Class 3: Court-Annexed Mediation / Enforceability of ADR Clauses & Settlement Negotiations Privilege

Court-Annexed Mediation

Court has the power to refer a matter to mediation at any time prior to judgement **even if the parties do not wish to do so** (***s56 of CPA)*** - compulsory mediation.

- The rules governing court-annexed mediation are set out in ***Pt 4 CPA (s 25-34 - Court Ordered Mediation)***

25 Definitions

Mediation means a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute

26 Referral by the Court

1) If it considers the circumstances appropriate, **the court may**, by order, **refer any proceedings before it, or part of any such proceedings**, for mediation by a mediator, and may do so either **with or without the consent of the parties** to the proceedings concerned.
2) The mediation is to be undertaken by a mediator agreed to by the parties or appointed by the court, who may (but need not be) a listed mediator.
3) In this section, **"listed mediator"** means a mediator appointed in accordance with a practice note with respect to the nomination and appointment of persons to be mediators for the purposes of this Part

- NOTE: 'proceedings before it' requirement means court has no power to refer parties to mediation (even by mutual consent) if proceedings in court have not yet commenced. In those circumstances, any mediation must be privately arranged

Relevant 'circumstances' for order of mediation (s26) for court to consider

- Nature of dispute i.e. if litigation is complex; ***Idoport Pty Ltd v NAB*** **[2001]** or what stage or what evidence has been considered already (timing, hearing date set? Evidence yet served? Would mediation be premature?)
- Power or resource imbalance
- Court satisfied that the parties' approach to resolution is not being unduly influenced by subjective considerations; (***Singh v Singh*** **[2002])**
- Particularly appropriate in disputes between family members and friends, where the court is persuaded that mediation offers a plausible prospect of success
- Attitudes of parties to mediation (consent or non consent). Court often refer 'reluctant starters' because experience shows that frequently if required to mediate, they become 'willing participants' (***Aversa (No 2)*** **[2023])**
- The only reason mediation would be barred, is if the court believes mediation would be fruitless.
- Any previous attempts at ADR?
- ***Higgins v Higgins*** **[2002] NSWSC 455 - compulsory order of CAM**
  - Facts: Plaintiff applied to SC for an order of compulsory mediation which was opposed by the defendants
  - Held by Austin J:
    - Plaintiff is elderly woman with deteriorating health, partly due to continuation of proceedings. Evidence is she wants to resolve the dispute and reconcile her family.
    - No evidence that mediation would be hopeless.
    - There is sufficient possibility that when faced with mediation, both parties will approach with spirit of compromise → order giving parties one last chance prior to a final hearing.
  - Ratio: Court's discretion for mediation is wide

27 Duty of parties to participate

It is the duty of each party to proceedings that have been referred for mediation to participate, in good faith, in the mediation

- A mediator has the same protection and immunity as a judicial officer (***s33***)
- Query the enforceability of any breach of this obligation, given s30(4)

Aversa v Transport for NSW (No 2) - in good faith

- Issue:
  - Can the Court order mediation under **s 26** despite one party's opposition, and should it do so in this case?
- Held:
  - Yes. The Court ordered that the proceedings be referred to mediation despite TfNSW's opposition.
- Ratio
  - The Court has a broad discretion to order mediation without consent, which must be exercised consistently with the **overriding purpose** in s ***56*** (just, quick and cheap resolution of disputes).
  - Parties compelled to mediate are subject to a statutory obligation to participate in good faith. The Court may consider whether the dissenting party is nonetheless likely to engage meaningfully.
  - Earlier reluctance to compel mediation (e.g. ***Morrow v Chinadotcom***) has evolved. Courts now recognise that:
    - Reluctant parties often engage productively once mediation is ordered.
    - Mediation success is unpredictable.
    - Compulsion does not necessarily make mediation futile.
  - Although TfNSW argued it was entitled to public vindication due to fraud allegations, the Court did not accept that public character alone precluded mediation.
  - Courts should generally be favourably disposed toward facilitating mediation, especially in disputes between ordinary citizens and the State.

Good faith - Justice Bergin in ***The Right Balance Between Trial and Mediation Article (2012)***

- Difficulty of imposing a statutory duty to mediate in good faith, primarily because mediation is confidential. Enforcing this duty may require disclosure of conduct during mediation, which conflict the private nature
- In assessing negotiation conduct, courts have sometimes applied an objective standard - whether the party failed to do **what a reasonable person would do in the circumstances**
- In ***Alton*** **[1999]** core elements of good faith mediation were identified as:
  1. Willingness to genuinely consider settlement options proposed by the other party or mediator; and
  2. Willingness to put forward options for resolving the dispute
- However, appearing disinterested is not conclusive evidence of bad faith - a party may still be considering proposals.

Mediation in defamation matters: ***Waterhouse v Perkins***

- Facts: Plaintiff filed 2 actions in defamation in 1991 and 1996 in respect of book. Plaintiff refused defendant's request for mediation (including agreement to pay for all of the mediator's costs).
- Held by Levine J:
  - ***S27 CPA*** provides that it is duty of each party subject to referral under s110K to participate in good faith in a mediation

- Argument that fundamental to defamation action is the vindication in the eyes of the public - which cannot be achieved by mediation.
- Defendants were concerned about costs, plaintiff about vindication. Potential outcomes of orders outweigh the dimensions and cost of a trial.
- 94. In any event, the plaintiff is an officer of this Court and if compulsorily ordered to participate he should do so as an officer of this Court fully conscious of the obligations of good faith.
- Ordered parties to mediate anyway

28 Costs of mediation

a) **If the court makes an order as to the payment of those costs**, by one or more of the parties in such a manner as the order may specify or,

b) In any other case, by the parties in such proportions as they may agree among themselves

29 Agreements and arrangements arising from mediation sessions - CPA

1) The court may make orders to **give effect to any agreement or arrangement arising out of a mediation session.**
2) On any application for an order under this section, any party may call evidence, i**ncluding evidence from the mediator** and any other person engaged in the mediation, as to the fact that an agreement or arrangement has been reached and as to the substance of the agreement or arrangement.
3) This Part does not affect the enforceability of any other agreement or arrangement that may be made, whether or not arising out of a mediation session, in relation to the matters the subject of a mediation session.

- s29(2) prevails over s30(4)

30 Privilege

1) In this section, **"mediation session"** includes any steps taken in the course of making arrangements for the session or in the course of the follow-up of a session.
2) The same privilege with respect to defamation as exists with respect to judicial proceedings and a document produced in judicial proceedings exists with respect proceedings and a document produced in judicial proceedings exists with respect to:
    a) a mediation session, or
    b) a document or other material sent to or produced to a mediator, or sent to or produced at the court or the registry of the court, for the purpose of enabling a mediation session to be arranged.
3) The privilege conferred by subsection (2) extends only to a publication made:
    a) at a mediation session, or
    b) in a document or other material sent to or produced to a mediator, or sent to or produced at the court or the registry of the court, for the purpose of enabling a mediation session to be arranged, or
    c) in circumstances referred to in section 31.
4) Subject to section 29(2):
    a) **evidence of anything said or of any admission made in a mediation session is not admissible in any proceedings before any court or other body,** and
    b) a document prepared for the purposes of, or in the course of, or as a result of, a mediation session, or any copy of such a document, is not admissible in evidence in any proceedings before any court or other body. I.e. position papers
5) Subsection (4) does not apply with respect to any evidence or document
    a) **If the persons in attendant at, or identified during, the mediation session** and, in the case of a document, **all persons specified in the document, consent to the admission of the evidence or document, or**
    b) In proceedings commenced with respect to any act or omission in connection with which a disclosure has been made or referred to in s31(c)

- Reflects a policy of encouraging parties to be candid during mediations, to maximise the prospects of dispute resolution
- The protections in s30 do **not** apply to a privately arranged mediation

31 Confidentiality

A mediator may disclose information obtained in connection with the administration or execution of this Part only in one or more of the following circumstances:

a) with the consent of the person from whom the information was obtained,
b) in connection with the administration or execution of this Part, including section 29(2),
c) 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,
d) 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
e) 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.

- This is a list of the only situations where the mediator may disclose information

UCPR r 20.3 - Statements as to proposed referral to mediation

On **any occasion** that proceedings are before the court for directions, the court may require each active party to state any of the following:

a) Whether the party consents to referral of a matter arising in the proceedings for mediation,
b) Whether the parties agree as to who is to be the mediator
c) Whether the parties agree as to the proportions in which the costs of mediation are to be borne, and the terms of any such agreement

UCPR r 20.6 - Mediation session procedure

1) The following provisions apply to the conduct of a mediation session unless the mediator, or the court, otherwise directs:
    a) The session must be attended
        i) By each party, or if a party is a corporation, by an officer of the corporation having authority to settle the proceedings, or
        ii) If the conduct of the proceedings by a party is controlled by an insurer, by an officer of the insurer having authority to settle the proceedings
    b) A party may be accompanied by the party's barrister or solicitor at the session

Enforceability of Agreements to Use ADR	• Although equitable remedies are discretionary, courts in NSW will usually make orders for specific performance of ADR clauses (i.e. hold the parties to their bargain) i.e. if a contract says parties must negotiate, mediator or follow some ADR before litigating, NSW court will usually try enforce that process
	• An agreement to negotiate in good faith is not automatically void for uncertainty just because it uses broad language. but is contractual enforceable (***Coal Cliff Collieries* 1991)**
	• Enforceability ultimately depends on *contractual construction and party intention*.
	
	***United Group Rail Services Ltd v Rail Corporation NSW* [2009] NSWCA 177 - clause uncertainty to mediate**
	• Facts:
	  ○ Engineering contract for design/build of rolling stock with mediation clause referred to a non-existent body (Australian Dispute Centre) and was agreed to be void for uncertainty
	  ○ United argued:
	  ■ The good faith negotiation clause (cl 35.11(c)) was also uncertain
	  ■ Arbitration clause (cl 35.12) was not severable and therefore unenforceable
	• Issue:
	  ○ Is a contractual obligation to undertake **"genuine and good faith negotiations"** enforceable or void for uncertainty?
	  ○ If mediation is void, is the arbitration clause still enforceable?
	• Held:
	  ○ The obligation to undertake genuine and good faith negotiations **was enforceable**.
	  ○ Court of Appeal treated dispute resolution machinery as part of parties' bargain and tried to give it practical effect where possible. Even though mediation step failed as it referred to a non-existent body, court still upheld good faith negotiation step and arbitration step.
	  ○ Court's general approach: preserve and enforce agreed ADR structure if contract can sensibly bear that meaning
	  ○ The arbitration clause **was severable and enforceable**, despite the mediation clause being void.
	  ○ Genuine and good faith negotiations can have real legal content, including honesty, a genuine attempt to resolve the dispute and fidelity to the contractual bargain – depends on whether it gives the courts enough to work with
	  ○ Public policy supports enforcement
	  ■ Efficient dispute resolution promotes: Commercial certainty + Reduced litigation costs
	  ■ "Just, quick and cheap" resolution (reflecting broader civil procedure principles).
	  ■ Commercial parties deliberately structure staged dispute resolution processes; courts should respect that bargain.
	  ○ If the clause shows a real commitment, such as requiring the parties to meet, negotiate genuinely, and only then proceed to arbitration, it is much more likely to be enforceable. If it is too loose, incomplete, or merely says the parties will try to agree something in the future without any workable standard, it may fail for uncertainty. That is why United Group Rail enforced the good faith negotiation obligation, but not the mediation step tied to the non-existent "Australian Dispute Centre". The bad mediation machinery could be severed, while the rest of the clause still operated.

Settlement Negotiations Privilege	• Settlement negotiations privilege protects communications which are brought into existence to settle a dispute (***s 131(1)*)** • The Evidence Act 1995 (NSW) ***s 131(1)*** excludes evidence of settlement negotiations subject to the exceptions set out in s ***131(2)*** • ***s30*** of the CPA protects against the admissibility in court proceedings "of anything said or of any admission made in a mediation session". S30 provides strict obligations on mediator parties including mediator to not disclose anything discussed in mediation. • CPA overrules Evidence Act 1995 (NSW) if the mediation is court ordered (***Azzi & Ors v Volvo Car Australia***). s131(2) does not overcome s30(4) of CPA ***Evidence Act 1995 (NSW) Division 3 – Evidence excluded in the public interest*** **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.** 2) Subsection (1) does not apply if: a) 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 b) the substance of the evidence has been disclosed with the express or implied consent of all the persons in dispute, or c) 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 d) the communication or document included a statement to the effect that it was not to be treated as confidential, or e) 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 f) 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 **g) 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** **h) the communication or document is relevant to determining liability for costs, or** i) making the communication, or preparing the document, affects a right of a person, or j) 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, o k) 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. 3) For the purposes of subsection (2)(j), if commission of the fraud, offence or act is a fact in issue and there are reasonable grounds for finding that: a) the fraud, offence or act was committed, and b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act, the court may find that the communication was so made or the document so prepared. (4) For the purposes of subsection (2)(k), if: (a) the abuse of power is a fact in issue, and

(b) there are reasonable grounds for finding that a communication was made or document prepared in furtherance of the abuse of power,
the court may find that the communication was so made or the document was so prepared.

5) In this section:
(a) a reference to a dispute is a reference to a dispute of a kind in respect of which relief may be given in an Australian or overseas proceeding, and
(b) a reference to an attempt to negotiate the settlement of a dispute does not include a reference to an attempt to negotiate the settlement of a criminal proceeding or an anticipated criminal proceeding, and
(c) a reference to a communication made by a person in dispute includes a reference to a communication made by an employee or agent of such a person, and
(d) a reference to the consent of a person in dispute includes a reference to the consent of an employee or agent of such a person, being an employee or agent who is authorised so to consent, and
(e) a reference to commission of an act includes a reference to a failure to act.

6) In this section: power means a power conferred by or under an Australian law.

- Encourages candour during the attempted negotiation of disputes
- Privilege does not extend to disclosure of 'objective facts' not reasonably incidental to the purpose of the negotiations (***Field***)

Field v Commissioner for Railways (1957) - **Threshold for settlement negotiations privilege**

Facts
- The plaintiff was injured while disembarking from a train.
- He claimed the train suddenly started moving when he was disembarking, causing his injury, whilst the defendant claimed that he began disembarking when the train was already moving.
- During the dispute, the defendant attempted to negotiate a settlement, and got the plaintiff to attend a doctor, who later testified that the plaintiff admitted to disembarking when the train was moving.
- The plaintiff argued that the testimony was prohibited because it was a part of settlement negotiations and thus protected

Held
- Settlement negotiation privilege is directed against express or implied admissions, it is **not concerned with objective facts** which may be ascertained during the course of negotiations.
- The question in this case was **whether the admission was ancillary enough to the settlement negotiations that it was protected.**
- In this case, it would be too much to say that it was ancillary to the settlement negotiations - t**here was no real connection between that admission to the settlement of the action.**
- **Evidence admissible**

Azzi & Ors v Volvo Car Australia (2007) - **Mediation Communication (s131(2)(h))**
- Facts
  - The plaintiff sued the defendant but lost, and an ordinary costs order was given.
  - The defendant sought costs on an indemnity basis because the plaintiff refused a settlement offer which was made during mediation.
  - The plaintiff alleged that the evidence was protected by settlement privilege even as to costs.
  - The defendant claimed that an exception is made under ***s 131(2)(h) of the Evidence Act*** for purposes of Costs
- Held
  - Evidence of offers made at mediation not admissible by law, even to determine issue of costs.
  - Exception in **s 131 (2) (h)** does not mean that every offer of settlement is admissible for the purposes of costs- it simply removes the bar set by **s 131 (1)**
  - The bar set by **s 30 (4)** of the ***CPA*** remains intact
  - In addition, mediation is not the same as a ***Calderbank*** **offer** and in this case in particular, there was no genuine offer and no real attempt to compromise
  - The **evidence was inadmissible**, and costs are awarded on an ordinary basis

Class 7: Costs and Cost Order

Proportionality of Costs

60 Proportionality of costs CPA

In any proceedings, the practice and procedure of the court should be implemented with the object of resolving the issues between the parties in such a way that the **cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute.**

Access to Justice and Lawyers - Hon JJ Spigelman
- The civil dispute resolution must be proportionate, meaning the cost of resolving a dispute should bear a sensible relationship to what is at stake
- **s60** involves a great deal of flexibility in the words 'importance and complexity', objective involves a continual process of collaboration between the profession and the courts in determining how the process of dispute resolution is to occur
- The first step is to review areas of practice in which the costs involved in the process sometimes bear no rational, let alone a proportionate, relationship to what is involved.
- Objective is to create cost incentives for parties to narrow the scope of disputation and to make serious attempts to settle
- In ***Piglowska v Piglowski,*** where legal aid costs exceeded the total value of the property in dispute, showing how litigation can become absurdly expensive. Justice should not aim for 'perfect justice' at all costs, but for 'appropriate' justice reached through fair but sensible procedures
- Refers not to what lawyers charge clients privately, but to the costs a successful party can recover from the losing party

Bleyer v Google Inc **[2014] NSWSC 897 - costs grossly disproportionate**
- Facts
  - Mr Bleyer sued Google for defamation in NSW Supreme Court
  - He alleged Google published 7 defamatory search result items about him
  - Those results were allegedly shown to only 3 people
  - Google asked the Court to permanently stay the proceedings (***67 CPA***) or summarily dismiss them as an abuse of process
  - Google argued that the time, cost and court resources needed to run the case were far too great compared to what was actually at stake i.e grossly disproportionate
- Reasoning
  - McCallum J held that, in an appropriate case, Court had power to stay or dismiss proceedings where resources required of the court and the parties are out of all proportion to the interest at stake
  - This kind of extreme disproportionality can be treated as a species of abuse of process, but power should only be used rarely
  - Starting point is ***s67*** of ***CPA*** which gives the Court general power to stay proceedings. ***S56*** focuses on just, quick and cheap resolution of the real issues whereas ***s60*** says court procedure should be implemented so that costs are proportionate to importance and complexity of dispute.

	○ Together these provisions support idea that courts must consider whether use of party and court resources is justified as courts have finite resources ● Ratio: ○ Court may stay or dismiss civil proceedings as an abuse of process where resources required of the court and parties to determine claim are so grossly disproportionate to interest at stake that allowing the case to continue would be unjust ***Zanella v Madden* [2007] NSWSC 559 - s56 just quick ane cheap** ● Facts ○ Plaintiff and defendant registered as joint tenants of land, plaintiff wanted to sell but defendant had not been seen or heard from in over 20 years ○ Plaintiff said she had paid most of purchase price by paying off mortgage ○ When their relationship ended 25 yrs earlier, defendant alleged she could have the property, but nothing done formally to transfer the interest ○ Plaintiff had made enquiries into defendants whereabouts ○ Property worth $150k and defendant's interests around $37.5k ● Issue ○ Was there enough evidence for Court to declare missing defendant as dead and should court require further expensive enquiries, such as advertising in Scotland before making declaration? ● Held ○ Defendant had not been heard from since 1980, no friends heard from him in more than 20 years, he had serious alcohol problems, more likely that he was dead ○ Court considered whether more steps should be taken to locate him, such as placing adverts in Scotland, however ***s56*** requires just, quick and cheap resolution of real issues. As defendant's interest was only worth $37.5k, cost of further searches would be to great compared to what was at stake, so court thought it was unnecessary and disproportionate to require extra steps
Purpose of Costs	● Costs are only intended to compensate successful party for solicitor's professional costs and disbursements (including any barrister's fees). ● Costs DO NOT compensate litigant for lost time, or travel expenses ● ***UCPR r42.10*** provides the court with power to order a party who fails to comply with rules or any court order to pay such of the other parties' costs as are occasioned by failure ***Northern Territory v Sangare* [2019] HCA 25 - irrelevant that cost order made against party that cannot afford it** ● Facts ○ Mr Sangare was a citizen of Guinea who arrived to Aus in 2011 and applied for protection visa but refused ○ He later worked for Department of Infrastructure who offered to sponsor him as skilled migrant, which mean he needed to apply for suitable visa ○ Cth later told him that his visa application invalid as he had already made and been refused a protection visa application ○ Minister asked departmental officers to prepare a brief about Mr Sangare. Mr S alleged brief contained defamatory material and false statements suggesting he lied about his immigration status ○ He sued the Northern Territory Department ○ His claim failed at trial and also on appeal. NT then asked for its legal costs from trial and appeal ○ Cost order refused as court thought Mr S did not have money to pay so making order would be futile ● Held ○ HC held that NT as successful party should receive its costs and that Mr S's lack of money was not a relevant reason to refuse a costs order ● Reasoning ○ The power to award costs is discretionary, but it must be exercised judicially and only by reference to relevant considerations. ○ Central guiding principle is that successful party generally entitled to its costs as they should be compensated for expense of litigation that should not, in justice, have been imposed on it ○ General rule can be displaced however: ■ If conduct misled losing party into thinking they had a good claim ■ Conduct during litigation that caused unnecessary delay/ expense ○ No such conduct by NT. Only reason for refusing costs was Mr Sangare's impecuniosity. ● Ratio ○ Party being rich or poor generally has no relevant connection with whether costs should be ordered. Financial hardship may sometimes affect structure of costs order e.g. by allowing payment over time but order will create a debt, and that debt is itself valuable to successful party
Duties of Litigants and Costs	● Parties have statutory duty to assist court to further the overriding purpose to facilitate just, quick and cheap resolution of real issues in the proceedings (***s56(1)***) and therefore, to participate in court's processes and to comply with directions and orders (***s56(3)***) ● Every legal practitioner has statutory duty not to cause their client to breach client's duty to assist court (***s56(4)***) **56 Overriding Purpose** 1) The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings. 2) The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule. 3) A party to civil proceedings is under a duty to assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court. 4) Each of the following persons must not, by their conduct, cause a party to civil proceedings to be put in breach of a duty identified in subsection (3)-- (a) any solicitor or barrister representing the party in the proceedings, (b) any person with a relevant interest in the proceedings commenced by the party. 5) The court may take into account any failure to comply with subsection (3) or (4) in exercising a discretion with respect to costs. 6) For the purposes of this section, a person has a **"relevant interest"** in civil proceedings if the person-- (a) provides financial assistance or other assistance to any party to the proceedings, and (b) exercises any direct or indirect control, or any influence, over the conduct of the proceedings or the conduct of a party in respect of the proceedings. ***Priest v New South Wales [2007] NSWSC 41*** Facts: ● Interlocutory dispute about discovery, not final trial ● Plaintiff wanted discovery of documents falling with 'Category 27' which referred to reports of a police operation into conduct of a former policy assistant commissioner

- State of NSW argued Cat 27 only referred to one document, namely the final report
- By this stage, there was still serious problems with defendant's handling of discovery including 37 further boxes of documents that had not been properly examined by defendant's counsel and were only supported by fairly superficial affidavit evidence
- The judge considered that the defendant had not properly assisted the Court in resolving the discovery issue.

Issue

- How should Category 27 be interpreted? Was it limited to one final report, or did it extend to other related documents?
- Had the defendant complied with its obligations under s 56 of the Civil Procedure Act 2005 (NSW) and its model litigant obligations in the way it handled the discovery dispute?

Held

- Cat 27 not limited to just single final report
- Real and significant issues remained about discoverability of documents and Court found that defendant had failed to meet its obligations under ***s56 CPA*** and its model litigant obligations. S56 imposes duties on parties and lawyers to assist Court in achieving that purpose and to comply with court processes and orders.
- Instead of helping resolve issue, defendant's conduct left Court unable to determine matter properly, judge said they were in a worse position to resolve application than he had been earlier
- Due to defendant's conduct, the plaintiff was awarded costs on an indemnity basis in relation to the Category 27 discovery issue.
- Under ***s98 CPA,*** costs are discretionary and may be ordered on either an ordinary or indemnity basis. Here defendant's conduct had prevented just, quick and cheap resolution of issue so indemnity costs were appropriate

S98 Courts powers as to costs

1) Subject to rules of court and to this or any other Act--
   (a) costs are in the discretion of the court, and
   (b) the court has full power to determine by whom, to whom and to what extent costs are to be paid, and
   (c) the court may order that costs are to be awarded on the ordinary basis or on an indemnity basis.
2) Subject to rules of court and to this or any other Act, a party to proceedings may not recover costs from any other party otherwise than pursuant to an order of the court.
3) An order as to costs may be made by the court at any stage of the proceedings or after the conclusion of the proceedings.
4) In particular, at any time before costs are referred for assessment, the court may make an order to the effect that the party to whom costs are to be paid is to be entitled to–
   a) Costs up to, or from, a specified stage of the proceedings, or
   b) A specified proportion of the assessed costs, or
   c) A specified gross sum instead of assessed costs, or
   d) Such proportion of the assessed costs as does not exceed a specified amount.

Parties and Costs

Uniform Law Costs

- In past known as 'solicitor and client' costs
- Often greater amount than ordered costs
- Professional fee client is required to pay is dictated by contract or costs agreement between solicitor and client for solicitor's professional fees and disbursements
  - In every matter, client has a right to have written cost agreement in place ***(s179,180)***
- These are amounts which client is liable to pay whether or not client is awarded 'ordered costs'
- A client may seek to have the court in which the litigation took place, or an independent costs assessor, assess the costs payable to the solicitor (***s196-205)***
- If court sets aside costs agreement, court may nevertheless order payment of a different amount to solicitor
- If lawyer agrees to 'no win no fee', client not liable to pay unless agreement includes provision for 'uplift fee'
- Note that in NSW (cf.USA), a solicitor cannot charge a contingency fee (e.g. 50% of whatever damages client recovers) (***s183)***

Ordered Costs

- In past known as 'party and party' costs
- The cost court usually orders one party to pay another party in litigation. Basic purpose of costs order is to **compensate** successful party, **not to punish** the unsuccessful party, a costs order is an *"indemnity against the expense of litigation that should not, in justice, have been visited upon successful party" (**NT v Sangare [2019])***
- General rule is that 'costs follow the event' i.e. the loser pays the winner's costs (the 'usual order' ***(UCPR r42.1)*** but ordered costs usually less than uniform costs so only partially indemnify client recipient against the costs that they are obligated to pay their solicitor (almost never recovers 100% of actual costs)
- Ordered costs are those costs court considers appropriate and reasonable for successful party to receive in order to be compensated for cost of achieving outcome of litigation
- Can be on an ordinary basis or indemnity basis (which is more generous).
  - Ordinary (***UCPR r42.2)***
    - Depends on level of services; in practice, anywhere between ⅓ to ⅔ of the successful party's actual costs
  - Indemnity (***UCPR r42.5)***
    - More generous, all costs incurred except those *'that appear to have been unreasonably incurred or appear to be of an unreasonable amount'.*
    - In practice rarely a full indemnity or anything close to it, more like ⅘
    - Costs awarded on an indemnity basis in a range of situations, usually because paying party has conducted themselves **improperly** or **unreasonably,** there must be **relevant delinquency (*Baulderstone)***
- Courts must specify if costs awarded on an indemnity basis, if not specified by court order, costs generally assessed on ordinary basis (***UCPR r42.2)***
- As cost order is to compensate for out pocket expense incurred and not for lost time, self represented litigant isn't entitled to cost order (***Cachia v Hanes* 1994)**
- Parties that receive or are ordered to pay, an unquantified costs order are entitled to apply for an assessment or taxation of costs subject to assessment processes under LPUL
- Although 'costs follow the event' is the general rule, court has **discretionary power** to make different orders (***s98(1)(a))***

Baulderstone Hornibrook Engineering v Gordian Runoff

Facts

- Case looked at what happens when parties fight issues that are not the real issues, prolong the trial or otherwise conduct the case unreasonably

Held

- Ordinary rule is that costs follow the event and usually successful party gets its costs, even if it did not succeed on every issue. This is not absolute, but a different order requires a proper reason.
- The court will only usually split costs if unsuccessful party can point to a clearly dominant or separable issue that successful party lost
- A breach of ***s 56***, especially by prolonging litigation through issues known not to be real issues, can justify a special costs order, including indemnity costs in an appropriate case.
- But courts must be careful not to punish parties merely because they argued hard, lost some issues, or made reasonable forensic choices that later turned out to be wrong.

	• On indemnity costs, Court said principles are well settled and generally require some relevant delinquency, abuse of process, ulterior purpose or unreasonable cost. Examples include:
	  ○ Misconduct causing wasted time
	  ○ Proceedings commenced in wilful disregard of known facts
	  ○ Allegations that should never have been made
	  ○ Groundless contentions that unduly prolong the case
	  ○ ***s56(6)*** expands circumstances in which indemnity costs may be made as failure to comply with ***s56*** can be taken into account in exercise of costs discretion.

Personal Costs against lawyers	• Courts can sometimes order lawyer to pay costs personally, power comes from ***Civil Procedure Act* 2005 (NSW)** and ***Sch 2*** of the ***Legal Profession Uniform Law Application Act* 2014 (NSW)**
	• Lawyers have duties to court to not run hopeless cases or cause unnecessary delay and expense. Personal costs orders are meant to discourage baseless litigation and poor conduct and to encourage better professional culture
	• Under ***s 56(4) CPA***, a lawyer must not act in a way that causes their client to breach the client's duty to assist the court in achieving the just, quick and cheap resolution of the real issues.
	• Under ***cl 4 of Sch 2 LPULAA***, before filing a pleading, a lawyer must certify there are reasonable grounds, based on provable facts and an arguable view of the law, that the claim or defence has reasonable prospects of success.
	• Law tries to balance:
	  ○ Lawyers should be free to act fearlessly for their clients
	  ○ Lawyers should not cause unjustified litigation that wastes money and court resources
	• Courts should not too quickly make personal costs orders against lawyers as that could make them fearful, hesitant and less effective in representing clients
	• **SC Practice note Gen 5** sets out situations where cost orders can be made against legal practitioners.
	  ○ Lawyers are expected to help with following court timetables and procedures, being ready for trial, giving realistic estimates of hearing length, filing written submissions on time, giving early notice of adjournment requests and avoiding late amendments to pleadings. If they fail, may support a personal cost order.
	  ○ If court is thinking about making cost order, process to be followed is: lawyer must be given chance to show cause why order shouldn't be made, may happen orally at end of hearing, or matter be adjourned for written submission. Court may ask other parties to make submissions too. If order made, court can require bill of costs to be filed and determine amount payable.
	
	Legal Profession Uniform Law Application Act 2014 (NSW)
	Schedule 2 Costs in civil claims where no reasonable prospects of success 1 Application of Schedule
	(1) **Schedule extends to appeals**
	This Schedule extends to legal services in connection with proceedings in a court on appeal as well as a court at first instance.
	
	(2) **Legal services provided by both barrister and solicitor**
	If legal services in relation to a particular matter are provided by both a solicitor and a barrister instructed by the solicitor, any function imposed by this Schedule on a law practice in respect of the provision of the services is to be read as imposing the function on both the solicitor and barrister.
	
	2 Law practice not to act unless there are reasonable prospects of success
	(1) A law practice must not provide legal services on a claim or defence of a claim for damages unless a legal practitioner associate responsible for the provision of the services concerned reasonably believes on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success.
	(2) A fact is provable only if the associate reasonably believes that the material then available to him or her provides a proper basis for alleging that fact.
	(3) This Schedule applies despite any obligation that a law practice or a legal practitioner associate of the practice may have to act in accordance with the instructions or wishes of the client.
	(4) A claim has reasonable prospects of success if there are reasonable prospects of damages being recovered on the claim. A defence has reasonable prospects of success if there are reasonable prospects of the defence defeating the claim or leading to a reduction in the damages recovered on the claim.
	(5) Provision of legal services in contravention of this clause constitutes for the purposes of this Schedule the provision of legal services without reasonable prospects of success.
	
	3 Preliminary legal work not affected
	This Schedule does not apply to legal services provided as a preliminary matter for the purpose of a proper and reasonable consideration of whether a claim or defence has reasonable prospects of success.
	
	4 Restrictions on commencing proceedings without reasonable prospects of success
	1) The provision of legal services by a law practice without reasonable prospects of success does not constitute an offence but is capable of being unsatisfactory professional conduct or professional misconduct by a legal practitioner associate of the practice who is responsible for the provision of the service or by a principal of the practice.
	2) A law practice cannot file court documentation on a claim or defence of a claim for damages unless a principal of the practice, or a legal practitioner associate responsible for the provision of the legal service concerned, certifies that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success.
	3) Court documentation on a claim or defence of a claim for damages, which has been lodged for filing, is not to be filed in a court or court registry unless been lodged for filing, is not to be filed in a court or court registry unless accompanied by the certification required by this clause. Rules of court may make provision for or with respect to the form of that certification.
	4) In this clause:
	"court documentation" means:
	  ○ (a) an originating process (including for example, a statement of claim, summons or cross-claim), defence or further pleading, or
	  ○ (b) an amended originating process, defence or further pleading, or
	  ○ (c) a document amending an originating process, defence or further pleading, or
	  ○ (d) any other document of a kind prescribed by the local regulations.
	"cross-claim" includes counter-claim and cross-action.
	
	5 Costs order against law practice acting without reasonable prospects of success
	If it **appears to a court** in which proceedings are taken on a claim for damages that a law practice has provided legal services to a party **without reasonable prospects of success,** the court may of its own motion or on the application of any party to the proceedings **make either or both of the following orders** in respect of the practice or of a legal practitioner associate of the practice responsible for providing the services:
	a) an order directing the practice or associate to r**epay to the party to whom the services were provided** the whole or any part of the costs that the party has been ordered to pay to any other party,
	b) an order directing the practice or associate to i**ndemnify any party other than the party to whom the services were provided** against the whole or any part of the costs payable by the party indemnified.

2) The Supreme Court may on the application of any party to proceedings on a claim for damages make any order that the court in which proceedings on the claim are taken could make under this clause.
3) An application for an order under this clause cannot be made after a final determination has been made under Part 7 by a costs assessor of the costs payable as a result of an order made by the court in which the proceedings on the claim concerned were taken.
4) A law practice or legal practitioner associate of the practice is not entitled to demand, recover or accept from a client any part of the amount for which the practice or associate is directed to indemnify a party pursuant to an order under this clause.

6 Onus of showing facts provided reasonable prospects of success

1) If the court (the "**trial court**") hearing proceedings on a claim for damages finds that the facts established by the evidence before the court do not form a basis for a reasonable belief that the claim or the defence had reasonable prospects of success, there is a presumption for the purposes of this Schedule that legal success, there is a presumption for the purposes of this Schedule that legal services provided on the claim or the defence (as appropriate) were provided without reasonable prospects of success.
2) If the Supreme Court (when the Supreme Court is not the trial court) is satisfied, either as a result of a finding of the trial court or otherwise on the basis of the judgment of the trial court, that the facts established by the evidence before the trial court do not form a basis for a reasonable belief that the claim or the defence had reasonable prospects of success, there is a presumption for the purposes of this Schedule that legal services provided on the claim or the defence (as appropriate) were provided without reasonable prospects of success.
3) A presumption arising under this clause is rebuttable and a person seeking to rebut it bears the onus of establishing that at the time legal services were provided there were provable facts (as provided by clause 2 (Law practice not to act unless there are reasonable prospects of success)) that provided a basis for a reasonable belief that the claim or the defence on which they were provided had reasonable prospects of success.
4) A law practice or legal practitioner associate of the practice may, for the purpose of establishing that at the time legal services were provided there were provable facts (as provided by clause 2 (Law practice not to act unless there are reasonable prospects of success)) that provided a basis for a reasonable belief that the claim or the defence on which they were provided had reasonable prospects of success, produce information or a document despite any duty of confidentiality in respect of a communication between the law practice or a legal practitioner associate of the practice and a client, but only if:
    a) the client is the client to whom the legal services were provided or consents to its disclosure, or
    b) the court is satisfied that it is necessary for the law practice or associate to do so in order to rebut a presumption arising under this clause.

- ***S99*** also provides for costs to be ordered against a legal practitioner where costs have been incurred by reason of serious neglect, serious incompetence, serious misconduct or impropriety.
- In ***Nadarajapillai*** **[2015]** held that conduct of solicitor, in instituting and maintaining an appeal that had no prospects of success, no merit, constituted serious incompetence on his part as a legal practitioner and costs have been incurred improperly and without reasonable cause
- In ***Berry Rural Co Operative Society ltd*** **[2018]** solicitor given four days to show cause in writing why she should not pay to Co Operative the whole of the costs the Co Operative must pay Sepak
- 'Improper' is broad, and includes serious professional wrongdoing, but not limited to conduct that would justify being struck off. Also covers significant breach of an important professional duty. 'Unreasonable' is conduct that is vexatious or intended to harass other side instead of helping resolve case and 'negligent' means failing to act with levels of competence reasonably expected of ordinary lawyer (***Ridehalgh v Horsefield*** **[1994]**)

99 Liability of legal practitioner for unnecessary costs

(1) This section applies if it appears to the court that costs have been incurred--
    (a) **by the serious neglect, serious incompetence or serious misconduct** of a legal practitioner, or
    (b) **improperly, or without reasonable cause,** in circumstances for which a legal practitioner is responsible.
(2) After giving the legal practitioner a reasonable opportunity to be heard, the court may do any one or more of the following:
    a) it may, by order, disallow the whole or any part of the costs in the proceedings:
        (i) in the case of a barrister, as between the barrister and the instructing solicitor, or as between the barrister and the client, as the case requires, or
        (ii) in the case of a solicitor, as between the solicitor and the client,
    b) it may, by order, direct the legal practitioner:
        (i) in the case of a barrister, to pay to the instructing solicitor or client, or both, the whole or any part of any costs that the instructing solicitor or client, or both, have been ordered to pay to any other person, whether or not the solicitor or client has paid those costs, or
        (ii) in the case of a solicitor, to pay to the client the whole or any part of any costs that the client has been ordered to pay to any other person, whether or not the client has paid those costs,
    c) It may, by order, direct the legal practitioner to indemnify any party (other than the client) against costs payable by that party.

Muritini v Mercia Financial Solutions Pty Ltd [2021] NSWCA 180

Facts

- Mr Muritni was a solicitor acting for Mr Glover, who was sued over possession of property and money owing under a loan agreement
- Mr Glover then brought a cross-claim against several parties which alleged very serious matters including fraudulent misrepresentation and conspiracy to defraud
- At trial these claims failed completely and trial judge said the allegations were based on speculation and had no proper evidentiary foundation
- Judge also said lawyers have ethical duties not to plead fraud or criminality without a proper basis
- After that, those parties sought personal costs orders against Mr Murtini, primary judge made orders for him personally to indemnify them for their costs

Reasoning

- Primary judge found in substantive judgement that conspiracy and fraud allegations were entirely insufficient and speculative and that finding triggered the presumption under ***r cl 6.*** Mr M then had burden of rebutting it and failed to do so because his affidavit and oral evidence largely just repeated same arguments already made and rejected at trial
- Court stressed that those allegations were extremely serious and because of this, they require clear evidentiary support and careful professional judgement. The obligation under ***Sch 2*** not to provide legal services unless there is a reasonable belief, based on provable facts and an arguable view of the law, that the case has reasonable prospects of success. ***Conduct Rules 21.3 and 21.4,*** which prohibit a solicitor from alleging fraud, criminality or serious misconduct without a proper factual basis.
- Mr Muritini appeared to assume that because one part of the factual background was a sham, Mr Nicholson and Mr Shields must have been involved in the fraud. But that was speculation, and it ignored more obvious alternatives, especially the involvement of Mr Lippits, who the evidence strongly pointed to.

Ratio

- A solicitor may be made personally liable for costs under ***s 99 CPA and Sch 2 of the Uniform Law*** where serious allegations such as fraud or conspiracy are advanced without provable facts and without reasonable prospects of success.
- Decided leave was not needed here, even though judgement ostensibly about costs, wasn't a judgement about costs only

Specific	**No order as to costs**

Costs Orders	• No party is ordered to pay costs of other party and each party pays its own, may be where it cannot be said that one party has simply capitulated or one party has acted unreasonably in initiating or defending proceedings **Costs of day** • Costs can include costs for work 'reasonably connected' with the issues dealt with on that day e.g. preparation and taking out order which resulted from hearing **Costs in any event** • Usually concerns costs of an interlocutory application, party ordered to pay these costs irrespective of outcome of proceedings where without another specific order, costs would follow the event **Costs in the cause** • Usually concerns the costs of an interlocutory application • Party that will ultimately be liable for costs of proceedings will have to pay costs of that interlocutory application as well

Costs against non parties	• ***S98*** is broad enough to provide power to make costs orders against non-parties. A reasonable and just costs award against a non-party could be justified in exceptional circumstances e.g. in case of nominal parties or next friends where a person who is a non-party is closely connected to proceedings
	• Federal court has equivalent power under ***s43 of Federal Court of Australia Act 1976 (cth)***
	
	Heath v Greenacre Business Park Pty Ltd **[2016]**
	Facts:
	• Heath was director of Deliver Australia Pty Ltd
	• Deliver was defendant
	• Heath verified Deliver's pleadings and swore affidavits on its behalf and also said he had authority from Deliver's directors to run the proceedings
	• Greenacre obtained an order for security for costs against Deliver, but Deliver never provided the security. Deliver was in financial difficulty and later went into voluntary administration and then liquidation. Heath personally managed the litigation for Deliver, especially after the company's solicitors stopped acting.
	• Greenacre then sought order that Heath personally pay its costs as a non-party
	Legal reasoning:
	• Held non party costs order could be made against Heath on an indemnity basis from 30 May 2014 to final hearing date
	• Section **98** CPA gives the court broad power to decide by whom, to whom, and to what extent costs are to be paid. But costs orders against non-parties are exceptional and should be made sparingly.
	• Court referred to usual factors from ***FPM Constructions*** including:
	  ○ whether the unsuccessful party was the moving party
	  ○ whether the non-party funded the litigation
	  ○ whether the conduct of the litigation was unreasonable or improper
	  ○ whether the non-party had a substantial interest in the outcome
	  ○ whether the unsuccessful party was insolvent or a person of straw
	• These factors are not a checklist and should not be applied mechanically. The real question is whether, in all the circumstances, the interests of justice require a non-party costs order.
	• Heath had a major role in litigation and caused Deliver to defend proceedings and pursue cross claim. After solicitors stopped acting, he personally took over management of case, attended directions hearings, sought mediation and continued defence. He also had real interest in outcome being director and secretary, indirect interest as shareholder, largest unsecured creditor so stood to benefit if cross-claim succeeded
	• The Court said that, after seeing the respondents' reply affidavits and given the absence of contradictory evidence from Deliver, Heath had no reasonable prospect of successfully defending the proceedings or maintaining the cross-claim. Acting reasonably, he should have realised this by no later than 30 May 2014. Instead, he kept the litigation going. By doing that, he irresponsibly exposed Deliver to increasing costs and increased the respondents' costs as well. That conduct was unreasonable enough to justify a non-party costs order.
	
	Munkara v Santos NA Barossa Pty Ltd **(No 5) [2024] FCA 717 - targeting lawyer instead of party for costs order**
	Facts
	• 3 Tiwi Island traditional owners challenged Santos' Barossa Gas Project pipeline, arguing it would damage cultural heritage (represented by the EDO 'Environmental Defenders Office')
	• The applicants lost and Court made serious criticisms of EDO's evidence preparation - particularly finding subtle witness coaching and distortion of Indigenous instructions by EDO lawyer
	• Santos then sought a non party costs application against the EDO and applied for leave to issue subpoenas to gather supporting documents
	• Santos argued the EDO partly funded the case, was deeply involved in evidence preparation, may have acted unreasonably and may have had its own ideological/ activist interest in stopping the project beyond the ordinary lawyer-client role
	Held
	• Court granted leave to issue the subpoenas, finding sufficient forensic basis to pursue documents relevant to the costs application
	• It rejected arguments that Santos needed to state its complete costs case before seeking documents (procedural fairness only requires the EDO to know the case before the hearing itself, not beforehand)
	• The Court also rejected the argument that the subpoenas were necessarily disproportionate. Although courts must avoid costly satellite litigation, this was already a very large, complex, and expensive case, and Santos had little realistic prospect of recovering costs from the applicants themselves.
	• If you want cost order against a lawyer, **s98** does extend to non parties, but if going after lawyer, better off using more specific provision which is **s99** which requires lawyer be given a reasonable opportunity to be heard before any costs order is made
	• Whether third party costs against the EDO was appropriate?
	  ○ FOR: Trial judge made serious findings about witness coaching, lawyers who present unreliable evidence or run litigation unreasonably can face costs consequences; Santos had little prospect of recovering from the applicants; and if the EDO acted as funder, strategist or activist beyond its ordinary role, costs exposure becomes more justified
	  ○ AGAINST: Exposing lawyers too readily to personal costs risks chilling fearless representation; public interest litigation inherently involves novel arguments and vulnerable clients who couldn't litigation without community legal support; holding strong values should not alone create costs liability; and fail cases shouldn't automatically become a vehicle for punishing lawyers harshly
	• Access to justice concerns
	  ○ Community legal organisations may become reluctant to run difficult public interest cases if losing could expose them to significant costs
	  ○ Vulnerable clients - including Indigenous communities may struggle to find representation
	  ○ Public interest litigation tests new legal questions; fear of personal costs order may deter lawyers from taking these cases
	  ○ Well-funded defendants could use costs applications aggressively to deter legitimate challenges to government or corporate decisions
	  ○ Satellite litigation over lawyers conduct can itself become expensive and distracting - settlement figure here (over $9m) illustrates scale of financial risk involved

Privilege

Introduction

- Privilege is a right or immunity that lets the privilege holder resist the disclosure of information or documents where disclosure would damage an important principle or relationship that society values enough to protect, even at the expense of full access to relevant evidence.
- Prevents particular documents from being produced or used in evidence
- Right to claim privilege belongs to person whose protected interest or relationship is affected (privilege holder) and they may/ may not be party to case
- Can be raised at trial to object admissibility of evidence
- Client legal privilege
  - Protects confidential client lawyer comms and docs made for purpose of legal advice/ litigation services
  - Exists to encourage clients to be frank with lawyers to receive proper legal advice
  - E.g. client email solicitor asking whether they are likely liable and solicitor replies with advice
- Professional confidential relationships privilege
  - Protects certain confidential relationships
  - Protects relationships from harm
  - E.g. A patient tells their psychologist deeply private info during diff, and later a party in litigation wants to compel disclosure of those communications.
- Journalist privilege
  - Protects identity of sources
  - Supports freedom of press by protecting informants
  - E.g. a whistleblower gives information to a journalist about company's misconduct on condition that their identity remains secret and journalist is later asked in court to reveal source.
- Public interest immunity
  - Protects information where non-disclosure is in public interest
  - Protects government information where disclosure would be contrary to public interest
  - E.g. government holds international national security docs and party to litigation seeks production of them. Would damage public interest by harming national security.
- Settlement negotiations privilege
  - Protects comms and docs made in connection with attempts to settle disputes
  - Encourages disputes to be resolved without litigation
  - E.g. during commercial dispute, one party writes 'without prejudice' offering to pay $20k to settle claim. These communications generally protected and cannot later be used as evidence of liability. ***UCPR r20.30***

Context for privilege claims see s131A(2)

Privilege claim can be asserted in following situations either pre-trial and/or during trial:

1. In response to a subpoena seeking the production of documents
   - Seek order that those docs need not be produced in court (**objection to production)** or a privilege claim be raised to prevent the party who issued the subpoena from accessing the docs that have been produced, but they are still produced to the court (**objection to inspection)**
2. In response to discovery order under **Pt 21 of UCPR**
   - Can list the document as 'privileged' by identifying it and circumstances under which privilege is claimed to arise(**UCPR r21.3(2)(d)).**
   - If party seeking discovery wishes to challenge a claim for privilege then that party needs to file and serve a **notice of motion** seeking an order that the relevant document be produced for inspection.
3. To object to answering an interrogatory **r22.2(c),**
   - If one party serves interrogatories, other party may refuse to answer on ground of privilege and object to it
   - Party seeking the answer to interrogatory could **file notice of motio**n for an order for a further answer to interrogatory
4. In response to notice to produce
5. To object an order to produce or inspect docs made by court pursuant to **s68 CPA**
6. To resist other forms of compulsory acquisition of docs e.g. search warrants and orders
7. As basis for objection to tender doc during hearing
8. As basis for objection to oral examination of witness during hearing

Evidence Act
131A Application of Part to preliminary proceedings of courts

(1) If--

(a) **a person** is required by a disclosure requirement to give information, or to produce a document, which would result in the disclosure of a communication, a document or its contents or other information of a kind referred to in Division 1, 1A, 1C or 3, and

(b) **the person objects** to giving that information or providing that document,

the court must determine the objection by applying the provisions of this Part (other than sections 123 and 128) with any necessary modifications as if the objection to giving information or producing the document were an objection to the giving or adducing of evidence.

(2) In this section,

"disclosure requirement" means a process or order of a court that requires the disclosure of information or a document and includes the following--

(a) a summons or subpoena to produce documents or give evidence,
(b) pre-trial discovery,
(c) non-party discovery,
(d) interrogatories,
(e) a notice to produce,
(f) a request to produce a document under Division 1 of Part 4.6.

Applicable law and procedure for privilege claim

- Privileges in EA (e.g. **ss118,119,129,130 and 131)** apply when evidence is being 'adduced'.
- Effect of **s131A** is that EA applies to pre-trial proceedings. **s131A(1)** provides Court must apply rules set out in EA for determining 'disclosure requirement' for docs in all prelim proceedings.
- Limitations of **s131A EA:**
  1. Defines 'disclosure requirement' as a process or court order that requires disclosure of information or document. This means that s131A doesn't appear to apply to investigatory or non-curial processes
  2. **s131A** has been held to have limited application in ***NSW v Public Transport Ticketing Corp* [2011].** NSW CA held that consider **s7 EA,** and **s21 Interpretation Act,** NSW is a 'person' for purposes of **s131A.** However **s131A** was not engaged in a public interest immunity claim made by the State in respect of docs caught by an order for discovery against a statutory body who was the 'person' subject to the 'disclosure requirement' in relation to various docs but that 'person' didn't object to providing those docs. Therefore claim to be determined under common law, not by **s130.** This means that **s131A** applies when

	the 'person' required by a disclosure requirement to give information or to produce a doc, is the 'person' who also objects to giving that info or providing that doc 3. **s131A** also **applies only** to stage of **objection to production** (not in an application for access to docs) ***(Waugh Asset Management 2010)*** but this has **been doubted**. • **s132 of EA** provides that the court is to inform a witness or a party of the rights to make applications and objections of privilege. In addition, **s133** states that the court may inspect a document to determine a question of privilege. • **UCPR r1.8 and 1.9** are relevant provisions. Traditional view for raising privilege claim was that it was raised after doc was brought/ produced to court so question determined on whether party seeking doc could access document. However **1.9(3) and (4) UCPR** permits objection to be made to production which means that addressee of subpoena, notice to produce or order for production can claim privilege and not produce docs to court • **r1.9(5)(c)** permits court to insist upon production of doc so that court can rule upon privilege objection. Judge can look at the docs. • **r1.9** has been held to only apply to an objection to production. Therefore, law applicable to an order granting access or inspection is common law.
Client Legal Privilege	• Client legal privilege is a substantive rule of law that protects confidential communications between lawyer and client and third party (e.g. expert witness), and confidential documents made for the dominant purpose of legal advice or litigation, so that clients can communicate fully and frankly with their lawyers. ○ A professional relationship between lawyer and client (**s120 EA** for unrepresented litigants) ○ Confidential communications; and ○ Created for dominant purpose of legal advice (**s118**) or litigation (**s119**) • Privilege is the client's so they can waive it. Lawyer has duty to protect and uphold this and ostensible authority to waive privilege on client's behalf. • Can be claimed pre-trial and trial procedures. However, can be abrogated by statute, e.g. abrogated for obtaining docs in relation to serious terrorism offences • Confidential - obligation at the time either express or implied understanding that this communication wouldnt be disclosed **Rationale** • Promotes open communication between lawyer and client to facilitate proper legal advice • Proper functioning of legal system depends upon freedom of communication between lawyers and clients. • Professional guidance should be uninhabited by later possibility that it can be used against the person seeking advice • Allows lawyer to give the client the best advice, how can you give client best advice, you need all the information • Helps the administration of justice - that concept that if i can be full and frank and free with lawyer, lawyer will come up with best argument, best argument into court, that supports administration of justice • ***AFP v Propend Finance*** ○ The law wants courts and parties to have access to all relevant evidence so litigation can be decided fairly. Law also wants clients to be able to speak honestly and completely with their lawyers. Legal professional privilege resolves that tension by giving priority, to confidential lawyer-client communications. People will only seek proper legal advice, and give full and frank instructions, if they know what they say will remain confidential. ○ Privilege protects communications, not documents as such. A document is not privileged just because it exists or because it is in a lawyer's file. **The real question is whether it records or contains a protected communication, such as confidential advice from lawyer to client, instructions from client to lawyer, or material created for that protected legal purpose.** ○ LPP is part of the administration of justice and helps make the rule of law effective in practice. If people cannot communicate freely with lawyers, then they cannot properly understand, defend, or enforce their legal rights. **Evidence Act 1995 (NSW)** **117 Definitions** '**Client**' includes a) a person/ body who engages a lawyer to provide legal services or who employs lawyer, b) employee or agent of client, c) employer of a lawyer if employer is Cth or State, d) if persons of unsound mind, a manager, committee or person responsible, e) if client has died, personal rep, f) a successor to rights and obligation of client. **'Confidential communication'** means a communication made when a) person who made it, or b) person to whom it was made was under express or implied obligation not to disclose its contents **'Confidential document'** means doc prepared when a) person who prepared it, or b) person for whom it was prepared, was under an express or implied obligation not to disclose its contents **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. **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, or between lawyer for client and another or b) Contents of confidential document that was prepared for **dominant purpose of client being provided with professional legal services** relating to an Aus or overseas proceeding, or anticipated Aus or overseas proceeding, in which client is or may be a party **120 Unrepresented parties** 1) Evidence not to be adduced if, on objection by a party who isn't represented in proceeding by lawyer, court finds that adducing evidence would result in disclosure of: a) Confidential communication between party and another, or b) Contents of confidential doc that was prepared, either by or at director or request of party for dominant purpose of preparing for or conducting proceeding **Dominant purpose test to determine client legal privilege** • ***Esso Aus Resources Ltd* 1999 :** The critical question is the purpose that existed at the time the communication was made or the document was prepared. It is not enough simply to assert that the dominant purpose was legal advice (***EA s118)*** or litigation (***EA s119)***. The surrounding circumstances objectively must prove it. • ***Fed Commission of Taxation v Spotless* 1996** said 'dominant' meant ruling, prevailing or most influential purpose • If is equal, it'll probably be the dominant purpose • In ***Sydney Airports Corporation Ltd* 2005,** Spigelman CJ said test is objective, although subjective intention of person responsible for creating doc is relevant and often decisive (***Esso).***

- Copies of otherwise non-privileged documents can themselves become privileged if the copy was made for the dominant purpose of obtaining legal advice or for use in litigation. In ***Commissioner Australian Federal Police (1997)***, where Brennan CJ explained that the test focuses on the purpose for which the copy was brought into existence, not the later use of the document.
    - Makes it easier for them to know which docs are important, get a sense of what other side is worried about or not worried about - could make a different for this reason that even though others aren't privileged
- Email chain may contain earlier emails included merely because someone clicked 'reply' or 'reply all' which can make it harder to determine whether whole chain created for relevant privileged purpose (***Desane Properties)***
- In ***Sydney Airports Corporation Ltd***, Spigelman CJ said that the status of an in-house lawyer is relevant because an in-house solicitor may create documents for business or commercial purposes unrelated to legal advice or proceedings.

***Esso Australia Resources Ltd v Commissioner of Taxation 1999* - creation of dominant purpose test**

- Involved a discovery dispute with the Commissioner of Taxation. Esso claimed legal professional privilege over certain documents in discovery, and the HC had to decide what the correct common law test was for privilege in that pre trial setting.
- HC decided that the correct common law test for legal professional privilege is the dominant purpose test
- Case arose in the context of discovery, before ***s 131A*** was enacted, so the Court had to apply the common law rather than the Evidence Act provisions limited to evidence being "adduced".
- Held that previous sole purpose test was too narrow/ rigid. If taken literally, any additional purpose, however minor, could destroy privilege even where legal purpose was real reason document existed. Court noted that judges had already been softening sole purpose test in practice.
- HC preferred the dominant purpose test because it struck a just balance between protecting privileged communications and allowing access to relevant information. It also aligned Australian common law with the Evidence Act and with other common law jurisdictions such as England, New Zealand, Ireland and most Canadian provinces.
- Held that LPP protects confidential comms made for obtaining legal advice/services including litigation and rationale is public interest in administration of justice as clients must be able to communicate fully and frankly with lawyers

Re Southland Coal Pty Ltd 2006

Key principles governing client legal privilege

1. Substantive Rule of Law i.e. substantive immunity/ protection the law gives to a client
    - Privilege allows a person to resist giving information or producing documents that would reveal lawyer-client communications made for the dominant purpose of legal advice or legal services, including litigation.
2. Privilege claim under ***s118/119*** is 2 stages
    - Court must first be satisfied that the communication or document falls within ***s 118 or s 119,*** and then
    - Be satisfied that producing the document, or its unredacted form, would disclose the confidential communication or contents
3. Onus is on the party claiming privilege
    - Must prove facts necessary to establish the claim on the balance of probabilities
4. 'Legal advice' understood broadly,
    - ***General Manager, WorkCover Authority of NSW,*** includes not only telling client law, but also advising what should prudently and sensibly be done
5. Disclosure for the purposes of ***ss 118 and 119***
    - includes not only explicit disclosure of a confidential communication, but also material that supports a definite and reasonable inference about its contents.
6. Privilege can extend in some cases to communications involving third parties.
    - ***Pratt Holdings Pty Ltd*** for the proposition that third party communications with a client may be privileged if their function is to enable the client to obtain legal advice and the third party is sufficiently involved in the lawyer-client communication process.
7. Purpose is a question of fact, and dominant purpose must be determined **objectively** from all the circumstances.
    - Mere assertion is not enough. The court must look at all the evidence, including the evidence of the author and the person directing the document's preparation. An ancillary purpose does not necessarily destroy privilege, but if two purposes are of equal weight, one will not be dominant.
8. Privilege will usually fail if the document is merely a commercial or ordinary business document.
    - Austin J stressed, with reference to ***Seven Network Ltd v News Ltd,*** that a document created in the ordinary course of business is not privileged unless the dominant purpose was legal advice or litigation.
9. If a party could call direct evidence about purpose but does not, the court may infer that the missing evidence would not have helped that party. ***Ho v Powell***
10. Court may inspect the document itself to determine the privilege claim.

Proof of client legal privilege

- 'Client' making privilege claim has burden of proving claim.
- ***AWB Ltd v Cole (No 5) (2006),*** where Young J said the onus may be discharged by evidence of the circumstances and context in which the document was created, by evidence of the purpose of the author or person who procured it, or by reference to the nature of the document itself.
- ***Hastie Group*** is that the Court is not limited to the express statements made in affidavits supporting the privilege claim and Court may draw inferences from other proved facts. In this case, respondents sought production of an expert report that had been prepared for and provided to a prospective litigation funder. The engagement letter under which the report had been commissioned was accepted to be confidential and privileged, because it was a confidential communication between the liquidators' solicitors and the expert, for advisory services connected with anticipated public examinations and anticipated proceedings. **Once that engagement letter was accepted as privileged, and the evidence established the nature of the report and the circumstances in which it was prepared, the Court held that the proper inference was that the report itself was also privileged.** The Court said that any other conclusion would likely create inconsistency. - privilege holder is the client
- Also held that although liquidators sometimes act on their own behalf, in this case they were acting as agents for the companies in proceedings brought in the companies' names. Therefore the privilege belonged to the companies, not the liquidators personally.

Evidence Act 1995 (NSW)

121 Loss of client legal privilege: generally

1) This Division does not prevent the adducing of evidence relevant to a question concerning the intentions, or competence in law, of a **client** or **party who has died.**
2) This Division does not prevent the adducing of evidence if, were the evidence not adduced, the court would be prevented, or it could reasonably be expected that the court would be **prevented, from enforcing an order of an Australian court.**
3) This Division does not prevent the adducing of evidence of a communication or document that affects a **right of a person.**

122 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 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) The reference in subsection (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).

124 Loss of client legal privilege: joint clients - partners of law firm would all jointly own privilege and one of the parties says 'hello have a look' and all parties come along, its been waived by your joint privilege holder

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.

125 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.

3) In this section– **"power"** means a power conferred by or under an Australian law.

126 Loss of client legal privilege: related communications and documents - need it to understand next document

If, because of the application of section 121, 122, 123, 124 or 125, this Division does not prevent the adducing of evidence of a communication or the contents of a document, those sections do not prevent the adducing of evidence of another communication or document if it is reasonably necessary to enable a proper understanding of the communication or document.

Note: Example: A lawyer advises his client to understate her income for the previous year to evade taxation because of her potential tax liability "as set out in my previous letter to you dated 11 August 1994". In proceedings against the taxpayer for tax evasion, evidence of the contents of the letter dated 11 August 1994 may be admissible (even if that letter would otherwise be privileged) to enable a proper understanding of the second letter.

Loss of client legal privilege (privilege only client can waive)

Privilege may be lost where

- It would prevent enforcing court order **s121(2)** e.g. where communication disclosed location of child taken in breach of court order and maintaining privilege would prevent enforcement of order
- Been waiver **s122** either by consent **s122(1)** or when client has 'acted in a way inconsistent' with maintenance of privilege **s122(2)** or when client has 'knowingly and voluntarily disclosed substance of evidence **s122(3)(a),(4),(5)** or when substance of evidence has been disclosed with express or implied content of client **s122(3)(b),(5)**
- There are joint civil client which satisfy **s124**
- A communication or document was made in *'furtherance of commission of fraud or an offence or the commission of an act that renders a person liable to a civil penalty'* **(s125(1)(a))** or a communication or 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 **(s125(1)(b))**
- Another communication or document 'is reasonably necessary to enable a proper understanding of the communication or document' that has lost privilege due to operation of **s121,122,123,124,125,126**

***Mann v Carnell* (1999) - privilege not waived despite being shown to 3rd party - within the same body politic**

Facts

- Dr Mann, a surgeon had previously sued ACT Board of Health. This case had settled.
- After the settlement, Dr Mann wrote to his local member of the ACT Legislative Assembly complaining that the litigation had been a waste of public funds. This local member then asked the ACT Chief Minister, Carnell to respond to that criticism
- Carnell, in answering the inquiry, gave the member copies of legal advice that counsel had provided to the ACT about the litigation, but only on a confidential basis. The member understood this, did not copy it and returned it.
- Dr Mann later found out about this and argued that, as the ACT had voluntarily shown the advice to a third party, legal professional privilege had been waived and he sought preliminary discovery of the advices so he could inspect them.
- Dr Mann is worried about defamation - stuff that barristers wrote about me is horrible, chief minister ACT person given that information to someone else, so he seeks preliminary discovery to see if there's a cause of action
- Held
- HC held LPP was not lost. Waiver depends on whether the conduct of the privilege holder is inconsistent with maintaining the confidentiality that the privilege protects. Waiver may be express or implied and implied waiver arises where client's conduct is inconsistent with continued confidentiality
- The Court rejected any absolute rule that voluntary disclosure to a third party automatically waives privilege. Referring to ***Goldberg v Ng***, the Court said disclosure for a limited and specific purpose, on terms of confidentiality, may leave privilege intact.
- When sent had condition that it was meant to be confidential, wasn't spread hasn't got any caveat on it.

- Structure of executive, remained internal within executive, with head - privilege attached to body politic, to that group, not really a third party
- Applying that principle, the Court held there was no inconsistency in the ACT Chief Minister confidentially providing legal advice to a member of Legislative Assembly who wanted to assess reasonableness of Territory's conduct in litigation. Purpose of privilege was to protect Territory from prejudicial disclosure of its legal advice, especially to Dr Mann himself, and that purpose was not undermined by limited and confidential disclosure that occurred here.
- If the advice had been provided on terms allowing it to be shown to Dr Mann, privilege would have been waived, but that did not happen.

Fenwick v Wambo Coal Pty Ltd **(No 2) [2011] - knowing and voluntary disclosure - although inadvertent in tender bundle, didnt claim inadvertent sending draft letter, draft letter didnt disclose substance of advice, court said no it was actually substance**

Facts

- The plaintiff sought production of documents referred to in an affidavit sworn by a representative of Wambo Coal.
- Most of those documents were confidential legal advices given to Wambo Coal by its solicitors and one surveyor's report obtained at solicitor's request for dominant purpose of giving legal advice
- Accepted that when created, these documents were privileged (**s118**)
- The dispute arose because Wambo Coal had given discovery of a draft letter without claiming privilege over it. Included the same draft letter in a court bundle prepared for the purposes of tender. That draft letter had never been sent, but it stated that Wambo Coal had referred the issue to its lawyers and then set out "the legal advice Wambo Coal received".
- The plaintiff argued that by producing this draft letter on discovery, Wambo Coal had waived privilege over the underlying legal advices.
- Wambo Coal argued there was no waiver and also pointed to fact that draft had later been included in court bundle
- THE SUBSTANCE OF THE EVIDENCE - Wambo arguing that it did not contain substance of legal advice just conclusions of legal advice

Held

- Privilege had been waived because of the production of draft letter on discovery without any claim for privilege. This was knowing and voluntary. Wambo Coal had deliberately taken view that letter was not privileged and could have withheld it from inspection by making privilege claim, but chose not to do so.
- The inclusion of the letter in the court bundle didn't itself waive privilege, because that inclusion was inadvertent
- Draft letter disclosed substance of legal advice i.e. what the advice was, and went beyond bare conclusions and gave reasoning. As this was disclosed, privilege over the underlying advices and related docs were waived under **s122**
- White J therefore ordered that those documents be produced for inspection

Waugh Asset Management v Merrill Lynch [2010] **- privilege waived due to compulsion under law**

Facts

- Waugh Asset Management wanted access to Merrilll Lynch's earlier legal advice documents (privileged)
- Merrill Lynch had served a witness statement from Mr Stutchbury which referred to his 'state of mind' which Waugh said was likely influenced by the legal advice.
- Waugh argued that by serving the witness statement, Merrill Lynch had waived privilege over the underlying legal advice (or lost confidentiality so Waugh could inspect it).
- Important: Waugh was not really trying to get the witness statement itself, it was trying to get the earlier advice documents behind it.
- The witness statement was served because the court had directed the parties to file and serve witness statements (so it was done under court compulsion).

Held

- Court held no waiver at that stage. Under both common law and by analogy with **s122(1) EA**, service of witness statement was conduct under compulsion of law because it was done in compliance with Court's directions. Conduct under compulsion of law is not inconsistent with maintaining privilege
- The Court accepted that privilege in the witness statement itself may have been lost on service, but said that was not the real issue. The application was concerned with privilege in the earlier underlying legal advice documents, not with privilege in the statement itself. The question was whether the evidence given in the witness statement was inconsistent with maintaining privilege in those antecedent documents. At the stage of mere service, the answer was no.
- The Court therefore upheld Merrill Lynch's objection at the preliminary stage. It said that a different analysis might arise later if Mr Stutchbury's statement were actually adduced in evidence at trial, because forensic use of the statement might then create inconsistency or waiver. But until that happened, there had been no waiver of privilege in the underlying legal advice documents.

Expense Reduction Analysis Group v Armstrong Strategic Management and Marketing **2013 - accidentally released docs - when an inadvertent disclosure will still keep privilege**

Facts

- HC dealt with the inadvertent disclosure of 13 privileged documents during court ordered discovery.
- Norton Rose, acting for the ERA parties, mistakenly included the documents on discovery disks given to Marque Lawyers for Armstrong.
- When Norton Rose promptly said the disclosure was accidental and asked for the documents back, Marque refused, arguing privilege had been waived.

Held

- The Court stressed that discovery is intrusive, but it is not meant to destroy a party's entitlement to maintain confidentiality where privilege exists.
- Importance of "the just, quick and cheap resolution of the real issues in the dispute or proceedings". **S56** not having a fight of substantive issues in case but just tangential issues
- Accordingly, where a privileged document is inadvertently disclosed, the court should ordinarily permit the mistake to be corrected and order return of the document if the receiving party refuses to do so.
- The HC also made clear that the conduct of Armstrong's lawyers in pursuing waiver arguments over this tangential issue did not advance the overriding purpose of civil procedure.
- The dispute wasted costs, distracted the parties from the real issues, and consumed court resources unnecessarily. In reality, because the documents were privileged and their disclosure was plainly accidental, there was no real waiver issue worth agitating.

Glencore International AG v Commissioner of Taxation [2019] **- public policy of privilege**

Facts

- Plaintiff brought proceedings in original jurisdiction of HC seeking injunction to restrain Commissioner of Taxation from using document described as 'Glencore documents' on basis that the documents were privileged
- Glencore Documents were among Documents known as Paradise Papers which were stolen from Appleby's electronic files and disseminated (law practice who provided legal advice to plaintiff)
- Plaintiff asserted doc was subject to LPP and asked defendants to return them and provide undertaking that they wouldn't be referred to or relied upon

Held

- HC held that LPP doesn't itself create a cause of action or standalone right to injustice itself and dismissed the proceedings
- The Court said that LPP is an immunity, not an actionable right. It is a substantive protection, but its effect is only to allow a person to resist compulsory disclosure of confidential lawyer-client communications. The Court relied on ***Daniels Corporation International Pty Ltd v ACCC, Propend, and Carter*** to explain that privilege is not a basis for suing someone merely because they possess or might use

privileged documents.

- Privilege exists because the public interest in the administration of justice requires clients to be able to communicate fully and frankly with lawyers. That public interest is treated as paramount over the more general public interest that all relevant evidence should be available.
- Right to resist disclosure, its like a shield, you can't get past me, i can resist you, it doesnt form a positive right to sue someone, you cant say the docs you already have you cannot use them its already privileged, the multinationals that use consultancies, lets say i happened to hack their computer system, its to resist production of documents - thats the nub of this particular case

GR Capital Group Pty Ltd 2020

Facts

- Considered whether the applicants had waived LPP by asserting, in support of a motion to set aside consent judgment, that they did not know the underlying transaction might be illegal and that illegality might have provided a defence.
- Xinfeng argued that this put the applicants' state of mind in issue and justified access to legal advice given by their former solicitors.

Held

- MacFarlan JA held that the governing test, drawn from ***Mann v Carnell and Osland***, is inconsistency between the privilege holder's conduct and the maintenance of privilege, not mere relevance or general fairness. The question is whether the privilege holder has, expressly or impliedly, made an assertion about the content of the legal advice so that it would be inconsistent to withhold it. The inquiry is evaluative and depends on all the circumstances, including the centrality of the issue, the likelihood that advice was given, and whether the conduct has in substance "laid open" the communication to scrutiny.
- Applying that test, the Court held there was waiver only to a limited extent. It was inconsistent for the applicants to assert that, when they consented to judgment, they were ignorant of the possible illegality defence while at the same time claiming privilege over legal advice specifically about the existence of that defence. In those circumstances, a reasonable observer would see them as having implicitly laid open that advice for scrutiny.

LPUL ASCR 2015

31 Inadvertent disclosure

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 not disclose or use the material, unless otherwise permitted or compelled by law,
31.2.2 notify the opposing solicitor or the other person immediately, and 31.2.3 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.