THE HON T F BATHURST AC

CHIEF JUSTICE OF NEW SOUTH WALES

COLLEGE OF LAW JUDGES' SERIES

LAWYER-CLIENT PRIVILEGE IN LITIGATION

WEDNESDAY 26 FEBRUARY 2020[*]

1. Good evening ladies and gentleman and welcome to this evening's College of Law Judges' Series on lawyer-client privilege in litigation. I would first like to respectfully acknowledge the traditional owners of the land on which we meet, the Gadigal People of the Eora Nation, and pay my respects to their elders, both past, present and future.

2. I would like to thank the College of Law for inviting me to present at this annual series and for organising such a pragmatic series of seminars for practitioners. I do think there is a tendency for organisers of such events to plan sessions that focus on the ground-breaking or trendy areas of the law at the time. Many words might be used to describe lawyer-client privilege but sadly "ground-breaking" or "trendy" are not two of them. Despite this, I think it is a key strength of *this* series that, bucking this trend, the sessions organised focus on the highly practical and core building blocks of legal practice, with topics ranging across pleadings, case management, subpoenas, discovery, interrogatories and affidavit evidence, to name but a few.

3. It is no doubt a symbol of the overlapping, yet distinct nature of the law in this area, that what is referred to at common law as "*legal professional* privilege" is statutorily referred to as "*client legal* privilege". The change in the statutory name of the doctrine from "legal professional" to "client legal" recognises that the privilege in fact belongs to the client, and not the members of the legal profession.[1] To add to the complexity, this evening's seminar of course had to be called "*lawyer-client* privilege". To have some clarity, I thought I would take this opportunity to stipulate from the outset that I will be referring to the common law test as legal professional privilege but the statutory equivalent, under sections 118 and 119 of the *Evidence Act*,[2] as the *Evidence Act* privilege. I will refer to the two collectively simply as Privilege.

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[*] I express my thanks to my Research Directors, Ms Madeline Hall and Ms Jessica Elliott, for their assistance in the preparation of this address.

[1] *Baker v Campbell* (1983) 153 CLR 52 at 85 per Murphy J.

[2] *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW).

4. Now for those of you who are already regretting your choice to spend tonight wading through these complexities, do not bolt out the door just yet. If it is any consolation, the operation of the Privilege has vexed lawyers for more than two thousand years. It was recorded that the prosecution of the Roman governor of Sicily by Cicero was impaired by the immunity of Hortensius who had a relationship of professional confidence with the defendant in 70BC.[3] Comparatively more recently, legal professional privilege can be traced back some 440 years to the reign of Elizabeth I.[4] Despite this, or perhaps because of this very fact, the parameters of the Privilege continue to evolve and the Privilege is replete with many subtle idiosyncrasies which I intend to focus on.

5. I understand tonight that Justice Jagot will be focusing on the core aspects of the Privilege, including its rationale, scope, abrogation and waiver. In light of this and the pragmatic focus of the series, I thought I would structure my thoughts into a few practical pointers for practitioners on navigating the nuances of the Privilege.

6. I would like to detail three subtleties that I think practitioners should know to ensure issues of Privilege are approached in an up to date manner that reflects the conceptual underpinnings of both its statutory and common law basis. First, I will discuss inconsistencies in the application of the *Evidence Act* privilege, second, raise unusual alternatives that exist to the Privilege, and finally explore the limitations to this "substantive" right in terms of cyber-hacking, fraud and statutory encroachment.

7. Without such an approach, I do think that a practitioner is in danger of misconstruing the Privilege in its application and, more worryingly, missing a subtlety that could make all the difference in its outcome. For only recently I stumbled across an article that stated that the three certainties in life were "death, taxes and fights over legal professional privilege".[5] I hope that by combining some recent developments with established principles, you will find something within my jumbled ramblings as vaguely interesting and useful.

Inconsistencies in the application of the *Evidence Act* privilege

8. I'll now turn to my first point, which focuses on the subtleties in the application of the *Evidence Act* privilege. The basic thing to bear in mind with the

[3] G L Peiris, 'Legal Professional Privilege in Commonwealth Law' (1982) 31 (4) *The International and Comparative Law Quarterly* 609, 609.

[4] See *Baker v Campbell Berd v Lovelace* (1577) 21 ER 33; *Dennis v Codrington* (1579) 21 ER 53.

[5] Angus Macinnis, 'Life's three certainties: death, taxes and fights over legal professional privilege', *Legalwise* (Web Page, 25 October 2018) < https://legalwiseseminars.com.au/lifes-three-certainties-death-taxes-and-fights-over-legal-professional-privilege/>.

Evidence Act is that despite its label of uniformity, its application differs depending on the court and proceedings. It would be dangerous, therefore, to always assume that the *Evidence Act* privilege will apply as a matter of course.

9. The history around the application of the *Evidence Act* privilege to pre-trial procedures in New South Wales courts, in comparison to the Federal Court, is a good example of this point. At first, the High Court established that the *Evidence Act* privilege did not extend to pre-trial procedures. This was due to the words of the sections limiting the provisions' operation to where there was "adducing" of the evidence.[6] However, in 2005 the Uniform Civil Procedure Rules extended the *Evidence Act* privilege to all pre-trial procedures for all courts governed by the UCPR. This extension was achieved by enacting rules within the UCPR exempting privileged documents from pre-trial procedures, such as discovery and interrogatories. Privileged documents were defined as information which by virtue of the *Evidence Act* could not be adduced in the proceedings.

10. However, from the beginning, this extension of the *Evidence Act* privilege to pre-trial procedures for all courts began to unravel. For instance, the UCPR only extended the *Evidence Act* privilege to civil pre-trial proceedings, not criminal ones. As a result, in 2007 section 131A was inserted in New South Wales' version of the *Evidence Act*. This provision expressly extends the *Evidence Act* privilege to preliminary proceedings. Preliminary proceedings are defined widely to capture not only orders of the court that require disclosure of information, but processes of court as well. This broad wording means, for instance, that when the court's rules, rather than an order of the court, provide the obligation for discovery, this will still be captured by section 131A.

11. Regrettably however, despite section 131A intending to remove the "undesirable situation" created whereby "two sets of laws operate in the area of privilege", complications still plague this section.[7] Most notably, it only confers the right to claim privilege on the person who is subject to the disclosure requirement. That person will not necessarily be the holder of the privileged information in the document. Furthermore, the section only applies where the person subject to the disclosure requirement objects to giving information or producing a document. If that person raises no objection, but another person does, the issue will be determined according to the principles

[6] *Mann v Carnell* (1999) 201 CLR 1.

[7] Australian Law Reform Commission, *Uniform Evidence Law Report* (Report No 102, December 2005) 457-458.

at common law.[8] This has been evocatively described as "a Grand Canyon-esque gap in the section's application".[9]

12. While the historical path to this outcome for this State's courts may appear complicated, it is positively seamless compared to the Federal Court's handling of the *Evidence Act* privilege to pre-trial processes. Originally, the Federal Court achieved the same effect as in New South Wales courts, without enacting particular rules, by holding that the *Evidence Act* privilege could be applied derivatively through the common law to ancillary proceedings.[10] This however was overturned in 1998 by a full Federal Court of Appeal, a result which was affirmed by the High Court in the decision of *Esso Australia Resources Ltd v Commissioner of Taxation* the following year.[11]

13. In response, the Federal Court enacted a rule, similar to the UCPR, to expand the application of the *Evidence Act*. However, for some reason, the expansion only applied to the pre-trial process of subpoena. Other pre-trial processes remained governed by the common law in the Federal Court. More confusion quickly emerged, as some commentators identified loopholes in the wording of the relevant Federal Court rule.[12] Worse still, arguments were made that the rule itself was ultra vires for being beyond the scope of the rule-making power under the *Federal Court of Australia Act*.[13] Finally in 2011, with the introduction of the new Federal Court Rules, any extension of the *Evidence Act* privilege to pre-trial processes was removed from the rules and the situation returned to the position post *Esso*. Furthermore, it has been subsequently affirmed that there is not to be any derivative modification of common law principles because of the terms and content of the *Evidence Act* privilege.[14]

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[8] *New South Wales v Public Transport Ticketing Corp* [2011] NSWCA 60 at [32] per Allsop P; *Singtel Optus Pty Ltd v Weston* (2011) 81 NSWLR 526 at [28] per White J; *Tavcol Pty Ltd v Valbeet Pty Ltd* [2016] NSWSC 1002 at [10]-[12] per McDougall J. .

[9] Ronald J Desiatnik, *Legal Professional Privilege in Australia* (Lexis Nexis Butterworths, 3rd ed, 2017) 288.

[10] *Adelaide Steamship Co Ltd v Spalvins* (1998) 81 FCR 360.

[11] *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49 ('Esso').

[12] J Campbell, 'Some aspects of privilege concerning communications with lawyers' (2006) 27 *Australian Bar Review* 264, 270-272.

[13] *Federal Court of Australia Act (1976)* (Cth).

[14] See *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49 at [23], [64], [91] and [144]; *Commissioner of Police, New South Wales v Guo* [2016] FCAFC 62 at [17] per Collier

14. In a nutshell therefore, while the *Evidence Act* privilege extends to the pre-trial stages of civil and criminal proceedings in New South Wales courts by way of section 131A of the *Evidence Act* and the UCPR, it does not apply at all in the Federal Court. In the Federal Court, legal professional privilege in a pre-trial context remains governed by the common law.[15] In New South Wales courts, the position is complicated by the fact that one may still have to resort to the common law of privilege in certain pre-trial situations due to the gaps in section 131A. For example, resort to the common law may occur in investigatory and other non-curial processes, including search warrants or notices to produce issued by investigatory agencies. The failure to achieve uniformity on this issue has led some commentators to describe Part 3.10 of the *Evidence Act* as "a blot on the record of law reform in this country".[16]

15. You may question the description of this glaring difference as a "subtlety" of Privilege. However, before anyone gets too smug in the room, it should be noted that there are still cases being reported where both parties have argued in the Federal Court relying upon the *Evidence Act* privilege.[17] Needless to say the Court continues to confirm that it is in fact the common law principles that apply.

16. The more general point to take from this distinction between the courts is to realise that the different application of the *Evidence Act* privilege to pre-trial processes in New South Wales courts and the Federal Court is just *one* example of a broader problem with the Privilege. The nature of the *Evidence Act* means that the application of *any* aspect of the *Evidence Act* privilege will always be dependent upon, and require an examination of, the minute mechanics of the particular court you are appearing in. Of course, none of this would matter if there were no differences between the *Evidence Act* privilege and legal professional privilege.[18] As it is however, the *Evidence Act*

J; *Tommy obh of Yinhawangka Gobawarrah v State of Western Australia (No 2)* [2019] FCA 1551 at [26].

[15] *Archer Capital 4A Pty Ltd (as trustee for Archer Capital Trust 4A) v Sage Group plc (No 3)* (2013) 306 ALR 414; [2013] FCA 1160 at [7]; *Australian Competition and Consumer Commission (ACCC) v Coles Supermarkets Australia Pty Ltd* [2014] FCA 45 at [26]; *Hooke v Bux Global Ltd (No 3)* [2018] FCA 1038 at [5]; *Martin v Norton Rose Fulbright Australia (No 2)* [2019] FCA 96 at [79].

[16] N Williams et al, *Uniform Evidence in Australia* (LexisNexis Butterworths, 2015), 660.

[17] See for instance *Domain Paper (Australia) Pty Ltd v Galloway* [2014] FCA 936.

[18] For a comprehensive, albeit older comparison of the differences between the two tests, see S McNicol, 'Client Legal Privilege and Legal Professional Privilege: Considered, Compared and Contrasted' (1999) 18 *Australian Bar Review* 189.

has created a parallel privilege, distinct but similar to the common law. It is therefore vital to first identify which test applies.

Unusual alternatives to Privilege: s 120 and Division 1A

17. However, before you throw your hands up in despair at the inconsistencies replete in the *Evidence Act* privilege, it is important to remember that it does have certain strengths, or innovations, over the common law. One example is the invention of privilege for unrepresented parties contained in section 120 of the *Evidence Act* that has no equivalent in the common law. Section 120 essentially confers the section 119 right on unrepresented parties, demonstrating that the involvement of a lawyer is not a necessary requirement for the invocation of the privilege.[19]

18. Section 120 states that "evidence is not to be adduced if, on objection by unrepresented party who is not represented, the court finds that adducing the evidence would result in disclosure of [either] a confidential communication between the party and another person, or the contents of a confidential document…that was prepared, either by or at the direction or request of, the party for the dominant purpose of preparing for or conducting the proceeding."[20] This is a narrower form of the section 119 privilege, as it is confined to the proceedings in question and does not extend to anticipated proceedings. It also does not apply in situations where a previously unrepresented litigant employs a lawyer at the last minute before a trial.[21] It is however, "wholly novel", with the common law not recognising any such privilege.[22]

19. The Australian Law Reform Commission articulated the rationale behind this "wholly novel" provision[23] as being that the privilege "should apply in fairness to the litigant in person in an adversary system".[24] Section 120 does prevent what has been described as the "odd, and one might say unjust" situation where "…information collected by an unrepresented party in a case [was] discoverable, whereas corresponding information collected by his [or her] represented opponent's solicitor [was] not discoverable".[25] Suffice to say, the

[19] K Smark, 'Privilege under the Evidence Acts' (1995) 18(1) *UNSW Law Journal* 95, 99.

[20] *Evidence Act 1995* (NSW) s 120.

[21] McNicol (n 18) 198 and Smark (n 19) 99.

[22] McNicol (n 18) 198.

[23] J D Heydon, *Cross on Evidence* (LexisNexis Butterworths, 10th ed, 2015) 917.

[24] Australian Law Reform Commission, *Evidence* (Interim Report, No 26, 21 August 1985) [883].

[25] *Dingle v Commonwealth Development Bank of Australia* (1989) 91 ALR 239 at 242 per Pincus J.

mere existence of the section is an important one for practitioners to keep in mind whenever dealing with unrepresented litigants.

20. Another strength of the New South Wales' *Evidence Act* as opposed to the common law is Division 1A which introduces the concept of a professional confidential relationship privilege. This has been described as constituting "a parallel privilege".[26] Despite the terminology, in reality, Division 1A "does not create a true privilege, but gives the court a discretion to direct that evidence not be adduced where it would involve the disclosure of a protected confidence."[27] A "protected confidence" is defined to mean "a communication made by a person in confidence to another person".[28] The communication needs to have been made "in the course of a relationship in which the confidant was acting in a professional capacity". The confidant must also be "under an express or implied obligation", arising under law or inferred from the nature of the relationship, not to disclose its contents.[29]

21. The Division 1A discretion of the court becomes a mandatory obligation if the court is satisfied that "it is likely that harm would or might be caused (whether directly or indirectly)" to the person who made the protected confidence.[30] The nature and extent of that harm must also outweigh the desirability of the evidence being given.[31] It is perhaps somewhat strange that any potential harm to the recipient of the protected confidence is not equally considered a circumstance where the discretion becomes mandatory. Nonetheless, the protection extends "to a wide range of confidential communications", including "confidences imparted to doctors and health professionals, journalists, social workers and in other relationships where confidentiality is an integral element."[32] Division 1A in the New South Wales' *Evidence Act* is unique in that the equivalent legislation in Victoria, the ACT and the Northern Territory does not contain a similar privilege and the equivalent provision in the Commonwealth *Evidence Act* applies only to confidential communications made to journalists.

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[26] Desiatnik (n 9) 317.

[27] Australian Law Reform Commission, *Uniform Evidence Law* (Report No 102, December 2005) [15.10].

[28] *Evidence Act 1995* (NSW) s 126A.

[29] *Evidence Act 1995* (NSW) s 126A.

[30] *Evidence Act 1995* (NSW) s 126B(3).

[31] *Evidence Act 1995* (NSW) s 126B(3).

[32] New South Wales, *Parliamentary Debates*, Legislative Council, 22 October 1997, 1121 (Attorney General Shaw).

22. The rationale behind Division 1A is to better balance the public interest in recognising legal, ethical and moral obligations of confidentiality that arise within certain relationships in society, with the countervailing public interest in the "efficient and informed disposal of litigation".[33] In light of this rationale, and despite the express words of the provision limiting its application to the adducing of evidence in proceedings, the courts have considered the provision in other circumstances. For instance, the goal and purpose of the provision was taken into account when a court was determining whether to allow inspection of a document produced in accordance with a notice to produce, prior to a hearing.[34]

23. In the context of Privilege, it is also of course important for practitioners to bear in the mind the potential for Division 1A to operate as a fall-back position if arguments under the common law or sections 118 and 119 fail. Although this was not the primary goal of the Division, the terms of the provision are wide enough to enable communications between a person and his or her lawyer in the course of a professional relationship of lawyer and client to be privileged.[35] In fact, the legislature appears to have anticipated this very situation in section 126F(4) which states that a court may give a direction that a protected confidence privilege applies irrespective of whether it is privileged under another section or would be privileged except for a limitation imposed by that section.

24. To give an example of when this alternate privilege has been used if where, in one case, the Court held that although a will was drafted by a lawyer, there was nothing inherent in its nature or its contents to show that there had been any dominant purpose of requesting or giving legal advice. The document was thus not caught by legal professional privilege.[36] Despite this, the Court accepted the submission that the will satisfied the definition of a protected confidence and was therefore caught by the discretionary privilege within Division 1A.[37]

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[33] Australian Law Reform Commission, *Evidence* (Interim Report No 26, 1985) [955].

[34] *Urquhart v Lanham* [2003] NSWSC 109.

[35] J C Campbell, 'Some aspects of privilege concerning communications with lawyers' (2006) 27 *Australian Bar Review* 264 at 277-8.

[36] *Urquhart v Lanham* [2003] NSWSC 109 at [7]. This was applying a common law test. Sections 118 and 119 were held not to apply as it concerned a pre-trial process, prior to the introduction of s 131A of the *Evidence Act* or the UCPR.

[37] *Urquhart v Lanham* [2003] NSWSC 109 at [12].

25. However, it is important to keep in mind a key distinction between this confidential communications privilege and client legal privilege. If a communication falls within client legal privilege, the privilege protects the communication from disclosure unless it is waived. In contrast, if a communication falls within the Division 1A privilege, a court in some situations is *only* given a discretion to protect it from disclosure, and if two criteria are satisfied, it must do so.[38] Furthermore, the precise parameters of the term "acting in a professional capacity" remain unsettled.[39]

26. I think that it is a valuable idea to keep in mind the unusual alternatives to traditional avenues of Privilege. Both section 120 and Division 1A mean that evidence of unrepresented litigants or professionals can be excluded in a way that was previously unavailable under the common law. Moreover, Division 1A may well give practitioners a second chance to exclude evidence, which did not satisfy the strict requirements of Privilege but nonetheless constitute protected confidences.

Legal professional privilege limitations

27. This brings me to my third and final practical point for practitioners, which concerns the limitations on the Privilege and an analysis of just how substantive this right is today. First, I will discuss the contemporary limitations that exist in the enforcement of the privilege in an age of hacking and cyber theft and finally what protections from statutory encroachment exist.

(a) Contemporary limitations to the enforcement of the Privilege in the age of hacking and cyber theft

28. Contemporary issues of hacking and cyber theft have revealed new limitations in the enforcement of the Privilege. This limitation was recently revealed in the unanimous decision of *Glencore International AG v Federal Commissioner of Taxation*[40] handed down in August last year. In this case, the High Court clarified the nature of the right of legal professional privilege and its application to the increasingly prevalent problem of cyber-attacks and data leaks. The case concerned the theft of more than 13 million documents known colloquially as the "Paradise Papers" from the computer system of a law firm based in Bermuda that was acting for the global commodity trading and mining group Glencore. Within these stolen documents was legal advice to Glencore known as the "Glencore documents" concerning the corporate

[38] See *Evidence Act 1995* (NSW) ss 126B(2) and 126B(3).

[39] See Stephen Odgers, *Uniform Evidence Law* (Thomson Reuters, 14th ed, 2019) 1058.

[40] [2019] HCA 26.

restructure of Australian entities. The stolen "Glencore documents" were shared with the world at large and obtained by the Australian Taxation Office.

29. It was not in dispute that the disseminated "Glencore documents" attracted legal professional privilege. However, a declaration to this effect was of no use to the plaintiff companies as the Australian Taxation Office were already in possession of the documents and could use those documents in connection with the exercise of their statutory powers under the *Income Tax Assessment Act 1936* (Cth) unless the plaintiffs could identify a juridical basis on which the Court can restrain that use.[41]

30. The traditional cause of action to protect a client's interest in legally privileged documents is a breach of confidence. However, Glencore did not allege a breach of confidence against the ATO. The High Court noted that 'the documents are in the public domain and there [is] no allegation concerning the defendants' conduct or knowledge'.[42] Consequently, the plaintiffs argued that "any furtherance of the public interest which supports the privilege is sufficient to warrant the creation of a new, actionable right respecting privileged documents" which entitles them to an injunction.[43]

31. In a joint decision, the High Court reaffirmed that legal professional privilege is "not merely an aspect of curial procedure or a mere rule of evidence but a substantive right founded upon a matter of public interest".[44] Despite this, the Court ruled that legal professional privilege is only an immunity from the exercise of powers that would otherwise compel disclosure and does *not* give rise to an actionable legal right or need for further relief beyond ensuring that privileged documents need not be produced.

32. Whilst the Court did not determine whether the plaintiffs were without any possibility of a remedy in the situation, the Court noted that "legal professional privilege is not the area which might be developed in order to provide the remedy sought".[45] This recent case illustrates that despite the Privilege being a 'substantive right', this will be of little assistance for parties whose legal advice has been hacked and broadly disseminated with the world at large. Undoubtedly, this case highlights the need for caution and sophisticated

[41] *Glencore International AG v Federal Commissioner of Taxation* [2019] HCA 26 at [4], [6].

[42] *Glencore International AG v Federal Commissioner of Taxation* [2019] HCA 26 at [7].

[43] Glencore *International AG v Federal Commissioner of Taxation* [2019] HCA 26 at [40].

[44] *Glencore International AG v Federal Commissioner of Taxation* [2019] HCA 26 at [21].

[45] *Glencore International AG v Federal Commissioner of Taxation* [2019] HCA 26 at [42].

security measures to protect the confidentiality of legal advice against contemporary cyber threats.

(b) Protections from statutory encroachments on the Privilege

33. One may well ask what does it really mean in practice for the Privilege to be a "substantive right" as recently reaffirmed by the High Court? What protections, if any, exist against statutory encroachment on the Privilege?

34. The *Constitution* contains no express provision concerning legal professional privilege. Furthermore, there is yet to be any authority by the High Court that indicates that the right to the Privilege is protected by an implication arising from Chapter III of the *Constitution.* The approach taken by the High Court to other privileges, particularly the privilege against self-incrimination, suggests that it is unlikely that such an implication would be found.[46]

35. Of course, the principle of legality does offer some protection from statutory encroachment on the Privilege. When interpreting a statute, courts will presume that Parliament did not intend to displace or interfere with the privilege, unless this intention was made in "express and unambiguous terms",[47] which "indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment".[48] "The majority of the High Court has stated that:

> 'Legal professional privilege is not merely a rule of substantive law. It is an important common law right or, perhaps, more accurately, an important common law immunity. It is now well settled that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect'.[49]

[46] *X7 v Australian Crime Commission* (2013) 248 CLR 92.

[47] *Baker v Campbell* (1983) 153 CLR 52 at 117 per Deane J. See also *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at [106] per Kirby J; *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319.

[48] *Al-Kateb v Godwin* (2004) 219 CLR 562; [2004] HCA 37 at [19] per Gleeson CJ. See also Coco v The Queen (1994) 179 CLR 427 at 437.

[49] *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at [11] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

36. However, it must be remembered that the principle of legality "does not constrain legislative power".[50] Nevertheless, the principle can play a role in protecting the 'right' of legal professional privilege by providing a presumption against the abrogation of his right. Consequently, it was stated in *Momcilovic v The Queen* by Chief Justice French that as a result of the principle of legality, 'the rights and freedoms of the common law should not be thought to be unduly fragile. They have properly been described as "constitutional rights, even if … not formally entrenched against legislative repeal"'.[51]

37. The main limitation upon when the right to legal professional privilege is said to apply is the qualification that the privilege only attaches to communications made for a proper or lawful purpose. This principle is not to be viewed as an exception, rather as representing the "outer bounds of the definition of privilege".[52] This thereby excludes communications tainted with a "wide species of fraud" from the privilege's protection.[53]

38. The common law limitation has received recognition in a widened form in section 125 of both the NSW and Commonwealth *Evidence Acts* which specifies that client legal privilege may be lost when the communication is made or contents of a document prepared "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" or "a deliberate abuse of power". The privilege is therefore "sufficiently flexible to capture a range of situations where the protection of confidential communications between lawyer and client would be contrary to the public interest".[54]

39. The document in question must not simply be evidence of the fraudulent, criminal or other wrongful conduct. Instead, the requirement that the document or communication be 'in furtherance of' the fraud means that the document or communication must be connected to the fraud in the sense of helping it, advancing it or assisting it.[55] However, this does not mean that

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[50] *Momcilovic v The Queen* (2011) 245 CLR 1 at [43] per French CJ.

[51] *Momcilovic v The Queen* (2011) 245 CLR 1 at [45] referring to Trevor Allan, 'The Common Law as Constitution: Fundamental Rights and First Principles' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Court Press, 1996) 146, 148.

[52] Adrian Zuckerman et al, *Zuckerman on Australian Civil Procedure* (LexisNexis Butterworths, 2018) 695.

[53] S Tully, 'Recent Developments Legal professional privilege and national security' (Winter 2014) *Bar News* 24, 25; *AWB Limited v Honourable Terence Rhoderic Hudson Cole (No 5)* [2006] FCA 1234; (2006) 155 FCR 30 at [210]-[212] and [229].

[54] *AWB Limited v Cole (No 5)* (2006) 155 FCR 30 at [215].

[55] *Kaye v Woods (No 2)* [2016] ACTSC 87 at [38] per Mossop AsJ.

conduct that post-dates the fraud cannot be held to be 'in furtherance of the commission' of the fraud.[56]

40. When considering the nature of this right in the context of coercive-information gathering powers of government agencies, it is important to note that the Privilege has been abrogated in furtherance of a "higher public policy interest". The Privilege was expressly abrogated in section 4 of the *James Hardie (Investigations and Proceedings) Act 2004* (Cth). The Explanatory Memorandum for the Bill highlighted the policy justification for abrogating the Privilege as 'any uncertainty over the power to obtain and use privileged material has the potential to severely inhibit ASIC's ability to exercise efficiently its information-gathering and investigative powers'.[57] In the Treasurer's Second Reading Speech it was acknowledged that "legal professional privilege is … an important common law right", however stated that abrogation of the privilege is justified "in order to serve higher public policy interests" such as the "effective enforcement of corporate regulation".[58]

41. A high-profile example of the Privilege conflicting with considerations of national security was the International Court of Justice's decision in the dispute pertaining to 'the Seizure and Detention of Certain Documents and Data' between Australia and East Timor handed down in 2014.[59] That dispute arose out of the seizure, pursuant to an ASIO warrant, of documents held in the custody of one of Timor Leste's legal advisers to the Timor Sea Treaty Arbitration. The subject matter of the arbitration included allegations that Australia had committed espionage by placing covert listening devices inside Timor Leste's cabinet, to gather information in relation to the negotiations of the Timor Sea Treaty. The warrant was issued as the allegations referred to an Australian intelligence officer being a witness for Timor Leste. ASIO claimed this raised concerns of national security (in so far as an intelligence officer may have disclosed that Australia had committed espionage).

42. Timor-Leste sought provisional orders pending the finalisation of the Timor Sea Treaty Arbitration, claiming that the confidential documents and data seized by Australia related to its legal strategy in the pending arbitration.[60]

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[56] *Talacko v Talacko* [2014] VSC 328 at [115] per Elliott J.

[57] Explanatory Memorandum, *James Hardie (Investigations and Procedures) Bill 2004* (Cth) [4.24].

[58] Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Seventh Report of 2005* (August 2005) 151.

[59] *Questions relation to the Seizure and Detention of Certain Documents and Data (Timor Leste v Australia)* ICJ, Provisional Measures, Order of 3 March 2014 (Certain Documents and Data).

[60] Tully (No 53) 24.

43. One of the grounds upon which it sought to maintain confidentiality over the documents was legal professional privilege. Regrettably for our purposes, the decision of the ICJ largely focused on Timor-Leste's primary argument that according to the general principle of sovereign equality of states, its property was immune and inviolable. However, one dissenting judge did consider the question of legal professional privilege. He found it "unlikely that any state would treat national security as inferior, or subject to" the privilege.[61]

44. So, where does that leave us in examining the nature of the substantive right? The most that can be said is that courts will generally construe legislation as abrogating the privilege in the case of 'clear words or necessary intendment'. The subtleties of that answer remain yet to be fleshed out.

CONCLUSION

45. In conclusion, I would encourage you to remember that Privilege is one of those areas swamped in subtleties and distinctions. It is very easy to get bogged down in them. Hopefully, the three points I have made today are of some assistance in navigating this murky, yet very important, area. Remember as always to also stay informed of any trends and developments concerning the application of the Privilege. As the recent decision of *Glencore* illustrates, the application and enforcement of the Privilege continues to evolve quite rapidly in the face of contemporary threats to cyber-security. Even more importantly, is the need to understand the fundamental rationale and operation of the Privilege. I believe Justice Jagot will now provide her insights on those aspects of the topic, although I would first be delighted to answer any questions you have on the points I have just raised.

[61] See *Questions relation to the Seizure and Detention of Certain Documents and Data (Timor Leste v Australia)* ICJ, Provisional Measures, Order of 3 March 2014 at [26] per Judge ad hoc Callinan (in dissent).