

**AN EXAMINATION OF THE LEADING CASES IN RELATION TO IMPLIED
WAIVER OF LEGAL PROFESSIONAL PRIVILEGE**

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There appears to have been an increase in applications to have access to the file of the other party's legal advisers upon the basis that there has been an implied waiver of legal professional privilege. This requires consideration by the Court of whether a communication is one to which legal professional privilege applies and whether there has been some action which has resulted in a waiver of the privilege.

Legal professional privilege precludes certain communications between a legal adviser and a client and material prepared for the purposes of litigation from being disclosed. Communications between a client and their legal adviser made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation, are privileged.

In *Grant v Downs* (1976) 135 CLR 674 at 685, the majority of the High Court described the rationale of legal professional privilege as follows:-

According to traditional doctrine (the rationale) is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their 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. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that all relevant documentary evidence is available. As a head of privilege, legal professional privilege is so firmly entrenched in the law that it is not to be exorcised by judicial decision. Nonetheless, there are powerful considerations which suggest that the privilege should be confined within strict limits.

There are particular categories of legal professional privilege which were described by Lockhart J in *Trade Practices Commission v Stirling* (1979) 36 FLR 244 as follows:-

- (i) Any communication between a client and legal adviser if it is confidential and made with a view to obtaining or giving legal advice or assistance notwithstanding that such communication is made through agents of either the client or the legal adviser.
- (ii) Any document prepared as a communication of the above class although not in fact so used.
- (iii) Communications between the client's legal advisers with a view to the client obtaining legal advice or assistance.
- (iv) Notes, memoranda, minutes or other documents made by the client or officers of the client or the legal adviser of the client of communications which are themselves privileged or relate to information sought by the client's legal adviser to enable advice to be given or to conduct litigation on the client's behalf.
- (v) Communications and documents passing between the client's legal adviser and a third party if they are made or prepared when litigation is anticipated or commenced for the purposes of the litigation, with a view to obtaining advice or evidence to be used in such litigation or information which may result in obtaining such evidence.
- (vi) Communications passing between the client and a third person, who is not the agent of the legal adviser to receive the communication from the client, if they are made with reference to litigation either anticipated or commenced for the purpose of being put before the legal adviser to obtain his advice or to enable him to prosecute or defend an action.
- (vii) Knowledge, information or belief that the client derived from privileged communications made to him by his legal adviser or agent.

In essence there are two categories of legal professional privilege, namely confidential communications between a client and his legal adviser and documents brought into existence for the sole purpose of legal proceedings.

As to the first category, a person should be entitled to obtain legal advice without the apprehension of being prejudiced by subsequent disclosure of confidential communications and that privilege is not confined to communications made in the course of or in anticipation of litigation, but extends generally to confidential communications between a client and his

legal adviser for the purpose of obtaining or giving legal advice (*Baker v Campbell (1983) 153 CLR 52 as per Deane J at 116.*)

As to the second category, the High Court in *Grant v Downs (supra)* held 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 advice in legal proceedings, the privilege will travel beyond the underlying rationale to which it is intended to give expression (at 688). In circumstances where a document is prepared by a third party who is not an agent of the client or the legal adviser, privilege will attach if the test is satisfied that litigation was contemplated or commenced and the document was prepared for the sole purpose of that litigation. In *Grant v Downs (supra)*, a report was brought into existence for three separate purposes, one of which was to obtain legal advice in relation to a coronial inquiry and there were other anticipated legal proceedings. As this report did not satisfy the sole purpose test, it was not privileged.

Since 1995, in Federal jurisdictions and in New South Wales, the existence of legal professional privilege is determined by the dominant as opposed to sole purpose test (*Sections 118 and 119 of the Evidence Act (Cth) and the Evidence Act 1995 (NSW)*).

In *Esso Australia Resources Ltd v Federal Commissioner of Taxation (1999) 201 CLR 49*, the majority of the High Court held that at common law, the issue of whether a communication will be privileged is to be determined by the dominant purpose test rather than the sole purpose test, which had been applied following the decision of *Grant v Downs (supra)*. McHugh and Kirby JJ strongly dissented, expressing concern at the extension of the privilege. Accordingly since 1995, the scope of documents protected by privilege has expanded.

Legal professional privilege is also known as “client legal privilege” as it belongs to the client, not the lawyer. It is only the client who is entitled expressly to relinquish it. At common law, a client who would otherwise be entitled to the benefit of legal professional privilege may waive the privilege either expressly or impliedly.

Generally there are two main ways by which waiver of privilege can be implied, firstly by issue waiver, when a party directly or indirectly puts into issue the substance of privileged communications, including putting state of mind in issue and secondly by the partial disclosure of privileged material.

Where parties to litigation make allegations raising the issue of their states of mind, to which legal advice they received is likely to have contributed, they cannot claim legal professional privilege in respect of this advice. For privilege to be waived, it must be shown that the legal advice in question was relevant in the formation of that state of mind or belief or that the advice in some way becomes an issue in the proceedings.

In *Telstra Corporation Ltd v BT Australasia Pty Ltd* (1998) 85 FCR 152, the majority held that when a party pleads that they undertook certain action in reliance on a representation, such as legal advice, their state of mind is put in issue as an essential element of their claim. The Court must determine what factors influenced the mind of the party to act in that way, upon the basis that it would be unfair to permit a party to assert a state of mind as part of their claim without the other party being provided with an opportunity to have regard to the material relevant to the formation of that state of mind and therefore the privilege over what would otherwise be confidential material will be waived by implication. The advice must be material to the state of mind which is relied upon as part of the cause of action.

Further, the issue is not whether the state of mind is relevant to a fact in issue but rather whether it would be inconsistent to permit a party to rely on stated beliefs by reference to source material without the basis of those beliefs being able to be scrutinized. The privilege will be lost only in relation to legal advice received before or at the time of the relevant events which are material to the formation of the state of mind.

Legal professional privilege can also be waived by implication if there is partial disclosure. Implied waiver may be established where it is inconsistent and unfair to permit a party to disclose and use part of a document whilst claiming privilege over the remainder of it. The contents of the remainder can be important to avoid the opposing party being misled by an

inaccurate perception of the disclosed communication. As such, waiver is more likely to be implied in circumstances where a document deals with a single subject matter rather than a number of different subjects which may be capable of severance without the loss of meaning.

There have been a number of decisions of the High Court which deal with implied waiver of legal professional privilege.

In *Attorney General for the Northern Territory v Maurice* (1986) 161 CLR 475 (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ), each member of the High Court set out a different test of fairness in determining if waiver of legal professional privilege ought to be implied. Ultimately the imputation of waiver was founded on fairness, not by considering the actual intention of the party who had made use of the material. Gibbs C.J (at page 483):-

“The question is whether the disclosure or use of material that has been made renders it unfair to uphold the privilege in the associated material, and although the question whether the material that has been disclosed has been used in evidence is relevant, it is not decisive

Justices Mason and Brennan (at pages 487 and 488):-

“...An implied waiver occurs when, by reason of some conduct on the privilege holder’s part, it becomes unfair to maintain the privilege. The holder of the privilege should not be able to abuse it by using it to create an inaccurate perception of the protected communication, Professor Wigmore explains:-

“When his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder” (Wigmore, Evidence in Trials at Common Law (1961), vol. 8, par. 2327, p 636.)

In order to ensure that the opposing litigant is not misled by an inaccurate perception of the disclosed communication, fairness will usually require that waiver as to one part of a protected communication should result in waiver as to the rest of the communication on that subject matter.

Hence, the implied waiver is at bottom focused on the fairness of imputing such a waiver...”

Justice Dawson (at pages 497 and 498):-

“So much may be obvious, but legal professional privilege is concerned with protecting the confidentiality of a relationship and if that confidentiality is

abandoned by a particular disclosure it may be necessary in fairness, whether further disclosure was intended or not, to require disclosure extending beyond the particular communication: see Wigmore on Evidence (McNaughton rev. 1961), vol. VIII, par. 2327. The cases are not entirely consistent and perhaps what is fair by way of disclosure must ultimately depend upon the relevant circumstances”.

In *Goldberg v Ng* (1995) 185 CLR 83 (Deane, Dawson, Toohey, Gaudron and Gummow JJ), the High Court considered whether circumstances where a solicitor voluntarily disclosed privileged material to the Law Society in relation to an investigation of a complaint by a client against him meant that privileged material may be required to be produced for inspection in different proceedings between the solicitor and the same client. Deane, Dawson and Gaudron JJ held that “*in considering whether there is an imputed waiver of legal professional privilege, the governing consideration is whether fairness requires that the privilege should cease irrespective of intention of the holder of the privilege.*”

The majority of the High Court held that although the Law Society had the power to compel production of documents, voluntary production of documents by the solicitor was regarded as significant and held to be an implied waiver of legal professional privilege. The two dissenting Judges (Toohey and Gummow JJ) held that the solicitors’ disclosure was “*for the limited and specific purpose of meeting the complaint against the solicitor*” (Toohey J) and “*there was no reason, as a matter of fairness, for denying the solicitor the protection*” (Gummow J).

The High Court has provided the objective test for the implied waiver of privilege in *Mann v Carnell* (1999) 201 CLR 1. The majority (Gleeson CJ, Gaudron, Gummow and Callinan JJ) held that the final determination of whether there has been implied waiver will be guided by whether the conduct of a party who was entitled to claim privilege or their legal adviser is inconsistent with the confidence preserved by the privilege.

The emphasis on inconsistency changed the previous approaches, which examined the “fairness” of allowing the privilege to stand in light of disclosing conduct. The majority stated:-

[28] At common law, a person who would otherwise be entitled to the benefit of legal professional privilege may waive the privilege. It has been observed that “waiver” is a vague term, used in many senses, and that it often requires further definition according to the context. Legal professional privilege exists to protect the confidentiality of communications between lawyer and client. It is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement. It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege. Examples include disclosure by a client of the client’s version of a communication with a lawyer, which entitles the lawyer to give his or her account of the communication, or the institution of proceedings for professional negligence against a lawyer, in which the lawyer’s evidence as to advice given to the client will be received.

[29] Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is “imputed by operation of law”. This means that the law recognizes the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege... What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.

[34]... Depending upon the circumstances of the case, considerations of fairness may be relevant to a determination of whether there is such inconsistency.

In *Osland v Secretary to the Department of Justice* (2008) 234 CLR 275, the High Court unanimously confirmed the following principles:-

- (i) Waiver is effected by the conduct of a person otherwise entitled to claim privilege, which is inconsistent with the maintenance of confidentiality which the privilege is intended to protect.
- (ii) A circumstance relevant to determining inconsistency is the purpose for which the privilege holder made the disclosure.
- (iii) Considerations of fairness inform the assessment of the privilege holder’s conduct.
- (iv) Questions of waiver are matters of fact and degree.

There have also been a number of important decisions in relation to implied waiver of legal professional privilege in the Federal Court and Victorian Supreme Court.

In *Bennett v Chief Executive Officer, Australian Customs Service (2004) 210 ALR 220* (Tamberlin, Gyles and Emmett (dissenting) JJ) applied the reasoning of the majority in *Mann v Carnell (supra)*. It was held that the voluntary disclosure of the gist or conclusion of legal advice in the circumstances of the case amounts to a waiver of the whole advice, including the reasons for the conclusion. The substance and the effect of the advice was being communicated in order to emphasise and promote the strength and substance of the case to be made”. At para 6, Tamberlin J stated:-

“It may perhaps have been different if it had been simply asserted that the client has taken legal advice and that the position which was adopted having considered the advice is that certain action will be taken or not taken. In those circumstances, the substance of the advice is not disclosed but merely the fact that there was some advice and that it was considered. However, once the conclusion in the advice is stated, together with the effect of it, then in my view, there is imputed waiver of the privilege. The whole point of an advice is the final conclusion. This is the situation in this case.”

Important passages from *Bennett* were quoted and applied in the Federal Court by Young J in *AWB Limited v Cole [2006] FCA 571*. One of the issues before the Court was the nature of protection against disclosure for documents that record confidential legal advice or confidential legal work. A ‘Draft Statement of Contrition’ known as Exhibit 665 had been inadvertently produced during the hearing by AWB Limited in answer to a notice to produce. Young J held that:-

[143] Taking all of the evidence into account, I have concluded that EX 665 would not, if disclosed, allow a reader to know or infer the nature, content or substance of any legal advice given by Mr Zwier to Mr Lindberg and AWB. Further, the disclosure of Ex 665 would not result in any waiver of the privilege inhering in that advice.

In regard to the distinction between recording the receipt of legal advice and disclosing the substance of such advice, Young J stated:-

[136] In my view, the distinction between a mere reference to advice having been obtained, and a reference that discloses the content or substance of the advice, has not been eliminated by the High Court’s restatement of the relevant principles as to waiver in Mann v Carnell (1999) 201 CLR 1...

[137] In Bennett v Chief Executive Officer, Australian Customs Service (‘Bennett’), the Full Court (Tamberlin, Emmett and Gyles JJ) held that legal representatives of

the Australian Customs Service had waived privilege in legal advice by stating openly that they had given advice to Customs that a particular regulation did not prohibit public comment by an officer on matters of public administration. After referring to numerous authorities, Gyles J stated at 119 [65]:-

“The voluntary disclosure of the gist or conclusion of the legal advice amounts to waiver in respect of the whole of the advice to which reference is made including the reasons for the conclusion.”

Tamberlin J referred to authorities which drew a distinction between a mere reference to the existence of legal advice which did not amount to a waiver, and cases in which the substance of the advice had been disclosed: see Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd (1996) 70 ALJR 603 at 607; Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd (1996) 40 NSWLR 12 and Adelaide Steamship Co Ltd v Spalvins (1998) 81 FCR 360 at 376-377. These cases arose in the context of s 122(2) of the Evidence Act 1995 (Cth), which expressly refers to a loss of client legal privilege consequent upon the disclosure of ‘the substance of the evidence’.

[138] Bennett has been followed Sundberg J in Rio Tinto Ltd v Commissioner of Taxation (2005) 224 ALR 299 at 312-313 [49]-[53], and Sackville J in Seven Network Ltd v News Ltd (No 12) [2006] FCA 348: see also Switchcorp Pty Ltd v Multiimedia Ltd [2005] VSC 425.

In *Seven Network Ltd v News Ltd (No 12) [2006] FCA 348*, Sackville J dealt with the issue of whether the discovery of a document setting out a conclusion stated in legal advice waives privilege. He held that waiver occurred because there was a voluntary disclosure of the gist or conclusion of the legal advice recorded in the document, at [12]. Sackville J reasoned:-

[13] Bennett v Chief Executive Officer, Australian Customs Service (2004) 140 FCR 101, legal representatives of the Australian Customs Service (‘Customs’) stated that they had given advice to Customs that a particular regulation did not prohibit all public comment by an officer on matters of public administration. Gyles J, with whom Tamberlin J agreed, considered that the primary Judge had erred in drawing a distinction between the conclusion expressed in legal advice, on the one hand, and the reasons for that conclusion, on the other. This distinction had led the primary judge to the incorrect holding that disclosure of the conclusion did not involve disclosure of the reasons (at[62]).

[14] Gyles J referred to a number of authorities supporting the proposition that a party who expresses a particular legal conclusion and asserts that it has received legal advice endorsing that view, will be taken to have waived privilege in the legal advice...

[15] Gyles J noted that the primary Judge in *Bennett v CEO* had correctly identified the decision in *Mann v Carnell* as providing guidance as to the law to be applied. However, Gyles J considered that the test had been misunderstood, at least in part. His Honour said this (at [68]):-

“The test looks to inconsistency between the disclosure that has been made by the client on the one hand and the purpose of confidentiality that underpins legal professional privilege on the other. It is not a matter simply of applying general notions of fairness as assessed by the individual judge. The authorities to which I have referred show that it is well established that for a client to deploy the substance or effect of legal advice for forensic or commercial purposes is inconsistent with the maintenance of the confidentiality that attracts legal professional privilege.”

[16] In agreeing with the analysis of Gyles J, Tamberlin J observed (at [6]) that the position in the case before the Full Court may have been different if the legal advisors to Customs had simply asserted that the client had taken legal advice and had adopted a particular position having considered that advice. Tamberlin J pointed out that in these circumstances, the substance of the advice is not disclosed, but only the fact that some advice had been given and had been considered. His Honour went on:-

“However, once the conclusion in the advice is stated, together with the effect of it, then in my view, there is imputed waiver of the privilege. The whole point of an advice is the final conclusion.”

Later in the Judgment, his Honour observed (at [14]):-

“Disclosure of one conclusion but not others in an advice does not necessarily amount to waiver in respect of the non-disclosed conclusions. However, if the conclusions and reasoning are so interconnected that they cannot be separated or isolated, then it may be that the whole of the advice on which all those conclusions are based, must be considered to have been waived...”

[18] The principle stated in *Bennett v CEO*, was applied by Sundberg J in *Rio Tinto Ltd v Commissioner of Taxation* (2005) 224 ALR 299. In that case, the Commissioner produced, in response to an application under the Freedom of Information Act 1982 (Cth), an audit report. The audit report stated that the Commissioner would be relying upon specific grounds ‘supported by ... opinions obtained from counsel.’ Sundberg J held (at [49]) that:-

“The conduct of the [Commissioner] in twice providing to the applicant an Audit Report that discloses the “gist” or “substance” of the privileged Audit Report documents is inconsistent with the maintenance of legal professional privilege over those documents and thus effects a waiver of the privilege.”

In *Switchcorp Pty Ltd v Multiimedia Ltd* [2005] VSC 425 in considering whether there had been an implied waiver of privilege through disclosure of legal advice, Whelan J after considering the relevant authorities restated the principal as follows:-

[11] The majority judgment in Mann v Carnell explained that disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. It is this inconsistency which the courts, where necessary informed by considerations of fairness, perceive between the conduct and the maintenance of confidentiality which brings about the waiver. The majority judgment emphasized that fairness plays a role in assessing whether there is inconsistency, but there is “no overriding principle of fairness operating at large”.¹⁰

[12] Returning then to the specific context relevant here, each case must be decided on its own facts applying the general principle to which I have referred. Notwithstanding that, the cases which have dealt with like circumstances to those existing here seem to me to support the following general propositions:-

- 1. A statement which reveals the contents of legal advice, even if it does so in a summary way or by reference only to a conclusion, will, or probably will, result in a waiver. In this respect I refer to: Ampolex in relation to the statement that the party “has legal advice supporting this position”, and the subsequent judgment of Justice Kirby on the stay application; Queensland Law Society Incorporated v Albietz; Australian Unity Health Ltd v PHIAC, in relation to the statement “legal advice supporting PHIAC’s view of this rule has been received”; Bennett v CEO of Australian Customs Service; and Ashfield Municipal Council v RTA of NSW.*
- 2. A statement which refers to legal advice, even if it associates that advice with conduct undertaken or with a belief held by the client, will not, or probably will not, result in a waiver. In this respect I refer to Ampolex in relation to the statement “On the basis of legal advice received, Ampolex believes ...”; Australian Unity Health Ltd v PHIAC in relation to the disclosure of the solicitor’s letter as being part of the material acted upon by the council; Multistar Pty Ltd v Minister for Urban Affairs & Planning; British American Tobacco Australia Services Ltd v Cowell; Temwood Holdings Pty Ltd v Western Australian Planning Commission; and Nine Films & Television Pty Ltd v Ninox Television Ltd.*

The Full Federal Court in *Perpetual Trustees (WA) Ltd v Equuscorp Pty Ltd* [1999] FCA 925 (Ryan, Carr and Marshall JJ) endorsed the majority view in *Telstra Corporation Ltd v BT*

Australasia Pty Ltd (supra). This occurred prior to the decision of the High Court in *Mann v Carnell (supra)*.

In *DSE (Holdings) Pty Ltd v Intertan Inc* (2003) 127 FCR 499, Allsop J provided an extensive review of authorities and noted that while he had an obligation to apply the law on implied waiver as expressed by the majority in *Telstra Corporation Ltd v BT Australasia Pty Ltd (supra)*, he would approach the matter ‘with the necessary recognition from *Mann v Carnell* that inconsistency is the key to understanding the application of the principle’ at [112]-[113]. Allsop J stated:-

[4]...I have come to view that the authorities in this Court may require me to be guided by what the majority of the Full Court of this Court said in Telstra Corporation Ltd v BT Australasia Pty Ltd (1998) 85 FCR 152, as necessarily modified by Mann v Carnell (1999) 201 CLR 1, esp 13 at [27] and [29]; as to which course see generally Perpetual Trustees (WA) Ltd v Equuscorp Pty Ltd [1999] FCA 925 (Full Court), Fort Dodge Australia Pty Ltd v Nture Vet Pty Ltd [2002] FCA 501 (per Hely J) and BP Australia Pty Ltd v Nyran Pty Ltd [2002] FCA 1302 (per Nicholson J).

[5] My own view is that Mann v Carnell evinces more than a modification of the approach of the majority in Telstra and amounts to a rejection of that approach and that the notion of inconsistency of conduct by the holder of the privilege and the maintenance of the confidence in question (though informed where relevant by notions of fairness) works a narrower and more confined operation for implied waiver than as expressed by the majority in Telstra.

[14] The overriding guiding principle is that stated in Mann v Carnell, supra at [29]. The expression of that principle and the subordination of the notion of “fairness” to possible relevance in the assessment of the inconsistency between the act and the confidentiality of the communication produces, it seems to me, an important change to the existing law. In order to explain why I think this to be so it is necessary for me to examine the pre-existing authorities. This will also illuminate the operation of the principle as expressed in Mann v Carnell at [29], and the importance of the recognition that it is the inconsistency between the relevant act of the holder of the privilege and the maintenance of the confidence that is essential not a broad balancing process based on fairness.

...

[95] The enunciation of principle by the Full Court of this Court in Esso and by the Full Court in Telstra, might be seen, at the very least, as having been overtaken by Mann v Carnell. It is the inconsistency between the act by the holder of the privilege and the confidentiality of the communication which destroys the

privilege. I would have thought that it is too broad a statement to say that a pleading of a state of mind to which legal advice is or might be materially relevant is an adequate surrogate for the expression of principle in Mann v Carnell...

[97] More importantly, it would seem to me that the view that relevance to an issue is the proper test is, as a general proposition, difficult to reconcile with Mann v Carnell. To the extent that this can be extracted from Data Access Corporation, Wardrope v Dunne, Pickering v Edmunds, Ampolex, and the majority in Telstra, I have difficulty seeing that it is consistent with Mann v Carnell at [29].”

In *SQMB v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 205 ALR 392, Lander J applied *Mann v Carnell* and stated:-

“[28] Waiver occurs when a party does something inconsistent with the confidentiality otherwise contained in the communication...”

In *Liberty Funding Pty Ltd v Phoenix Capital Ltd* (2005) 218 ALR 283 the Full Court (Branson, Sundberg and Allsop JJ), applied the decision in *Mann v Carnell* stating at [22]:-

“...The essence of waiver is not general fairness – it is the inconsistency of the posited act with the confidentiality protected by the privilege (in which analysis fairness may play a part): Mann v Carnell at [29] and [34] ...”

In *Seven Network Ltd v News Ltd* (No7) [2005] FCA 1092, Sackville J in considering whether a party waived privilege by raising its state of mind in pleadings, stating at “[19] ...authorities on waiver of legal professional privilege do not speak with one voice.” Sackville J referred to the Full Court decisions in *Telstra Corporation Ltd v BT Australasia Pty Ltd* and *Liberty Funding* and the comprehensive review of authorities by Allsop J in *DSE (Holdings)* and noted that:-

“[24] I think that there is much force in the view that the reasoning in Mann v Carnell requires Telstra v BT to be reconsidered...”

In *Australian Agricultural Company Limited v AMP Life Limited* [2006] FCA 371 Cowdroy J was concerned with whether the respondent had waived legal professional privilege by its conduct of the proceedings. Cowdroy J set out significant passages from *Mann v Carnell* and *Telstra v BT* and then agreed with the position of Allsop J in *DSE (Holdings)* on the effect of *Mann v Carnell* on the ratio of *Telstra v BT*:-

[28] *The effect of Mann v Carnell upon the ratio in Telstra was considered by Allsop J in DSE (Holdings) Pty Ltd v Intertan Inc, where his Honour said (at 501-502 [4]-[5]):-*

“I have come to the view that the authorities in this Court may require me to be guided by what the majority of the Full Court said in Telstra Corporation Ltd v BT Australasia Pty Ltd (1998) 85 FCR 152, as necessarily modified by Mann v Carnell (1999) 201 CLR 1 at 12 [27] and 13 [29] ...

My own view is that Mann v Carnell evinces more than a modification of the approach of the majority in Telstra and amounts to a rejection of that approach and that the notion of inconsistency of conduct by the holder of the privilege and the maintenance of the confidence in question (though informed where relevant by notions of fairness) works a narrower and more confined operation for implied waiver than as expressed by the majority in Telstra.”

[29] *I respectfully agree with his Honour with respect to the effect of Mann v Carnell. To the extent that Telstra suggests that fairness is the overriding consideration, it should not be followed. It is clear that following Mann v Carnell, inconsistency of conduct should be the guiding principle in determining whether legal professional privilege has been waived, although fairness remains an element for consideration in determining whether conduct is inconsistent.*

Cowdroy J then examined case law considering inconsistency of conduct and stated:-

[33] *The above authorities establish that the conduct of a party will be inconsistent with the maintenance of privilege if the nature and extent of legal advice has been raised, whether directly or by necessary implication, by that party as an issue in the proceedings. This will usually occur where a state of mind has been positively pleaded in circumstances where legal advice given would be specifically pertinent to the formation of that state of mind or where a party’s understanding of their legal position is critical to their defence.*

[34] *However, I cannot accept the submission of AAC that any positive defence mounted by AMP which raises its state of mind necessarily constitutes a waiver of privilege. In my opinion, in order to waive privilege a party must assert a belief which is likely to have been, or is explicitly said to have been, materially dependent upon legal advice given to that party. In that case the proof or otherwise of the belief is dependent upon the legal advice and accordingly privilege is waived. This is the position in cases where the dispute relates to a party’s understanding of its legal position at a given point in time, such as Thomason, Rio Tinto, Ampolex and Fort Dodge.*

In the Family Court in *Macquarie Bank Limited v B & Anor* [2006] FamCA 1052, Justice Le Poer Trench provided a detailed analysis of the relevant authorities and considered that there would appear to be a number of matters for a Court to consider before determining that there has been an implied waiver of legal professional privilege namely:-

- (a) Evidence relied upon must provide a relevant disclosure of communications normally the subject of legal professional privilege.
- (b) Waiver of such privilege may arise as a result of material contained in a pleading or affidavit, or given in oral evidence at a hearing or through the contents of a document provided by one party to the other, whether by formal discovery or not.
- (c) The disclosure of the communication may be made as part of the evidence in support of the case relied upon by the party entitled to claim privilege in respect of that communication.
- (d) The disclosure must be relevant or potentially relevant to an issue to be determined by the Court.
- (e) The disclosure must illustrate conduct which shows inconsistency between a party seeking to maintain privilege in relation to some communications relevant to an issue in the case. For waiver to be established it must be determined that it would be unfair to a party to allow the inconsistency to stand.