

## Module 5: Waiver to Privilege

Inconsistent action (Mann) → any public interest aspect (Mann and Osland)

### Implied Waiver Exception to Privilege

- The **privilege belongs to the client and may only be waived by the client.**
- Waiver may be express or implied.
  - Express waiver (relatively straightforward) occurs when there is **disclosure** of the privileged communication or document containing that privileged communication with the **intention of giving up the confidentiality** of that information.

### Implied (imputed) Waiver at Common Law

- Examples of implied waiver include situations where:
  - Legal **advice is referred to in communications with a third party**, For example, in support of the privilege-holder's position or to advance the privilege-holder's interests.
  - Legal advice is referred to in press or stock exchange releases.
  - Legal advice is discussed in board papers or other internal documents which were then circulated to third persons.

The determination of whether there has been implied waiver is guided by the consideration of whether the **conduct of a party** who was entitled to claim privilege or their legal adviser is **inconsistent with the confidence** preserved by the privilege. (*Mann v Carnell* [1999] HCA 66)

- Implied waiver can occur even if the person did not intend to waive the privilege

### Mann v Carnell [1998] HCA 66

(imputed waiver not occurred when the action (communication to decide whether the ACT Government used public money reasonably in settling a litigation claim) was not inconsistent with the maintenance of the confidentiality – public interest aspect)

- Facts: Kate Carnell (Chief Minister of ACT) conveyed legal advice that she received to Moore a member of the ACT's Legislative Assembly on a confidential basis. The conveyance was for the purpose that Moore could consider whether public money had been appropriately used by the ACT Government to settle litigation with the appellant Mann
- Issue: whether LPP attached to certain communications was lost by a subsequent disclosure of those communications
- Held
  - **Legal principles – waiver of privilege at common law**
    - A person who would otherwise be entitled to the benefit of legal professional privilege **may waive the privilege**.
    - It is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement.

- The inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege.
  - E.g. include **disclosure by a client of the client's version of a communication with a lawyer**, which entitles the lawyer to give his or her account of the communication, or
  - the **institution of proceedings for professional negligence against a lawyer**, in which the lawyer's evidence as to advice given to the client will be received.
- Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide **whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect** → the law recognizes the inconsistency and determines its consequences, even though such consequences **may not reflect the subjective intention** of the party who has lost the privilege.
- What brings about the waiver is the inconsistency, which the courts, where necessary informed by **considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality**; not some overriding principle of fairness operating at large.

**Findings in this case:** Waiver not occurred

- The disclosure was **for a particular purpose**, i.e., for Moore to consider the conduct of the ACT Government in settling the legal proceedings.
- That conduct was **not by itself inconsistent** with the ACT Government also wanting to maintain the privilege over that legal advice.

***British American Tobacco Australia Service Ltd v Cowell (Representing the Estate of McCabe (deceased)) [2002] VSCA 197***

(the privilege is impliedly waived in relation to another piece or part of advice **if and only if that other piece or part is necessary to a proper understanding** of the first)

- Facts:
  - An affidavit containing privileged material had been filed by Mr Maher (in-house of BATAS), exhibiting two letters to and from a law practice which contained legal advice concerning the destruction of certain documents.
  - BATAS had expressly waived privilege in respect of these 2 letters as part of the affidavit
- Issue: whether a more general waiver could be implied from the express waiver to cover associated earlier legal advice.
- Held:
  - **Legal principles**
    - An implied waiver occurs when, by reason of some conduct on the privilege holder's part, it becomes unfair to maintain the privilege. The holder of the

privilege should not be able to abuse it by using it to create an **inaccurate perception of the protected communication.**

- Thus, ordinary notions of fairness require that an assertion of the effect of privileged material or disclosure of part of its contents **in the course of proceedings before a court or quasi-judicial tribunal be treated as a waiver** of any right to resist scrutiny of the proprietary of the use he has made of the material by reliance upon legal professional privilege. If, in such a document, a party sets forth **part of the contents of a particular identified document** or communication or asserts the effect of or his reliance upon a particular identified document or communication, it may be that **consideration of fairness might require that he be treated as having waived any legal professional privilege** in relation to the whole document or communication. Where, however, he does no more than make use of privileged material (eg legal advice, expert opinion or statements of potential witnesses) **for the purpose of formulating the statement in such a document of the details of the case which he proposes to make**, it would be an affront to ordinary notions of fairness to hold that the effect of his compliance with that procedural requirement was that he has waived his legal professional privilege.

***Attorney General (NT) v Maurice (1986) 161 CLR 475 at 487-8.***

- To ensure that the opposing litigant is **not misled by an inaccurate perception of the disclosed communication**, fairness will usually require that waiver as to one part of a protected communication should result in waiver as to the rest of the communication on that subject matter: *Great Atlantic Insurance Co v Home Insurance Co [1981] 1 WLR 29.*
- Reference in one letter of advice to an earlier letter of advice does not expose the latter to scrutiny by the other party to litigation merely because legal professional privilege is waived in relation to the former... where legal professional privilege is waived in relation to one piece (or part) of advice, the privilege is impliedly waived in relation to another **if - and only if - that other is necessary to a proper understanding of the first.**
- **Findings:** Defendant's claim to LPP ought not to have been overruled
  - The 2 letters did not create an "inaccurate perception of the protected communication"
  - the insight that the documents in question might provide "into the content, circumstances and consistency of the advice which was requested and received". That may have been so, but it **did not mean that therefore privilege had been waived.**

***Bennett v Chief Executive Officer of the Australian Customs Service* [2004] FCAFC 237**

(Disclosure of the **conclusion of legal advice** however, may lead to waiver of the whole advice – no public interest aspect)

- Facts:
  - In a dispute between Bennett (former customs officer) and the Australia Customs Service, the Australian Government Solicitor wrote to Bennett’s solicitors, conveying the substance of the advice the AGS had provided to the ACS, as below
  - “AGS has now advised Customs that Public Service Regulation 7(13) does not prohibit all public comment by an officer on matters of public administration. Rather, the sub-regulation must be construed or ‘read down’ so as not to apply to public comment on matters of administration which are not already on the public record ...
  - AGS has advised Customs that your client is not correct in asserting that he is not subject to the Act and Regulations if he makes public statements about Customs-related matters in his capacity as President of COA.”
- Held: Imputed waiver found
  - The test looks to **inconsistency between the disclosure that has been made by the client** on the one hand and the **purpose of confidentiality that underpins legal professional privilege on the other**. It is not a matter simply of applying general notions of fairness as assessed by the individual judge.

**Findings:**

- the substance and effect of the advice was being communicated in order to **emphasise and promote the strength and substance of the case** to be made against Mr Bennett
- In my view, it would be **inconsistent and unfair**, having **disclosed and used the substance of the advice in this way**, to now seek to maintain privilege in respect of the relevant parts of that advice which pertain to the expressed conclusion.
- Waiver may not be found if
  - It may perhaps have been different if it had been **simply asserted that the client has taken legal advice** and that the position which was adopted having considered the advice, is that certain action will be taken or not taken. In those circumstances, the **substance of the advice is not disclosed** but merely the fact that there was some advice and that it was considered.
- Once the conclusion in the advice is stated, together with the effect of it, then in my view, there is imputed waiver of the privilege.

***Switchcorp Pty Ltd v Multiimedia Ltd* [2005] VSC 425**

(Reference to legal advice vs reference to the contents of the legal advice → in this case the conclusion is provided → waiver imputed, no public interest aspect)

- Facts: Switchcorp sought access to all documents constituting or recording legal advice referred to in **Multimedia's statement to the ASX** regarding the dispute between the parties. The statement had read: "The **Board's lawyers have been instructed** to vigorously defend the claim and have advised that the plaintiff's claim **will not succeed.**"
- Held:
  - Legal principles
    - Fairness play a role in assessing whether there is inconsistency, but there is no overriding principle of fairness operating at large.
    - A statement which reveals the contents of legal advice, even if it does so in **a summary way or by reference only to a conclusion**, will, or probably will, result in a waiver
    - A statement which **refers to legal advice**, even if it associates that advice with conduct undertaken or with a belief held by the client, will not, or probably will not, result in a waiver.
  - Findings:
    - There was a **clear and deliberate disclosure of the gist** or the conclusion of legal advice received by Multimedia from its lawyers about the outcome of the proceeding. I do perceive inconsistency between this statement and the maintenance of confidentiality of the advice to which it refers.
    - If fairness has a role to play it seems to me that the relevant unfairness arises from the inconsistency. It is **unfair in this sense to permit Multimedia** to cast aside confidentiality of the advice in making the statement to the world at large so as to explain or justify its position and to then insist upon confidentiality when inspection is sought of an otherwise discoverable document.

[Macquarie Bank Ltd v B Anor \[2006\] FamCA 1052](#)

(Privilege may also be waived **where the content of the confidential communication is put in issue in the proceeding** by the party entitled to the privilege)

- Facts:
  - The 1st respondent was liable to Macquarie Bank under a guarantee. The 1st and 2nd respondents who were formerly husband and wife, had entered into consent orders on terms that included a transfer of certain property from the 1st to the 2nd respondent.
  - Macquarie Bank applied to **set aside the consent orders with** a view to placing the property in question back in the hands of the 1st respondent so the appellant could realise the judgment that it had obtained against the 1st respondent.
  - Resisting the appellant's application, the 2nd respondent in this case had filed an affidavit that contained the following paragraph:

- [224] In or about June 2004, I instructed my previous solicitors to act on my behalf in order to divide the property that [the husband] and I had accumulated during our relationship.
- [225] I understand, from **advice provided to me by my previous Solicitor** that he was required to return a Form of Application for Consent Orders, Terms of Settlement and Form of Transfer to the 1<sup>st</sup> respondent on several occasions between June 2004 and July 2004, and consequently I was not able to bring my Application for the division of property to this Court earlier and my legal costs in connection with the division of our property were increased greatly.”
- Macquarie Bank sought access to:
  - “All files and documents, including letters of advice, file notes and correspondence relating to instructions received by the previous solicitor, or any other member of your firm
  - One of the issues pressed by the appellant was the **bona fides of the consent order**. The appellant argued that the consent order was entered into by the parties in the knowledge that such an order would deprive the appellant of the opportunity to realise any judgment the appellant may obtain against the 1st respondent.
- Held:
  - **Legal principles:**
    - the **mere reference** to a privileged document in a non-privileged document which has been provided for inspection does not necessarily amount to waiver.
    - What brings about the waiver is the inconsistency which the courts, where necessary informed by considerations of fairness, perceive between the conduct of the client and the maintenance of confidentiality, not some overriding principle of fairness operating at large.
    - Privilege may also be waived **where the content of the confidential communication is put in issue in the proceeding** by the party entitled to the privilege.
    - It is, of course, not sufficient that the evidence in question be relevant to an issue between the parties; if this were the sole requirement the privilege would be worthless.
    - if a party, by pleadings or evidence, **expressly or impliedly makes an assertion about the content of confidential communications between that party and a legal adviser**, fairness to the other party may mean this assertion is a waiver of privilege.
    - For the doctrine of implied waiver to operate, it must also be shown that the **legal advice in question was relevant in the formation of that state**