been adopted by the Evidence Act 1995 (Cth) ss 118-120 and the Evidence Act 1995 (NSW) ss 118-120: see Chapter 21.

### The Esso decision

[4.4.14] All six members of the High Court (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby and Callinan JJ) rejected the first three arguments advanced by the appellant, Esso Australia Resources Ltd. In so doing, the High Court agreed with the Full Court of the Federal Court in holding that:

1. The Evidence Act 1995 did not apply to the discovery and inspection of documents.
2. The common law of privilege was not modified by the Evidence Act 1995.
3. Order 15, r 15 of the Federal Court Rules did not provide a basis upon which courts could order that the test on discovery and production of documents conform to that to be applied in adducing evidence.

[4.4.15] However, a majority of the High Court (Gleeson CJ, Gaudron, Gummow and Callinan JJ at 127) accepted the fourth argument advanced by the appellant, namely, that the High Court 'should declare, contrary to what was said by three members of the court in *Grant v Downs*, but in accordance

with what was said by Barwick CJ in that case, that at common law in Australia the dominant purpose test applies'.

#### Gleeson CJ, Gaudron and Gummow JJ in *Esso's* case

[4.4.16] In a joint judgment, Gleeson CJ, Gaudron and Gummow JJ (at 133) set out the facts of both *Grant v Downs* and *Waugh v British Railways Board* (ibid at 133) and noted that in both cases the claims for privilege were disallowed. Their Honours stated:

In neither case was the obtaining of legal advice or assistance the dominant, let alone the sole, purpose of bringing the documents into existence. It may be added that the conditions of s 118 and s 119 of the Evidence Act would not have been satisfied in either case: at 134.

[4.4.17] Their Honours then remarked that prior to the decision at first instance in *Grant v Downs* it was generally accepted that the 'one purpose' test applied. Gleeson CJ, Gummow and Gaudron JJ stated:

At the time *Grant v Downs* was decided at first instance, the law, both in Australia and England, as to the test to be applied in such cases had not been determined by any court of ultimate authority, but the prevailing view was that it was sufficient to attract privilege to such reports if one purpose of their preparation was to obtain legal advice or assistance ...

The generally accepted view, however, was that, if there were multiple purposes, it was sufficient to attract privilege that one, not insubstantial, purpose was that of obtaining legal advice or assistance. It was to the correctness of that view that the judgments in *Grant v Downs* were primarily directed: at 134.

[4.4.18] Their Honours then noted that all five members of the High Court in *Grant v Downs* agreed in the result that the 'one purpose' test should no longer represent the common law in Australia. However, in the joint judgment of Stephen, Mason and Murphy JJ the 'sole purpose' test emerged. Their Honours added that nowhere in their reasons did Stephen, Mason and Murphy JJ expressly consider a 'dominant purpose' test as an alternative possibility, or give reasons for rejecting such a test (at 134). The main reason for the decision of Stephen, Mason and Murphy JJ was that their Honours regarded it as unacceptable and contrary to the interests of justice, that routine reports and other documents prepared by subordinates of large corporations and public authorities for the information of their superiors should be privileged merely because *one* of their intended destinations was the desk of a lawyer (at 135).

[4.4.19] Gleeson CJ, Gummow and Gaudron JJ then considered the other two judgments (of Jacobs J and Barwick CJ) in *Grant v Downs* and commented that, whilst the joint judgment only considered the alternatives of 'one purpose' or 'sole purpose' test, Jacobs J and Barwick CJ also addressed 'intermediate possibilities' (at 136). Their Honours also observed that Barwick CJ's 'dominant purpose' test was 'unanimously preferred' by the House of Lords in *Waugh's* case to the sole purpose test of the joint judgment (at 136). The House of Lords 'acknowledged that a dominant purpose test was less clear than a sole purpose test, but they found the latter unduly

restrictive. They pointed out that dominant purpose is a concept well known, and frequently applied, in other areas of legal discourse' (at 136).

[4.4.20] Their Honours then decided that the dominant purpose test should be preferred because 'it strikes a just balance, it suffices to rule out claims of the kind considered in *Grant v Downs* and *Waugh*, and it brings the common law of Australia into conformity with other common law jurisdictions' (at 139). These are the only positive reasons given by their Honours for preferring the dominant purpose test. The other reasons advanced are all negative, ie, they are critical of the sole purpose test for its 'extraordinary narrowness' (at 138), its 'absoluteness and rigidity' (at 139) and the fact that it has been applied as though it were a dominant purpose test.

#### Other judgments in *Esso's* case

[4.4.21] Callinan J delivered a separate judgment agreeing with Gleeson CJ, Gaudron and Gummow JJ. McHugh and Kirby JJ delivered separate dissenting judgments.

#### Government employment

[4.4.22] Obviously for legal professional privilege to apply there must be in existence a lawyer-client relationship. There have been many judicial statements to the effect that confidential professional communications made for the purpose of litigation or legal advice must be fairly referable to that relationship: see, eg, *Waterford v Commonwealth* (1987) 71 ALR 673 per Dawson J at 702; *Wheeler v Le Marchant* (1881) 17 Ch D 675.

[4.4.23] The High Court in *Waterford v Commonwealth* (1987) 71 ALR 673, also indicated that the legal adviser must be both competent and independent of the client for legal professional privilege to apply. In that case, some salaried legal advisers (from the Department of the Attorney-General and the Department of the Australian Government Solicitor) were employed by the federal government (the Department of Treasury) and were advising the government in a professional capacity as to certain proceedings pending in the Administrative Appeals Tribunal in respect of the Freedom of Information Act 1982 (Cth).

[4.4.24] The High Court held that it was open to the Commonwealth to claim legal professional privilege in respect of confidential, professional communications passing between federal government agencies on the one hand and their salaried legal advisers on the other, provided those communications were made for the sole purpose of providing legal advice for litigation: see also *Attorney-General v Foster* (1999) 161 ALR 232.

[4.4.25] Presumably, today, because of *Esso's* case, this test will be even easier to apply and even more governmental inhouse communications will be privileged due to the 'dominant purpose' test.

#### Copies of non-privileged documents

[4.4.26] In *Commissioner, Australian Federal Police v Propend Finance Pty Ltd* (1997) 141 ALR 545, the High Court by a 5:2 majority held that privilege attaches to a copy document which is provided to a lawyer if the

copy was made solely for the purpose of obtaining legal advice or solely for use in legal proceedings. The majority consisted of Brennan CJ, Gaudron, McHugh, Gummow and Kirby JJ whilst Dawson and Toohey JJ delivered separate dissenting judgments. Brennan CJ qualified the majority's finding by adding that if the original unprivileged document is not in existence (or its location is not disclosed or is not accessible to a person seeking to execute a search warrant) fairness will deny privilege to the copy document which is made available to prove the contents of the original.

[4.4.27] The minority views of Dawson and Toohey JJ were that copies of unprivileged original documents are not privileged because legal professional privilege attaches to the contents of the document rather than the document itself.

[4.4.28] *Propend's* case will also be affected by the recent *Esso* decision. Presumably now a copy of a non-privileged document will be privileged if the copy was made for the *dominant* purpose of obtaining legal advice or for the *dominant* purpose of use in legal proceedings. Again, like in *Waterford's* case, *Esso* will make the test easier to satisfy and more documents (here copies) will be privileged than was the case prior to *Esso*. The *Esso* 'dominant purpose' test may, however, lead to some uncertainty in this area, particularly as to the shredding of documents, and this will be seen below in relation to the judgments of McHugh and Kirby JJ.

[4.4.29] Brennan CJ held that the test for privilege is anchored to the purpose for which the document is brought into existence. So, 'on a strictly logical application of the test, if a copy is made solely for the purpose of advice or litigation, then the copy is privileged' at 548. Brennan CJ conceded that there are practical problems with this. For example, it may be very difficult to prove the intention of the maker of the document at the time of copying. Furthermore, it may be difficult and artificial to distinguish between the original and the copy. However, Brennan CJ looked at the consequences, ie, if privilege were denied to a copy of an unprivileged original then 'the way would be open for the execution of search warrants by the emptying out of, and sifting through, solicitors' files and counsel's briefs' at 549.

[4.4.30] McHugh J also stated that it 'seems illogical and absurd that a copy can be privileged when the original is not' at 582. A similar point was made by Kirby J who stated:

If properly characterised, a copy document was brought into existence to permit the original to be destroyed and not solely for the purpose of securing legal advice, it would fall outside the protection of the privilege. If the destruction of the original were done in pursuance of a crime of fraud, the privilege could be lost: at 612

[4.4.31] It should be noted that the recent adoption by the High Court in *Esso* of the 'dominant purpose' test would affect these comments made by Kirby J as to the destruction of originals. It may still be possible to argue that the copy document was privileged if the *dominant* purpose of bringing the copy into existence was to secure legal advice and the *subsidiary* or *ancillary* purpose was to destroy the original. However, Kirby J's point that

the destruction may be pursuant to an illegality should not be overlooked, ie, the crime/fraud exception may operate here to deny privilege in the copy.

### Exceptions to the privilege

#### Observed-facts exception

[4.4.32] In *National Crime Authority v S* (1992) 100 ALR 151, Heerey J stated that legal professional privilege only applies to communications and, hence, any facts observed or discovered by either party in the course of their lawyer-client relationship will not be privileged. This means that any physical objects or personalty (other than documents) which the lawyer can see with her or his own eyes will not be protected from disclosure: *Brown v Foster* (1857) 1 H & N 736 at 740; 156 ER 1397 at 1399. Any facts which the lawyer would have ascertained in any event (such as the client's name and address), irrespective of the lawyer's confidential communication or professional skill, will also not be privileged: see *Baker v Campbell* (1983) 49 ALR 385 per Dawson J at 439; *Southern Cross Commodities Pty Ltd v Crinis* [1984] VR 697; and *Commissioner of Taxation (Cth) v Coombes [No 2]* (1999) 164 ALR 131. Finally, the privilege does not protect documents which constitute or evidence transactions, such as contracts, conveyances, declarations of trust, and receipts, which are not themselves the giving or receiving of advice or part of the actual or anticipated litigation: see *Allen, Allen and Hemsley v Deputy Commissioner of Taxation* (1989) 20 FCR 576 at 583.

#### Crime or fraud

[4.4.33] It was established in the old case of *R v Cox and Railton* (1884) 14 QBD 153 that communications between a lawyer and client which are made in the furtherance of a crime or fraud are not privileged. In that case Cox and Railton, judgment debtors, were convicted of conspiracy to defraud M, a judgment creditor. The prosecution called a solicitor as a witness to testify that Cox and Railton had consulted him as to how they could defeat judgment and as to whether a bill of sale could legally be executed to defeat M's judgment. The court held that the solicitor's evidence was properly received and that legal professional privilege did not apply to protect the evidence from disclosure. Stephen J explained that legal professional privilege only covers situations where there is 'professional confidence' and 'legitimate professional employment' between the lawyer and the client. Furthermore, legal professional privilege 'cannot include the case of communications, criminal in themselves, or intended to further any criminal purpose' (14 QBD at 167). Hence, Stephen J concluded that the privilege will be destroyed whenever the communication is made to facilitate the commission of a crime or fraud, whether or not the solicitor is ignorant of the criminal or fraudulent purpose: see also *Re Moage Ltd (in liq); Sheahan v Pitterino* (1998) 26 ACSR 726.

[4.4.34] In *R v Bell; Ex parte Lees* (1980) 146 CLR 141, the High Court held that legal professional privilege does not apply to protect a solicitor from revealing confidential information relating to the whereabouts of a child who was the subject of a custody order under the Family Law Act 1975

(Cth). Gibbs J held that the privilege does not apply wherever it would be contrary to a higher public interest to give effect to it (146 CLR at 147).

Stephen J held (at 156) that the privilege could not be claimed if it would subvert or frustrate the 'processes of law'. Murphy J held (at 159) that the welfare of the child is paramount over the doctrine of legal professional privilege, and Wilson and Aickin JJ held (at 162) that Mrs M's behaviour in requesting Lees to keep confidential her whereabouts bore the 'taint of illegality' and was contrary to the due administration of justice in that it furthered her contempt of court.

[4.4.35] The exception in relation to 'crime and fraud' was extended by the High Court, in *Attorney-General (NT) v Kearney* (1985) 61 ALR 55, to cases where the confidential communication is made by a public authority for the purpose of obtaining advice on how to exceed its statutory powers or to prevent others from exercising their rights under the law: see per Gibbs CJ at 64.

[4.4.36] Gibbs CJ, Mason and Brennan JJ all relied on *R v Bell; Ex parte Lees* (1980) 146 CLR 141 in deciding that a 'higher public interest' would prevail over the competing public interest that legal professional privilege should apply. As Gibbs CJ stated:

In my opinion the present case comes within the principle which forms the basis of the rule that denies privilege to communications made to further an illegal purpose. It would be contrary to the public interest which the privilege is designed to secure — the better administration of justice — to allow it to be used to protect communications made to further a deliberate abuse of statutory power and by that abuse to prevent others from exercising their rights under the law: 61 ALR at 64.

[4.4.37] Wilson J decided that the privilege could not operate because there had been a deliberate pursuit of a purpose in the making of regulations which is known to be beyond power. (Dawson J dissented.)

#### Documents establishing innocence

[4.4.38] In Australia, prior to the High Court decision in *Carter v Managing Partner, Northmore, Hale Davy and Leake* (1995) 129 ALR 593, there was an exception to privilege in criminal cases where the information or documents would tend to establish the innocence of an accused person. This exception was based on the case of *R v Barton* [1972] 2 All ER 1192 which had established that, in a criminal trial, legal professional privilege will not attach to documents in the possession or control of a solicitor which, on production, would help further the defence of an accused or tend to establish the innocence of an accused. The manner in which this exception operates was explained by French J in *R v Ataou* [1988] 2 WLR 1147 at 1154:

When a communication was originally privileged and in criminal proceedings privilege is claimed against the defendant by the client concerned or his solicitor, it should be for the defendant to show on the balance of probabilities that the claim cannot be sustained.

[4.4.39] In *Carter v Managing Partner, Northmore, Hale Davy and Leake* (1995) 129 ALR 593, the High Court by majority abolished the exception. Indications are given in Brennan J's judgment of future judicial reluctance to extend any exceptions to legal professional privilege based on a higher public interest: see also *Director of Public Prosecutions (Cth) v Kane* (1997) 140 FLR 468.

[4.4.40] It should be noted that s 123 of the Evidence Act 1995 (Cth) reverses the majority decision in *Carter's* case by allowing a defendant to adduce evidence of a privileged communication or document in criminal cases.

#### Waiver

##### Nature and types of waiver

[4.4.41] Waiver has been defined as an 'act of conduct' which amounts to the forgoing of a right to keep certain information confidential: see *Re Stanhill Consolidated* [1967] VR 749 at 752. Waiver of privilege may be express or implied and it may be intentional or unintentional. Waiver of privilege can also be imputed by operation of law. Express waiver usually speaks for itself. Considerations of fairness and whether the other party may have been misled usually govern implied waiver. Intentional waiver usually causes no difficulty and is most often constituted by a client simply consenting to the release of certain privileged communications or documents. (Intentional waiver can, therefore, overlap with express waiver.) Unintentional waiver usually occurs where a privileged communication or document has accidentally, inadvertently or mistakenly passed into the hands of a third party who subsequently reads or uses it in some way, eg, by photocopying or distributing it.

[4.4.42] Waiver, which is imputed by operation of law, usually occurs where there has been no express or intentional general waiver and has in the past generally been governed by considerations of fairness. However, in the recent case of *Mann v Carnell* (1999) 168 ALR 86 the High Court has demonstrated a reluctance to use 'unfairness' as the governing test for imputed waiver. Gleeson CJ, Gaudron, Gummow and Callinan JJ in a joint judgment in that case preferred a test of 'inconsistency', not 'unfairness', for the doctrine of imputed waiver.

##### Waiver imputed by operation of law

[4.4.43] In the case of *Goldberg v Ng* (1995) 69 ALJR 919 the High Court by majority (Deane, Dawson and Gaudron JJ, with Toohey and Gummow JJ dissenting) propounded a test for imputed waiver which states that privilege will be lost wherever fairness dictates that disclosure is incompatible with the retention of confidentiality. In that case the appellants were a solicitor, Goldberg, and his wife. There were two sets of proceedings. First, the 'Supreme Court proceedings' in which Goldberg and his wife were being sued by the respondent, Ng, for the recovery of money paid to Goldberg's wife as part of a compromise arrangement. Second, the 'Law Society proceedings' under which Ng had complained to the Law Society of New



South Wales with respect to an alleged defalcation by Goldberg. In the 'Law Society proceedings', Goldberg had disclosed privileged documents (ie, a draft brief and other disclosures to Goldberg's own legal advisers) to the Law Society on the express basis that they would not be shown to anyone else. In the meantime, Ng sought to subpoena the documents for use in the 'Supreme Court proceedings'. Goldberg claimed legal professional privilege for the documents and Ng argued that Goldberg had waived the privilege.

[4.4.44] A majority of the High Court (Deane, Dawson and Gaudron JJ, Toohey and Gummow JJ dissenting) held that there had been an imputed waiver and that as a matter of fairness, the documents should be disclosed to Ng. The majority found that there had been no express or intentional general waiver of privilege by Goldberg because Goldberg had expressly disclosed the documents to the Law Society for the limited purpose of dealing with its inquiries in relation to the complaint against him. Nevertheless, the delivery of the documents to the Law Society was an 'act inconsistent with the maintenance of the privilege' and where such an act had occurred the court had to consider whether it was fair that the privilege should cease. In this case, the majority found that waiver as against the client had arisen as an imputation by operation of law.

[4.4.45] Toohey and Gummow JJ delivered separate dissenting judgments.

[4.4.46] The 'fairness' test of *Goldberg v Ng* has, however, recently lost favour in the High Court as evidenced by the decision in *Mann v Carnell* (1999) 168 ALR 86. As stated above, the majority in *Mann v Carnell* preferred a test of 'inconsistency' not 'unfairness' for the doctrine of imputed waiver. Gleeson CJ, Gummow, Gaudron and Callinan JJ in a joint judgment stated:

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. ...

What brings about the 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: at 94.

[4.4.47] Their Honours also went on to add the important point that it is not necessarily the case that any voluntary disclosure to a third party will waive the privilege (at 95). Their Honours referred with approval to the following statement of Jordan CJ in *Thomason v Campbelltown Municipal Council* (1939) 39 SR (NSW) 347:

The mere fact that a person on some one occasion chooses to impart to another or others advice which he has received from his solicitor indicates no intention on his part to waive his right to refuse on other occasions to disclose in evidence what that advice was, and supplies no sufficient reason for depriving him of a form of protection which the law has deemed it specially

necessary to throw around communications between solicitor and client: at 95.

[4.4.48] Their Honours also referred to recent English authorities which held that disclosure for a limited and specific purpose does not lead to the loss of privilege: see *British Coal Corp v Dennis Rye Ltd (No 2)* [1988] 1 WLR 1113; *Goldman v Hesper* [1988] 1 WLR 123; and *Gotha City v Sotherby* [1998] 1 WLR 114. Their Honours suggested that 'disclosure to a third party' might be a 'convenient rubric' under which to discuss problems of waiver, although they added that this was an over-simplification of the circumstances of the case before them (at 95).

[4.4.49] On the facts of *Mann v Carnell*, the majority held that there had been no waiver of the privilege in the Chief Minister of the ACT's Executive giving to a member of the ACT's Legislative Assembly, confidentially, access to legal advice that had been provided to the Territory in relation to certain litigation which Dr Mann had instituted.

[4.4.50] Gleeson CJ, Gummow, Gaudron and Callinan JJ held that the privilege was that of the body politic, the ACT, and the:

purpose of the privilege being to protect the Territory from subsequent disclosure of the legal advice it received concerning the litigation instituted by the appellant, there was nothing inconsistent with that purpose in the Chief Minister conveying the terms of that advice, on a confidential basis, to a member of the Legislative Assembly who wished to consider the reasonableness of the conduct of the Territory in relation to the litigation: at 96.

[4.4.51] Kirby J delivered a separate judgment agreeing in result with Gleeson CJ, Gummow, Gaudron and Callinan JJ. McHugh J delivered a dissenting judgment.

#### No partial waiver

[4.4.52] The courts have generally accepted that there is no such thing as 'partial waiver'. In other words, it is considered unfair and misleading to allow a party entitled to a privilege to disclose part of a document and yet claim privilege as to the remainder: see *Attorney-General (NT) v Maurice* (1986) 69 ALR 31 at 34; *Great Atlantic Insurance Co v Home Insurance Co* [1981] 2 All ER 485. The rule against partial waiver applies where a document deals throughout with the same subject matter. Templeman LJ explained that the rare case of severance would only ever be possible if the document 'deals with separate subject matters so that the document can in effect be divided into two separate and distinct documents each of which is complete': [1981] 2 All ER 485 at 490: see also *Grofan Pty Ltd v ANZ Banking Group Ltd* (1993) 43 FCR 408 and *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* [2000] FCA 593.

#### Waiver of associated material

[4.4.53] The doctrine of associative waiver, or waiver by implication, states that documents mentioned in, or connected with, a document for which privilege has been waived, themselves run the risk of being disclosed. It is important to stress that this doctrine differs from partial waiver because

the doctrine of associative waiver deals with the case where *one* document refers to *another* document.

[4.4.54] In the case of *Attorney-General (NT) v Maurice* (1986) 69 ALR 31, the High Court considered in detail the doctrine of associative waiver and applied a fairness test (similar to that used with partial waiver) to decide whether the doctrine operated: see also *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1996) 137 ALR 28 and *Australian Unity Health Ltd v Private Health Insurance Administration Council* [1999] FCA 1770.

#### Statutory modification

[4.4.55] While it is possible for parliament to modify or abolish the fundamental doctrine of legal professional privilege, there are very few examples of parliament actually having intervened. This should be contrasted with the vast examples of statutory intervention in the case of the privilege against self-incrimination. For two rare examples of implied abrogation of the doctrine of legal professional privilege by statute, see the decisions in *Corporate Affairs Commission (NSW) v Yuill* (1991) 100 ALR 609 and *Australian Competition and Consumer Commission v The Daniels Corporation International Pty Ltd* [2001] FCA 244. For recent examples of express abrogation of legal professional privilege by statute, see the Crimes (Confiscation and Evidence) Amendment Act 1998 (Vic), s 19D as relation to the Longford Royal Commission and the Legal Practice Act 1996 (Vic), ss 83, 149, 189, 194 and 441B.

### 5 Without Prejudice Privilege

[4.5.1] This privilege, which is sometimes referred to as the 'negotiations for settlement' privilege or the 'privilege in aid of settlement', protects from disclosure in evidence all communications between parties which are genuinely aimed at settlement in the event that those negotiations are unsuccessful. The broad view of the privilege is that all bona fide attempts to negotiate a settlement, eg, offers of payment, counter offers, admissions and offers of compromise between the parties, cannot be admitted into evidence without the consent of both parties if the matter goes to court. The narrow view of the privilege is that the privilege protects from curial disclosure only admissions made by parties during negotiations for settlement: see McNicol, *Law of Privilege*, p 435. The major rationale for the rule is the public interest in promoting peaceful out-of-court settlements, in reducing litigation and in preventing negotiating statements being used in court as admissions on the question of liability. However, the libertarian rationale of fostering candour and trust between negotiators without fear of later disclosure of their offers to a court is also an important explanation for this common law privilege.

[4.5.2] The application of the without prejudice privilege is not dependent on the express use of the words 'without prejudice'. If it is clear from the *surrounding circumstances* that the intention of the parties is to settle the action out of court, evidence of the content of the negotiations will not be admissible at the trial, notwithstanding the fact that the words 'without prejudice' were never used. In the case of *Rodgers v Rodgers* (1964) 114 CLR

608, the High Court held that abortive negotiations between parties to a subsisting matrimonial cause were without prejudice and evidence of the negotiations was inadmissible at the proceedings for the provision of maintenance for the appellant and her children, despite the fact that the negotiations were not expressed to be 'without prejudice'.

[4.5.3] Conversely, the express use of the words 'without prejudice' will not automatically result in the negotiating documents becoming privileged: see *Gregory v Philip Morris Ltd* (1988) 80 ALR 455 at 475. A writer cannot destroy the admissibility of a letter merely by stamping 'without prejudice' at the top of it: see *Cutts v Head* [1984] 1 All ER 597 at 604. Many lawyers use the words 'without prejudice' indiscriminately and under a complete misunderstanding as to the meaning of the words: see McNicol, *Law of Privilege*, pp 442-3. Again, it must be stressed that the bona fide intention of two parties who are in dispute to achieve an out-of-court compromise of the action must be gleaned from the surrounding circumstances. The express use of the words 'without prejudice' will only provide *some* evidence that negotiations to settle must have begun.

[4.5.4] As a pre-condition for without prejudice privilege to apply, there must be some person in dispute with another and agreement will *not* have been reached. Only then will the negotiations be privileged from production and inadmissible. As to the meaning of 'dispute', see *Glengallan Investments Pty Ltd v Arthur Anderson* [2001] QCA 115. On the other hand, where the negotiations do result in a concluded settlement, the terms of the concluded agreement can be proved and put in evidence: *Tomlin v Standard Telephones and Cables Ltd* [1969] 1 WLR 1378; see also *State Rail Authority (NSW) v Smith* (1998) 45 NSWLR 382. *Tomlin's* case also made it clear that the court may look at all the correspondence where the issue is whether there is any real agreement intended to be binding between the parties at all.

[4.5.5] It should be noted that without prejudice privilege does not extend to the protection of objective facts not connected to the matters in issue which are in dispute between the parties: *Field v Commissioner for Railways (NSW)* (1955) 99 CLR 285.

[4.5.6] Finally, without prejudice privilege can in *some* circumstances extend to documents created by a third party. In *Rabin v Mendoza & Co* [1954] 1 All ER 247, the plaintiff claimed damages from the defendants, a firm of surveyors, for a negligent survey of a dwelling-house which the plaintiff purchased. In an attempt to reach settlement, the parties agreed at a 'without prejudice interview' that the defendants should procure another surveyor's report in order to obtain insurance cover against the risk of defects developing in the plaintiff's house. No settlement was reached, however, and the action commenced. The defendants claimed privilege from production and inspection of the surveyor's report on the ground that it was made as a result of a without prejudice discussion between the parties. The Court of Appeal held that as the surveyor's report was obtained as a result of an express or tacit agreement that it would not be used to the prejudice of either party, this meant that production and inspection of it would not be ordered.

## CHAPTER TWELVE

Evidence  
Part B "Other Privileges" — Chapter 5

## Chapter 5

# Other Privileges

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### 1 Introduction

[5.1.1] It was seen in Chapter 4 that the common law has traditionally recognised only three privileges — the privilege against self-incrimination, legal professional privilege and without prejudice privilege. There have, in the past, been attempts to extend common law protection to other professional relationships and confidential communications (eg, between accountant and client, between journalists and their sources, between doctor and patient), but the common law has stood steadfast in its refusal to create further common law privileges. As Dixon J stated in *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73 at 102–3, except for the existing restricted categories of privilege already protected, an inflexible rule had been ‘established that no obligation of honour, no duties of non-disclosure arising from the nature of a pursuit or calling, could stand in the way of the imperative necessity of revealing the truth in the witness box’.

[5.1.2] However, despite the common law’s inertia in this area, some Australian jurisdictions have decided to create limited statutory privileges, mainly because parliament has deemed certain confidential relationships worthy of protection. For example, in some Australian states a statutory privilege exists protecting communications between husband and wife during the marriage, between clergy and communicant, and between doctor and patient. The same type of justification which exists for the fundamental common law doctrine of legal professional privilege exists for these three limited statutory privileges. Those statutes which create a doctor–patient privilege are endorsing the concept that all patients should have the freedom to confide fully in their doctor without fear of subsequent disclosure. Similarly, the statutory recognition of a marital communications privilege supports the notion that spouses should be able to confide freely and candidly with one another without being forced to disclose their conjugal communications to a court. And the statutory clergy–communicant privilege also recognises the vital importance of penitents to be able to confess privately to their clerics without subsequent revelation to a court. It is proposed to consider these three limited statutory privileges in this chapter.

## 2 Marital Privilege

[5.2.1] Today there is legislation in four Australian jurisdictions protecting marital communications: Evidence Act 1977 (Qld) s 11; Evidence Act 1910 (Tas) s 94; Evidence Act 1958 (Vic) s 27; Evidence Act 1906 (WA) s 18. In Victoria, Queensland and Tasmania, the privilege only protects communications made *to* the spouse-witness and does not extend to communications made *by* the spouse-witness.

[5.2.2] The illogicality of enacting a privilege which belongs only to the person *to whom* the communication was made and *not* to the conveyor of the confidential information has been discussed in the case of *Rumping v Director of Public Prosecutions* [1964] AC 814 at 833-4: see also McNicol, *Law of Privilege*, pp 310-8.

[5.2.3] In Western Australia, the problem of illogicality referred to above does not exist because the privilege extends to communications made *to* or *by* the spouse-witness. This provision is more consistent with the rationale for the privilege (ie, protecting both spouses' conjugal confidences) and is obviously easier to apply. The privilege has been abolished in South Australia and in the Northern Territory, and does not apply in the Family Court: Family Law Act 1975 (Cth) s 100(2).

[5.2.4] In New South Wales, s 18(2)(b) of the Evidence Act 1995 (NSW) confers a discretionary family member privilege in criminal cases whereby a family member may object to giving evidence of a communication between the family member and the defendant. In the Australian Capital Territory the position is covered by an identical discretionary family member privilege set out in s 18(2)(b) of the Evidence Act 1995 (Cth).

[5.2.5] In Victoria the marital privilege only applies in civil proceedings: Evidence Act 1958 (Vic), s 27(2). Conversely, the privilege only applies in criminal proceedings in Queensland, New South Wales and the Australian Capital Territory. In Western Australia, the privilege applies in all proceedings except certain proceedings under the divorce and matrimonial causes jurisdiction of that state: Evidence Act 1906 (WA), s 18.

[5.2.6]

Marital Communications Privilege		
<b>New South Wales</b>	Discretionary family member privilege protecting communications between family member and defendant	Criminal proceedings only
<b>Queensland</b>	Privilege protecting communications to spouse-witness (only receiver of information)	Criminal proceedings only
<b>South Australia</b>	—	—
<b>Tasmania</b>	Privilege protecting communications to spouse-witness	All proceedings except some matrimonial
<b>Victoria</b>	Privilege protecting communications to spouse-witness	Civil proceedings only

Marital Communications Privilege		
<b>Western Australia</b>	Privilege protecting communications to or by spouse-witness	All proceedings except some matrimonial
<b>Australian Capital Territory</b>	Discretionary family member privilege protecting communications between family member and defendant	Criminal proceedings only
<b>Northern Territory</b>	—	—
<b>Federal Courts</b>	Discretionary family member privilege protecting communications between family member and defendant	Criminal proceedings only

**Note:** Where there is no entry, no privilege exists.

[5.2.7] Marital privilege only applies to existing husbands and wives. If a marriage ceases, through death or divorce, the privilege is lost. The reason for this is that the statutory provisions only refer to 'husbands' and 'wives' and the test of marital status is applied at the time the court requires the disclosure of evidence (and not at the time when the communication is made). Hence, at that time there is no existing marital relationship to disrupt by compelling disclosure of the communication.

## 3 Clergy and Communicant Privilege

[5.3.1] Today there is legislation in five Australian jurisdictions protecting confessional communications arising out of the clergy-communicant relationship: Evidence Act 1995 (NSW) s 127; Evidence Act 1939 (NT) s 12(1), (3); Evidence Act 1910 (Tas) s 96(1); Evidence Act 1958 (Vic) s 28(1). In the Australian Capital Territory, the position is covered by the religious confessions privilege embodied in s 127 of the Evidence Act 1995 (Cth).

[5.3.2] In Victoria, New South Wales and the Australian Capital Territory the protection of the privilege is slightly narrower than in Tasmania and the Northern Territory because in the former jurisdictions the confession must be made to the member of the clergy 'in the member's professional capacity according to the ritual of the church or religious denomination concerned': Evidence Act 1995 (NSW) s 127(4). These words, which ensure that the confession must be a formal or ritual one, are absent from the equivalent provisions in Tasmania and the Northern Territory and it has been accordingly argued that these latter provisions could also cover confessions made for 'spiritual ends which do not conform to the requirements of a liturgy': see *R v Lynch* [1954] Tas SR 47 at 48.

[5.3.3] All the five jurisdictions make it clear that the holder of the privilege is the communicant and not the clergy. Further, all five jurisdictions extend the privilege to civil *and* criminal proceedings and the New South Wales and Australian Capital Territory provisions go even further by



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(NSW), s 127(3) and Evidence Act 1995 (Cth), s 127(3). Section 127(1) of the Evidence Act 1995 (NSW) is also significant in that it extends the protection of the privilege beyond confessional communications to the fact that they have been made (the latter of which may suffice for an adverse inference to be made against the communicant). The New South Wales, Northern Territory, Australian Capital Territory and Tasmanian provisions (but not Victorian) exempt from protection communications made for any criminal purpose.

[5.3.4]

Clergy and Communicant Privilege			
New South Wales	Privilege protecting formal ritual confessions and the fact that they were made	Civil, criminal and non-curial proceedings	No protection for communication made for criminal purpose
Queensland	—	—	—
South Australia	—	—	—
Tasmania	Privilege protecting formal ritual and spiritual confessions	Civil and criminal proceedings	No protection for communication made for criminal purpose
Victoria	Privilege protecting formal ritual confessions	Civil and criminal proceedings	—
Western Australia	—	—	—
Australian Capital Territory	Privilege protecting formal ritual confessions and the fact that they were made	Civil, criminal and non-curial proceedings	No protection for communication made for criminal purpose
Northern Territory	Privilege protecting formal ritual and spiritual confessions	Civil and criminal proceedings	No protection for communication made for criminal purpose
Federal Courts	Privilege protecting formal ritual confessions and the fact that they were made	Civil, criminal and non-curial proceedings	No protection for communication made for criminal purpose

**Note:** Where there is no entry, no privilege exists.

[5.3.5] For a recent decision dealing with the relationship of church and communicant or bishop and communicant in Queensland where no statutory provision exists, see *Clark v Corporation of Trustees of Roman Catholic Archdiocese of Brisbane* [1998] 1 Qd R 26.

## 4 Doctor and Patient Privilege

[5.4.1] Today there is legislation in three Australian jurisdictions protecting communications (and, in some cases, information) arising out of the doctor-patient relationship: Evidence Act 1939 (NT) s 12(2); Evidence Act 1910 (Tas) s 96(2); Evidence Act 1958 (Vic) s 28(2), (3), (4), (5).

[5.4.2] In contrast to the clergy and communicant privilege, the protection of the doctor-patient privilege is confined in s 28(2) of the Evidence Act 1958 (Vic) to 'any civil suit action or proceeding' (with certain exceptions as to insurance and other matters listed in s 28(5)). Again, the form of the legislation makes it clear that the holder of the privilege is the patient and not the doctor and, hence, the doctor is forbidden in civil proceedings to disclose confidential information without the consent of the patient.

[5.4.3] Under s 28(2) of the Evidence Act 1958 (Vic) the privilege protects from disclosure 'any information acquired in attending the patient', whereas in the Northern Territory and Tasmania the privilege more narrowly protects 'communications by the patient'. The Victorian legislation has been interpreted broadly by the High Court to include more than mere oral or verbal communications by the patient — it also extends to any information acquired by the doctor 'through the eye', ie, anything which comes to the knowledge of the doctor with regard to the health or physical condition of the patient while the doctor-patient relationship continues: see *National Mutual Life Association (Australasia) Ltd v Godrich* (1909) 10 CLR 1 at 41; and *Hare v Riley and Australian Mutual Provident Society* [1974] VR 577 at 582.

[5.4.4] In Victoria, where the patient has died, the right to consent to the release of the information is governed by s 28(3), (4) and (5) of the Evidence Act 1958 (Vic). Section 28(3) states that in civil actions (except those exempted under s 28(5)), the legal personal representative, spouse or child of the deceased patient becomes the 'holder' of the privilege and, hence, has the power to waive the privilege by consenting to the release of medical information concerning the deceased patient. Section 28(4) of the Evidence Act 1958 (Vic) makes it clear that from the time when there is no legal personal representative, spouse or child in existence, there is no person left with the power to consent to the release of the medical information and s 28(3) will cease to have effect.

[5.4.5]

Doctor and Patient Privilege		
New South Wales	—	—
Queensland	—	—
South Australia	—	—
Tasmania	Privilege protecting communications by the patient	Civil proceedings only

Doctor and Patient Privilege		
Victoria	Privilege protecting any information acquired in attending a patient	Civil proceedings only
Western Australia	—	—
Australian Capital Territory	—	—
Northern Territory	Privilege protecting communications by the patient	Civil proceedings only
Federal Courts	—	—

**Note:** Where there is no entry, no privilege exists

[5.4.6] There is a new sexual assault communications privilege in New South Wales in Division 1B of the Evidence Act 1995 (NSW), ss 126G–126J. For a recent decision dealing with this privilege, see *R v Young* (1999) 46 NSWLR 681.

**Note:** Students should refer to **Chapter 21**, [21.3.22]–[21.3.23], for a discussion of how the Evidence Act 1995 (Cth) affects the issues raised in this chapter.

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Doctor and Patient Privilege		
Victoria	Privilege protecting any information acquired in attending a patient	Civil proceedings only
Western Australia	—	—
Australian Capital Territory	—	—
Northern Territory	Privilege protecting communications by the patient	Civil proceedings only
Federal Courts	—	—

**Note:** Where there is no entry, no privilege exists

[5.4.6] There is a new sexual assault communications privilege in New South Wales in Division 1B of the Evidence Act 1995 (NSW), ss 126G–126J. For a recent decision dealing with this privilege, see *R v Young* (1999) 46 NSWLR 681.

**Note:** Students should refer to **Chapter 21**, [21.3.22]–[21.3.23], for a discussion of how the Evidence Act 1995 (Cth) affects the issues raised in this chapter.

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Doctor and Patient Privilege		
Victoria	Privilege protecting any information acquired in attending a patient	Civil proceedings only
Western Australia	—	—
Australian Capital Territory	—	—
Northern Territory	Privilege protecting communications by the patient	Civil proceedings only
Federal Courts	—	—

**Note:** Where there is no entry, no privilege exists

[5.4.6] There is a new sexual assault communications privilege in New South Wales in Division 1B of the Evidence Act 1995 (NSW), ss 126G–126J. For a recent decision dealing with this privilege, see *R v Young* (1999) 46 NSWLR 681.

**Note:** Students should refer to **Chapter 21**, [21.3.22]–[21.3.23], for a discussion of how the Evidence Act 1995 (Cth) affects the issues raised in this chapter.

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## CHAPTER TWELVE

### Evidence

#### Part C “Exclusion of Evidence in the Public Interest” — Chapter 6

## Chapter 6

# Exclusion of Evidence in the Public Interest

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## 1 Introduction

[6.1.1] The last two chapters have considered specific common law and statutory privileges which operate to prevent the compulsory disclosure of relevant evidence in court and other types of proceedings. In the same way the doctrine of public interest immunity, which will be the focus of this chapter, operates to withhold relevant information from a court or other body having the power to coerce the giving of evidence. Public interest immunity differs from privilege, however, because it operates for the benefit of the public interest at large and not for any private relationships or interests. It is a fundamental common law doctrine (which was formerly known as Crown privilege) which excludes from evidence any information the disclosure of which would be injurious or prejudicial to public or state interests. In contrast to the privileges considered in **Chapters 4 and 5**, there is no necessity for a claim to public interest immunity to be made by any person or party (and hence there will be no such thing as a 'privilege-holder'). Furthermore, public interest immunity cannot be waived by any person or party (because by its very nature it exists for the *public* interest) nor can secondary evidence or copies of documents which are protected by public interest immunity be disclosed. (On the inability to waive public interest immunity, see *Makanjuola v Commissioner of Police* [1992] 3 All ER 617.)

## 2 Class Claims and Contents Claims

[6.2.1] A claim to public interest immunity can be based on the fact that the documents belong to an identifiable 'class' of documents which should be suppressed, such as Cabinet papers, governmental papers which record minutes of discussion between heads of departments, Cabinet submissions and documents relating to high level governmental policy: see, eg, *Sankey v Whitlam* (1978) 142 CLR 1; and *Commonwealth v Northern Land Council* (1993) 176 CLR 604. Alternatively, a claim to public interest immunity can

## Exclusion of Evidence in the Public Interest

established that a document falls into such a class, a court 'will lean initially against ordering disclosure' and only considerations which are indeed exceptional would be sufficient to overcome the public interest in their immunity from disclosure because they are documents with a pre-eminent claim to confidentiality: (1993) 176 CLR 604 at 618. Their Honours added (at 619) that where such exceptional circumstances do exist, the judge should personally inspect the documents and should not order disclosure unless the judge is satisfied that the documents are *crucial* to the proper determination of the case.

[6.3.6] *Sankey v Whitlam* was distinguished by the High Court for a number of reasons. First, *Sankey v Whitlam* was a criminal case and the *necessary* exceptional circumstances might exist in situations of alleged serious criminal misconduct on the part of a Cabinet Minister, as in *Sankey v Whitlam*: (1993) 176 CLR 604 at 619. In contrast, the Northern Land Council case concerned only a civil action where access to the actual deliberations of Cabinet did not in any way appear crucial to the conduct of its case by the Northern Land Council. Second, *Sankey v Whitlam* was a case which did not even involve Cabinet documents, 'let alone documents disclosing Cabinet deliberations': (1993) 176 CLR 604 at 619. Third, *Sankey v Whitlam* involved documents which were no longer current whereas it could not be said that the matters which were the subject of the Ranger Uranium Mining agreement had ceased to be current or controversial. In short, there were no 'exceptional circumstances' in the Northern Land Council case justifying disclosure to the court. Their Honours concluded by noting their disapproval of a procedure whereby private inspection is allowed by the lawyers of one of the parties before a court itself inspects the documents. Toohey J delivered a dissenting judgment. See also *Deputy Commissioner of Taxation v England* (1998) 40 ATR 34; 24 FCR 576.

#### 4 Inspection and Criminal Cases

[6.4.1] In *Alister v R* (1983) 154 CLR 404, the High Court recognised that inspection of documents for which public interest immunity is claimed will often be of assistance to the court, especially in criminal cases, in deciding whether the documents have such an important bearing on the ultimate decision that they outweigh the public interest in suppression. In that case, the Attorney-General for the Commonwealth filed an affidavit claiming that disclosure of a class of documents held by ASIO, if the documents existed, would be damaging to national security. The High Court rejected each of the grounds asserted in the affidavit and made an order for inspection of the documents.

[6.4.2] The facts of *Alister's* case were as follows: Alister and two others, who were all members of the Ananda Marga sect, conspired to murder one Cameron, the leader of the National Front, on 15 June 1978 by exploding a bomb near Cameron's house. The prosecution case relied on the evidence of Seary, a police informer who had pretended to join the conspiracy of the Ananda Marga sect in February, 1978. The defence challenged the Crown case as a 'fabrication and a frame up' (per Gibbs CJ at 415) and, in order to



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There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done: 142 CLR 1 at 38.

Fourth, the High Court categorically rejected the view that there are classes of documents (such as Cabinet documents) which may be automatically suppressed in the public interest: see Gibbs ACJ at 41-4.

[6.3.3] On the facts of *Sankey v Whitlam*, the High Court held that there were special circumstances justifying production flowing from the 'unusual character' of the proceedings which involved criminal charges against a former Prime Minister and three members of his Ministry relating to their conduct in office. The special circumstances included the need for Sankey to duly present his case (per Gibbs ACJ at 46-7), the fact that the matters were three years old and hence could not be called 'current' governmental activities (per Gibbs ACJ at 46), the fact that the due administration of justice would in no way be unnecessarily impeded given that the defendants held high offices and the charges were of a serious nature (per Stephen J at 56), and the fact that suppression of the documents in the public interest would most likely lead to a dismissal of the charges against the defendants: per Stephen J at 56.

[6.3.4] *Sankey v Whitlam* should, however, today be read in the light of the more recent High Court case of *Commonwealth v Northern Land Council* (1993) 176 CLR 604. In that case the High Court reversed a Federal Court decision that inspection of 113 Cabinet notebooks and 13 other notebooks recording discussions in Cabinet should be granted to the legal advisers of the Northern Land Council upon their express undertaking not to disclose the documents to anyone, except with leave of the court. The facts of *Commonwealth v Northern Land Council* concerned a civil action by the Northern Land Council alleging that the Commonwealth had used duress, undue influence and breach of fiduciary duty in obtaining agreement from the Northern Land Council to the Ranger Uranium Mining Project. The Northern Land Council claimed a declaration that the agreement was void and it sought production for inspection of 113 Cabinet notebooks. The Commonwealth objected to production on the ground of public interest immunity. The matter eventually went to the High Court with the Commonwealth appealing against an order made by Jenkinson J to the effect that the lawyers of the Northern Land Council (but not Jenkinson J himself) could inspect the notebooks subject to an undertaking by them of non-disclosure.

[6.3.5] The High Court allowed the appeal by the Commonwealth and held (at 616) that documents recording the actual deliberations of Cabinet fall within a class of documents where there are strong considerations of public policy militating against disclosure regardless of their contents. Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ, in a single judgment, continued to endorse the importance of the court process of balancing competing public interests and they stressed (at 617-8) that even documents 'recording Cabinet deliberations upon current or controversial matters' do not enjoy absolute or automatic immunity from production. Yet, once it is

shake the credibility of Seary and to undermine the reliability of his evidence, Alister and the others sought production from ASIO of all documents relating to Seary, including any reports, if any, made by Seary to ASIO. An affidavit sworn by the then Attorney-General that it would be prejudicial to national security to reveal the ASIO documents or even to reveal whether they existed was filed and, as a result, the trial judge set aside the subpoena directing ASIO to produce the documents on the ground that the documents were privileged in the public interest.

[6.4.3] The matter ultimately went to the High Court on the issue of public interest immunity and the High Court held that the trial judge erred in setting aside the subpoena without first inspecting the documents. This was because, in all the circumstances of the case, the interest of the applicants (ie, of Alister and the others) in obtaining any report made by Seary to ASIO was not outweighed by the public interest that would ordinarily require investigations by ASIO to be kept secret: see per Gibbs CJ at 415.

[6.4.4] There are three important issues arising from *Alister's* case. First, the High Court reasserted the dominance of the courts over the executive government in determining claims to public interest immunity. No claim to public interest immunity by any responsible Minister or departmental head will result in absolute or automatic suppression of documents in the public interest, whether it is a 'class' or a contents claim: see per Gibbs CJ at 412.

[6.4.5] Second, the High Court made it clear that although affidavits by the responsible Minister of the Crown or departmental head will never be conclusive, carefully drafted affidavits are still highly desirable in support of a claim to public interest immunity. The High Court reinforced its view from *Sankey v Whitlam* that affidavits claiming public interest immunity should state with precision the grounds on which it is claimed that the documents should not be produced, and vague or amorphous statements to the effect that suppression is necessary for the proper functioning of the executive government and of the public service are 'plainly unacceptable' now that the court must determine the issue of public interest immunity for itself: *Sankey v Whitlam* (1978) 142 CLR 1 per Mason J at 96-7. Accordingly, in *Alister's* case, the High Court rejected all the grounds for public interest immunity contained in the Attorney-General's affidavit describing them as far too wide, unsatisfactory, unconvincing and insupportable: (1983) 154 CLR 404 per Gibbs CJ at 412-13, per Brennan J at 452-3, 456-7.

[6.4.6] It should also be noted that the affidavit should state whether the deponent has inspected the documents for which the claim is made. If, eg, the claim is a 'contents' claim to public interest immunity, it would be imperative that the deponent should have seen the contents before he or she attests to the need for the document's suppression in the public interest. On the other hand, if the claim is a 'class' claim, the court may give less weight to a Minister's claim to public interest immunity where the Minister has not seen the documents in question, although it would obviously not be imperative that the Minister has looked at the actual documents in the case of a 'class' claim.

[6.4.7] Third, the High Court reinforced the important role of the court in balancing competing public interests and made it clear that inspection is a logically anterior stage to this balancing process: see per Gibbs CJ at 412. The High Court recognised that the question of inspection may vary according to whether the case is a civil or a criminal one. In civil cases, the judge must have some concrete ground for belief which takes the case beyond a mere fishing expedition before the judge decides to inspect. In contrast, in criminal cases, the courts should be more receptive to the question of curial inspection and should lower the civil standard of 'reasonable probability' where the accused seeks production: per Wilson and Dawson JJ at 439. The importance of the fact that the documents may assist the defence of an accused person is clearly a factor favouring inspection: see per Gibbs CJ 154 CLR 404 at 414. See also *Cutter v R* (1997) 143 ALR 498; *Eastman v R* (1997) 76 FCR 9; and *R v Sergi* [1998] 1 Qd R 536.

## 5 Extension of Public Interest Immunity — Lower Level Cases

[6.5.1] Apart from the obvious cases of 'high matters of state' where public interest immunity is claimed for such things as Cabinet documents, diplomatic despatches and documents containing matters crucial to national security (see, eg, *Duncan v Cammell, Laird & Co Ltd* [1942] AC 624; *Balfour v Foreign and Commonwealth Office* [1994] 2 All ER 588; and *Egan v Chadwick* (1999) 46 NSWLR 563), there has been an extension of the scope of public interest immunity to 'lower level cases' which are not so directly linked with the interests of government: see Cross and Tapper, *Cross on Evidence*, 9th ed, Butterworths, London, 1999, pp 486-7; McNicol, *Law of Privilege*, pp 412-7.

[6.5.2] In the leading decision of *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171, the House of Lords stated that the categories giving rise to public interest immunity are not closed and they may be extended by analogy and legitimate extrapolation from a known category of public interest exception. Accordingly, the House of Lords recognised a fresh category of public interest immunity in information about child abuse provided to organisations concerned with protection of children, and that this category of immunity was a legitimate extension of the immunity already given to informants to the police: see *Marks v Beyfus* (1890) 25 QBD 494; *Rogers v Home Secretary* [1973] AC 388; *R v Young* (1999) 46 NSWLR 681; and *R v Abdullah* (1999) (CCA(NSW), Spigelman CJ, Grove and Barr JJ, 7 July 1999, unreported).

[6.5.3] The facts of *D v National Society for the Prevention of Cruelty to Children* (NSPCC) were as follows. The Society received information about the alleged abuse of a 14-month old girl. An inspector of the Society visited the house of the parents of the child and found the complaint to be false. The mother of the child then sued the Society for damages for nervous shock as a result of the false complaint and the Society's negligence. The Society defended the action and claimed immunity from disclosure of any documents which revealed the identity of the informant. The Society's argument,

[6.5.6] Woodward J was the most prepared to extend the doctrine of public interest immunity. In relying on Lord Hailsham's view in *D v NSPCC*, that categories of public interest can be extended as social legislation develops, Woodward J stated:

It is my opinion that, in this country, a fresh category of public interest immunity should be recognised, covering secret and sacred Aboriginal information and beliefs. Just who should be entitled to invoke such a category need not be decided in the present case. But, given the basic public interest to be served, and the valuable task which the Authority is performing, I think it is entitled to whatever protection it may gain from the shield of public interest immunity: 10 FCR 104 at 114-15.

However, Bowen CJ and Woodward J both held that when this fresh category of public interest was weighed against the traditional public interest in disclosure of relevant material necessary for the trial, the latter public interest in disclosure prevailed.

## 6 Conclusion

[6.6.1] It is clear that the court must engage in a balancing exercise which involves, in each case, weighing the public interest that harm would be done by the production of the documents against the public interest that the administration of justice would be frustrated if the documents were withheld, and then deciding which of those public interests predominates. However, in order to undertake this balancing exercise fairly and effectively, the court must, in each case, first identify a clear category of public interest involving injury to the nation or the public service which requires suppression. Some examples of public interests requiring suppression, which are by no means exhaustive, are:

- the public interest that disclosure might damage national security, diplomacy or defence;
- the public interest that disclosure will harm or impede the proper functioning of government or the public service;
- the public interest that disclosure would be likely to lead to the drying up of sources of important and valuable information;
- the public interest that disclosure might impede effective police functioning and law enforcement;
- the public interest that disclosure would threaten the effective functioning of bodies protecting children's welfare;
- the public interest that disclosure may threaten the preservation of secret and sacred Aboriginal information and beliefs.

[6.6.2] The second task for the court, which is also essential for the effective undertaking of the balancing exercise, is to identify a clear public interest requiring disclosure. This involves the court being satisfied that there are likely to be documents which contain material evidence which is of evidential significance to the litigation. The public interest served by an open administration of justice demands that the court examine the evidentiary value, relevance and importance of the documents to the particular litigation. Here the public interest in disclosure will clearly be strengthened if the

which was ultimately successful in the House of Lords, was that the proper performance by the Society of its duties under its charter and the relevant statute required that absolute confidentiality of information given in confidence should be maintained, that if disclosure were ordered the Society's sources of information would dry up and that that would be contrary to the public interest.

[6.5.4] In recognising this fresh category of public interest in cases of confidentially reported information on child abuse (which public interest ultimately prevailed over the public interest in the administration of justice), the House of Lords also stressed that confidentiality is not a separate head of privilege. Hence, the fact that the Society gave private undertakings of confidentiality and guaranteed anonymity to their informants was not, of itself, a sufficient reason for protecting from disclosure the information or its source. Private promises of confidentiality must yield to the general public interest in the administration of justice, unless a more important public interest is found to be served by suppressing the information or the identity of the informant. The 'more important' public interest was found in that case in the general public interest of children's welfare and in the protection of confidential information supplied to a body whose purposes included the prevention of ill-treatment and abuse to children and which body was authorised by statute to take proceedings for the care of children. It was crucial to the House of Lords that sources of information to bodies of this type do not dry up and, hence, the law should guarantee immunity from disclosure of the identity of informants in legal proceedings in a similar manner to that which the law accords immunity to police informers. See also *Northern Territory v O* (1999) 196 CLR 553.

[6.5.5] A similar approach of recognising a fresh category of public interest immunity in a 'lower level case' was taken by Bowen CJ and Woodward J in *Aboriginal Sacred Sites Protection Authority v Maurice* (1986) 10 FCR 104. This case concerned a claim by the Authority for public interest immunity in respect of documents prepared by its employees and persons under contract to it (certain anthropologists, linguists and others) in relation to the Waramungu land claim to have sacred sites recorded under the Aboriginal Sacred Sites Act 1978 (NT). The Authority objected to the production of these documents on the ground that disclosure would be injurious to the public interest in that it would involve revelation of information conveyed in confidence by Aboriginal informants. The relevant public interest was said to be that of 'fostering a relationship between Aboriginal informants on the one hand, and the Authority and its agents on the other, in order to enable the Authority to effectively perform its functions': (1986) 10 FCR 104 at 112. Bowen CJ and Woodward J held that public interest immunity could be claimed by the Authority in respect of the documents. However, they held that when the public interest in the suppression of the documents was weighed against the public interest in favour of disclosure, the balance was in favour of disclosure subject to restrictions. Toohey J, on the other hand, held that public interest immunity did not attach to the class of documents sought to be protected by the Authority.

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documents are required by an accused in a criminal trial, if the documents are critical to the case sought to be made by the applicant or if it is impossible to do justice at all without the documents. Once the court has identified a clear public interest in suppression and a clear public interest in disclosure, the balancing process can begin and the court must decide which public interest predominates in a given case.

**Note:** Students should refer to **Chapter 21, [21.3.25]–[21.3.26]**, for a discussion of how the Evidence Act 1995 (Cth) and the Evidence Act 1995 (NSW) affect the issues raised in this chapter.

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## CHAPTER THIRTEEN

## Conclusion

## CONCLUSION

This thesis has comprehensively analysed every form of privilege and explored the limits of and exceptions to privilege, including the situations where the privilege is lost by inadvertent disclosure and other forms of waiver. The textbook *The Law of Privilege* has explained and evaluated every form of privilege in eight chapters - nature of privilege, lawyer-client (legal professional privilege), doctor-patient (medical professional privilege), clergy-communicant, husband-wife (marital privilege), privilege against self-incrimination, without prejudice privilege and public interest immunity. The common law rules of privilege in each Australian jurisdiction as well as the statutory privileges created by the State and Territory Evidence Acts and the changes brought about by the "uniform" evidence legislation - the Evidence Act 1995 (Cth) and the Evidence Act 1995 (NSW) have been analysed in the chapters in this binder. In particular, in Part 3.10 of both these Acts, a statutory "client legal privilege" was introduced to apply in the courtroom and to replace legal professional privilege,<sup>1</sup> a modified form of the privilege against self incrimination was preserved<sup>2</sup> and new formulations of the clergy communicant privilege<sup>3</sup> and the without prejudice privilege<sup>4</sup> (called "settlement negotiations privilege") have been provided for. These changes which have been effected by the Evidence Acts 1995 (Cth) and (NSW) have been explored and evaluated in Chapters Six, Seven and Nine.

Whilst every form of privilege has been dealt with in the thesis, there has been a particular emphasis on the common law doctrine of legal professional privilege. In particular, changes to the doctrine of legal professional privilege over the last decade have been focussed upon. For example, in 1999, the High Court decision of *Eso Australia Resources Ltd v Federal Commissioner of Taxation*<sup>5</sup> abolished the sole purpose test for legal professional privilege and replaced it with a dominant purpose test and the case of *Mann v Carnell*<sup>6</sup> replaced a fairness test

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<sup>1</sup> ss 118-126

<sup>2</sup> s 128

<sup>3</sup> s 127

<sup>4</sup> s 131

<sup>5</sup> (1999) 168 ALR 123

<sup>6</sup> (1999) 168 ALR 86



for waiver of privilege with an inconsistency test. *Esso* also circumscribed the operation of the uniform legislation in relation to interlocutory proceedings. The High Court has now also allowed, in certain situations, for privilege to apply to copies of non-privileged documents in *Commissioner, Australian Federal Police v Propend Finance Pty Ltd*<sup>7</sup> These changes brought about by *Esso's* case were explored and evaluated in Chapter Ten and Part A of Chapter Twelve and the further changes of *Mann v Carnell* and *Propend's* case were discussed in Part A of Chapter Twelve. In the case of *Baker v Campbell*<sup>8</sup> (which was discussed in *The Law of Privilege*) the High Court held that legal professional privilege is not merely a rule of evidence applicable in judicial and quasi-judicial proceedings but a fundamental principle of the common law capable of applying to all forms of compulsory disclosure. At the time Brennan J (as he then was) in a powerful dissenting judgement predicted insuperable pragmatic obstacles with extending legal professional privilege to the non-curial arena. Brennan CJ reiterated this view some 14 years later in *Propend's* case<sup>9</sup>. Some of these insuperable pragmatic obstacles which have come to fruition were discussed in Chapter Eight. In addition, new sub-categories of legal professional privilege have emerged in the form of joint privilege and common interest privilege. These new extensions of the doctrine of legal professional privilege were explored and evaluated in Chapter Five.

The thesis has drawn together all the important areas of privilege law and has argued that judges, lawmakers and others involved in the application of privilege should be always cognisant of the particular rationale for the privilege in question. In relation to the most important common law privilege, that is, legal professional privilege, it has been suggested that the growth of the privilege may be unjustified, particularly in those areas where the courts loses sight of the traditional instrumental rationale for the privilege and have concentrated on other interests, such as the need to have the same test for privilege applying prior to the trial as at the trial<sup>10</sup> or the more recently formulated human rights rationale for the privilege. It is argued that if this is done, there would be much less justification for the common law's jealous protection of the privilege and for its refusal to recognise further exceptions to it.<sup>11</sup> In the case of all forms of privilege, the thesis

<sup>7</sup> (1997) 141 ALR 545

<sup>8</sup> (1983) 153 CLR 52

<sup>9</sup> Op. Cit. n.7

<sup>10</sup> See, for example, the change by the High Court from the sole purpose test to the dominant purpose test for legal professional privilege in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 168 ALR 123, discussed in Chapter 10.

<sup>11</sup> See, for example, the decision in *Carter v Managing Partner, Northmore, Hale Davy and Leake* (1995) 183 CLR 121 where the High Court refused to recognise an exception to

has argued that the competing interests in disclosure of evidence and information, particularly where the information is vital for the resolution of disputes, the ascertainment of facts and the determination of legal responsibility should be considered. This is so despite the fact that judges in commonwealth jurisdictions have tended to treat privilege (and particularly legal professional privilege) as absolute in the sense that there is nothing left to be balanced because privilege is already the result of a balancing exercise.

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legal professional privilege in criminal cases where the information or documents would tend to establish the innocence of an accused person. This is dealt with in Chapter Twelve, Part A.