

DUTIES OWED TO CLIENT

LEGAL PROFESSIONAL PRIVILEGE

Certain communications arising out of lawyer-client relationship **are protected from compulsory disclosure** –

- Common law right – **fundamental**: *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR – **ACCC cannot use their investigatory powers to compel the production of privileged information** – DOES NOT override legal professional privilege.
- Is absolute and unqualified: *Carter v Managing Partner, Northmore Hale Davy & Leake* (1995)
- Extends to **ALL lawyers** even those not practising.
- Survives termination of the retainer: *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR.

Scope of Duty

- Clients **cannot contract** to extend scope of privilege: *Southern Cross Commodities Pty Ltd v Crinis* (1984);
- DOES NOT extend to protect communications **contrary to public interest**: *R v Bell* (1980) – e.g. for criminal or fraudulent purposes: *R v Cox & Railton* (1884).

S 125 Evidence Act – **EXCEPTION to Privilege**: Communication made in the **furtherance of the commission of a fraud** can be adduced; and a communication **made in the furtherance of a deliberate abuse of power** – **can be adduced** (NOT privileged information).

Evidence Act 2008 (Vic) SECT 125 – Exception to Professional Privilege

Loss of client legal privilege—misconduct

(1) This Division **does not prevent the adducing of evidence of—**

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

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

(2) For the purposes of this section, if the commission of the fraud, offence or act, or the abuse of power, is a fact in issue and there are reasonable grounds for finding that—

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

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

the court may find that the communication was so made or the document so prepared.

(1) In this section, "power" means a power conferred by or under an Australian law.

→ **Privilege belongs to CLIENT**: *Attorney-General (NT) v Maurice* (1986).

- Only the client can waive the privilege
- Does not DIE with the client: *Chant v Brown*;
- Survives termination of retainer
- Joint clients – privilege belongs to all clients so **all must waive**.

→ **Applies in respect of all forms of compulsory disclosure** – e.g. judicial process of search and seizure: *Baker v Campbell* (1983).

EA SECT 117

Definitions

(1) In this Division—

"**client**" includes the following—

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

- (b) an employee or agent of a client;
- (c) an employer of a lawyer if the employer is—
 - (i) the Commonwealth or a State or Territory; or
 - (ii) a body established by a law of the Commonwealth or a State or Territory;
- (d) if, under a law of a State or Territory relating to persons of unsound mind, a manager, committee or person (however described) is for the time being acting in respect of the person, estate or property of a client—a manager, committee or person so acting;
- (e) if a client has died—a personal representative of the client;
- (f) a successor to the rights and obligations of a client, being rights and obligations in respect of which a confidential communication was made;

"lawyer" means—

- (a) an Australian lawyer; and
- (b) a non-participant registered foreign lawyer; and
- (c) a foreign lawyer or a natural person who, under the law of a foreign country, is permitted to engage in legal practice in that country; and
- (d) an employee or agent of a lawyer referred to in paragraph (a), (b) or (c);

TYPES OF PRIVILEGE

- (1) **Advice Privilege** – confidential communications b./w the client and lawyer (either directly or through agent) and b/w the lawyer and TPs for the purpose of **giving/obtaining legal advice are protected**: *Somerville v ASC (1995)*.

S 118 EA protects evidence being adduced if the court finds that adducing the evidence would result in disclosure of a confidential communication for the **dominant purpose of the lawyer providing legal advice to the client**.

SECT 118

Legal advice

Evidence is **not to be adduced if**, on objection by a client, the court finds that adducing the evidence would result in disclosure of—

- (a) a confidential communication made between the client and a lawyer; or
- (b) a confidential communication made between 2 or more lawyers acting for the client; or
- (c) the contents of a confidential document (whether delivered or not) prepared by the client, lawyer or another person—

for the dominant purpose of the lawyer, or one or more of the lawyers, **providing legal advice to the client**.

- (2) **Litigation Privilege** – confidential communications made b/w lawyer and client or lawyer and TPs **for the purpose of use in existing or reasonably anticipated litigation are protected**: *ACCC v Aust Safeway Stores & Others (1998)*.

S 119 EA protects confidential communications **for the dominant purpose of the client being provided with professional legal services**.

SECT 119

Litigation

Evidence is **not to be adduced if**, on objection by a client, the court finds that adducing the evidence would result in disclosure of—

- (a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made; or
- (b) the contents of a confidential document (whether delivered or not) that was prepared—

for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.

- Litigation must be *more than a mere possibility*: *Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* (2002).
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Duty Begins:

- Even before beginning to gather evidence
- Carrying out investigations into events/facts of case **will NOT automatically** mean communications for the purpose under s 119: *Brunswick Hill Apartments Pty Ltd v CGU Insurance Ltd* (2010).
- Privilege applies to witness statements: *Sanko Steamship Co Ltd v Sumitomo Australia Ltd* (1992).

Communications with or From TPs

- **Agent of a client** – communications may be protected b/w agent and lawyer.
- **Agent of the lawyer** – communication is protected b/w agent and client: *Trade Practices Commission v Sterling*.

What is Privileged information?

Communications of a **confidential nature** from a lawyer to a client or vice versa touching the subject matter of the retainer are *prima facie* privileged: *Dalleagles Pty Ltd v Australian Securities Commission* (1991).

- Privilege does not extend to *all* communications made b/w a lawyer and a client
- **Requirement to be privileged**: needs to be for purpose of **ADVICE** or for purpose of **USE IN EXISTING OR REASONABLY ANTICIPATED LITIGATION**.

TEST – Elements:

(1) Be confidential: *Ritz Hotel Ltd v Charles of the Ritz Ltd (No 22)* (1988)

- Context and proposed use relevant
- Disclosing in present of third parties *may not* undermine the confidential nature of the communication and/or document: *Australian Rugby Union v Hospitality Group* (1999) 165 ALR 253; *Cf Gotha City v Sotheby's* (1998) 1 WLR 114.

"**confidential communication**" means a communication made in such circumstances that, when it was made—

- (a) the person who made it; or
- (b) the person to whom it was made—

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

"**confidential document**" means a document prepared in such circumstances that, when it was prepared—

- (a) the person who prepared it; or
- (b) the person for whom it was prepared—

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

(2) Be b/w a lawyer and a client – lawyer acting in professional capacity: *Trade Practices Commission v Sterling* (1979).

- Must be **fairly referable** to relationship: *Minter v Priest* (1930) 1 KB 655.
- Not privileged – unrelated to provision of legal services; communications made in social context;
- Communications b/w lawyer and *prospective clients* can be privileged: *Minter v Priest* (1930) – **where client believed retainer existed**.
- Privilege may arise where person is not actually a lawyer, up until client becomes aware of this fact: *Groffam Pty Ltd v ANZ Banking Group Ltd* (1993) 45 FCR 445;
- Normally denied to unrepresented individuals but not s 120 EA.

SECT 120

Unrepresented parties

(1) **Evidence is not to be adduced if**, on objection by a party who is not represented in the proceeding by a lawyer, the court finds that adducing the evidence would result in disclosure of—

- (a) a confidential communication between the party and another person; or
- (b) the contents of a confidential document (whether delivered or not) that was prepared, either by or at the direction or request of, the party—

for the dominant *purpose of preparing for or conducting the proceeding*.

(3) Meet the dominant purpose: *Eso Australia Resources Ltd v Commissioner of Taxation* (1999)

- Communications must have been made with the dominant purpose of legal advice or anticipated litigation;
- Onus on party claiming privilege: *Waterford Commonwealth* (1987) 163 CLR 54;
- Relevant time for determination **is at the time of the communication and/or creation of document**;
- Non-privileged information will be severed from privileged information if possible: *Actew Corporation Ltd v Mihaljevic* [2007].

Meaning of 'Communications' –

Covers oral, written and other communications (copies also privileged)

- Not if already previously in existence: *Commission of Inland Revenue v West-Walker* (1954);
- Copies of original *privileged* document will also be privileged: *Commissioner, Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501.
 - Copies of non-privileged documents will be privileged if made for purposes obtaining advice or use in anticipated litigation: *Propend*.
- Attachments to privileged documents **not automatically privileged**: *Brooks v Medical Defence Association of Western Australia* (1999) 94 FCR 164.
- A detailed bill of costs may be privileged: *Chant v Brown* (1849) 68 ER 32.

Is NOT normally:

- ❖ Instructions to a lawyer to do a particular thing: *Federal Commissioner of Taxation v Coombes* (1999) 92 FCR 240.
- ❖ The identity of the client: *Bursill v Tanner* (1885) 16 QBD 1;
- ❖ The address of the client – may be confidential
- ❖ Trust account records: *Marsden v Amalgamated Television Services Pty Ltd* (1999) NSWSC 1254;
- ❖ Documents that are evidence of a transaction: *Dalleagles Pty Ltd v Australia Securities Commission* (1991) 4 WAR 325;
- ❖ Disclosure of conclusion of legal advice and its substance and effect means relevant parts of advice not privileged: *Bennett v Chief Executive Officer, Australian Customs Services* (2003) 140 FCR 101.
- ❖ Statement that action was undertaken on the basis of legal advice: *Temwood Holdings Pty Ltd v Western Australian Planning Commission* (2003) WASCA 112.

ABROGATION OF PRIVILEGE BY STATUTE

Must be done by way of clear and unambiguous terms: *Baker v Campbell* (1983) 153 CLR 52.

- May be express words or by necessary implication
- Implication follows from express words
- Example – **s 466 Uniform Law** overriding privilege in relation to trust record examinations, investigations and compliance audits (pursuant to **s 370 UL**).

If clearly ousted, will be for limited purpose/to limited extent: *Southern Equities Corp Ltd v Arthur Anderson & Co* (1997) 70 SASR 166.

WAIVER OF THE PRIVILEGE

Can only be done by the **client as the owner of the privilege**: *Mann v Carnell* (2000); **s 122 EA**.

SECT 124

Loss of client legal privilege—joint clients

(1) This section only applies to a civil proceeding in connection with which 2 or more parties have, before the commencement of the proceeding, jointly retained a lawyer in relation to the same matter.

(2) This Division does not prevent one of those parties from 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 or at the direction or request of any one of them—

in connection with that matter.

- If **joint clients** – must all waive: *Farrow Mortgage Services Ltd v Webb* (1936).
- **S 124 EA EXCEPTION Joint Clients** – allows evidence to be adduced of a communication made by one of the clients to the lawyer or the contents of a confidential document prepared by or at the direction of request of any one of them.

Can be done expressly or impliedly from the circumstances:

- Waiver of part of document is *generally* a waiver of entire document: *Prus-Grzybowski v Everingham* (1986) 87 FLR 186;
- Waiver of associated documents will depend on what is fair in conduct of trial: *Prus-Grzybowski v Everingham* (1986) 87 FLR 186;
- **Implied waiver** where conduct is inconsistent with maintenance of confidentiality: *Mann v Carnell* – it being unfair to the opponent to maintain the privilege. – e.g. client knowingly and voluntarily discloses it themselves: *Evidence Act s 122(3)*.

Overhearing by a third party will **NOT amount to a waiver** where client and lawyer have sought to keep information confidential: *R v Uljee* [1982].

- Disclosure DOES NOT necessarily waive privilege where it is inadvertent: *Great Insurance Co v Home Insurance CO* [1981] 1 WLR 529.
- Disclosure to third parties such as accountants, expert witnesses, confidants, etc. generally does not result in loss of privilege.

SCR Rule 31: Inadvertent Disclosure (NO WAIVER)

31.1 Unless otherwise permitted or compelled by law, a solicitor to whom material known or reasonably suspected to be confidential is disclosed by another solicitor, or by some other person and who is aware that the disclosure was inadvertent **must not use the material and must:**

- **31.1.1:** return, destroy or delete the material (as appropriate) immediately upon becoming aware that disclosure was inadvertent; and
- **31.1.2:** notify the other solicitor or the other person of the disclosure and the steps taken to prevent inappropriate misuse of the material.

31.2 A solicitor who reads part or all of the confidential material before becoming aware of its confidential status must:

- **31.2.1:** notify the opposing solicitor or the other person immediately; and
- **31.2.2:** not read any more of the material.

31.3 If a solicitor is instructed by a client to read confidential material received in error, the solicitor **must refuse to do so**.

PRIVILEGE IN THE AID OF SETTLEMENT

Admissions contained in correspondent b/w litigants made **bona fide for the purpose** of settling their dispute are excluded from admissibility into evidence: *Field v Commissioner for Railways for NSW* (1957).

REQUIREMENTS –

- Must be in a **dispute** b/w the parties at the time of the communication, whether or not proceedings have been commenced (but must be contemplated: *Rodgers v Rodgers* (1964) 114 CLR 608).
- Express or implied **admissions** in correspondence must be made *bona fide* for purpose of achieving a settlement: *Field v Commissioner for Railways for NSW* (1957);
- **Connection b/w admission and settlement of dispute:**
 - ‘**Without prejudice**’ not sufficient, though raises presumption: *Smith v Gould (Ruling No 1)* [2012] VSC 210.
 - **Test** – what was the intention of the author (objective) and how would a reasonable recipient understand it? *Schering Corporation v Cipla Ltd* [2005] FSR 25.

SECT 131

Exclusion of evidence of settlement negotiations

(1) *Evidence is not to be adduced of—*

(a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute; or

(b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.

EXCEPTIONS TO WITHOUT PREJUDICE PRIVILEGE

If settlement is reached, communications will be evidence of settlement and its terms, but privilege will otherwise remain: *First Capital Partners Pty Ltd v Sylvatech Ltd* (2004) 186 FLR 266; **s 136(2)(e); (f)**.

Additionally, numerous exceptions listed in **s 131(2) EA** –

- Where privilege is waived by the litigant: *Avonwick Holdings Ltd v Webinvest Ltd* [2014] – **s 131(2)(a); (b)**;
- Where ‘without prejudice’ nature of discussions used as a cover for improper behaviour – **s 131(2)(g); (j); (k)**;
- ‘Calderbank offers’ – i.e. without prejudice communications considered in determining costs – **s 131(2)(h)** – **relevant if matter goes to trial**.

OTHER DUTIES

Duty to Promote Quality Client Care

SCR Rule 7 – Must:

- Provide clear and timely advice to help client understand issues;
- Make informed decisions; and
- Advise on alternative dispute resolutions options

Must also be honest and courteous: **Rule 4.1.2 SCR**.

Duty to Promote Access to Justice: should not prohibit access to justice by e.g. high fees;

Duty to Encourage Settlement: main responsibility of legal practitioner in contentious matter is to achieve an efficient and effective resolution.

- As above, must advise client on ADR options
- Should aim to settle matters out of court – note obligation under **s 22 Civil Procedure Act 2010 (Vic)**;