

### Client Legal Privilege

- Has **two sources** - is a rule of substantive law:
  - Evidence Act 1995 (NSW) ss 118 and 119;
  - Common Law.
- Claim of privilege can be asserted in the following situations:
  - 1. in response to subpoena seeking documents;
  - 2. in response to order for discovery;
  - 3. to object to answering an interrogatory;
  - 4. in response to a notice to produce documents;
  - 5. to object to an order to produce or inspect documents made by the court;
  - 6. to resist other forms of compulsory acquisition of documents;
  - 7. as the basis for an objection to tender document during hearing;
  - 8. as the basis for an objection to the oral examination of a witness during a hearing.

### Step 1: Establishing Thresholds

- Normally will need to address two fundamental questions (Southland Coal)
  - **1. Has the claim for privilege been established? (ss 118 and 119)**
  - **2. If so, has the privileged been waived? (ss 122-126)**

#### Does Privilege Attach to this Item?

- Communications, whether oral or in writing, made between a lawyer and client (or in some cases 3rd parties); and
- documents (whether delivered or not) prepared by the lawyer or client; that are:
  - **Confidential in character; and**
  - **made or prepared for the dominant purpose of either:**
    - **Enabling the client to obtain, or the lawyer to give, legal advice (s 118) or**
    - **for use in actual, pending or anticipated litigation (EA s 119)**

#### How Can It be Waived?

- The privilege is the client's and the client is the person that can waive it (Mann v Carnell)

#### Are These Copies?

- Copies of non-privileged documents can be privileged if the copy is made for the dominant purpose of legal advice or for use in litigation (Commissioner of Australian Federal Police v Propend Finance Pty Ltd)

### Definitions s 117

- Confidential communication: oral/written acceptable; Defines client broadly.

**REQUIREMENT:** Professional relationship between lawyer and client.

### Step 2: Onus/Burden of Proof

- The party claiming the privilege bears the onus of establishing the basis of the claim and the party seeking production does not bear the onus of excluding privilege (*Mitsubishi v Vic WorkCover*).
- Standard: on the BOP (s 142).

### Step 3: Establish Either ss 118 or 119

- **s 118:** Evidence is not to be adduced if, adducing the evidence **would result in disclosure (see test for 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 (apply dominant purpose test) the lawyer, or one or more of the lawyers, providing legal advice to the client.**
- **s 119:** Evidence is not to be adduced if, adducing the evidence **would result in disclosure (see test for disclosure) of:**
  - (a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made; **OR**
  - (b) the contents of a confidential document (whether delivered or not) that was prepared;
- **FOR the dominant purpose of (apply dominant purpose test) the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), OR**
- an **anticipated (see definition) or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.**

#### Defining Terms:

1. **Disclosure:** Whether what is disclosed by adducing evidence explicitly reveals the confidential communication or contents of confidential documents or supports an inference of fact as to the content.
    1. not satisfied if causes reader to "wonder / speculate whether legal advice has been obtained and what was the substance of that advice" – *AWB Ltd v Cole*;
  2. litigation is "**reasonably anticipated or in contemplation**" if its initiation is likely/ reasonably probable; a mere vague apprehension of litigation is insufficient (*Mitsubishi* - see case law).
- **SOUTHLAND FOR APPLICATION (p65).**

#### Step 4: Apply Dominant Purpose Test

- Dominant purpose test has been suggested as involving these questions:
- **“Would the communication have been made or the document prepared even if the suggested dominant purpose had not existed?”**
  - Determined OBJECTIVELY, but subjective intentions relevant (Esso Australia)
- If the answer is ‘yes’, the test is not satisfied.
- If the answer is ‘no’, test will be satisfied, notwithstanding some ancillary use/purpose was contemplated at the time. “ S Odgers
- See Case Law on Esso;
- Alternatively, if the document **would have been prepared irrespective of the intention** to obtain professional legal services, it will not satisfy the test (Grant v Downs)
- The **existence of an ancillary purpose** is not fatal to a claim for privilege but if there are multiple purposes of equal weight, it is unlikely that one would dominate the other hence a claim for privilege will fail (Southland Coal);
- A claim for privilege will not succeed if all that emerges is the document is a commercial **document and has been brought into existence in the ordinary course of business (Southland Coal).**
- Dominant purpose test = but for test (Esso).

#### Rationale of Client Privilege

- Baker v Campbell: Proper functioning of legal system depends on freedom of communication
- Relationship between a client and legal advisor has a special significance part of functioning of the law.

#### Can LPP/CLP undermine the public interest?

- If the jury/judge doesn’t have all the information it is in the public interests that the parties in litigation have access to all relevant evidence (trade-off)?

#### Examined by McHugh J in *Australian Federal Police v Propend Finance*

- Traditional doctrine: promotes the public interest because assists and enhances the administration of justice by facilitating the representation of clients;
- Client can make full and frank disclosures of relevant circumstances to solicitor.
- **Three points from Traditional Doctrine:**
- conflict of interest: need to protect the confidence of client v public interest in parties having access to all relevant evidence
- the subject matter of privilege is communications, either oral, written or recorded, and not with documents per se
- privilege is paramount importance in our legal system as it is a corollary of the rule of law.

#### Case Law

##### - **Esso v Commissioner of Taxation**

- Facts: Esso claimed legal professional privilege in the context of discovery
- Issue: Whether correct test was sole purpose test or dominant purpose test.
- Held: Dominant purpose test is to be used Sole purpose test too narrow.
- Dominant purpose reflects balancing of public interests in allowing access to documents and promoting confidence of the lawyer-client interactions
- Essentially a “but-for” test: If a communication would not be made “but for” obtaining legal advice or use in litigation, then it should be privileged

##### - **Mitsubishi v Vic Workcover**

- Facts: Vic Workcover claimed indemnity from Mitsubishi because some of its faulty products caused an accident. Mitsubishi contacted its solicitors to advise it of its liability who sent communications to certain experts to conduct investigations and produce expert reports. At the time discovery was made, Mitsubishi claimed certain expert reports and internal investigations which were commissioned by its solicitors were under client legal privilege and therefore do not have to be disclosed to Vic Workcover.
- Held: **“Dominant” purpose** means the ruling, prevailing or most influential purpose, distinguished from “primary” and “substantial” – the element of “clear paramount” is the touchstone;
- It is a question of fact: look at the objective circumstances, and the intention of the maker of document or person calling it into existence
- **Reasonable Anticipation of Litigation (s 119)**
- litigation is “reasonably anticipated or in contemplation” if its initiation is likely or reasonably probable – a mere vague apprehension of litigation is insufficient
- there must be a real prospect of litigation, as distinct from a mere possibility, but it does not have to be more likely than not.
- In this case there was a real prospect of litigation because:
  - Nature of the incident – worker and employer had ability to sue
  - Experience – this type of defective product leads to litigation
- **Litigation may be reasonably anticipated before the evidence gathering process/ investigation has even begun.**

### Loss of Client Privilege

- Evidence Act sets out when client legal privilege may be lost: ss 121 – 126.
- Where client legal privilege may be lost:
  - Would prevent enforcing court order; s 121(2)
  - Has been a waiver/consent; s 122(1)
  - Are joint civil clients which satisfy; s 124
  - Misconduct; s 125:
    - (1)(a): communication or document made for the furtherance of a fraud or offence or commission of an act with civil penalty.
    - (1)(b): where a client or lawyer (or both), knew or reasonably ought to know was made or prepared in furtherance of a deliberate abuse of power.
  - Communication “is necessary to enable a proper understanding of communication” that has lost privilege under one of the above laws; s 126.

### Ground 1: Prevent Enforcing a Court Order

- s 121(2) Evidence Act
- e.g. where the communication disclosed the location of a child taken in breach of a court order and maintaining privilege would prevent the enforcement of the order.

### Ground 2: Misconduct

- **If communication was made for commission of (a) fraud / (a) offence / (b) deliberate abuse of power**
- s 125(1)(a): Where a communication or document was made in “furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty”;
- s 125(1)(b): Where 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 power”.
- **ADDITIONAL REQUIREMENTS:**
  - (2)(a): must have been committed;
  - (2)(b) document was made in furtherance of fraud, offence or abuse of power.

### Note the Existence of Additional Considerations

- s 124: When lawyer represents 2 people;
- s 126: Loss of privilege when interpreting related communication and documents.

### Ground 3: Has Been Consent/Inconsistency

- s 122 Evidence Act (Operates in 2 ways):
- **(1): By consent;**
  - **DC Payments:** It is a fundamental common law right and no waiver unless clear conduct/language which displays intention to waive, either expressly or impliedly.
  - **Expense Reduction Analysts:** If mistakenly included, not waiver. However, must act promptly to correct mistake.
- **(2): Client has acted in manner that is inconsistent with maintenance of privilege;**
- **Inconsistencies include:**
  - Knowingly and voluntarily disclosing the substance of the evidence to another person – s 122(3)(a)
  - When the substance of the evidence has been disclosed with the express or implied consent of the client – s 122(3)(b)
- **Exceptions to Inconsistencies include:**
  - s 122(4) person not authorised to make disclosures
  - s 122(5)(a) given under duress/deception/compulsion of law
- **Fredrick v Wambo Coal**
- Facts: Document produced in discovery, no claim for privilege made. Later claim of privilege under compulsion of law.
- Held: Not waived here because did not make claim for privilege and made document available. Question = disclosure of substance involved questions of degree: case amounted to disclosure of substance as letter disclosed conclusion of legal advice and the reasoning.
- **Wagh v Merrill Lynch**
- Facts: Argued disclosure of witness statement = waiver.
- Held: No waiver, acting under comp. of law.
- s 122(5)(b) disclosure by client to another person of matter to which same lawyer is providing, or is to provide legal services to
- s 122(5)(c) disclosure to a person whom the client had a common interest
- **TEST FOR WAIVER (Mann v Carnell):** What brings about waiver is 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.
- **Mann v Carnell**
- Facts: Mann wrote to member of ACT describing litigation as waste of public funds. Respondent sent member copy of privileged doc about litigation. Man wanted discovery.
- Held: No inconsistency..
- Principle: Where party discloses privileged documents in confidence to 3rd person who has common legal interest = no inconsistency with privilege (no imputed waiver).

