PRIVILEGE UNDER THE *EVIDENCE ACTS*

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I. INTRODUCTION

In common with most areas of the law of evidence, the common law of privilege is largely restated by the *Evidence Act* 1995 (Cth) and the *Evidence Act* 1995 (NSW) ("the Acts"). Largely, but not entirely. In certain respects, the law has undergone significant change, while in others, the precise extent of the change is unclear, and must await determination by the courts. What follows is an attempt to identify some of the significant changes made to the law of privilege by the Acts, and to discuss their significance.[1]

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1 While the relevant *Interpretation Acts* permit recourse to the reports of the Australian Law Reform Commission ("ALRC") and of the New South Wales Law Reform Commission ("NSWLRC"), the discussion in the article is largely restricted to the words of the Acts themselves, as it is desired only to point to changes in the law, rather than express any concluded view on the extent of those changes.

II. GENERAL PRINCIPLES

Before turning to consider the individual privileges dealt with by the Acts, it may be helpful to consider some general matters. The provisions dealing with privilege[2] are set out in part 3.10 of the Acts, in ss 117 to 134. Sections 132 to 134 deal with procedure applicable to all privileges dealt with by the Acts. Section 132 is of particular interest in that it imposes, in respect of each privilege dealt with in Part 3.10, an *obligation* on courts to be satisfied that a witness or party who may be entitled to rely upon such a privilege is aware of that entitlement. While the courts have traditionally been astute to ensure that persons who may be entitled to claim the privilege against self-incrimination are aware of such a right, other matters of privilege have to some extent been left to the parties and their advisers to consider and assert. It should be noted that the obligation imposed on the court under s 132 is to satisfy itself that the witness or party is aware of the "effect of that provision". Exactly how far this requires a judge to go beyond being satisfied that the relevant person is aware of the *existence* of the relevant provision is not precisely clear. In particular, it is not clear how far a judge is obliged to be satisfied that the relevant person appreciates the potential *application* of the relevant provision to the circumstances. Of course, in circumstances where a witness or party is represented by apparently competent and experienced legal representatives, the court may be able to be very easily satisfied that the witness or party is aware of the effect of the relevant provision. Conversely, where the person in question is unrepresented, the court may have to go to some lengths to reach the state of satisfaction required by s 132.

Section 132 is expressed in mandatory language, but the consequence of a court failing to inform a witness or party of its entitlements under the privilege provisions of the Acts is not expressly stated. Presumably, in appropriate circumstances, it could provide the basis for a belated application at trial that evidence previously admitted be ruled inadmissible, at least upon proof that the person in question was in ignorance of his or her rights, and would have claimed privilege if those rights had been known. Conceivably, it might also provide the basis for an appeal, in the event that the admission of the evidence was critical to the disposition of the matter.

Section 133 provides that the court may inspect a document when a question arises in relation to privilege over that document. As the matter is discretionary, it will presumably be approached in the same manner as at common law[3] and it may be anticipated that a judge may nevertheless decline to inspect documents in certain circumstances. Thus, in *Brambles Holdings Ltd v Trade Practices Commission (No 3)* Franki J dealt with a claim for privilege by considering the

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2 A statutory equivalent of public interest immunity is dealt with together with privilege in Part 3.10 of the Acts. Unless otherwise stated, a reference to 'privilege' is intended to include public interest immunity, and is a reference to a ground for an application or objection under Part 3.10 of the Acts.

3 At common law, the court was permitted to inspect the documents to determine a claim for privilege: see, for example, *National Crime Authority v S* (1991) 29 FCR 203; *Grant v Downs* (1976) 135 CLR 674.

affidavit of discovery, rather than inspecting the documents, apparently because such a course was convenient and time saving.[4]

Section 134 provides that evidence that must not be adduced or given in a proceeding because of the provisions of Part 3.10 of the Acts is not admissible in the proceedings. At first sight, this provision appears merely to state the obvious, but it is apparently intended to deal with the situation where evidence is in fact adduced in court, despite the provisions of the Acts. One example might be where a witness gave privileged evidence before he or she could be stopped, and objection taken and considered.[5] In such a case, s 134 would render such evidence inadmissible. How much further the provision extends remains to be seen. In certain circumstances, it may be arguable that the provision bears upon the waiver of privilege. This would apparently not be so in relation to client legal privilege under ss 118 to 120, which is only enlivened upon 'objection', but it might be so in relation to other privileges, such as the exclusion of evidence of settlement negotiations under s 131, which does not require objection to take effect. Thus, if a 'without prejudice' letter was addressed by one party to a dispute to two other parties to the dispute, and if the letter was tendered without objection, one of the two recipients of the letter not having appeared at the trial, it would seem that the letter would be inadmissible, and if admitted into evidence by oversight would be liable to be disregarded by the court.

III. LEGAL PROFESSIONAL PRIVILEGE

Legal professional privilege, called "client legal privilege" in the Acts,[6] is preserved and extended under the Acts. The Acts deal separately with the privilege in relation to legal advice on the one hand, and litigation on the other, conforming to the general view of the common law position.[7]

While the Acts generally follow the common law,[8] two important changes are made. Firstly, the 'sole purpose test', expounded by the High Court in *Grant v Downs*,[9] is changed to a 'dominant purpose' test. Secondly, the privilege is extended to litigants in person. The classic statement of the sole purpose test appears in the judgment of Stephen, Mason and Murphy JJ in *Grant v Downs*:

> All that we have said so far indicates that unless the law confines legal professional privilege to those documents which are brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings the privilege will travel beyond the underlying rationale to which it is intended to give expression.[10]

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4 (1981) 58 FLR 452.

5 An example given by the ALRC: ALRC, Interim Report No 26, *Evidence* (1985) at [850].

6 The change in nomenclature is explicable by reference to the extension of the privilege to persons who act without the assistance of legal representatives: see s 120 of the Acts.

7 See for example *Wheeler v Le Marchant* (1881) 17 Ch D 675.

8 For example, by including an employee in the definition of 'lawyer' in s 117: see *Waterford v Commonwealth* (1987) 163 CLR 54.

9 Note 3 *supra*. It should be noted that Barwick CJ dissented, favouring a dominant purpose test.

10 *Ibid* at 688.

However, given the test expounded by the Acts, *Grant v Downs* and the cases which follow it are of comparatively little assistance in assessing the manner in which client legal privilege will be applied. On the other hand, in both England[11] and New Zealand,[12] the courts have applied a 'dominant purpose' test for some time. Particularly instructive are two recent cases, one from each jurisdiction. In *Guinness Peat Ltd v Fitzroy Robinson* the Court of Appeal had to consider a situation where the defendant architects had written to their professional indemnity insurers in response to a claim against them by the plaintiffs. The plaintiffs then attempted to gain access to that document and the defendants' insurers responded with an argument that:

> [T]he purpose [of the letter] must be ascertained by an objective view of the evidence as a whole. This shows that the letter came into existence because the insurers by the terms on which they offered cover under their policy, as a condition precedent to the right of the insured to be indemnified required that immediate written notice be given to them of any claim... The reason for this requirement is to be found stated in para 7 of an affidavit sworn on behalf of the defendants by a Mr Wade, the casualty claims manager..:
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> The original and only purpose for bringing into existence an immediate notice in writing of any actual or potential claim made against a firm of architects insured...is to enable [the insurer] to submit it, together with other relevant documentation, to their legal advisers for their advice on whether the claim should be paid or resisted. ...
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> Counsel for the defendants accepted that the phrase 'only purpose' as used in the first sentence of the passage just quoted may have been a slight exaggeration.[13]

In those circumstances the Court of Appeal had no difficulty in upholding a claim for privilege on the dominant purpose test.

In *Carlton Cranes Ltd v Consolidated Hotels Ltd* Tompkins J observed:

> It is clear from the articulation of the rule by Cooke J [in *Guardian Royal Assurance v Stuart* [1985] 1 NZLR 596] that there are two limbs, both of which must be satisfied before privilege attaches. First, the document must have come into existence when litigation is in progress or reasonably contemplated. That situation must be in existence at the time that the document was created. Secondly, the dominant purpose of its preparation must be to enable the legal adviser to conduct or advise regarding litigation. This is to be judged not only by the purpose of the person creating the document, that is the intention of the actual composer, but also regard is to be had to the intention of the person or authority under whose direction, whether particular or general, it has been produced or brought into existence. This emerges from the dissenting judgment of Barwick CJ in *Grant v Downs* (1976) 135 CLR 674, at p 677, adopted by Slade LJ in *Guinness Peat Properties v Fitzroy Robinson Partnership* [1987] 2 All ER 716 at p 723.[14]

Following the decision of the Court of Appeal in *Guardian Royal Assurance v Stuart*,[15] his Honour held that in the circumstances of the case before him, the reports which had come into existence for the purposes of the insurers (which purposes included deciding whether or not liability should be admitted or denied) were not privileged because they could not be said to have been prepared for the

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11 *Waugh v British Railways Board* [1980] AC 521.

12 *Guardian Royal Assurance v Stuart* [1985] 1 NZLR 596.

13 [1987] 2 All ER 716.

14 [1988] 2 NZLR 555 at 557.

15 Note 12 *supra*.

dominant purpose of enabling legal advice to be given. The tension between this decision and that of the English Court of Appeal in *Guinness Peat* is apparent (although in one sense hinging upon the perhaps surprising acceptance by the latter court of the evidence from the insurer as to the purpose of the production of the document in question) and will no doubt be reflected upon as the Australian courts grapple with the client legal privilege provisions of the Acts.

The extension of the privilege to litigants in person by s 120 of the Acts is quite novel. Section 120(1)(a) protects from disclosure a confidential communication by a litigant in person made for the (dominant) purpose of preparing for or conducing the proceedings. Section 120(1)(b) protects from disclosure a confidential document (such as notes for address or for cross-examination) created by a litigant in person for such a purpose. (It would appear that a company is unable to rely upon s 120 due to the requirement that companies be represented by a solicitor in legal proceedings.) Section 120 thus confers on unrepresented persons a right analogous to that conferred on represented parties by s 119, namely, a privilege in relation to litigation. While there is no need for a provision for unrepresented persons equivalent to s 118, there does appear to be one situation in which the protection offered to such persons is inferior to that offered to other persons. That situation arises where a person has prepared for a case him or herself, but, just prior to trial, retains a lawyer for representation, perhaps in the dawning realisation of the enormity of the task undertaken by a litigant in person. In those circumstances, the client cannot rely upon the provisions of s 120, which are available only to "a party not represented in the proceeding by a lawyer", yet the client may have prepared numerous documents (or have engaged in numerous communications) for the purposes of the proceedings which do not fall within the protection given by s 119, as they were not prepared or made for the dominant purpose of the client being provided professional legal services.

Without entering into the debate as to the desirability of s 120 as a whole, it may be observed that the procedures for claiming legal professional privilege depend, to a large extent, upon both the integrity and the experience of legal practitioners who make such a claim. A court may be more reluctant to rely upon the integrity of a litigant in person who makes a claim for privilege, because of the litigant's personal involvement in the proceedings, and because of the absence of disciplinary jurisdiction over the litigant.[16] And unless the litigant is reasonably experienced with legal proceedings, the court may also not be able to assume that the litigant will be able to be relied upon to apply the provisions of s 120 with the same facility as a lawyer. Of course, any claim for privilege made can still be tested[17] by the court, but this is necessarily a time-consuming and inefficient process.

The Acts also provide for a change to the law relating to waiver of legal professional privilege. Section 122(1) provides that the privileges conferred by ss 118 to 120 do not prevent the adducing of evidence given with the consent of the client or party concerned. Such a provision would not usually be necessary, as

16 Of course, the laws relating to contempt of court may provide some reassurance.

17 Including, as previously noted, by inspection of any document in question by the court: s 133.

the privileges conferred by ss 118 to 120 do not arise unless there is an 'objection' by a client[18] or a party,[19] and in any case in which evidence was given by the consent of the relevant person, there would presumably be no 'objection' by that person.

Subsections (2) to (5) of s 122 are more significant and seem to work a substantial change to the existing law. The principles governing the waiver of privilege at common law, were considered in *Attorney-General (NT) v Maurice*. As Mason and Brennan JJ explained:

> A litigant can of course waive his privilege directly through intentionally disclosing protected material. He can also lose that protection through a waiver by implication. An implied waiver occurs when, by reason of some conduct on the privilege holder's part, it becomes unfair to maintain the privilege.[20]

Similarly, Deane J stated:

> Waiver of legal professional privilege by imputation or implication of law is based on notions of fairness. It occurs in circumstances where a person has used privileged material in such a way that it would be unfair for him to assert that legal professional privilege rendered him immune from procedures pursuant to which he would otherwise be compellable to produce or allow access to the material which he has elected to use to his own advantage. 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 propriety of the use he has made of the material by reliance upon legal professional privilege.[21]

In contrast to this flexible principle of fairness, s 122(2) provides that the privileges in ss 118 to 120 are not available if the client or party has "knowingly and voluntarily disclosed" the substance of the evidence to another person, subject to certain exceptions. Subsection 122(4) provides that the privileges are not available if the substance of the evidence has been disclosed with the express or implied consent of the client or party to another person, subject to certain exceptions. While in most cases, these provisions may produce similar (and perhaps more predictable) outcomes to those which would flow under the common law, there may be circumstances in which differences arise.[22]

One example is the case of inadvertent failure to claim privilege over documents during the discovery process, a fairly regular occurrence. At common law, the principles were considered by Rogers J in *Hooker Corporation Ltd v Darling Harbour Authority*.[23] In that case, an undoubtedly privileged document had been included in a defendants' list of documents without a claim for privilege and the plaintiff accordingly inspected the document in question and obtained a copy of it. Some months later, the defendants wrote to the plaintiff alerting the plaintiff of the error and indicating an intention to claim privilege, but no steps were taken to recover possession of the copy document from the plaintiff. At trial, the plaintiff's

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18 Sections 118-119.

19 Section 120.

20 (1986) 161 CLR 475 at 487.

21 *Ibid* at 492-3.

22 As the common law test is based on notions of fairness, this may suggest that the common law test is more desirable: SJ Odgers, *Uniform Evidence Law* (1995) p 202.

23 (1987) 9 NSWLR 538.

counsel opened the plaintiff's case and referred to the material in the document in the opening address, to which no specific objection was taken by the defendants. On a later day during the hearing, the plaintiff sought to tender the document, and the defendants claimed privilege. After an extensive review of the authorities, his Honour concluded that, in the circumstances, privilege had not been waived, principally on the ground that the discovery process which led to the inadvertent disclosure involved a great volume of documents, and had been (in conformity with the applicable court procedure) carried out with haste. It is apparent from his Honour's reasoning[24] that had the burdens imposed by the scope and pace of the discovery process been less, a different result might have obtained, which appears to be a reflection of the 'fairness' principle stated by the High Court in *Maurice*. In contrast, if such a case were to be decided under s 122, the matter would presumably be decided by reference to whether or not the disclosure was made "knowingly or voluntarily" by the clients[25] or (more pertinently) was made by their lawyers "with [the clients'] express or implied consent".[26] While it may be that notions of 'fairness' are to some extent involved in an assessment of whether implied consent was present, it is not hard to imagine circumstances in which no consent (express or implied) could be held to exist, yet in which it would be quite unfair for a person to maintain a claim of privilege.

Another divergence from the present common law can be seen in s 123, which provides that a defendant in a criminal proceeding is not prevented from adducing evidence by the privileges conferred by ss 118 to 120 unless it is evidence of a confidential communication relating to an associated defendant.[27] Again, it is useful to refer to the existing common law position, as recently considered by the High Court in *Carter v Managing Partner*. Justice Brennan stated the issue raised by the appeal as follows:

> [W]hether persons having in their possession or power documents which are subject to legal professional privilege can be compelled to produce those documents on subpoena issued on behalf of an accused person in criminal proceedings when those documents may establish the innocence of the accused or may materially assist his defence but the person entitled to the privilege does not waive it.[28]

The majority of the Court held that privilege could be maintained in such circumstances.[29] Justice Deane considered that to allow the privilege to be overridden in such circumstances should be a matter for legislative change, and that such change would require dealing with a "variety of questions which would arise for essentially pragmatic decision". Those questions included:

> [W]hether the privilege should be overridden whenever disclosure of the protected material would materially assist in the defence of any person charged with a criminal offence, however minor, or only pursuant to some new balancing process in which

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24 *Ibid* at 543.

25 Section 122(2).

26 Section 122(4).

27 'Associated defendant' is defined in the Acts, to mean, in essence, a person charged with an offence arising out of the same facts as those from which the defendant's alleged offence arose, or an offence otherwise related to the defendant's alleged offence.

28 (1995) 129 ALR 593 at 594.

29 Justices Brennan, Deane and McHugh; Toohey and Gaudron JJ dissented.

> account could be taken of matters such as the seriousness of the alleged offence, the amount of material assistance to the defence which is likely to be derived from the disclosure and the damage which disclosure might cause to the person entitled to the benefit of the privilege.[30]

It may be observed that no such balancing process is involved in s 123, and accordingly it would be open for a person charged with a minor offence of a summary nature, to adduce evidence of highly sensitive disclosures made by a third party to his or her lawyers.[31] Justice Deane continued:

> Another question would be what, if any, provision should be made to seek to restrict the infringement of confidentiality to what is necessary in the interests of the particular accused and the open administration of justice by the courts. Another is whether, and to what extent, associated rights of access should be accorded to the Crown. For example, should the Crown be given access to privileged material produced at the behest of the accused and be entitled to destroy its confidentiality by leading it in evidence on the trial in which it was produced if the accused decided not to rely on some or all of it?

The former question remains untouched by the Acts. The latter question would appear to be answered by the language of s 123 in so far as it provides an exception for a *defendant* adducing evidence, thus presumably preventing the Crown from taking the course raised by Deane J.

It remains to consider the rather opaque terms of s 121(3) which provides that client legal privilege "does not prevent the adducing of evidence of a communication or document that affects a right of a person". The precise scope of this provision has been questioned,[32] and it has been suggested that a variety of matters including defamatory utterances, acts of bankruptcy, the exercise of an option, or conduct amounting to an election might fall within in it.[33] With most of these examples, there would usually have to be an element of communication beyond the solicitor-client relationship for a right to be affected, so it is difficult to see what scope the provision has. If defamatory utterances are regarded as falling within the scope of the provision, that would be regarded by many as alarming, given that the purpose of legal professional privilege is "[to keep] secret [lawyer-client] communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor".[34] The mere prospect that a person could commence defamation proceedings[35] on the basis of what a client had said to his solicitor about an opposing party or witness appears to be inconsistent with the "full and frank disclosure" necessary to support the privilege, and it appears unlikely that s 121(3) would be interpreted so as to allow evidence of such a conversation to be adduced.

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30 Note 28 *supra* at 606.

31 This observation was made by Deane J himself, by reference to ALRC Report No 38, *Evidence* (1987) in footnote 53 to his Honour's judgment.

32 Heydon, *A Guide to the Evidence Act 1995 (Cth)* (1995) pp 58-9.

33 Note 22 *supra* p 200.

34 Note 3 *supra* at 685, per Stephen, Mason and Murphy JJ.

35 Of course, a defence of qualified privilege might well be available to the client concerned, but at common law, this would be liable to be defeated by proof of malice.

IV. PRIVILEGE AGAINST SELF-INCRIMINATION

One of the most significant changes brought about by the Acts is an entirely new regime for regulating the privilege against self-incrimination, based upon the issue of certificates to witnesses. Pursuant to s 128(1), a witness may raise objection to giving particular evidence on the ground that the evidence may tend to prove that the witness has committed an offence against Australian or foreign law or is liable to a civil penalty.[36] Once that objection is raised,[37] subsection (2) requires the court to consider whether or not there are reasonable grounds for the objection. If the court finds that there are such grounds, the court is not to require the witness to give the evidence in question but is to inform the witness that he or she need not give the evidence. If the witness chooses to give the evidence, the court is required by subsection (3) to give a certificate to the witness.

There are two other circumstances in which a certificate may be issued. Firstly, if the court overrules the objection but, once the evidence has been given, the court finds that there were reasonable grounds for the objection, a certificate must be given.[38] Secondly, if there are reasonable grounds for objection but the interests of justice nevertheless require that the witness give the evidence, the witness may be required to give the evidence[39] and a certificate must be given to the witness.[40] A limit on the power of compulsion is that it is not available unless the court is satisfied that the evidence does not tend to prove that the witness has committed an offence (or is liable for a civil penalty) under a law of a foreign country, no doubt because a certificate issued under s 128 would or might be of no avail in a foreign court.[41] It is interesting that s 128(5) does not require that the person be liable to be *convicted* of the foreign offence, only that the evidence tends to show the offence has been committed. Accordingly, it would appear that a witness could not be compelled under s 128(5) to answer a question which would tend to show that he or she had committed an offence which was subject to a statute of limitation preventing prosecution, even if the interests of justice required that evidence to be given.

Whatever route leads to the issue of a certificate in relation to certain evidence given by a witness, the effect is the same. Section 128(7) provides that it prevents the evidence being used against the witness in any criminal proceedings in an Australian court, except in respect of the falsity of the evidence given. The prohibition extends by virtue of s 128(7)(b) to "evidence of any information, document or thing obtained as a direct or indirect consequence of the person having given the evidence". The reference in the Acts to an "Australian" court might raise interesting questions as to the extent to which the courts of a State

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36 'Civil penalty' is defined in the Dictionary of the Acts to include a penalty under the law of a foreign country. 'Penalty' is not defined and would presumably continue to bear its common law meaning: see for example *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.

37 As previously noted, the court has an obligation under s 132 to be satisfied that the witness is aware of the provision allowing the claim of the privilege.

38 Section 128(4).

39 Section 128(5).

40 Section 128(6).

41 Section 128(5)(b).

other than New South Wales might be prevented from receiving evidence obtained as an indirect consequence[42] of a person having given evidence in a New South Wales court. Presumably, this will decided by reference to the obligation under s 118 of the Constitution to give full faith and credit to the laws of another State. An important exception to the right to claim the privilege is provided by s 128(8), which provides that s 128 is not available to a *defendant* in criminal proceedings in relation to the doing[43] of an act, or the possession of a state of mind which is a fact in issue. Such a provision is necessary to prevent a defendant electing to give evidence at his or her criminal trial selectively, relying upon the privilege. However, as the terms of s 128(8) show, such a defendant remains entitled to claim the privilege in relation to facts unconnected with the offences to which the trial relates.

V. EVIDENCE OF SETTLEMENT NEGOTIATIONS

Section 131 prevents evidence being adduced of a communication made between persons in dispute,[44] or between such persons and a third party, in connection with an attempt to negotiate a settlement of a dispute. It also prevents evidence being adduced of a document that has been prepared in connection with an attempt to negotiate a settlement of a dispute. Section 131 is the statutory equivalent of what is usually called the 'without prejudice' privilege, or the privilege in aid of compromise. In common with its common law equivalent, it does not prevent the tender into evidence of documents or communications for the purposes of proving that that agreement to settle the dispute was actually reached.[45]

Section 131 appears in Division 3 of Part 3.10 of the Acts, which is headed "Evidence excluded in the public interest", no doubt in recognition of the prevailing rationale for the existence of the privilege, namely the public policy of encouraging the settlement of disputes.[46] As with the other privileges, the Acts generally state the law in conformity with the current common law, with a number of modifications. Section 131(2) sets out a number of exceptions to the applicability of the privilege. Paragraph (a) of that subsection reflects the joint nature of the privilege by providing that the privilege does not apply in the event that (all of) the persons in dispute consent to the evidence being adduced. The reference to "the persons in dispute" is presumably only a reference to such of the persons in dispute as were party (whether as maker or recipient) to the communication or document in question, as this is consistent with the language is

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42 For example, inquiries carried out by the Victorian police, based on evidence given in New South Wales, and leading to a prosecution in Victoria.

43 Or not doing: s 128(9).

44 'Dispute' in this context means civil dispute, for the Acts specifically provide that "settlement of a dispute" does not extend to an attempt to negotiate the settlement of a criminal proceeding: s 131(5)(b).

45 Section 131(2)(f).

46 See *Field v Commissioner for Railways for NSW* (1957) 99 CLR 285 at 291; *Quad Consulting v Bleakley* (1991) 27 FCR 86 at 91, *Hong Kong Bank of Australia v Murphy* (1992) 28 NSWLR 512 at 522.

subsection (1). The need for waiver jointly by the parties is consistent with the common law position.[47]

By expressing the privilege to extend to a "communication", the Acts may well have enlarged its scope. At common law, the privilege is usually considered as extending only to prevent evidence of express or implied *admissions* made, rather than to communications per se.[48] It may be wondered what could pass between parties which did not amount to either an admission or a communication. One example might be the observation by one party of the physical condition of another party, or of his or her property. Thus, an observation by one party that another (alleged injured) party ceased to walk with a pronounced limp during settlement discussions could be argued to be admissible in evidence,[49] while a statement by the allegedly injured party during settlement discussion that he or she was 'not really hurt', would plainly not be admissible, as it would amount to a communication.

The express inclusion of third parties in the formulation of the privilege extends the scope of the privilege as well. In *Field*, the parties to a claim for damages for personal injury had commenced settlement negotiations and, as part of that process, an appointment was made for the plaintiff to be examined by a medical specialist retained by the defendant.[50] In the course of that examination, the plaintiff gave a history of the circumstances in which the accident occurred to the specialist. At trial, the defendant sought to adduce from the medical specialist the history given by the plaintiff. The High Court held that the privilege did not prevent the defendant adducing such evidence, as the statement of history by the plaintiff to the medical specialist, whilst undoubtedly containing admissions, was not reasonably incidental to the process of settlement negotiations.[51] Under s 131, such a statement to a doctor would apparently amount to a "communication" and as s 131(1)(a) is expressly extended to statements made "between one or more persons in dispute *and a third party*, in connection with an attempt to negotiate a settlement of the dispute", it would seem that it would be privileged.[52] However, the doctor's evidence of his or her *observations* of the party in question would still appear to be admissible.

One further interesting characteristic of the exceptions is paragraph 131(2)(h), which provides that the privilege does not apply if the communication or document is relevant to determining liability for costs. It is usual to distinguish between documents (or statements) which may be admitted at least on the question of costs by marking them (or stating) 'without prejudice save as to costs', or words of a similar nature. It may be possible to argue under the Acts that even if this form of words is not used and a document (or statement) is instead simply expressed to be

47 *Re Turf Enterprises Pty Ltd* [1975] Qd R 266 at 267; *Quad Consulting v. Bleakley ibid* at 93.

48 See *Field v Commissioner for Railways for NSW* note 46 *supra* at 291. See also *Cutts v Head* [1984] Ch 290, at 306; *Quad Consulting v Bleakley ibid* at 91.

49 It would appear difficult to assert that this amounted to an implied admission, at least in a case where the change was not consciously made.

50 Note 46 *supra*.

51 *Ibid* at 592 per Dixon CJ, Webb, Kitto and Taylor JJ.

52 Note 22 *supra* p 227.

'without prejudice' (or is not subject to any particular expression), such a document (or statement) may still be admissible on the question of costs, simply because it is relevant to that issue. In one sense, such a document (or statement) could be said not to be relevant, because the principle in question is sometimes expressed as being that in the absence of an indicated intention to the other party to refer to the matter on the question of costs, no such reference may be made on the question of costs, apparently on the basis that it would be unfair to allow such reference without having allowed the other party to "fashion his or her conduct accordingly".[53] On the other hand, it might be said that such restrictions flow from the laws of evidence, and the express exception created by paragraph 131(2)(h) removes the need to alert the other party to the intention to refer to the material in question on the question of costs.

VI. RELIGIOUS CONFESSIONS

Section 127 of the Acts confers on past or present members of the clergy a privilege from divulging the contents of a religious confession made to that person while he or she was a member of the clergy. This provision is very similar to, and derived from, the terms of s 10 of the *Evidence Act* 1898 (NSW). The privilege is expressed to be available to clergy of "any church or religious denomination", a term which is not defined but which will presumably be interpreted in light of the High Court's decision in *Church of the New Faith v Commissioner of Payroll Tax (Vic)*.[54]

VII. EVIDENCE OF MATTERS OF STATE

Although the form of s 130 of the Acts is quite different from the common law of public interest immunity, the content and effect of the provision seems to differ little from the existing law.[55] In particular, the section preserves the balancing process whereby the public interest in preserving secrecy is weighed against the public interest in disclosure. Of course it is possible that as the courts have experience with interpreting s 130, some differences from the common law position may emerge.

VII. CONCLUSION

In common with other areas dealt with by the Acts, the law of privilege has been restated and, in some respects, substantially altered by the new legislation. The process of interpretation of that legislation will initially be undertaken by the

53 See for example *In the Marriage of Steel* (1992) 15 Fam LR 556 at 562.
54 (1983) 154 CLR 120.
55 See *Sankey v Whitlam* (1978) 142 CLR 1 for a statement of the common law position.

federal and New South Wales judiciary, although if the other jurisdictions enact cognate legislation, the body of interpreting courts will increase accordingly. In one sense, the process of reducing to legislation matters previously dealt with by the common law may actually slow the rate of change to the law, as the scope for judicial activity is inevitably constrained by the text of the statutes. Yet, as the issues raised in the article suggest, there remains much room for judicial consideration and it may be expected that that process in the next few years will prove to have significant effect upon this area of the law for many years to come.