

CONTINUING LEGAL EDUCATION SERIES
21 November 2006 (updated 12 March 2008)

WAIVER OF LEGAL PROFESSIONAL PRIVILEGE

Introduction

1. The unplanned waiver of Legal Professional Privilege (LPP) can be attended by three consequences for a legal practitioner:
 - a. Prejudice to the client's position
 - b. Exposure to cross examination or adverse comment in the client's proceedings
 - c. As a result of the previous two consequences, exposure to claims by way of professional negligence.
2. It is therefore very desirable that practitioners have a clear understanding of the circumstances which may give rise to waiver of LPP.

The rules that apply

3. The common law of LPP applies in the federal courts in pre trial processes such as discovery, notices to produce and subpoenas.¹
4. When adducing evidence in NSW and federal courts and in pretrial processes in NSW courts different questions arise – with waiver governed by the Evidence Acts.

¹ *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49

5. I deal first with the common law position and then with the Evidence Act rules.

Legal professional privilege generally

6. Legal professional privilege (“LPP”) applies to confidential communications between a client and a legal adviser if made either for the dominant purpose of obtaining or giving legal advice or with reference to litigation that is actually taking place or is in the contemplation of the client.²
7. LPP is “an important common law immunity.”³
8. LPP attaches to communications of the relevant kind with all legal advisors, including in house counsel⁴ provided the in house lawyer retains professional independence despite his or her “in-house” capacity.
9. Whether an in house solicitor has the requisite independence is a question of fact to be decided having regard to all the circumstances including the terms and conditions of employment, the practical operation of the organizational unit in which the lawyer works, the participation of the lawyer in legal professional activities and whether he or she holds a practising certificate.⁵
10. The privilege will generally apply to records of confidential communications of the relevant kinds with both external and independent in house solicitors.

² For a comprehensive discussion of what is required to establish a claim of LPP see *AWB Ltd v Cole (No 5)* [2006] FCA 1234

³ *Daniels Corporation v ACCC* (2002) 213 CLR 543

⁴ *Waterford v Commonwealth* (1987) 163 CLR 54 at 63-4, 74-5

⁵ *Commonwealth of Australia and Chief of Air Force v Russell Vance* ⁵ [2005] ACTCA 35

Waiver at common law -General

11. In *Mann v Carnell*⁶ the High Court articulated the principle for determining

whether a waiver of LPP occurs:

Legal professional privilege exists to protect the confidentiality of communications between lawyer and client. It is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement. It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege....

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

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.⁷ [emphasis added]

12. The background to *Mann v Carnell* perhaps says more about the nature of

law and politics in the ACT than about the issues decided in the case. Dr

Mann, a surgeon, had what was essentially an employment dispute with

the operator of Canberra's public hospital. *Mann v Carnell* was the third

matter to emerge from that dispute to be decided by the High Court.⁸ The

communication in dispute in *Mann v Carnell* was advice which informed

the government's decision to compromise the claim which had been dealt

with in the first of those High Court decisions.

13. Dr Mann complained to a member of the Legislative Assembly about the

conduct of the government in the litigation and the member passed the

complaint on to the Chief Minister. There was a practice within the

Legislative Assembly whereby members would respect the confidentiality

of government communications. The Chief Minister sent to the member in

confidence copies of documents containing legal advice about the litigation

⁶ (1999) 201 CLR 1

⁷ At 201 CLR 13

⁸ The other two are *Mann v O'Neill* 191 CLR 204 and *Mann v Capital Territory Health Commission* 148 CLR 97

to enable him to consider the reasons for the conduct. The member then returned the copies to the Chief Minister but retained the covering letter a copy of which he sent to the litigant.

14. The *Mann v Carnell* test of “inconsistency” applies to both of the old categories of “issue waiver” and “disclosure waiver.”
15. “Disclosure waiver” arises in circumstances where some part of a privileged communication has been disclosed. “Issue waiver” arises where the holder of the privilege has “put in issue” the contents of the confidential communication and thereby waived privilege in it.
16. The recent decision of the Full Court of the Federal Court in *Commissioner of Taxation v Rio Tinto Ltd*⁹ has amplified our understanding of the test in *Mann v Carnell*:
 - a. In every case the inquiry is a fact based inquiry
 - b. The inquiry focuses on the acts or omissions of the privilege holder¹⁰
 - c. Other decided cases are of assistance only to the extent that their facts are analogous – and even then do not provide a basis for substituting any legal principle for the overall test of “inconsistency”¹¹
 - d. While categories of cases are a useful means of thinking about the operation of the rule, there is no separate or different rule for cases of disclosure compared to cases of issue waiver.
17. With these cautions in mind I now turn to consider the categories of disclosure and issue waiver.

Disclosure waiver at common law

⁹ (2006) 151 FCR 341

¹⁰ 151 FCR at 354 [45]

¹¹ 151 FCR at 354 [46] – [47]

18. A number of issues arise in the context of disclosure waiver including:
- a. Whether there has been disclosure of the “*substance of the legal advice*”
 - b. The relevance of the purpose for which the disclosure is made
 - c. Whether inadvertence plays a part.

Substance of the advice

19. In order for there to be a disclosure of a privileged communication, the substance of that communication must be disclosed. A mere reference to the advice is not enough.¹²

20. Whether the “substance” will have been disclosed is very much a case by case question.

21. In *Bennett v Chief Executive Officer of the Australian Customs Service*¹³ a majority of the Full Court of the Federal Court found waiver in advice, provided by AGS to Customs. AGS sent a letter to Mr Bennett’s solicitors which stated that AGS had advised Customs and set out the effect of the advice said to have been provided. It was apparent from the letter that the purpose of it was to encourage Mr Bennett and his advisers to consider the apparent strength of Custom’s legal position. The majority rejected a contention that disclosure of the conclusion did not waive privilege in the underlying reasoning. The sending of the letter waived the privilege in the advice to which it referred.

22. The result in *Bennett* compares with *Ampolex Ltd v Perpetual Trustee Company (Canberra) Ltd & Ors*¹⁴. In that case there were two entries in a report that were said to constitute a waiver. In the first, found by the court

¹²See *Attorney-General (N.T.) v. Maurice* (1986) 161 CLR 475 at 481 and 499

¹³ (2004) 210 ALR 220

¹⁴ (1996) 40 NSWLR 12

to be a waiver, the relevant disclosure referred to a formula and stated that Ampolex “had legal advice supporting this position.” Rolfe J held that the reference disclosed the “essence or vital part of the advice.” By contrast the other reference contained a disclosure of views which were said to “have regard to” certain legal advice. This reference was to the client’s dealing with the advice and did not necessarily disclose the contents of the advice. Therefore it did not amount to a waiver.

23. To similar effect, in *Temwood Holdings Pty Ltd -v- Western Australian Planning Commission*¹⁵, disclosure of a position which was said to have been “based on legal advice” was also found not to be a waiver.

24. At trial in *Rio Tinto Ltd v Commissioner of Taxation*¹⁶, Sundberg J cited *Bennett* and found a disclosure waiver (and an issue waiver).

25. *Rio Tinto* concerned two issues:

- a. whether the Tax Commissioner “was satisfied” about certain matters;
and
- b. whether the Commissioner had properly exercised a statutory discretion.

26. The Commissioner had produced an audit report in answer to a notice to produce and to an application under the *Freedom of Information Act 1982* which stated:

- i) “The Commissioner will be relying on the following grounds which have been confirmed by senior Tax Counsel (Mr John Evans) and supported by AGS (Mr Jonathan Todd) and opinions obtained from Counsel.....

27. The Court found that that report disclosed Mr Evans’ and Mr Todd’s

conclusions and therefore found that the Report disclosed the “gist” or “substance” of the advice. The Full Court decision in *Bennett*

¹⁵ [2003] WASCA 112

¹⁶ [2005] FCA 1336

demonstrated that disclosure of the conclusion reached can waive privilege in the communication of the reasoning.

28. Against this is the other recent case of *Nine Films & Television Pty Ltd v Ninox Television Ltd*.¹⁷

29. In *Ninox*, there was a reference to an entity moving forward “based on” a particular piece of legal advice. That did not constitute disclosure of the substance of the advice.

30. These cases highlight that where a disclosure refers directly to the conclusion of legal advice there is a high risk of a finding that the disclosure is inconsistent with, and therefore waives, the privilege.

31. However, where the disclosure is of a conclusion drawn by the client having “taken into account” legal advice or “based on” legal advice the mere disclosure is unlikely to constitute a waiver (although such a statement may be inconsistent with the continuance of the privilege by reason of issues considered under “issue waiver”)

Purpose is relevant

32. *Mann v Carnell* highlights the central relevance of purpose. It demonstrates that not all disclosures (even of the whole of the advice) waive privilege. In assessing inconsistency between the privilege and a disclosure, purpose assists in defining the scope of the confidentiality of the lawyer client communication (and therefore of the privilege) and of the communication said to constitute a waiver. In *Mann v Carnell* the majority said: ¹⁸

¹⁷ [2005] FCA 356

¹⁸ 201 CLR at 15 [34]

The purpose of the privilege was to enable the Australian Capital Territory to seek and obtain legal advice, in relation to the litigation which Dr Mann had instituted, without the apprehension of being prejudiced by subsequent disclosure of that advice. That included, and perhaps included above all, subsequent disclosure to Dr Mann. If [the member of the Legislative Assembly] had been given copies of the legal report and advice given to the Territory in relation to the proceedings brought by the appellant upon the basis that he was at liberty to show them to the appellant (even if to nobody else), that would have waived the privilege, because it would have been inconsistent with the confidentiality protected by the privilege.

33. *Bennett* was decided the other way – because of the purpose of the communication which constituted the waiver. Tamberlin J said:

[5] In the present case it is evident from the letter of 28 September 1999, which was written by the Australian Government Solicitor to the solicitors for Mr Peter Bennett that the substance of the advice for the Australian Government Solicitor was conveyed in a context which did not attract an obligation of confidentiality in relation to the letter. It is apparent that the substance and effect of the advice was being communicated in order to emphasise and promote the strength and substance of the case to be made against Mr Bennett...

[6] The above extracts express the substance of the advice that was given by the Australian Government Solicitor in each of the paragraphs. In my view, it would be inconsistent and unfair, having disclosed and used the substance of the advice in this way, to now seek to maintain privilege in respect of the relevant parts of that advice which pertain to the expressed conclusion.

34. Gyles J stated¹⁹:

[68]The authorities to which I have referred show that it is well established that for a client to deploy the substance or effect of legal advice for forensic or commercial purposes is inconsistent with the maintenance of the confidentiality that attracts legal professional privilege.

Inadvertence

35. Prior to *Mann v Carnell*, it had been held in a number of cases that where a litigant is bound to provide discovery and mistakenly includes a

¹⁹ At [68]

privileged document in its list of documents, the privilege which would otherwise attach to the document was not necessarily waived.²⁰

36. While those cases were reasoned from the old test of “fairness” there is no difficulty coming to the same conclusion by applying the test of inconsistency.

37. In *FKP Constructions v Smith*²¹ Gzell J decided there was no inconsistency between the inadvertent inclusion of the documents in the accelerated production ordered by the court in that case and the maintenance of the privilege.

Issue Waiver – common law

38. LPP may be waived where the content of a confidential communication is put in issue in a proceeding by the party entitled to the privilege.

39. In *Rio Tinto* the Commissioner was obliged to provide particulars of the matters taken into account by the Commissioner’s delegate in reaching the statutorily required state of satisfaction that was in issue in those proceedings.

40. The Commissioner responded by saying that the matters were evidenced in a number of documents which he listed. The list included the legal advice in which privilege was claimed.

41. The Full Court concluded that by responding in that manner the Commissioner put in issue the contents of the documents – and that that was inconsistent with the continuance of the privilege.

42. It was important to that conclusion that the Commissioner could have responded by listing the matters (which happened to also be listed in those

²⁰ *Hooker Corporation –v- Darling Harbourside* (1987) 9 NSWLR 538; *Woolhara MC v Westpac Banking Corp* (1994) 33 NSWLR 529 at 539; *BT Australasia v NSW* (1998) 154 ALR 202 at 208

²¹ [\[2005\] NSWSC 126](#)

documents) which the Commissioner said had been taken into account.

That would not have waived the privilege. Thus the Commissioner, by his voluntary act “put the contents of the otherwise privileged communication in issue.”²²

43. The Court undertook a comprehensive review of the case law in the area and stated the principle to be derived²³:

where issue or implied waiver is made out, the privilege holder has expressly or impliedly made an assertion about the contents of an otherwise privileged communication for the purpose of mounting a case or substantiating a defence.

44. Where a party alleges undue influence the party puts in issue not only his or her state of mind, but the factors which brought about that state of mind. By making the allegation the party puts in issue the content of any advice received on the question.

45. A party, who alleges negligence against a lawyer, or a failure of a lawyer to provide accurate advice, puts in issue the totality of the relevant communications with the lawyer.²⁴

46. A party which alleges that it relied on a precontractual representation in entering into the contract *might* thereby put in issue the legal advice which it has received on that contract. In *Telstra Corp Ltd & Anor v BT Australasia Pty Ltd* Branson & Lehane JJ said:²⁵

Where, as in this case, a party pleads that he or she undertook certain action “*in reliance on*” a particular representation made by another, he or she opens up as an element of his or her cause of action, the issue of his or her state of mind at the time that he or she undertook such action. The court will be required to determine what was the factor, or what were factors, which influenced the mind of the party so as to induce him or her to act in that way. That is, the party puts in issue in the proceeding a matter which can not fairly be assessed without examination of relevant legal advice, if any, received by that party. In such circumstances, the party, by putting in contest the issue of his or her reliance, is

²² 151 FCR at 356 [52]

²³ 151 FCR at 356 [52]

²⁴ *Thomason v Campbelltown Municipal Services* (1939) 39 SR(NSW) 347; *Benecke v National Australia Bank* (1935) 35 NSWLR 110

²⁵ (1998) 85 FCR 152 at 166 - 167

to be taken as having consented to the use of relevant privileged material, or to put it another way, to have waived reliance on the privilege which such material would otherwise attract.

Within that framework, the conduct of a party which leads to the implication of consent to the use of otherwise privileged material, or to an implied waiver of such privilege, in undue influence cases, legal professional negligence cases and, in my view, the "*state of mind*" cases, is that of raising for determination in legal proceedings, as an element in the cause of action relied upon, an issue incapable of fair resolution without reference to that material.

47. In *Rio Tinto* the Court emphasised that *Telstra* did not establish a principle that whenever a party alleged reliance on a representation it necessarily put in issue the content of legal advice it had received on the question.

Telstra:

*did not say that privilege would be waived in relation to advice that may only have played a part in the formation of a state of mind relevant to an issue in the proceedings.*²⁶

48. ***That is consistent with Seven Network Limited v News Limited, one of the many interlocutory decisions in the C7 litigation where a pleading of reliance was found not to constitute a waiver***²⁷

49. ***In the Seven case, Seven pleaded reliance on representations alleged to have been made prior to the entry into certain agreements.***

Sackville J found that the mere pleading of reliance does not result in waiver. Instead, the Court takes a number of factors into account including:

- a. the centrality to the proceeding of the issue to which the privileged communication is said to relate; [or to restate the issue in line with the formulation in *Rio Tinto* is the state of mind in issue in the proceedings or is the state of mind merely relevant to a fact which in turn is in issue in the proceedings?]
- b. the likelihood that legal advice played a significant part in the foundation of that state of mind;

²⁶ (2006) 151 FCR 341 at 358 [56]

²⁷ [2005] FCA 1721

- c. any apparent inconsistency between the position taken by the party claiming privilege and the likely contents of the privileged communication.

Consideration in the context of a decision-maker relying on the advice

50. The application of the issue waiver principles to administrative decision making by government also raises the question of waiver when decision-makers refer to advices for the purposes of making judicially reviewable decisions.

51. In *Rio Tinto* the Court said:

Since the decision of the majority of the High Court in *Waterford* [v Commonwealth²⁸], it is plain enough that legal professional privilege may attach to communications brought into existence by government officers seeking or giving legal advice as to the nature and extent of governmental powers, whether statutory or otherwise: see *Waterford* at 63-64 per Mason and Wilson JJ and 74-75 per Brennan J. Even though such communications may contribute to the decision-making, the mere reference to this fact by a decision-maker in the course of defending a judicial review application or on a taxation appeal is not inconsistent with the maintenance of the privilege..... This is because the decision-maker (here the Commissioner) would not put such legal advice in issue merely by saying that the advice was relevant or contributed to his decision. There would be no issue waiver because the decision-maker would not have done anything inconsistent with the maintenance of privilege. The situation might be otherwise if the decision-maker puts the contents of the legal advice in issue by specifically relying on the contents of the advice (and not merely the fact of the advice) to vindicate his claimed state of satisfaction or exercise of discretion.

52. In *Rio Tinto* the Court did not refer to the decision of Lee J in the Federal Court in *Candacal Pty Ltd v Industry Research & Development Board*²⁹.

The case concerned a dispute over legal professional privilege in relation

²⁸ (1987) 163 CLR 54

²⁹ [2005] FCA 649 (24 May 2005)

to a decision to refuse registration of a syndicate under a scheme that provided tax incentives for research and development.

53. One argument was that an advice had been “incorporated” into an administrative decision thereby bringing about a waiver. Lee J said:

86 It may be assumed that the advice referred to and relied upon by the Board was legal advice. The briefing paper prepared for the TCC meeting held on 25 June 2001 which recommended that registration of the syndicate “in respect of the 1993/94 year of income” be refused, indicated that legal advice to that effect had been obtained.

87 If that is so, it should be concluded that the Board incorporated that advice into the administrative decision it made and that proper understanding of the decision, and of the decision-making process undertaken by the Board, will depend upon examination of the advice relied upon. It follows as a matter of fairness that the Board could not purport to maintain a claim to client legal privilege in respect of that advice.

54. The approach of *Candacal* was either distinguished or not followed by Edmunds J in *New South Wales Council for Civil Liberties v Censorship Review Board*⁶⁰ who said:

If his Honour is to be understood as saying that the act of considering legal advice in the course of exercising statutory power necessarily effects a waiver because the advice is taken to be ‘incorporated’ into the decision, it is inconsistent with the above authorities and cannot be accepted. There may be cases where a statutory decision-maker does some positive act to rely upon advice to support its decision (which is one possible construction of *Candacal*). Whether or not this would constitute a waiver is not material to the present case

55. An example of such a positive act is in *Australian Unity Health v Private Health Insurance Administration Council*.³¹

56. The case of *Australian Unity Health*³² involved an application for judicial review of an administrative decision. In reasons provided pursuant to s13 of the *Administrative Decisions (Judicial Review) 1977 (Cth) Act* certain legal advice was listed under the heading of “Evidence and Other Material

³⁰ [2006] FCA 1409

³¹ (1999) FCA 1770

³² [1999] FCA 177

on which Findings were Based.” Further, an affidavit filed in the proceedings exhibited a document stating that “legal advice supporting [the respondent’s] view of the rule has been received.”

57. Goldberg J held that the exhibited document (perhaps together with the statement of reasons) effected a disclosure waiver. His Honour said at [21]:

It seems to me that when it is established that part of the evidence or other material on which the finding was based was the letter of advice and that the letter of advice supports the respondent’s view of the rule, it can be said with some force that it is an issue in the case as to what activated or motivated the decision-maker, in circumstances where part of the material relied on was legal advice. For those reasons legal professional privileged cannot be claimed.

58. In *New South Wales Council for Civil Liberties v Censorship Review*

*Board*⁶³ Edmunds J held that the mere use of an advice by an independent statutory tribunal did not constitute a waiver, even where there was a party to the proceedings of the Tribunal who was not aware of the existence or content of the advice.

Waiver – Evidence Act

59. The key provision of the Evidence Act is s122. Its text is attached.

60. Questions that would be of issue waiver at common law fall largely to be determined under s122(1) which applies to “evidence given with the consent of the party concerned”.

61. Consent is not limited to express or expressed consent. (*Adelaide Steamship Ltd v Spalvins* (1998) 81 FCR 360)

62. However, whether consent extends to encompass the common law’s fairness test is the subject of conflicting authority. The full court in *Adelaide Steamship* held that it did not. In *Telstra Corporation Ltd v BT Australasia Pty Ltd* (1998) 85 FCR 152 the court held that in cases of issue waiver

³³ [2006] FCA 1409

arising from a party putting in issue in legal proceedings a question incapable of fair resolution without reference to the material, the common law test of fairness applied.

63. This will require consideration of questions such as:

- a. is reliance that is alleged central to the issue in dispute
- b. is it likely the party alleging reliance obtained legal advice that would bear on the allegation of reliance
- c. is it likely that the advice raises doubts as to allegations of reliance or damage? (*Chen v City Convenience Leasing Pty Ltd* [2005] NSWCA 297).

64. Questions of disclosure waiver probably fall to be determined under s122(2) to (5). (notwithstanding McDougall J applying the common law test to disclosure waiver in *Singapore Airlines v Sydney Airports Corporation* [2004] NSWSC 380).

65. The operation of those provisions raises numerous opaque issues.

66. Some things however are clear.

67. Disclosures between officers of the one corporation of advice to that corporation, in the context of the performance of those officers of their jobs for the corporation is not a disclosure. (*Seven Network Ltd v News Ltd* [2005] FCA 864)

68. There is room to argue that disclosures by a client or party are not “knowing and voluntary” for the purposes of s122(2) when they are affected by some sort of mistake. (*DPP v Kane* (1997) 140 FLR 468 – clerk in DPP’s office faxed documents to other side in error). Inadvertance or carelessness may be sufficient to avoid the waiver – but will need to be proved. (*Sovereign v Bevillesta* [2000] NSWSC 521).

69. S122 (2) and (4) provide for waiver where the “substance of the evidence” has been disclosed. Waiver occurs where sufficient of the privileged communication has been disclosed “to warrant loss of the privilege”. The test may have elements of quantity – whether enough of the communication – and quality – whether the substance or conclusion – has been disclosed.

70. It is clear that disclosures required by court orders and directions do not constitute a waiver under s122. (*Akins v Abigroup* (1998) 43 NSWLR 539)

Practical Steps to avoid waiver

71. Given the state of the case law a prescriptive or rules based approach is impossible. Accordingly the following merely represents some guidelines. It may sometimes be in a client’s interest to disclose the substance of an advice. However, if such an approach is to be taken, it should be done in an informed manner having regard to the likelihood of a waiver finding in the particular circumstances.

72. Having said this, the following represent some general guides if the risks of waiver of privilege are to be reduced:

- a. Avoid disclosing advices or extracts of advices
- b. If it is forensically necessary to refer to the conclusion of an advice, refer to the conclusion reached by the client having considered the advice, rather than to the conclusion reached by the lawyer
- c. Do not disclose documents/extracts of documents that refer to advices
- d. If reference is to be made to an advice such reference should only be in the most non-specific terms and again preferably by reference to the client’s conclusion rather than to what the lawyer said
- e. In court documents, avoid raising a party’s state of mind unless absolutely necessary

- f. When sufficient to establish the cause of action upon which you rely, avoid pleading reliance in general; and instead specifically plead the range of factors which lead the client to take the course of action said to have been induced (and avoid where possible including in that list legal advice).

Tom Brennan

12 March 2008

Evidence Act s122

Loss of client legal privilege: consent and related matters

(1) This Division does not prevent the adducing of evidence given with the consent of the client or party concerned.

(2) Subject to subsection (5), this Division does not prevent the adducing of evidence if a client or party has knowingly and voluntarily disclosed to another person the substance of the evidence and the disclosure was not made:

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

(b) as a result of duress or deception; or

(c) under compulsion of law; or

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

(3) Subsection (2) does not apply to a disclosure by a person who was, at the time, an employee or agent of a client or party or of a lawyer unless the employee or agent was authorised to make the disclosure.

(4) Subject to subsection (5), this Division does not prevent the adducing of evidence if the substance of the evidence has been disclosed with the express or implied consent of the client or party to another person other than:

(a) a lawyer acting for the client or party; or

(b) if the client or party is a body established by, or a person holding an office under, an Australian law—the Minister, or the Minister of the State or Territory, administering the law,

or the part of the law, under which the body is established or the office is held.

(5) Subsections (2) and (4) do not apply to:

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

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

(6) This Division does not prevent the adducing of evidence of a document that a witness has used to try to revive the witness's memory about a fact or opinion or has used as mentioned in section 32 (attempts to revive memory in court) or 33 (evidence given by police officers).