

NSW YOUNG LAWYERS
ANNUAL ONE DAY EVIDENCE ACT SEMINAR

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LOSS OF CLIENT LEGAL PRIVILEGE

Scope of Paper

This paper is concerned with the loss of client legal privilege, to use the language of the *Evidence Act* ss.121 to 126. The old common law term for loss of privilege was “waiver”.

Client Legal Privilege

Client legal privilege prevents the adducing of evidence (and the compulsory production of records in pre-trial processes such as discovery, subpoenas and notices to produce) in respect of both:

- (a) confidential communications; and
- (b) confidential documents.

In both cases of communications and documents the privilege protects both:

- (a) legal advice; and
- (b) communications in the context of litigation.

The legal advice privilege protects confidential communications made between a client and a lawyer; between two or more lawyers acting for the one client and the contents of a confidential document prepared either by the client or the lawyer.

In all cases the legal advice privilege only attaches where the communication occurred or the document was created for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.¹

The litigation privilege attaches to a communication between a client and any other person, or between a lawyer acting for the client and any other person and to any confidential document where the communication occurred or the document was

¹ Section 118.

prepared for the dominant purpose of the client being provided with professional legal services related to extant or anticipated litigation.²

It is important to bear in mind the scope and the limits of client legal privilege in applying the central tests for whether that privilege is lost – because as will be seen those central tests focus upon the inconsistency between the conduct of the client and the client's asserting the privilege.

Distinguish Loss of Privilege from Cases in which the Privilege Does not Exist

The limits on the scope of the privilege mean that in particular cases conduct of the lawyer or client will result in the privilege never arising. In those cases the onus of proof of the existence of the privilege will rest upon the party claiming the privilege – while in cases where the question is whether the privilege has been lost the onus rests on the party seeking to defeat the privilege.

For example where a solicitor provides advice to a client in conference in the presence of a third party, and the third party is not under an obligation to the client to keep confidential what is said, the client legal privilege will not be created. In such a case any communication which occurs is not confidential.

Similarly, if a lawyer emails advice to a client with a copy to a third party who is not obliged to keep that email confidential there will be no privilege in the communication evidenced by the email.³

Whether or not a witness statement attracts litigation privilege (without addressing the question of whether any privilege might be lost) highlights an important set of distinctions.

A document drafted by a lawyer consequent upon the proofing of a witness for use by the lawyer in preparing a case meets the description of a confidential document prepared for the dominant purpose of the client being provided with professional legal services.

² Section 119.

³ It may well be that privilege would be created and subsist in the email as a document and there may be a question as to whether the copying of the email to the third party results in a loss of the privilege in the document. However that is likely to be of little consequence in circumstances where the fact of the communication of the email and its contents was relevant.

However if, at the commencement of proofing the witness, the solicitor has offered to the witness that a copy of the proof document will be forwarded to the witness for the witnesses' records a substantial question arises whether the document when created is "a confidential document" and there may also be a question whether it meets the dominant purpose test.

Where a witness statement or affidavit is finalised for the purpose of tendering in open Court and disclosing to the other party (whether or not there are orders in place requiring the service of the affidavit), litigation privilege will not attach to the document from the time that it is finalised and signed. The privilege will attach where the statement is signed for the purpose of having it available in the event a decision is made at a later time to rely on the evidence of the witness.⁴

Further a copy of such finalised affidavit, maintained on the file of the solicitor for the client, would ordinarily attract litigation privilege. The copy document clearly enough is created for the dominant purpose of the provision of legal services in connection with litigation.⁵

Loss of Client Legal Privilege and Litigation Privilege

The principal provision for loss of client legal privilege and litigation privilege is s.122. It provides:

- (1) *This Division does not prevent the adducing of evidence given with the consent of the client or party concerned.*
- (2) *Subject to subsection (5), this Division does not prevent the adducing of evidence if the client or party concerned has acted in a way that is inconsistent with the client or party objecting to the adducing of the evidence because it would result in a disclosure of a kind referred to in section 118, 119 or 120.*
- (3) *Without limiting subsection (2), a client or party is taken to have so acted if:*
 - (a) *the client or party knowingly and voluntarily disclosed the substance of the evidence to another person; or*
 - (b) *the substance of the evidence has been disclosed with the express or implied consent of the client or party.*

⁴ *Clifford v Vegas Enterprises (No. 2)* (2010) 182 FCR 448 at 458 [58]; and *ACCC v Cadbury Schweppes Pty Ltd* (2009) 174 FCR 547 at [35] to [45].

⁵ *Clifford v Vegas Enterprises* at [61].

- (4) *The reference in paragraph (3)(a) to a knowing and voluntary disclosure does not include a reference to a disclosure by a person who was, at the time of the disclosure, an employee or agent of the client or party or of a lawyer of the client or party unless the employee or agent was authorised by the client, party or lawyer to make the disclosure.*
- (5) *A client or party is not taken to have acted in a manner inconsistent with the client or party objecting to the adducing of the evidence merely because:*
- (a) *the substance of the evidence has been disclosed:*
 - (i) *in the course of making a confidential communication or preparing a confidential document; or*
 - (ii) *as a result of duress or deception; or*
 - (iii) *under compulsion of law; or*
 - (iv) *if the client or party is a body established by, or a person holding an office under, an Australian law--to the Minister, or the Minister of the Commonwealth, the State or Territory, administering the law, or part of the law, under which the body is established or the office is held; or*
 - (b) *of a disclosure by a client to another person if the disclosure concerns a matter in relation to which the same lawyer is providing, or is to provide, professional legal services to both the client and the other person; or*
 - (c) *of a disclosure to a person with whom the client or party had, at the time of the disclosure, a common interest relating to the proceeding or an anticipated or pending proceeding in an Australian court or a foreign court.*
- (6) *This Division does not prevent the adducing of evidence of a document that a witness has used to try to revive the witness's memory about a fact or opinion or has used as mentioned in section 32 (Attempts to revive memory in court) or 33 (Evidence given by police officers).*

Background to the Section

The current version of s.122 commenced operation on 1 January 2009.

It was enacted following a joint review by the Australian and New South Wales Law Reform Commissions of the operation of the *Evidence Act*. Its enactment was directly informed by the reasoning of the majority of the High Court in *Mann v Carnell*.⁶

That case concerned the question whether common law privilege in advice on settlement of the dispute between Dr Mann and the ACT Government had been

⁶ Gleeson CJ, Gaudron, Gummow and Callinan JJ (1999) 201 CLR 1.

waived by the Chief Minister (Ms Carnell) providing a copy of the advice to another Member of the Parliament on a confidential basis for the purpose of demonstrating to that Member of Parliament that there was a proper basis to the Government's position in the litigation. Their Honours said:⁷

“What brings about the waiver is the inconsistency, which the Courts, where necessary informed by the consideration of fairness, perceive, between the conduct of the client in the maintenance of the confidentiality; not some overriding principle of fairness operating at large.”

Thus whether the question of waiver arose by reason of disclosure or by use the majority in *Mann v Carnell* articulated a test of inconsistency between the conduct of the client on the one hand and the maintenance of the confidentiality protected by the privilege on the other.

In assessing whether there was such inconsistency it was necessary to look at the purpose served by the privilege. In the case of *Mann v Carnell* the purpose was to keep the other side – Dr Mann- from knowing of the advice. There was no inconsistency because disclosure to an individual Member of Parliament on a confidential basis did not lead to any disclosure of the advice to Dr Mann; and did not lead to the advice being deployed or used in any way which could effect the conduct of the litigation.

Notwithstanding that overarching principle of inconsistency the cases which have followed make clear that it remains useful in considering waiver of common law privilege or loss of the *Evidence Act* privileges to analyse questions of disclosure separately from those of use.

Section 122 – Some General Comments

Subsection (1) remains in the same terms as it was prior to the 2009 amendments. However prior to those amendments the subsection was the part of the section which had most work to do. Because of the breadth of the new subsection (2) it is now the case that there is little work for subsection (1) to do. The one clear circumstance in which it operates is when evidence is adduced by or on behalf of the party otherwise

⁷ At [29].

entitled to the privilege. In that circumstance it undoubtedly operates to make clear that ss 118 and 119 do not prevent the adducing of such evidence.⁸

Subsection (2) probably applies the *Mann v Carnell* notion of inconsistency as the overarching principle for loss of client legal privilege under the Act. However subsection (3) goes further than *Mann v Carnell*. That is, privilege under the Act is lost if a client or party knowingly and voluntarily discloses the substance of the evidence to another person or the substance of the evidence has been disclosed with the express or implied consent of the client or party, whether or not such a disclosure would be found to be inconsistent with the privilege in the *Mann v Carnell* sense.

Loss of Privilege – Disclosure

Communications which are not disclosures

Disclosures to a Court are not to “another person” within the meaning of the provision.⁹

Similarly communication of advice provided to a corporate client on a confidential basis between the officers of that client is not disclosure.¹⁰

The mere fact that a record of interview with a potential witness is sent to the interviewee, solely for the purpose of being checked, and if need be corrected and then returned to the author, the interviewee not being entitled to retain a copy of the record of interview, does not amount to a disclosure for the purposes of the section. However if the witness statement were provided to the witness without the specification of a condition that it not be disclosed by the witness, there would be such a disclosure.¹¹

⁸ But see the discussion below concerning common interest privilege.

⁹ *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar* [2006] NSWCA 160 at [45].

¹⁰ *Seven Network Limited v News Limited* [2005] FCA 864 at [56].

¹¹ *Newcastle Wallsend Coal Co Pty Ltd v Court of Coal Mines Regulation* (1997) 42 NSWLR 351 at 389 per Powell JA, Meagher JA agreeing.

Is a disclosure “knowing and voluntary”?

Whether a disclosure when made is knowing and voluntary most often falls to be considered in the context of documents produced on discovery or subpoena which, at least at some later point, the producing party recognises to be privileged.

There is authority to the effect that once formal discovery and inspection has occurred disclosure of any document so discovered and inspected will be regarded as voluntary and knowing, even if it was produced by way of mistake.¹²

On the other hand there is authority that a disclosure will not be regarded as knowing and voluntary where everything indicates an intention to claim privilege in respect of the document and what has gone wrong is attributable to sheer inadvertence or carelessness, at least where the lawyer responsible for the production has given evidence to that effect.¹³

That line of authority was applied by Gyles J of the Federal Court to hold that at least in a case which had been prepared for trial on an expedited timetable and in which there was a very large volume of tendered documents, the facts of the provision as if on discovery of documents by one party to the other, the tender of those documents as part of an agreed eleven volume tender bundle and the reading of those documents by the opponent’s counsel did not constitute a knowing or voluntary disclosure.¹⁴

The cases can be reconciled as follows:

- (1) each case will turn upon its own facts;
- (2) when a document has been formally produced and inspected the starting point is that privilege is lost;
- (3) privilege may be sustained where there is clear evidence that the production of the document is wholly attributable to inadvertence or carelessness.

¹² *Meltend Pty Ltd v Restoration Clinics of Australia Pty Ltd* (1997) 75 FCR 511; *ASIC v Rich* [2004] NSWSC 934.

¹³ *Sovereign v Bevillesta* [2000] NSWSC 521 at [23].

¹⁴ *Unsworth v Tri Star Steering and Suspension Australia Limited* [2007] FCA 1081.

A similar approach seems to be indicated by the authorities on a failure to object to a question the answer to which is the disclosure of information otherwise privileged.¹⁵ Any such failure to object is likely, without evidence that that failure was due to inadvertence or carelessness, to result in a finding of knowing and voluntary disclosure, and loss of the privilege.

Is the “substance” of the communication or document disclosed?

A disclosure which results under s.122(3) in loss of the privilege is a disclosure of the “substance” of the communication or document.

Whether a disclosure results in the disclosure of the “substance” of a communication or a document is determined case by case.

The cases indicate the following:

- (a) disclosure that a client has taken legal advice; has considered that legal advice and has subsequently decided on a particular course does not disclose the substance of the advice;¹⁶
- (b) on the other hand to disclose that a client has taken legal advice, has considered that legal advice and consequently has taken a certain course creates a real risk, depending upon the detailed facts, of disclosing the effect of the advice. That may be sufficient to disclose its “substance”,¹⁷ and
- (c) to communicate to the other side in a litigious dispute that a party takes a particular view on an issue in dispute and has legal advice supporting that view discloses the substance of that advice, insofar as it deals with that issue.¹⁸

Disclosures which are inconsistent with the privilege

Where a disclosure does not lead to loss of privilege by reason of s.122(3) it may nevertheless result in a loss of privilege by reason of s.122(2). That is, if the disclosure in the circumstances is inconsistent with the maintenance of the privilege.

¹⁵ *Divall v Mifsud* [2005] NSWCA 447.

¹⁶ *NRMA Limited v Morgan (No. 2)* [1999] NSWSC 694 at [9].

¹⁷ *Adelaide Steam Ship Co Limited v Spalvins* (1999) 81 FCR 360.

¹⁸ *Ampolex Limited v Perpetual Trustee Company (Canberra) Limited* (1996) 40 NSWLR 12.

However in the application of s.122(2) in the case of disclosures much depends upon the particular purpose and effect of the particular disclosure.

Where the whole of a document is privileged because it is a confidential communication between legal advisor and client, if that client relies upon part of that document in making its case, and permitting that client to maintain the privilege in the rest of the document would otherwise be unfair, privilege in the whole of the document may well be lost.¹⁹

On the other hand recent authority applying the common law test of inconsistency without any extension of operation by reference to s.122(3) highlight that disclosure, by general publication, even of the substance of legal advice, is not necessarily inconsistent with maintaining the privilege. So, the publication of the substance of the advice received by a Minister by press release and of advice received by a Department by posting a statement on a Government website did not result in waiver where the publication did not result in any impact on a litigious dispute with the other party.²⁰

Loss of Privilege – Use

The clearest example of inconsistency in a *Mann v Carnell* sense is where a party in its pleadings directly raises the adequacy of legal advice received by it. Thus a party who institutes proceedings for professional negligence against its lawyer thereby loses the privilege in respect of all communications with that lawyer bearing upon the claim.²¹

Beyond that clearest of case the application of the inconsistency test depends upon the detailed assessments of the facts of each case.

The fineness of the distinctions is highlighted in *Commissioner of Taxation v Rio Tinto Limited* (2006) 151 FCR 341.

Where the Commissioner had merely referred to documents, in which privilege was claimed, in his particulars, there was no inconsistency and the privilege was sustained.

¹⁹ *Bailey v Department of Land and Water Conservation* (2009) 74 NSWLR 333 at [132].

²⁰ *Osland v Secretary, Department of Justice* (2008) 234 CLR 275; *British American Tobacco Australia Limited v Secretary, Department of Health and Aging* (2011) 195 FCR 123.

²¹ *Mann v Carnell* at [28].

But where the Commissioner alleged that in making the decision which was subject to review he had taken into account matters which were evidenced in documents in which the privilege was claimed, the privilege was lost. By asserting that the contents of those documents had been taken into account in the making of a decision subject to review the Commissioner had put in issue in the proceedings the content of those documents. In so doing, the conduct of the Commissioner was inconsistent with the maintenance of the privilege.

In the business context loss of privilege through use arises most commonly in misrepresentation, or misleading and deceptive conduct cases. In a typical case of purchase of a business, where the purchaser later alleges misrepresentation and reliance upon those misrepresentations, there is a significant risk that the purchaser thereby puts in issue whether he or she received legal advice and the adequacy of that legal advice.

If in the particular case the allegation goes further to put in issue the content of that legal advice, the privilege will be lost.

Whether there is a loss of privilege in such a case will depend upon the detailed facts. The centrality of allegations of misrepresentation and reliance to the party's claim; whether any legal advice is likely, given the nature of the particular alleged misrepresentations, to have had a bearing on the allegation of reliance and whether in the circumstances legal advice might have raised doubts as to the allegations of reliance, or as to any particular claim for damages will all be relevant to the assessment of whether the plaintiff's conduct is inconsistent with the maintenance of the privilege.²²

Common Interest Privilege

Joint Lawyer

Section 122(5)(b) provides that privilege will not be lost where disclosures occur in the context of professional legal services being provided both to the client and "another person".

²² *Chen v City Convenience Leasing Pty Ltd* [2005] NSWCA 297.

However each of those clients is free to adduce evidence of communications made by any of those clients to the lawyer or the contents of a confidential document prepared by or at the direction or request of any of those clients in connection with the matter in which the lawyer is retained without reference to any of those other clients (s.124).

The adducing of such evidence by one client would not however necessarily lead to the loss of privilege by any other of those clients. In particular the adducing of evidence by one such client is not of itself “conduct” of another of those clients capable of being inconsistent with the maintenance of the privilege in a *Mann v Carnell* sense.

Common interest

Section 122(5)(c) has the effect that privilege is not lost by reason of a disclosure to any person with whom the person entitled to the privilege, at the time of the disclosure, has a common interest relating to extant or anticipated litigation.

The section is not limited to circumstances in which the client and the other person are both parties to the proceedings. It extends to any circumstance in which the other person has a “common interest” in relation to the litigation.

A “common interest” can exist between an insured and insurer, between partners, or between a party to litigation and its funder. Whether that is the case depends upon a consideration of particular facts to determine whether in fact the interest of the party claiming the privilege and the other person are indeed common.²³

Where those interests are common, the fact of disclosure to the person with the common interest will not be sufficient to establish a loss of the privilege.

Practical Tips - Creation of the Privilege

If a third party is sitting in on any conference with a client commence the conference with the express discussion of the basis upon which the third party is there – that is that the conference is confidential and the third party must not disclose to anyone outside the room what is said.

²³ *Rickard Constructions Pty Limited v Rickard Hales Moretti Pty Limited* (2006) NSWSC 234 at [56].

Do not copy client communications to any third party, other than in cases where your client has expressly authorised that course. Ensure that there exists, prior to the sending of any such copy, a record that the third party has agreed with the client to keep any such communication confidential. Even then, consider whether there is the risk that the third party and the client will be involved in litigation with interests which are not common.

Avoid the engrossing of affidavits or witness statements until they are in a form in which, if they are required to be disclosed to the other side, difficulties will not be caused.

Practical Tips for Protecting the Privilege – Disclosure

The starting point for protecting the privilege is one of overall approach to delivery of advice or litigation services to your client. What you do and say in dealings with your client is your client's business and no-one else's. In dealings with the other side to a transaction or litigation, with experts or with any other party if you are minded to say something, orally or in writing, about your dealings with your client, pause. Give careful thought to whether there is another way of achieving the outcome you seek without mentioning those dealings.

For example in instructions to an expert, where you have drafted "we have advised our client that ...", strike it through and replace it with "please assume that ...".

Do not permit witnesses to retain copies of drafts of their statements or affidavits.

In finalising any affidavit, witness statement, or reply to subpoena or notice to produce, or in finalising the list of documents for discovery ensure that part of your review of documents is to consider the questions of both legal advice privilege and litigation privilege.

Where documents have been produced on discovery, subpoena or notice of motion, or attached to an affidavit or an exhibit to an affidavit do not assume that the privilege has necessarily been lost.

However where that production has occurred, and the other side has already inspected the documents you can expect that there is a high risk the privilege has been lost

unless there is clear evidence that the production was solely by reason of inadvertence or carelessness. Usually that evidence will need to come from the lawyer who was inadvertent or careless. This requires careful thought, including as to whether that lawyer can continue to act.

Even in brief interlocutory matters, if there is a prospect of your client being cross examined ensure that you have prepared by having clearly in mind the scope of any communications or documents in respect of which privilege might be claimed – so that you are in a position to take objection to any question the answer to which would require the disclosure of the content of any such communication or document.

Practical Tips for Protecting the Privilege – Use

Never make an allegation, by way of pleadings or particulars, which bears upon your client's state of mind without giving detailed consideration to whether the allegation may put in issue the content of any legal advice or litigation services which your client might have obtained.

Never make a submission to a Court which relies upon the content of advice received by your client, without considering whether, and to what extent, the substance of the submission puts in issue the content of the advice provided to the client.

Avoid instructing experts by reference to advice provided to the client or to advice obtained from counsel.