The forward march of legal professional privilege

By Alister Abadee

Since the enactment of the *Uniform Evidence Law* in 1995 in certain Australian jurisdictions, there has been considerable controversy as to the extent to which its statutory provisions affect, modify or displace rules of common law. The controversy has been particularly acute in the area of legal professional privilege and waiver. That controversy has been partly facilitated by the recognition, since 1983, that the law of privilege is more than a rule of evidence, and constitutes a substantive principle of law capable of application outside the curial context.

An inevitable consequence of the privilege is the limiting or inhibiting of the full disclosure of all evidence relevant to the issues in dispute between parties to litigation. This possibility has led the Courts, over the better part of two decades, to do two things: first, rein in the scope of privilege. This was, in substance, what the joint judgment of Stephen, Mason and Murphy JJ sought to accomplish by the 'sole purpose' test in *Grant v Downs*. Secondly, some Courts extended the circumstances in which a waiver of privilege arises. An example of the extension of waiver is the doctrine that holds that where a party has placed in issue its state of mind, such as pleading reliance upon a representation, then to the extent that that state of mind was informed by legal advice, it would be 'unfair' for the advice to remain privileged.

The Uniform Evidence Law deals with the topics of legal professional privilege in a different and limited way. Sections 118 and 119 substitute a 'dominant' purpose test to determine claims for privilege over evidence 'adduced' in Court. Sections 122 to 126 usher in concepts of 'express' and 'implied' waiver, but again in a context where privilege claims are raised in the courtroom.

Although the Uniform Evidence Law has only been partly enacted throughout the federation, these provisions have inevitably brought to the fore issues such as the extent to which they apply outside of the trial context, as well as larger issues such as the extent to which the common law develops or is modified as a result of statutory law.

The High Court considered these questions in two decisions delivered on 21 December 1999: *Esso Australia Resources Ltd v Commissioner of Taxation*[1] *and Mann v Carnell*[2]. Both *Esso* and *Mann* concerned attempts to obtain documents through the pre-trial process of discovery.

Esso and the common law of professional privilege

In *Esso*, the appellant commenced proceedings in 1996, appealing against notices of amended assessment of income tax issued by the Commissioner of Taxation. General orders for discovery were made. In its list of documents, Esso made a claim for privilege in respect of certain documents, based upon the contention that their disclosure would result in the disclosure of a confidential communication made between it and a lawyer for the dominant purpose of the lawyer providing legal advice to Esso.

The trial judge (Foster J) determined, as a separate question of law, that the 'sole purpose' test, as formulated by the High Court in *Grant v Downs*, was the correct test for claiming legal professional privilege. His Honour also determined that the Federal Court did not have the power to make an order to exclude from production discovered documents, on the basis that such documents satisfied the 'dominant purpose' test set out in sections 118 and 119. On appeal to the Full Federal Court, a specially constituted bench of five members, by bare majority, substantially upheld Foster J's decision, although it modified the order concerning the second question: the Federal Court was empowered to exclude production of discovered documents for the reason that they satisfied the 'dominant purpose' test, but to do so would, in the circumstances, be an improper exercise of power.

Four arguments were relevantly put by Esso in the High Court, to support its attempt to resist production of the documents in dispute:

i. as a matter of statutory construction, the Evidence Act established a 'dominant purpose' test applicable to discovery and inspection;

ii. the common law, by analogy or derivation, should be modified to accord with provisions of the Evidence Act, in at least those jurisdictions to where the Uniform Evidence Act applied;

iii. the Federal Court could, and should, exercise the discretionary power conferred by its rules to refuse to order the production of discovered documents;

iv. the High Court should overturn its decision in *Grant v Downs*, and substitute the 'dominant purpose' test formulated by Barwick CJ in dissent in that case.

The majority (Gleeson CJ, Gaudron and Gummow

JJ) in the High Court held that none of arguments (i) to (iii) succeeded.

As to (i), sections 118 and 119 fell within Chapter 3 of the *Evidence Act 1995 (Cth)*, which is generally concerned with the admissibility of evidence. On its face, the language of sections 118 and 119 indicated that they apply only to the 'adducing of evidence', whose compass extends to evidence in interlocutory proceedings, but does not cover all the circumstances in which a claim for privilege may arise[3].

As to (ii), the majority recognised the historical derivation of certain aspects of common law principle from statutory provisions, such as the law relating to criminal conspiracy and part performance[4]. The majority also referred to the line of reasoning, commencing with the decision by McLelland CJ in Eq in *Telstra Corp v Australis Media Holdings (No.1)*[5] and subsequently applied in both Federal[6] and New South Wales[7] courts, that there was something illogical, absurd or anomalous that different tests for privilege may apply in ancillary procedures, as compared with a trial, notwithstanding that this distinction was drawn by the Australian Law Reform Commission[8].

There were two related difficulties with this argument identified by the majority. First, the legislation had only been enacted, with the exception of the federal courts, in the jurisdictions of New South Wales and the Australian Capital Territory. This fact collided with the proposition established in *Lange v Australian Broadcasting Corp*[9] that there is but one common law in Australia. Secondly, since the provisions relating to privilege in the Uniform Evidence Act jurisdictions were themselves confined, it was difficult to discern a consistent legislative policy or view as to what the public interest demanded in relation to the law of legal professional privilege.

'The doctrine of issue waiver has been cut back as a result of *Mann*.'

As to (iii), the majority held that although Court rules such as Order 15 rule 15 conferred a discretionary power upon the Court to order production, the purpose of that power was not to subvert or circumvent rules determining the existence of privilege. The majority also noted the express requirement of Order 15 rule 15 that an order be necessary, a matter which may only be determined in the light of all facts and circumstances[10].

The paramount issue in the appeal was issue (iv), i.e. whether the High Court would overturn the customary formulation of the common law 'sole purpose' test from *Grant v Downs*. The majority commenced its analysis by referring to the tension between the policy underscoring legal professional privilege – serving the administration of justice by encouraging full and frank disclosure by clients to their lawyers – and the desirability of obtaining full access to the facts relevant to issues in dispute. In effect, the Court was invited to reconsider whether the balance between these policies struck in *Grant v Downs* was appropriate.

In practice, the significance of whether a 'sole' or 'dominant' purpose applies (in the discovery context) arises only where there is some other additional purpose, other than a legal purpose, which infused the relevant documentary communication. A multiplicity of legal and non-legal purposes for a document may be quite normal, particularly in large corporations or bureaucracies. Those purposes may, for example, be administrative or disciplinary in nature.

It has been bluntly suggested that the 'sole purpose' test in the joint judgment of Stephen, Mason and Murphy JJ in *Grant v Downs* was motivated by the concern that legal professional privilege was being invoked by corporate litigants to shield the truth[11], although the joint judgment put the issue more in terms of an advantage or immunity provided to corporations which was unavailable to individuals[12].

Having determined that the circumstances warranted a reconsideration of the test for legal professional privilege[13], the majority noted that the test had to strike an appropriate balance between the competing policy considerations referred to above, as well as meeting practical considerations, such as the ease with which the test could be applied. The majority then critiqued the 'sole purpose' test from *Grant v Downs*, citing its 'extraordinary narrowness'[14]. Although it might be possible to place a gloss on the test, it was preferable to abandon the test altogether.

Although the majority considered that it might also be possible to reconstruct a new test, it considered that for all practical purposes, the 'dominant purpose' test of Barwick CJ in *Grant v Downs* was the only alternative, and should be adopted, since it had the virtues of striking an appropriate balance between policy considerations, and bringing the common law of Australia into line with other common law jurisdictions (England and New Zealand)[15].

Mann: a new test for waiver at common law

In *Mann*, the appellant, a surgeon, applied for preliminary discovery of legal advices provided by the Chief Minister of the Australian Capital Territory, Ms Carnell, to an independent member of the ACT Lower House, Mr Moore, as part of practice (established in evidence) of members being confidentially briefed by Territory Ministers. The surgeon sought pre-trial discovery with a view to commencing defamation proceedings against Carnell.

The issue before the High Court was whether the legal professional privilege attaching to the advices (privilege having been acknowledged) had been lost by reason of the disclosure by Carnell to the member of the Lower House. It was also assumed that, although the privilege relevantly belonged to the Australian Capital Territory, Carnell acted within her authority in disclosing the communications to Moore.

As at the date of the Full Federal Court's decision in this case, the prevailing interpretation (within the Federal Court) of whether privilege had been lost at the pre-trial stage was the decision in *Adelaide Steamship Co Ltd v Spalvins*, which held that although sections 118 and 122

did not directly apply, the common law had to be adapted to the statutory provisions, so that the provisions would apply derivitively. The application of this proposition, in the circumstances, was that the confidential disclosure by Carnell to Moore did not result in the loss of privilege, within s122(2)(a) of the Evidence Act.

In line with its decision in *Esso*, the High Court held that this reasoning was not correct, as the statutory provisions of waiver did not derivitively affect and modify the common law on waiver[16].

The majority (Gleeson CJ, Gaudron, Gummow and Callinan JJ) considered the concept of waiver at common law. The majority reasoned, from the premise that privilege belonged to the client, that it was 'inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege'[17]. Significantly, the Court differentiated the notion of inconsistency from the principle of 'fairness operating at large'[18], although considerations of fairness may be relevant, especially in the context of 'implied' waiver[19].

In its reasoning, the majority was influenced by the proposition in *Goldberg v Ng*[20] that voluntary disclosure to a third party did not necessarily waive privilege, and particularly, the view expressed by Jordan CJ in *Thomason v Council of the Municipality of Campbelltown*[21], that a selective disclosure of a privileged communication did not necessarily evince an intention to waive the client's right to refuse on other occasions to disclose the content of the advice.

In the circumstances, there was no inconsistency between protecting the Territory from subsequent disclosure of legal advice to Mann and Carnell conveying the terms of that advice (on a confidential basis) to a member of the Lower House who wished to consider the reasonableness of the Territory's conduct in relation to the litigation.

Has *Mann* affected the doctrine of issue waiver?

In an earlier edition of *Bar News*[22], an analysis was made of a decision of the Full Federal Court in *Telstra Corporation v BT Australasia*[23] concerning the doctrine of issue waiver. In that decision, the majority (Branson and Lehane JJ) broadly interpreted 'consent' in s122 (1) of the Evidence Act 1995 to include consent imputed by law. That finding relied, in part, upon the proposition that where a party puts in issue its state of mind, to which legal advice is likely to have contributed, the common law would find a waiver because it would be unfair to the other party for privilege over the advice to be maintained[24]. The decision was also affected by the reasoning that s122 of the Evidence Act modified the common law principles relating to waiver of privilege at the pre-trial stage[25].

The implications of *Mann* for the doctrine of issue waiver may be considered from (a) the pre-trial perspective; and (b) in the courtroom.

Issue Waiver: pre-trial

A typical example is where a party has placed its state of mind in issue by its pleading and there is a basis for thinking that legal advice informed that state of mind.

It is likely that *Mann* means that the mere act of pleading an issue relating to a party's state of mind will not be inconsistent with maintaining privilege over relevant legal advice. Fairness will be no more than a factor to consider in determining whether there is the necessary inconsistency.

Issue Waiver: At trial

A typical example is where a witness admits in cross-examination that the receipt of legal advice affected its state of mind relevant to an issue. In *Telstra*, the majority, relying upon notions of unfairness, held that 'consent', for the purpose of s122(1) of the Evidence Act, extended to conduct that would amount to an imputed waiver at common law. This reasoning was followed in *Perpetual Trustees (WA) Ltd v Equuscorp Pty Ltd*[26].

Mann indicates that this reasoning cannot stand, since this notion of 'imputed consent' derives from an incorrect understanding of waiver at common law, i.e. that 'unfairness' of itself is the test to determine waiver.

In these circumstances the privilege holder (probably) still has the choice whether to go on and disclose the content of the advice and thereby waive the privilege; or to maintain the privilege but run the risk of the Court finding that the privilege-holder has not discharged the onus of proving an issue, relevant to its state of mind, that is borne by it.[27]

Conclusion

The doctrine of issue waiver has been cut back as a result of *Mann*. That view, in combination with the extension of the ambit of privilege in *Esso*, reinforces the status of privilege as a human and constitutional right[28], even if it may effectively impede the capacity of the Courts to ascertain the real facts in proceedings.

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1 (1999) HCA 67; (1999) 74 ALJR 339.
2 (1999) HCA 66; (1999) 74 ALJR 378.
3 (1999) 74 ALJR 339 at 343. Claims for privilege may also arise in administrative and investigative proceedings, as well as statutory processes of search and seizure: *Baker v Campbell* (1983) 153 CLR 52.
4 (1999) 74 ALJR 339 at 344.
5 (1997) 41 NSWLR 277
6 *Adelaide Steamship Co Ltd v Spalvins* (1998) 81 FCR 360.
7 *Akins v Abigroup Ltd* (1998) 43 NSWLR 539, but cf R v Young (1999) 46 NSWLR 681.
8 ALRC, *Evidence*, Final Report, No.38 (1987).
9 (1997) 189 CLR 520 at 563.
10 (1999) 74 ALJR 339 at 346.
11 S McNicol, 'Before the High Court: *Esso Australia Resources Ltd v Federal Commissioner of Taxation*' (1999) 21 Syd LR 656 at 665.
12 (1976) 135 CLR 674 at 687-688.
13 (1999) 74 ALJR 339 at 348-350.
14 Ibid., 351.
15 Ibid., 351-352.
16 (1999) 74 ALJR 378 at 384.
17 Ibid., 384, citing *Cross on Evidence*, 5th ed (1996), para 25005, see now 6th ed (2000) para 25010.
18 (1999) 74 ALJR 378 at 384.
19 Ibid., 385.
20 (1995) 185 CLR 83 at 120, ibid., 385.
21 (1939) 39 SR (NSW) 347 at 355.
22 J T Gleeson, 'Issue Waiver – Doctrine or Heresy?' *Bar News* (Spring 1999) 43.
23 (1998) 85 FCR 152.
24 Ibid., 166.
25 Telstra went on appeal to the High Court, but the parties settled before delivery of reasons for judgment. For a discussion of comments from the Court during argument, see Gleeson, supra n.22, pp 43-44.
26 (1999) FCA 925 (Unreported, Full Federal Court, 7 September 1999).
27 per McHugh J in *Giannarelli v Wraith (No.2)* (1991) 171 CLR 592 at 605.
28 *The Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 552, 564.