
Opposing Disclosure

Privilege Generally

- Privilege relates to the use and admissibility of information and documents as evidence.
- Constant tension between the value of the privilege and the need for evidence.
- The right to claim privilege is with the vested person.
- Can be asserted in the following scenarios (**EA s 131A(2)**) in pre-trial processes as a shield (*NSW v Public Transport Ticketing Corporation*):
 - o a summons or subpoena to produce documents or give evidence,
 - o pre-trial discovery,
 - o non-party discovery,
 - o interrogatories,
 - o a notice to produce,
 - o a request to produce a document under Division 1 of Part 4.6.
- If the uniform evidence legislation is not applicable, then the tests for privilege in the common law apply, e.g., FOI requests (Cth): *British American Tobacco Australia Limited v Secretary, Department of Health and Ageing*.

Client Legal Privilege

- Tension between the need to protect confidences shared by the client with their lawyer and the public interest in parties to litigation having access to all relevant documentary evidence (*AFP v Propend Finance*)
- Rationale for client legal privilege (*Re Southland Coal*):
 - o necessary in an adversarial system of litigation;
 - o encourages full and frank disclosure by clients to the solicitor which facilitates providing complete legal advice; and
 - o assists and enhances the administration of justice.
- Proving client legal privilege
 - o The “client” who is making a privilege claim has the burden of proving the claim: *Mitsubishi Electric v Victorian Workcover Authority*.
 - This is the same for liquidators of a company: *Hastie Group Ltd (in liq) v Moore*.
- Is the document privileged?
 - o Statutory test
 - Type of legal advice.
 - Legal advice: **EA s 118**.
 - o 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,
 - o for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.
 - Litigation: **EA s 119**.
 - o 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,
 - o 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.
 - Third-party to litigation: **EA s 120**.

- (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.
 - The elements of client legal privilege are:
 - a professional relationship between lawyer and client (note EA s 120 for unrepresented litigants).
 - What constitutes a ‘client’?: *EA s 117(1)*.
 - Includes (a) person who employs a lawyer, (b) employee or agent of a client, (c) if client has died, their personal representative.
 - What constitutes a ‘lawyer’?: *EA s 117(1)*.
 - May be Australian, foreign or an agent or employee of either of them.
 - confidential communications (either oral communications or documents); and
 - Confidential communication: a communication with an express or implied obligation to not disclose its contents when it was made: *EA s 117(1)*.
 - created for the dominant purpose of legal advice or litigation.
 - ‘Dominant’ indicates the purpose which was the “ruling, prevailing or most influential purpose”: *Mitsubishi v VWA*.
 - “Anticipated” means a reasonable probability/likelihood but need not be more likely than not: *Mitsubishi v VWA*.
 - It is the purpose in existence **at the time of** the making of the confidential communication or preparation of the confidential document is determinative: *Barnes v Commissioner of Taxation*; *Commissioner Australian Federal Police v Propend Finance*. Evidence needs to establish the circumstances for the creation of the document/communication.
 - A copy of non-privileged document may be privileged if it was created for the dominant purpose of legal advice or for use in litigation: *Commissioner Australian Federal Police v Propend Finance*.
 - Common law test
 - Also the dominant purpose test: *Esso Australia Resources Ltd v Commissioner of Taxation*.
- Has privilege been lost?
 - It would **prevent enforcing a court order**: *EA s 121(2)*.
 - There has been a **waiver** (*EA s 122*);
 - either by **consent** (*EA s 122(1)*);
 - Accidental disclosure
 - Inadvertent disclosure where a party makes every reasonable effort to ensure accuracy and attempts to correct errors promptly is not waiver: *ERA v Armstrong*.
 - Note that accidental disclosure is also covered by *Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015 r 31*, where if it is known or reasonably suspected to contain confidential information, then return/destroy/delete and notify the other solicitor. Must stop reading immediately. The solicitor must also refuse to keep reading even if requested by the client.
 - when a client has “**acted in a way that is inconsistent**” with the maintenance of the privilege (*EA s 122(2)*);
 - Waiver may be express or implied and **may not reflect the subjective intentions** of the party who has lost privilege: *Mann v Carnell*.
 - Not inconsistent if (*EA s 122(5)*):
 - the substance of the evidence has been disclosed—

- in the course of making a confidential communication or preparing a confidential document, or
 - as a result of duress or deception, or
 - under compulsion of law, or
 - Giving a privileged document under discovery is not under compulsion of law, because the defendant is entitled to withhold the document from inspection if it is privileged (UCPR r 21.5(2)): *Fenwick v Wambo Coal*.
 - 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
 - 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
 - Affirmed in *Mann v Carnell*.
 - 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.
- when a client has “**knowingly and voluntarily disclosed** the substance of the evidence (EA s 122(3)(a), (4), (5)); or
 - 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 (EA s 122(4)).
 - That the defendant took a mistaken view that it could not claim privilege on a document does not affect the fact that its disclosure is both knowing and voluntary: *Fenwick v Wambo Coal*.
- when the **substance of the evidence has been disclosed** with the express or implied consent of the client (EA s 122(3)(b), (5)).
 - Disclosure of conclusion of legal advice generally treated as disclosure of its substance, but this involves a question of degree (*Fenwick v Wambo Coal*).
- There are **joint civil clients** which satisfy EA s 124.
- A communication or document was made 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” (EA s 125(1)(a)), or a communication or document that the “client or lawyer (or both), or the party, knew or ought to reasonably to have known was made or prepared in furtherance of a **deliberate abuse of a power**” (EA s 125(1)(b)); or
- Another communication or document “is reasonably **necessary to enable a proper understanding of the communication or document**” that has lost privilege due to the operation of EA s 121, 122, 123, 124 or 125: EA s 126.

Religious Confession Privilege

- NSW requires child sexual abuse reporting to police: *Crimes Act 1900 (NSW) s 316A*.
 - However, a prosecution is not to be commenced against a person for this offence without the approval of the Director of Public Prosecutions if the person obtained information in the course of one of the vocations listed in the Regulations – which includes members of the clergy (*Crimes Act 1900 (NSW) s 316A(7); Crimes Regulation 2015 (NSW) cl. 4(f)*)
- There is religious confessional privilege with evidence: EA s 127.
 - There is also **Division 1A of Part 3.10 of the EA** that provides that privilege provides a balancing test rather than an absolute exemption from disclosure. It allows a court to direct that evidence of a protected confidence not be adduced, balancing the harm that would be caused to the confider if the evidence were given against the desirability of the evidence being given.
- There is debate for whether there is a common law religious confessional privilege.
- Two perspectives on this:

- A general positive duty to report compels citizens to betray their fellow citizens, friends and family to the police.
- Citizens have a duty to assist the police in fulfilling one of the state's primary obligations, which is to investigate crimes.
- Support of an exemption of religious confessions (and Royal Commission rebuttals)
 - requiring clergy to report information disclosed during confession would be in breach of the principle of freedom of religion.
 - The Royal Commission does not accept that, as a consequence, communications of sexual offences against children made in religious confession should be protected by the civil law.
 - The recognition of the right to freely practise one's religious beliefs must be balanced against the right of children to be protected from sexual abuse.
 - Satisfied that exemptions carry a risk to the safety of children.
 - the religious confessions privilege is similar in nature to legal professional privilege and should operate similarly to protect communications between a priest and a penitent.
 - The Royal Commission does not agree that they are similar.
 - The purpose of the privilege is to sustain the rule of law, in that fair operation of the civil legal system requires that all citizens should have access to legal advice.
 - Whereas, a religious confession privilege protects the practise of those who hold particular religious beliefs from the operation of the civil law.
 - there would be little utility in imposing a reporting requirement, as religious confession is infrequently attended and the practice of confession is such that information given about child sexual offences would not be of use to the police.
 - Religious confession remains a forum in which abuse may be disclosed.
 - perpetrators of child sexual abuse are unlikely to attend religious confession anyway; however, in the face of a reporting requirement, perpetrators would cease to attend confession and would be unable to access a source of guidance and contrition.
 - This is not supported by evidence.
 - priests would be unlikely to adhere to a reporting requirement, and there may be subsequent damage to the reputation of the legal system.
 - The Royal Commission is not convinced.
 - That a someone does not comply with an obligation is not a sufficient reason to exempt them from that obligation.
 - a reporting requirement is inconsistent with the privilege contained in the Uniform Evidence Act.
 - Note that reporting obligations in respect of child sexual offences seek to prevent further harm to children, whereas evidentiary privileges prescribe how matters are to be dealt with in court proceedings.
- Royal Commission view
 - There should be no exemption, excuse, protection or privilege from the offence granted to clergy to failing to report information disclosed in or in connection with a religious confession.
 - Satisfied that confession is a forum where Catholic children have disclosed their sexual abuse and where clergy have disclosed their abusive behaviour in order to deal with their own guilt.
 - Recommendation:
 - Each state and territory government should ensure that the legislation it introduces to create the criminal offence of failure to report recommended in recommendation 33 addresses religious confessions as follows:
 - The criminal offence of failure to report should apply in relation to knowledge gained or suspicions that are or should have been formed, in whole or in part, on the basis of information disclosed in or in connection with a religious confession.
 - The legislation should exclude any existing excuse, protection or privilege in relation to religious confessions to the extent necessary to achieve this objective.
 - Religious confession should be defined to include a confession about the conduct of a person associated with the institution made by a person to a second person who is in

religious ministry in that second person's professional capacity according to the ritual of the church or religious denomination concerned.

Negotiation Privilege

- Settlement negotiations privilege protects communications which are brought into existence to settle a dispute.
- Test
 - o Evidence is not to be adduced if made in connection with an attempt to negotiate a settlement: **EA s 131(1)**.
 - Admission of guilt to defendant-appointed medical witness was not privileged, because “made without proper connection with any purpose connected with the settlement of the action”; “not reasonably incidental”: *Field v Commissioner for Railways*.
 - The primary purpose was to negotiate a settlement but was outside the scope of going to the medical witness, as the function was wholly medical.
 - Not just limited to mediations or court-annexed mediations.
 - o Exceptions: **EA s 131(2)**.
 - the persons in dispute **consent** to the evidence being adduced in the proceeding concerned or, if any of those persons has tendered the communication or document in evidence in another Australian or overseas proceeding, all the other persons so consent, or
 - the substance of the evidence has been disclosed with the **express or implied consent** of all the persons in dispute, or
 - the substance of the evidence has been partly disclosed with the **express or implied consent of the persons in dispute, and full disclosure of the evidence is reasonably necessary to enable a proper understanding of the other evidence** that has already been adduced, or
 - the communication or document **included a statement to the effect that it was not to be treated as confidential**, or
 - the evidence tends to **contradict or to qualify evidence that has already been admitted** about the course of an attempt to settle the dispute, or
 - the **proceeding in which it is sought to adduce the evidence is a proceeding to enforce an agreement between the persons in dispute to settle the dispute**, or a proceeding in which the making of such an agreement is in issue, or
 - evidence that has been adduced in the proceeding, or an inference from evidence that has been adduced in the proceeding, **is likely to mislead the court unless evidence of the communication or document is adduced to contradict or to qualify that evidence**, or
 - the communication or document is relevant to **determining liability for costs**, or
 - making the communication, or preparing the document, **affects a right of a person**, or
 - the communication was made, or the document was prepared, 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
 - one of the persons in dispute, or an employee or agent of such a person, knew or ought reasonably to have known that the communication was made, or the document was prepared, in furtherance of a deliberate **abuse of a power**.
- Court-ordered mediation: *Azzi v Volvo*.
 - o Evidence from anyone: **CPA s 30**.
 - Statements/admissions made in a mediation session not admissible: **CPA s 30(4)(a)**.
 - ‘mediation session’ extends to steps taken in course of making arrangements for session, or in course of the follow-up session: **CPA s 30(1)**.
 - Documents made in, for purposes of, in course of, or as a result of mediation session not admissible: **CPA s 30(4)**.
 - Exception: consent of all in attendance/persons specified in document: **CPA s 30(5)(a)**.
 - o The mediator can only disclose evidence: **CPA s 31**.
 - with the **consent** of the person from whom the information was obtained,
 - in **connection with the administration or execution of this Part**, including section 29 (2),
 - if there are reasonable grounds to believe that the disclosure is **necessary to prevent or minimise the danger of injury** to any person or damage to any property,
 - if the **disclosure is reasonably required for the purpose of referring any party or parties to a mediation session** to any person, agency, organisation or other body and the disclosure is made with the consent of the parties to the mediation session **for the purpose of aiding in the resolution of a dispute** between those parties or assisting the parties in any other manner,
 - in **accordance with a requirement imposed by or under a law of the State** (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth.

- Both subject to **CPA s 29(2)**: any party may call evidence as to the fact that an agreement or agreement has been reached and as to substance of the agreement or arrangement (if an application is being made to make an order giving effect to the arrangement arising out of mediation session).
- Note that even if an exception overcomes EA (s 131(1)), CPA s 30 is still relevant (as it is court-mediation-related), so evidence relevant to costs may still be inadmissible: *Azzi v Volvo*.