

7 Client Legal Privilege

I. General duty of legal practitioners wrt CLP

SR 21/BR 60/BR 61; *Esso* (1999) – Responsible use of court processes and privilege: a practitioner must take care to ensure that all decisions to make allegations or suggestions under privilege against any person is:

1. **21.2.1/60(a)/61(a)** reasonably justified by the material then available to the solicitor,
2. **21.2.2/60(b)/61(b)** appropriate for the robust advancement of the client's case on its merits, and
3. **21.2.3/60(c)/61(c)** not made principally in order to harass or embarrass a person.
4. **60(d)** not given principally to gain some collateral advantage for the client/barrister/instructing solicitor/third party.

II. Overview – starting point: what kind of privilege is being claimed?

1. Is privilege claimed to prevent communications being:

- a. Used for any other purpose [if so, then the **common law test** applies] – referred to as 'Legal Professional Privilege' (LPP) – **See III**; or
- b. Adduced as evidence [if so, then *Evidence Act 1995* (NSW) (EA) applies] – referred to as 'Client Legal Privilege' (CLP) – **See IV**.
 - i. Also applies to preliminary proceedings (s 131A EA).

2. The party claiming privilege carries the onus of proving that the communication or document was made for the dominant purpose of giving or obtaining legal advice (Young J in *AWB v Cole*; *Esso*).

III. Common law test – LPP

A. Confidential communication

Prima facie, all information received in the course of acting for the client, until at least the end of the contract, where that information is not public knowledge, is confidential information (Trowell).

1. 'Confidential' – see above at Topic 4B.

2. 'Communications' is defined broadly: photographs, spreadsheets, drafts, incidental documents/copies etc.

• Examples:

- a. Documents that record legal work for the benefit of the client – research summaries etc., whether or not they are given to the client (*AWB Ltd v Cole* (2006));
- b. Documents produced to enable a legal adviser to give advice (*AWB v Cole*);

3. CLP protects **communication rather than the document**, as the privilege is not anchored to the purpose for which the document was brought into existence – e.g. CLP can attach to copies of non-privileged documents if the purpose of bringing the copy into existence satisfies the **dominant purpose test** (*Glencore*).

- a. CLP is **NOT** a cause of action/actionable legal right ('sword'), rather it is a 'shield' that prevents the disclosure of documents (*Glencore v Commissioner of Taxation*).
 - i. **Facts:** massive data hack resulted in legal advice being released into the public domain
 - ii. **Held:** document was **NOT** subject to privilege as CLP is merely a 'shield' to protect a party from having to disclose documents, rather than an actionable legal right (a 'sword') that could find a cause of action e.g. an injunction to prevent use of documents already in the public domain ⇒ **CLP is lost if data is hacked or disclosed by a third party.**

B. ...that arises from professional lawyer-client relationship

1. Must be in a lawyer-client professional capacity: competence & independence.

- a. E.g. if you have been admitted but no practising certificate → competence issue.

b. E.g. if you work as in-house counsel → independence issue (see Topic 9)

2. May extend to third parties where communication is necessary for legal advice (Pratt Holdings (2004)).

- a. In *Pratt Holdings*, the company sought advice from a firm of solicitors on the application of the *Income Tax Assessment Act*. The firm suggested that P obtain a valuation of assets from an independent accounting firm. The valuation report would be privileged, as it was for the purpose for P to obtain legal advice.
- b. The provision of non-legal services to a client who then chooses to provide them to its lawyers **does NOT clothe the original non-legal advice with privilege** as they have been prepared for a non-legal purpose.
 - i. A copy for the **purpose of providing them to the lawyer for legal advice would be.**

C. ...made for the **dominant purpose** of (1) providing or obtaining legal advice ('advice privilege'); or (2) use in actual, pending or contemplated court proceedings ('litigation privilege') (*Esso*).

The dominant purpose is the 'ruling, prevailing or most influential' purpose (FCT v Spotless); a document with several purposes, none predominating, is not privileged (Robertson v Singtel Optus). It is an objective question of fact assessed from the document and the circumstances of its creation, and labelling something 'privileged' is insufficient (Glencore). The party claiming privilege bears the onus (AWB v Cole).

1. Insufficient to show a **substantial** purpose, or that the privileged purpose is one of two purposes of equal weighting etc. – requisite purpose must **predominate** (*Robertson v Singtel Optus (2023)*).
 - a. **Facts:** Deloitte Report was prepared for the purpose of formulating Optus' response to the incident and preventing its reoccurrence and was therefore, not for the dominant purpose of legal advice.
 - b. **Held:** no LPP over the documents as the dominant purpose test not satisfied – they had **multiple purposes** in procuring the review and report by Deloitte, one of which was a privileged purpose; but not satisfied that the latter satisfied the requisite dominant purpose test (Beach J).
2. **Test:** Would the communication have been made (or document brought into existence) irrespective of the obtaining of advice? If so, then the communication may not satisfy the dominant purpose test.
 - a. Evidence of **intention** [document maker, or authorising person] is significant but not conclusive.
 - b. The **whole or part of communication may be privileged** where that part is discrete and can be severed from the communication e.g. document may be privileged, but its annexures may not be (*Robertson v Singtel Optus*).
 - i. Waiver of privilege as to part of a document is in general a waiver as to the whole unless severance is possible (*Prus-Grzybowski v Everingham (1986)*).

IV. Evidence Act – CLP

- '**Client**' is defined to include the employer of a lawyer and an employee or agent of a client thereby specifically **extending the privilege to in-house lawyers (s 117)**.
- '**Confidential communication/document**' means the person who made the communication/document or the person to whom it was made was under express or implied obligation not to disclose its contents, whether or not the obligation arises under law (**s 117**).
 - Communications between a client and a third party and/or a lawyer and a third party included in the litigation arm of the privilege (**s 119(a)**).
 - Part of a communication may be privileged if it can be severed (see above).

Client Legal Privilege (CLP) protects confidential lawyer-client communication made for the dominant purpose of giving legal advice, or for use in litigation (Esso; s 118-9 Evidence Act).

1. Test: 'dominant purpose' test to be 'adduced as evidence' (Esso).

- *The dominant purpose is the 'ruling, prevailing or most influential' purpose (FCT v Spotless); a document with several purposes, none predominating, is not privileged (Robertson v Singtel Optus).*

- It is an objective question of fact assessed from the document itself and the circumstances of its creation, and **labelling** it as 'privileged' is insufficient (*Glencore*).
- The party claiming privilege bears the **onus** (*AWB v Cole*). Here, the [communication, conversation] constitutes [legal advice (s 118) etc.] as it ...

a. **Legal advice; or**

- Confidential communication between: client and lawyer (**s 118(a)**); or 2 or more lawyers acting for client (**s 118(b)**); or contents of confidential documents prepared by client, lawyer or another person (**s 118(c)**).

b. **Current or anticipated/pending litigation advice (s 119).**

- 'Reasonably anticipated litigation' = litigation must be more than a mere possibility, but does not have to be more likely than not (*Mitsubishi Electric Australia*).
- '**Probable**' will meet the threshold.

2. Analogue

The [report] is closely analogous to the Deloitte report in *Robertson v Singtel Optus*, which served incident-response and prevention purposes and so failed the dominant-purpose test.

3. Onus of proof

Prima facie, client-lawyer communications on matters relevant to a retainer are presumed to be privileged.

- The onus of proof is on the party claiming privilege to establish the facts underlying this presumption.
- The onus then **shifts** to the party who disputes such claims to establish facts that prima facie rebut the presumption.

V. Are there any limitations or exceptions? Note: only cite EA if applicable.

However, there are scenarios in which privilege may not attach to confidential communication.

1. Waiver – privilege belongs to the client thus only the client can waive it, expressly or impliedly.

- EXPRESS (written/oral consent); or**
 - IMPLIED waiver:** where there is some *inconsistency* between the conduct of the privilege holder and the maintenance of confidentiality of which privilege is intended to protect (*Expense Reduction Analysis Group v Armstrong Strategic Management*; s 122).
- What brings about inconsistency is a question for the Court, informed by considerations of fairness, between the conduct of the client and maintenance of confidentiality, not overriding principle of fairness [29] (*Mann v Carnell* (1999)).
 - Fact-based inquiry as to whether the conduct of a privilege holder has directly or indirectly put the contents of an otherwise privileged document in issue.
 - Knowingly and voluntarily disclosed** the substance of the evidence to another person (s 122(3)(a), (4), (5));
 - Analogous to/distinguished from *Fenwick and Wambo Coal (No. 2)*, where the draft letter included in discovery contained the reasoning and conclusions of the legal advice provided → CLP was waived.
 - Examples:
 - In *Robertson v Singtel Optus* (2023), an argument that Optus' reference to the report in its announcements resulted in an implied waiver of privilege being unsuccessful. Beach J found that there had been no disclosure, and no intention to do so either.
 - In *Lillicrap v Nalder & Son* (1993), a client who sues his solicitor invites the court to adjudicate the dispute waives privilege and confidence to the extent that is necessary to enable the court to do so fully and fairly in accordance with the law including the law of evidence.