

KEY PRINCIPLES OF PRIVILEGE AND WAIVER OF PRIVILEGE

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By Greg Couston & Lucy Williams

The doctrine of legal professional privilege dates back to ancient times. It can be identified in the legal principles of the Romans. Its roots, in English law, can be traced back to the period of Elizabeth I.

It appears that the original development of legal professional privilege in English law arose out of respect for a lawyer's honour, as a gentleman, to maintain the confidences entrusted to him; rather than a recognition of the interests of a client, or wider public policy considerations.

Irrespective of the history of its development, there are three things in the modern legal landscape which are absolutely true:

- the doctrine of legal professional privilege is well-established, in common law and in statute, as a sophisticated and often complex, principle of law;
- it is frequently misunderstood; and
- it continues to generate problems and disputes.

An example of a major privilege dispute was provided late last year in the Federal Court class action litigation concerning OZ Minerals (*Mitic v OZ Minerals Ltd* [2015] FCA 1152). The privilege dispute concerned 1,500 documents discovered by OZ Minerals, 550 documents produced by one law firm and 2,240 documents produced by another law firm. The privilege dispute was litigated by each party nominating up to 20 sample documents.

The outcome was fact specific; but the judgment spelt out conveniently a number of fundamental principles concerning privilege and waiver. Subsequent decisions have affirmed these principles.

Twelve key principles on privilege

In *Mitic v Oz Minerals*, Justice Edelman adopted the 12 key principles that were summarised by Young J in *AWB Ltd v Cole* (No 5) [2006] FCA 1234:

Snapshot

- Practitioners must frequently deal with the issue of legal professional privilege.
- The underlying facts play a large part in any privilege considerations – but practitioners need to clearly appreciate the legal principles.
- The Federal Court provided a useful summary of the principles of privilege and waiver last year in the case of *Mitic v OZ Minerals Ltd* [2015] FCA 1152.

1. 'The party claiming privilege carries the onus of proving that the communication was undertaken, or the document was brought into existence, for the dominant purpose of giving or obtaining legal advice.
2. The purpose for which a document is brought into existence is a question of fact that must be determined objectively. Evidence of the intention of the document's maker is not necessarily conclusive; and it may be necessary to examine evidence concerning the purpose of other persons involved in the hierarchy of decision-making ...
3. The existence of privilege is not established merely by the use of verbal formulae ... nor is a claim of privilege established by mere assertion that communications are undertaken for the purpose of obtaining or giving "legal advice".
4. Where communications take place between a client and his/her independent legal advisers, or between a client's in-house lawyers and those legal advisers, it may be appropriate to assume that legitimate legal advice was being sought, absent any contrary indications ...
5. A "dominant purpose" is one that pre-dominates over other purposes; it is the prevailing or paramount purpose ...
6. An appropriate starting point, when applying the dominant purpose test, is to ask what was the intended use or uses of the document which accounted for it being brought into existence ...
7. The concept of legal advice is fairly wide. It extends to professional advice as to what a party should prudently or sensibly do in the relevant legal context; but it does not extend to advice that is purely commercial or of a public relations character ...
8. Legal professional privilege protects the disclosure of documents that record legal work carried out by the lawyer, such as research memoranda, collations and summaries of documents, chronologies and the like, whether or not they are actually provided to the client ...
9. Subject to meeting the dominant purpose test, privilege extends to notes, memoranda or other documents made by officers or employees of the client that relate to information sought by the client's legal adviser ... whether or not [such documents] themselves are actually communicated to the lawyer ...
10. Legal professional privilege is capable of attaching to communications between a salaried legal adviser and his or her employer; provided that the legal adviser is consulted in a professional capacity in relation to a professional matter, and the communications are made in confidence and arise from the relationship of lawyer and client.
11. Legal professional privilege protects communications rather than documents ...

12. The Court has power to examine documents over which privilege is claimed ... (at [11]).

Note that these principles deal with the 'legal advice' privilege provided for in s 118 of the *Evidence Act*. Practitioners will be aware that privilege also attaches to confidential communications with third parties for the purpose of legal advice relating to litigation (s 119).

The principles, with some adaption, are also relevant to this second category of privilege.

Principles concerning waiver

The Federal Court also reiterated five general principles from the joint judgment of Gleeson CJ, Gaudron, Gummow and Callinan JJ in *Mann v Carnell* [1999] HCA 66; (1999) 201 CLR 1 – the leading decision on the waiver of privilege:

- '[S]ince it is the client who is entitled to the benefit of the confidentiality of legal privilege, it is the client who may relinquish that entitlement and waive privilege ...
- the client may waive privilege by inconsistency between (i) the client's conduct and (ii) the maintenance of the confidentiality of the communications ...
- waiver may be express or implied but in either case it is determined objectively ...
- in cases of implied waiver there is a need to decide whether particular conduct is inconsistent with the maintenance of confidentiality which the privilege is intended to protect. The concept of inconsistency is informed ... by considerations of fairness between the conduct of the client and maintenance of the confidentiality not some overriding principle of fairness operating at large ...
- not every voluntary disclosure of a document to a third party will waive privilege ...
- there are circumstances where disclosure to a third party for a limited and specific purpose does not amount to a waiver of privilege ... (at [13]).

Practitioners should be cautious concerning this last element.

Conclusion

Clearly, the issue of whether any particular communication falls within the protection of legal professional privilege, depends substantially upon the underlying facts but it is important for practitioners to have a clear understanding of the legal principles which are engaged by the doctrine of privilege. **LSJ**

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