

The Evolving Principles Governing Client Legal Privilege

The Evolving Principles Governing Client Legal Privilege

Robert McDougall[1]

I. Introduction

It is plain that client legal privilege is not just a rule of evidence, but also a basic and substantive doctrine of the common law. [2] The rule is founded on the perception that the proper and efficient functioning of the legal system is aided when parties are represented by skilled lawyers who are fully instructed; and that the protection given by the privilege encourages the client to be frank with the lawyer in giving instructions, and the lawyer to be equally frank with the client in the expression of advice. [3] Client legal privilege, which was traditionally known as legal professional privilege, is a creature of the common law, although in Federal jurisdictions and in States that have adopted the uniform *Evidence Act*[4] the relevant principles have been comprehensively restated. The change of name is reflective of the nature of the privilege and to whom it belongs. It is not a benefit of or for the legal profession but a privilege for the citizen. This forms the basis as to why the right to privileged legal communications has served as a cornerstone of our legal system for some time. However, the codification of the relevant principles in the *Evidence Act* 1995, coupled with the increasingly common use of in-house counsel and professional (expert) reports has made it progressively more difficult to determine the expanse of the privilege. Further, although I have referred to the “codification” of the relevant principles above, the common law rules still have work to do: for example, in relation to the circumstances in which privilege may be taken to have been waived.

The availability and scope of the privilege are under consideration in the wake of debate within legal circles and key ‘stakeholder’ groups extending into the wider community. That debate has resurfaced after the Cole and HIH Royal Commissions. In response to calls for reform, the Federal Attorney-General, the Hon Phillip Ruddock MP, directed the Australian Law Reform Commission (ALRC) to consider the law of privilege, specifically in relation to whether the coercive information-gathering powers of federal investigatory bodies and Royal Commissions would be more effectively performed if the doctrine of privilege was modified or abrogated. The competing public interests of the broader community and the private interests of individuals and corporations are currently being considered by the ALRC, which is due to produce a report on its inquiry by December this year.

II. The foundation of client legal privilege

In general, client legal privilege is established in New South Wales by ss 118 and 119 of the *Evidence Act*. Section 118 provides a privilege for documents containing legal advice. For a document to be privileged on this basis, it must have been prepared “for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client”. While the test may sound simple at first glance, the meaning of “dominant purpose” alone has been the source of substantial judicial debate. The communication’s purpose, the authority by which it was procured, and the surrounding facts and history of the parties may be necessary to determine its application.

While s 118 establishes a privilege solely between lawyers and their clients, the privilege afforded by s 119 encompasses as well communications between lawyers acting for their clients and third parties, and clients and third parties. Section 119 protects confidential communications when they are made for the dominant purpose of providing the client with professional legal services. Those legal services must relate to a current or pending Australian or overseas proceeding where the client is, may, or might have been a party. In addition to the dominant purpose considerations seen in s 118, judges now must also focus on what qualifies as pending litigation.

Sections 120 and 122 deal with the loss of legal privilege, including by consent, waiver and more generally.

In this paper, I intend to discuss three relatively recent decisions (in two different cases), which analyse the application of these rules and the privileges they create. The first is *Singapore Airlines v Sydney Airports Corporation*[5], a case I decided in mid 2004 that went on appeal. My decision was affirmed by the Court of Appeal in 2005. [6] The third decision is *AWB Limited v Honourable Terence Rhoderic Hudson Cole*, [7] a case decided by the Federal Court of Australia in May 2006.

III. *Singapore Airlines v Sydney Airports Corporation*

1. Overview

On 1 February 2001 an aerobridge hit the door of a Singapore Airlines plane. According to the pleadings, liability rested with the owner of the airport (SACL), and the maker and the current operator of the aerobridge. Once the senior corporate solicitor employed by SACL was informed of the accident, she formed the view that litigation was likely and commissioned an expert report into the incident. The letter requesting the report stated that it was commissioned “in contemplation of litigation and anticipated legal liability on SACL’s behalf” and “[i]ts contents are to be kept strictly confidential and its circulation is to be limited”. Later that same day and as predicted, Singapore Airlines served a written claim seeking reimbursement. Singapore Airlines and the operator of the aerobridge sought orders for the discovery of the report. SACL claimed that the document was entitled to litigation privilege under s 119 of the *Evidence Act*.

2. Litigation privilege

The first relevant issue was the time at which the facts as to dominant purpose and the status of the litigation fall to be determined. Because the wording of s 119 is ambiguous, it was necessary to look at relevant case law. Decisions on facts where lawyers themselves prepare documents suggested that the relevant time is when the documents are “brought into existence”.^[8] However, some recent cases suggested that the relevant time in circumstances where the report was commissioned by a solicitor is the time when the report was commissioned.^[9] I concluded that in a case where the reasons for which the report was required were constantly changing and the author of the report was notified of those changes, the relevant time period for the dominant purpose analysis could be extended until the date the report was prepared.^[10] In this case, however, the purpose of the report did not alter after it was commissioned. Consequently, the relevant time for assessment of “purpose” was the time when the senior corporate solicitor commissioned the report.

The next question was whether, at the time the report was commissioned, the dominant purpose ^[11] was the provision of legal services. The first hurdle that SACL had to meet was to show that the purpose of use in litigation must be “paramount”. Although subsidiary purposes (if they were shown) would not necessarily deprive the report of litigation privilege, as Branson J explained, in *Sparron v Apand Pty Ltd*:^[12]

“If the decision to bring the document into existence would have been made irrespective of any intention to obtain professional legal services, I am inclined to doubt that the purpose of obtaining professional legal services could be regarded as the dominant purpose for the making of the document.”

Her Honour’s test is in substance the same as the use of the “but for” test as a negative or disqualifying factor: compare its use in causation generally.

In *Singapore Airlines*, I found that the senior corporate solicitor commissioned the report for a number of different purposes. In addition to its use in litigation, the report, which would explain the cause of the accident and methods of prevention of such accidents in the future, would also be provided to the Airline Operation Committee (AOC), which would decide whether and when the bridge would be placed back in service. These facts suggested that SACL was unable to show that the purpose of use in litigation was paramount.

Moreover, I said that where in-house counsel commissions a report, it is not the purpose of in-house counsel that is determinative, but the purpose of the company. In the traditional example, where an external lawyer drafts a particular document, it is his or her purpose that is relevant; and similarly, where an external lawyer commissions a report, it is once again that lawyer’s purpose that is relevant. However, in the context of documents commissioned by in-house counsel, the relevant purpose is that of the company because the company has ultimate control over the production of the document. ^[13] Although the purpose of the particular in-house counsel who commissions the report may be imputed to the company, the purpose of any other officer and employee who authorized or required its production, or for whose use it was prepared, will also be relevant to the characterisation of the dominant purpose for which the document was prepared. While the senior solicitor who actually commissioned the report may have considered that use for the purposes of prospective litigation was the dominant purpose, SACL did not prove that this was the dominant purpose of other employees who had a role in commissioning the report, or for whose use also it was prepared, or of other recipients of the report. As SACL (which bore the onus) had failed to prove that the dominant purpose of the report was for use in litigation, I concluded that the report was not privileged.

The next question was the existence of anticipated proceedings. There must be more than a vague apprehension of litigation, but it need not be more likely than not that litigation will be commenced. As in the case of the dominant purpose test, it is not necessarily the commissioning in-house solicitor's view of the likelihood of proceedings that is determinative, but the company's view. As with purpose, that should fall to be considered objectively, on the whole of the relevant material. Any assessment of the company's view must take account of the views of other employees who had a role in the commissioning of the report, or for whose (among others') use it was prepared. In the real world, it is likely that the in-house lawyer will be the one whose view predominates; but this is as a matter of fact, not principle. In the actual case, the timeliness of Singapore Airlines' complaint, coupled with the solicitor's evidence, provided an adequate basis for the conclusion that litigation was anticipated. Other relevant considerations included the surrounding facts of the case, which suggested mechanical or operational failure and the involvement of numerous parties, and the senior solicitor's belief that it was an extremely litigious environment.

The fourth and final question was whether the alleged privilege had been lost through waiver. Although common law consideration of waiver included reference to overriding principles of fairness, [14]waiver is currently regulated by s 122. The concept is based on disclosure of the document's substance or, more fundamentally, on inconsistency between the conduct of the client and the maintenance of the confidentiality. Voluntary disclosure to a third party does not necessarily waive privilege, but any disclosure inconsistent with the continued existence of confidentiality will waive the privilege even if undertaken for good reason. I concluded that SACL did not waive any litigation privilege that may have attached to the expert's report on the ground of fairness, because this issue would only arise if SACL used a portion of its report to its advantage while keeping the remaining parts privileged. However, the production of the report's conclusions to the AOC was capable of being conduct inconsistent with the maintenance of the confidentiality, because that body included airline representatives who would be likely to discuss the report with their company and others. Thus, it was necessary to consider whether disclosure of the conclusions alone gave rise to implied waiver.

The substance of an otherwise privileged document must be revealed before there will be a waiver. In circumstances where a lawyer is giving advice, the ultimate conclusion reached is most likely "the essence or vital part of the advice".[15] In contrast, where the question of waiver arises in connection with a report written by an expert, the summary of conclusions would be unlikely to contain the true substance of the report. [16] The substance of the advice necessarily involves not only the conclusions, but also the relevant factual bases and the reasoning process. Without those, the conclusions cannot be assessed. [17]

Under s 133 of the Act, the Court has the right to read a report or document to determine for itself whether the substance had been disclosed. I declined to do so. Instead, I based my decision upon the fact that only the conclusions of the expert report had been revealed to the AOC. Since neither the underlying factual findings nor reasoning had been disclosed, the true substance of the document had not been revealed and privilege had not been lost under s 122.

3. My determination

I concluded that, although litigation was pending when the report was commissioned and any privilege had not been waived by its partial disclosure to another body, the report lacked privilege because SACL, the party asserting the privilege, had failed to show that the dominant purpose of the report was its use in litigation.

4. The case on appeal

On appeal, the only issue before the Court of Appeal was whether SACL had proven that the dominant purpose of the report was for use in litigation. Although the Court of Appeal found that I had misunderstood one aspect of a witness's response it agreed (although for reasons that it stated separately and at length) with my reasoning regarding the application of the s 119 privilege, and it upheld my decision.

SACL contended that in-house lawyers should not be treated differently as a result of their status as an employee of the company, and that the test for dominant purpose should remain the subjective purpose of the lawyer. The Court did not agree. Spigelman CJ, with whom Sheller JA and MW Campbell AJA agreed, found that the status of a solicitor as in-house counsel was relevant to the factual inquiry. His Honour said:

"An in-house solicitor is, by reason of his or her position, more likely to act for purposes unrelated to legal proceedings than an external solicitor who,

in the normal course, has no relevant function other than that involving legal proceedings and/or legal advice. An in-house solicitor may very well have other functions. Accordingly, in determining whether or not a document was brought into existence for a purpose which was both privileged and dominant, the status of the legal practitioner is not irrelevant.” [18]

Moreover, the Court found that in circumstances where the in-house lawyer had admitted that the report had other purposes and would be received by other individuals, her subjective intention did not have to be given determinative weight. Spigelman CJ concluded:

“[t]he evidence that the report was always to be deployed for non-privileged purposes, which purposes were of significance to the claimant ... was such that although the privileged purpose may have been the most important single factor, it was not shown to be dominant.”[19]

IV. AWB Limited

1. Overview

The third, more recent, decision, which demonstrates some limitations on the breadth of client legal privilege, is *AWB v Cole*. [20]

In late 2005 the “Oil for Food Inquiry” was established to investigate and report on whether the actions of AWB and two other Australian companies constituted a breach of any applicable law. In the course of the inquiry, AWB inadvertently produced a “Draft Statement of Contrition”. While the Commonwealth did not argue that any privilege had been waived by the document’s accidental production, it did contend that the claim of client legal privilege had not been established. Finding that the dominant purpose of the draft was not for legal advice, the Commissioner agreed, but he deferred making any orders for production etc until an “appeal” [21] was heard and determined by the Federal Court. Young J of the Federal Court considered the relevant issues, including whether the draft attracted the privilege, and found that it did not.

2. The facts

A crisis management expert was retained by AWB in early December 2005 to provide public relations advice or strategic advice in relation to the inquiry. In mid December AWB’s CEO and its counsel discussed the expert’s retainer and his advice to “over apologize” through a statement of contrition. On 21 December a telephone conference took place between the expert, AWB’s external legal advisers and various representatives of AWB, including some executives, its CEO and in-house counsel. During the conversation, the expert provided suggestions as to what would be an appropriate statement and counsel provided legal advice about the statement’s form and content, including the addition of some subject matters. Following this conversation, the external lawyers provided additional written legal advice. Only after this additional legal advice was received did the CEO, allegedly acting on it, create the draft statement. The draft statement was then circulated through numerous iterations to those present at the initial conference for further discussion and advice. Ultimately, the statement of contrition, which was proposed to be used during the CEO’s testimony, did not see the light of day.

3. Whether the draft statement of contrition was protected by client legal privilege

The first asserted basis for protection was legal advice privilege, which provides a privilege for documents made for the dominant purpose of obtaining legal advice, regardless of whether there is pending litigation. Cases considered by Young J [22] suggested that legal advice could encompass a large area of communications created or produced by counsel.

In *Balabel v Air India*, [23] the Court found that “legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context”.

In *Three Rivers District Council v Governor and Company of the Bank of England (No 6)*, [24] the House of Lords overturned a Court of Appeal decision. (The Court of Appeal had concluded that advice as to how a bank should present its case to an inquiry so as to seek to lead to a favourable conclusion was not privileged.) As Lord Scott of Foscote stated, “presentational advice falls ... squarely within the policy reasons underlying legal advice privilege.” [25]

In Australia, the decisions of Anderson J in *Dalleagles Pty Ltd v Australian Securities Commission* [26]

and Allsop J in *DSE (Holdings) Pty Ltd v Intertan Inc*[27] echoed the position arrived at in *Balabel*.

In substance, Young J accepted the reasoning in those English and Australian decisions. However, his Honour also focused on two additional matters:

- (1) The concept of professional legal advice given by a lawyer in his or her capacity [28]; and
- (2) The need for the advice to satisfy the dominant purpose test.

In considering the dominant purpose issue, Young J concluded, as I had done, that the relevant purpose might not be the purpose of the author or the individual commissioning the document but, rather, the purposes of "other persons involved in the hierarchy of decision making or consultation that lead to the creation of the document". [29] AWB argued that the determinative purpose was that of the external lawyer, because the draft statement was allegedly written at the direction of the external lawyer who approved of its creation and provided legal advice about its substance. But Young J concluded that the lawyer's purpose was not determinative, because his was not the true impetus for the creation of the draft statement. Moreover, the purpose and use of the document must be decided objectively according to all the evidence. Having regard to the evidence, Young J concluded that the draft statement was brought into existence for several purposes, including the procurement of further advice from the expert and company executives in addition to the external lawyer. The facts that: the draft statement was sent to counsel amongst others; was based very closely on the oral and written advice of counsel; and "had to be evaluated against legal advice"; did not mean that legal advice was the dominant purpose. None of the evidence showed that any one purpose was dominant. Consequently the draft statement was not privileged, because the claimant failed to prove that legal advice was the dominant purpose.

The second basis for the assertion of legal advice privilege was that the draft statement actually recorded legal advice. Derived from the policy objective that a client should be able to obtain legal advice in confidence, the client legal privilege, in the words of Branson J in *Wenkart v Australian Federal Police*, "extends to any document prepared either by the client or by the legal adviser from which the nature of the advice sought, or given, might be inferred." [30] Gummow J has said that a document will be regarded as containing legal advice only if the disclosure of the document in question will directly reveal, or allow its reader to infer, the actual content or substance of a privileged communication: *Propend Finance Pty Ltd v Commissioner of Federal Police*. [31] Young J explained it thus in paras [133], [134]:

"133 There is, of course, a difference between explicit disclosure and disclosure by inference. Inferences are rarely certain. In my opinion, what Gummow J and Anderson J each had in mind was that the document in question would support an inference of fact as to the content or substance of a privileged communication; but the inference of fact must have a definite and reasonable foundation in the contents of the document. It would not be sufficient that the document as a whole, or particular statements within it, cause a reader to wonder or speculate whether legal advice had been obtained and what was the substance of that advice. I do not think that this is the kind of tendency that Anderson J had in mind in *Dalleagles* when his Honour said that the true basis for extending privilege to this class of documents was not so much that they were themselves advice or communications, but because they will, if disclosed, reveal or tend to reveal, the content of privileged communications.

134 The application of the principle in this way is, I think, supported by Dawson J's observations in *Maurice* at 496-497:

'Before it emerges in its final form, successive drafts of a claim book may be privileged but this is not because of any privilege attaching to the final product. Draft pleadings in an action may be privileged, but I have never heard it suggested that a statement of claim or a defence or a reply is privileged so that the privilege is waived when it is filed or delivered to the other side. The reason why the draft may be privileged before the document is completed was early explained in Walsham v Stainton, upon the basis that, although after a pleading has been filed it becomes publici juris, the drafts "might disclose the precise character of confidential communications with the solicitor, by showing the alterations made from time to time". In the same way a letter to the other side in litigation which is drafted in a

solicitor's office may be privileged before it is sent because it may reveal confidential communications between the solicitor and his client. Once it is sent, however, it ceases to be confidential and there is no privilege in it, not because privilege in the document is waived, but because no privilege attaches to it.

When the claim book in this case reached final form or, at all events, when it was put to the use for which it was intended, it was not a confidential communication and not a privileged document. Legal professional privilege exists to secure confidentiality in communications between a legal adviser and his client but it can have no application in relation to a document the purpose of which is to communicate information to others. Of course, what is contained in such a document may reveal some confidential communication between a legal adviser and his client, but if it does do so and so waives privilege, the waiver is of the privilege in the anterior communication and not in the document itself.

*Thus, if in a pleading the contents of a privileged communication are set out then the privilege attaching to that communication may be waived by the pleading. But for this to happen the content of the communication itself must be revealed. The mere reference to the occasion, such as a conversation or a letter, without reference to its content will not constitute a waiver of the privilege: *Buttes Oil Co v Hammer* [No 3]; *Roberts v Oppenheim*.'*

See also Gibbs CJ at 481, Mason and Brennan JJ at 488 and Deane J at 493."

AWB argued that the draft statement revealed aspects of the legal advice given to it. Young J appears to have proceeded on the basis that the document was not privileged simply because of the CEO's adherence to his lawyer's advice when he wrote the document.[32] However, his Honour concluded that the fact that one could not identify what subject matters were introduced to the draft by reason of or following that advice meant that one could not determine the content or substance of the advice. In the result, the draft statement was not privileged as a record of legal advice.[33]

The third and final question relating to privilege was whether litigation privilege should extend to inquiries; or, alternatively, whether the document was created for the purpose of being used in connection with civil or criminal litigation which might result from the inquiry and the recommendations of the Commissioner.

As to the first point: Lord Nicholls of Birkenhead in *In Re L (a minor) (Police Investigation : Privilege)* concluded that that the litigation privilege should be extended to any proceeding which cannot be conducted fairly without its use, including child care proceedings. [34] But the majority of the House of Lords held that the litigation privilege did not apply to proceedings that lacked an adversarial nature. [35] In *Three Rivers*, the case concerning the inquiry into the Bank of England's actions, the Bank did not even assert a litigation privilege.

AWB argued nonetheless that the privilege should be extended, because the same policy reasons for its existence in litigation apply in the case of an inquiry. It pointed to the following circumstances:

- (1) The Commissioner would report on the lawfulness of AWB's conduct;
- (2) Criminal penalties attach to untruthful evidence; and
- (3) The proceedings have a somewhat adversarial dimension, including the presence of representation and the examination and cross examination of witnesses.

Despite these similarities, Young J stated [36] that "the reason why the litigation privilege has been recognised as a substantive rule of law and as a fundamental right, is that it operates to secure a fair civil or criminal trial within our adversarial system". In direct contrast to a trial, a commission of inquiry does not finally determine rights or obligations. Considering these differences and the protection already afforded to those in an inquiry by the legal advice privilege, Young J concluded that the rationale for litigation privilege did not require its extension to a commission of inquiry. [37]

His Honour's conclusion on this point is *obiter dictum*, since his Honour had held that the document

was not privileged at all. But his reasoning is persuasive. It is supported by the decision of Bergin J in *Ingot Capital Investments Pty Ltd & Ors v Macquarie Equity Capital Markets Ltd & Ors* [2006] NSWSC 530.

As to the second or alternative point: Young J concluded that it failed, because he found as a matter of fact that the draft statement was not created for the purpose of any future litigation that might arise out of the inquiry, but the inquiry itself. [38]

4. The determination

Young J concluded that AWB had not made out its claim of client legal privilege over the draft statement of contrition and therefore ordered that the application be dismissed.

5. Addendum

The third question considered by Young J in *AWB* – whether litigation privilege should extend beyond court proceedings to inquiries – was dealt with by Bergin J in *Ingot Capital Investments Pty Ltd & Ors v Macquarie Equity Capital Markets Ltd & Ors* [2006] NSWSC 530. The question for her Honour's decision was whether an opinion prepared by an expert for use in or in relation to proceedings in the Administrative Appeals Tribunal (AAT) attracted litigation privilege. That raised the first question whether, in terms of s 119 of the *Evidence Act*, the proceedings in the AAT were "an ... Australian proceeding". Her Honour noted at para [16] that the AAT was not obliged to apply the rules of evidence (*Administrative Appeals Tribunal Act 1975* (Cth), s 33(1)(c)). Thus, her Honour said, "the [Evidence] Act does not apply" to the AAT."

Her Honour then turned to privilege at common law. She noted at para [18] that litigation privilege protects communications between the client and the lawyer made for the dominant purpose of providing the client with legal services in connection with pending or anticipated legal proceedings."

Her Honour concluded at [55], after a detailed review of the authorities, that the AAT stood outside the adversarial system of justice, and that there was no proper basis on which common law litigation privilege should be extended to proceedings in the AAT. Her Honour said that the dictates of fairness, which underlay the availability of common law advice and litigation privilege, did not apply to the processes of and proceedings in the AAT.

V. Discussion

In summary, although the breadth of client legal privilege seems to have been expanded in recent years through landmark cases such as *Three Rivers*, cases such as *Singapore Airlines* and *AWB* demonstrate that this privilege is not all encompassing and is often fragile. As to both advice and litigation privilege, the dominant purpose requirement may be (and often is) a substantial barrier to the claim of privilege. The fact that a document is sent to counsel, as well as other individuals, with one purpose (obtaining legal advice) will not necessarily afford the document privilege. A document which coincides with a lawyer's advice or "had to be evaluated against legal advice" will not automatically have legal advice privilege; it must also satisfy the dominant purpose test. Likewise, phrases in the document commissioning the report that notify the author that the document is required for use in litigation will not of themselves ensure protection.

Those of you who are in-house counsel must be conscious of more than your own purpose when you commission a report. The purposes of all those who play a part in its authorization, and all those who may receive it, may be relevant; and those purposes may be imputed to the company. Remember that the relevant purpose is that of the company that you consider to be the most important purpose may not always be the dominant purpose of the report.

You should also bear in mind what Spigelman CJ said as to the possible multiple functions of in-house counsel: [39]

"24 In my opinion, his Honour did not err in identifying the status of Ms Wilder as an in-house solicitor as possibly being relevant to the factual inquiry in which he was engaged. An in-house solicitor is, by reason of his or her position, more likely to act for purposes unrelated to legal proceedings than an external solicitor who, in the normal course, has no relevant function other than that involving legal proceedings and/or legal advice. An in-house solicitor may very well have other functions. Accordingly, in determining whether or not a document was bought into existence for a purpose, which was both privileged and dominant, the status

of the legal practitioner is not irrelevant. I do not see that his Honour erred in any respect in the references he made to the status of Ms Wilder as an in-house corporate solicitor.”

Turning to litigation privilege: a solicitor must have regard to the real likelihood of litigation. One cannot simply commission a report as a fallback position on the off chance that litigation may occur in the future, and expect to attract the privilege. The court will take into account factors including the amount at issue, the surrounding facts, the number of parties, and the likelihood of resolution without the intervention of the courts. You should be aware that a party may not be able to maintain this privilege in non-adversarial proceedings or proceedings where rights and obligations are not determined.

Bear in mind in each case that the question is to be resolved objectively on the whole of the relevant evidence. The court is not bound by expressions of subjective state of mind – even on oath. Contemporaneous documents and events will be likely to inform the deliberation.

In all cases, the claimant bears the onus of proving that the material is privileged. You should be aware that this onus is not one to be discharged simply by the incantation of any particular form of words. The Court is entitled to look (and in the case of dispute will look) at all the circumstances, including those in which the material came into existence and the nature of the documents (or whatever) themselves. As Stephen, Mason and Murphy JJ said in *Grant*,^[40] “privilege is not necessarily established by resort to any verbal formula or ritual”. The Court is also entitled to look at the material: although as I said in *Singapore Airlines*, it need not, and will not always, do so. ^[41]

Lawyers must be conscious of the ease with which an implied waiver of privilege can occur. When you disclose parts of confidential communications or reports to others, you must consider whether the true substance of the report was revealed. In the case of expert reports, this may depend upon the type of report required and the nature of the instructions given. The court has the right to read the privileged document to see if its substance has been revealed. Moreover, you must make sure that your actions or the actions of the party you represent are not inconsistent with the maintenance of the confidentiality. You must consider who will have access to the report and how they will be likely to treat it.

Finally, I wish to refer to the role that lawyers play in the formulation and advancement of claims for privilege. In my view, a lawyer’s professional obligations and duties to the court require that a lawyer not make or facilitate the making of a claim for privilege that the lawyer does not believe on reasonable grounds can be sustained. In referring to “reasonable grounds”, I intend to call up a test similar to that relating to the commencement of legal proceedings for the filing of a defence or cross-claim.

I have already noted that client legal privilege is justified on the basis that it is essential to the judicial process. This is because it “serves the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers”: *Esso Australia Resources Limited v Commissioner of Taxation* ^[42]. Despite the uncertainty surrounding the application of the privilege, it is well established that privilege is not all encompassing. It is limited to the two categories, legal advice and litigation, and is easily lost through waiver. While the grave importance of the privilege is unquestioned, its breadth is continually debated.

VI The future

As I have said, the ALRC is considering the law relating to some aspects of client legal privilege. The reference is not open ended. Specifically, the ALRC will not consider whether the rules relating to privilege have outlasted their utility, or whether the privilege should be abrogated wholly or substantially modified with general effect.

The ALRC is considering whether it is desirable to

- modify or abrogate the privilege in order to achieve a more effective performance of Commonwealth investigatory functions;
- clarify existing federal provisions that modify or remove the privilege, with a view to harmonising them across the range of Commonwealth statutes; and
- introduce or clarify other statutory safeguards where the privilege has been modified or abrogated, with a view to harmonisation across the range of Commonwealth statutes. ^[43]

There is little utility in undertaking a detailed analysis of the ALRC’s investigations or in seeking to

project the contents of its report. Matters that could, and in my view should, be considered include the following:

- should privilege be extended to (for example) the advice of accountants? Often, accountants and lawyers are both engaged in respect of particular transactions. Different considerations (as to privilege) may apply depending on how the engagements are effected. Is this desirable?
- harmonising the principles relating to the abrogation or overriding of privilege across the whole range of Commonwealth investigative bodies, so that there are uniform provisions and people may know where they stand without the need to refer to a vast and diverse collection of legislation.
- clarifying the consequences of abrogation or overriding of privilege. In particular, should protection be afforded to those whose privilege is abrogated or overridden? And if protection is to be afforded, should it relate only to the documents actually produced as a result? Or should it extend to lines of inquiry or investigation initiated by a consideration of those documents? What is the position of strangers to the privilege whose activities are unmasked as a result, directly or indirectly, of documents obtained through abrogation or overriding of privilege.
- what safeguards or protocols should be applied where a claim of privilege is made? At present, there are a range of protocols, not of general application, and often inconsistent. Few if any have legislative strength. How can the rights of individuals be protected, whilst at the same time ensuring the efficiency of the activities of investigative bodies?
- what should happen if an investigating officer comes across material that, plainly, is privileged, and that, equally plainly, has been produced in ignorance (either of the existence of privilege or of the right to claim it)? Should there be a default position providing for the maintenance (or “non loss”) of privilege in those circumstances? How should this be administered?
- should specific protocols be put in place for electronic documents? Often the sheer bulk of information maintained on electronic databases makes it prohibitively expensive (if not impossible) to check each document on a database for privilege. Any such checking is likely to take very substantial time. Should there be a default provision relating to the inadvertent disclosure of privileged material where, either because of the urgency of an investigation or the sheer expense of checking, both privileged and non privileged documents are made available through access to an electronic database?

Another very difficult area arises from the interaction of client legal privilege and the privilege against self-incrimination. Again, it is beyond the scope of the reference to the ALRC to consider the rationale and continued existence of the privilege against self-incrimination. But what will happen where a document is produced, because client legal privilege has been abrogated or overridden by statute, and the document incriminates the client? Even though production cannot be resisted on the ground of client legal privilege, may it be resisted in reliance on the privilege against self-incrimination? And if the answer is “no”, then what (if any) safeguards are to be put in place in relation to the use of the document?

These are all difficult issues. The ALRC will have to grapple with them – and, no doubt, with many others. Its report, and any legislation enacted pursuant to the report’s recommendations, may make significant inroads into the operation of, and protection afforded by, client legal privilege.

END NOTES

1. A Judge of the Supreme Court of New South Wales. The views expressed in this paper are my own, not necessarily those of my colleagues or of the Court. I gratefully acknowledge the very substantial contribution of my former tipstaff, Anne Egan Wagstaff, BA, summa cum laude (Providence College), JD, cum laude (University of Notre Dame), who prepared the draft on which this paper is based. My current tipstaff, Jillian Francis, LLB, BIR (Bond University) prepared notes on the ALRC Inquiry to which I spoke when this paper was presented to a Seminar of the Commercial Law Association on 22 June 2007. The virtues of this paper are theirs; its defects are mine.
2. See *Baker v Campbell* (1983) 153 CLR 52 and *Commissioner of Australian Federal Police v Propend Finance Pty Limited* (1997) 188 CLR 501, to nominate two only of numerous cases.
3. See Wilson J in *Baker* at 93-94 and Dawson J in the same case at 127; again, the point is supported by numerous other decisions.

4. *Evidence Act* 1995 (Cth) and its State analogues

5. [2004] NSWCA 47.

6. [2005] NSWCA 47.

7. [2006] FCA 571.

8. See [2004] NSWSC at [18].

9. See [2004] NSWSC at [19].

10. See [2004] NSWSC at [22]. Young J expressed a similar view in *AWB v Cole* [2006] FCA 571 at [111].

11. As was accepted both before me and on appeal, the characterisation of purpose requires an objective test; but in applying that test, regard may be given to the subjective intention of the person who is responsible for the documents' coming into existence. See Callinan J in *Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49 at 107 [172]. The Court is not bound by a stated opinion, nor should it be; the Court is entitled to consider all relevant material.

12. (1996) 68 FCR 322, 328.

13. In the words of Barwick CJ in *Grant v Downs* (1976) 135 CLR 674 at 677, the company (employer) is "the person or authority under whose direction ... [the report] was produced or brought into existence." The report was produced for the purposes of SACL; such purposes as the solicitor (or other) had were not private purposes, but incidents of their employment.

14. *Mann v Carnell* (1999) 201 CLR 1.

15. [2004] NSWSC at [69].

16. [2004] NSWSC at [72].

17. In a different context, see Heydon JA in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 732 [67], 734 [70] and 743 [85].

18. [2005] NSWCA 47 at [24].

19. [2005] NSWCA 47 at [55].

20. [2006] FCA 571.

21. A substantial part of the reasons dealt with the nature of the "appeal", to the Federal Court. That topic, although no doubt fascinating, can be put to one side for present purposes.

22. [2006] FCA 571 at [86] and following.

23. [1988] 1 Ch 317 at 330.

24. [2005] 1 AC 610.

25. [2005] 1 AC 610 at [43].

26. (1991) WAR 325.

27. (2003) 135 FCR 151.

28. [2006] FCA 571 at [101].

29. [2006] FCA 571 at [110].

30. Unreported, 11 November 1986; cited by Young J at [2006] FCA 571 [131].

31. (1995) 58 FCR 224.

32. [2006] FCA 571 at [118].

33. [2006] FCA 571 at [142], [143].

34. [1997] 1 AC 16 at 31.

35. [1997] 1 AC at 26 (Lord Jauncey of Tullichettle, with whom Lord Lloyd of Berwick and Lord Steyn agreed.)

36. [2006] FCA 571 at [158].

37. [2006] FCA 571 at [164].

38. [2006] FCA 571 at [165].

39. [2005] NSWCA 47 at [24].

40. 135 CLR at 689.

41. [2004] NSWSC 80 at [66].

42. (1999) 201 CLR 49 at [35].

43. See About the Inquiry: A brief summary of the main issues under review at

<http://www.alrc.gov.au/inquiries/current/privilege/about.html>.