

THE HON T F BATHURST AC
CHIEF JUSTICE OF NEW SOUTH WALES
COLLEGE OF LAW JUDGE'S SERIES
LAWYER/CLIENT PRIVILEGE
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1. Good evening ladies and gentleman and welcome to tonight's Judge's Series on lawyer client privilege. 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 and present.
2. I'd like to thank the College of Law for inviting me to this annual event and for organising such a practical series of seminars for practitioners. I do think there is a tendency when organisers plan education seminars to seek out the weird and wacky, or at least the highly specialised. However, I think it is a key strength of *this* series that, bucking this trend, these sessions focus on highly realistic and useful aspects of practice, 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". To add to the complexity, today's seminar of course had to be called "*lawyer client* privilege". To have some clarity, I thought I'd take this opportunity, right at the start, to stipulate 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*,¹ as the *Evidence Act* privilege. I will refer to the two collectively simply as Privilege. On that note, may I recommend an obvious source of entertainment, for any of you who find your concentration waning during my talk, is to simply count how many times I say the word "privilege". Hopefully none of you will have to resort to such antics to be amused, but for the record I will be keeping count as well.
4. I understand tonight Justice Nicholas will be focusing on the core aspects of the Privilege, including its rationale, scope, abrogation and waiver. In light of this and the functional focus of the series, I thought I would structure my thoughts into practical pointers for practitioners; focusing on some of the more subtle idiosyncrasies of Privilege. I'd specifically like to detail four subtleties that I think practitioners should know to ensure issues of Privilege are approached in an up

* I express my thanks to my Research Director, Mis Madeline Hall, for her assistance in the preparation of this address.

¹ 1995 (NSW).

to date way that reflects the conceptual underpinnings of both its statutory and common law basis. Without such an approach I do think 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 outcome. I hope by combining some recent developments with established principles, you will find something within my jumbled ramblings as vaguely interesting.

(1) The effect of the Legal Profession Uniform Law: removing a two-tier system?

5. The first point that I think all practitioners need to be aware of, is the effect the introduction of the Legal Profession Uniform Law has had on the operation of the Privilege, particularly in its application to in-house legal counsel. Prior to the Uniform Law, in-house counsel were not required to have a practicing certificate.² Now, to engage in legal practice they must.³ In addition, and significantly, the Uniform Law also adopts Victoria's previous position that the law relating to Privilege is not, to quote the legislation, "excluded *or otherwise affected*", merely because the Australian legal practitioner is acting in the capacity of in-house counsel.⁴ This, in combination with the requirement to hold a practicing certificate, appears to contradict New South Wales' previous position. The previous position had essentially established a two-tier system in the way the Privilege applied to in-house counsel as opposed to all other practitioners.
6. The two-tier system has grown out of a line of authorities that stated for in-house counsel to attract the Privilege they first must establish that they are independent. Only if this is first established can you then turn to the question of what the dominant purpose of the communication was.⁵ This approach is clearly predicated on a concern that in-house counsels are *inherently* less independent than other practitioners, simply due to the nature of their employment. The alternate submission is that the question of in-house counsel's independence is simply one of many factors to consider when determining what the dominant purpose of a communication was.⁶

²Section 14(3) *Legal Profession Act 2004* (NSW).

³ Section 10 and definition of a "qualified entity" in *Legal Profession Uniform Law (NSW) No 16a* (NSW). In-house counsel are not exempted under the *Legal Profession Uniform General Rules 2015* (NSW).

⁴ Section 38(2) *Legal Profession Uniform Law (NSW) No 16a* (NSW) (emphasis added). Note the section specifically refers to "corporate legal practitioner" which is defined as "an Australian legal practitioner who engages in legal practice only in the capacity of an in-house lawyer for his or her employer or a related entity, but does not include a government legal practitioner".

⁵ *Rich v Harrington* [2007] FCA 1987; (2007) 245 ALR 106; *Hannaford v Royal Society for the Prevention of Cruelty to Animals, NSW* [2013] NSWSC 1708 (**Hannaford**); *Archer Capital 4A v Sage Group (No 2)* [2013] FCA 1098; (2013) 306 ALR 384 (**Archer**) at [64]-[73]. See also, L Bastin, "Should "independence" of in-house counsel be a condition precedent to a claim of legal professional privilege in respect of communications between them and their employer clients?" (2011) 30(1) *CJQ* 33 (**Bastin**) and A Maria, 'Privilege in the in-house context' (2015) 42(1) *Brief* 24.

⁶ *Archer*; *Dye v Commonwealth Securities Ltd (No 5)* [2010] FCA 950.

7. Before you conclude that this difference in approach is about splitting hairs, I refer you to the decision of *Hannaford* against the RSPCA.⁷ In that case, the judge held that although letters had been sent from the RSPCA to its solicitor, for the *sole* purpose of obtaining professional legal services, the claim for privilege over the letters nonetheless failed. This was because the evidence had not established the solicitor had the necessary degree of independence from the RSPCA in the first place.⁸ Clearly therefore the subtle differences in approach can radically change outcomes.
8. It was cases like *Hannaford* that meant prior to the Uniform Law, in-house counsel faced an additional hurdle before being able to assert Privilege over their communications. In effect, there was a two-tier system for the Privilege, depending on the lawyer's employment.
9. Such a situation could be described as unwarranted for several reasons.⁹ It could be undesirable for many more. For one thing, introducing a gatekeeper to the dominant purpose test appears to be directly in conflict with the wording of the *Evidence Act*. For another, as the Australian Law Reform Commission acknowledged in its 2008 report, there was "strong opposition" within the profession to such segregate treatment.¹⁰ Moreover, by establishing essentially a second component to the test for Privilege, uncertainty was created about the precise nature of the condition precedent and who bears the persuasive and evidential burdens in relation to it.¹¹ In desperation, the profession has been resorting to compiling lists of factors that point to 'independence'. These have quickly moved far beyond consideration of whether in-house counsel possess a practicing certificate or not. They have become bogged down in minutia like the headings of stationary and official office titles.¹²
10. However, as I alluded to, the advent of the Uniform Law may have changed all this.¹³ This is because the courts may construe section 38 as mandating in-house counsel not be considered *inherently* any less independent and that therefore, by implication, the two-tier system, which arises directly from such an assumption, should no longer be used.
11. Unfortunately, but unsurprisingly, there is little guidance as to whether this was the purpose of the provision either in the second reading speech or explanatory

⁷ *Hannaford*. Note Wigney J in *Archer* at [72] doubted whether much would turn on the apparent difference.

⁸ *Hannaford* at [74] and [79].

⁹ See J Tamberlin and L Bastin, 'In-house counsel, legal professional privilege and "independence"' (2009) 83 *Australian Law Journal* 193.

¹⁰ Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report 107 (2008) at 8.101.

¹¹ See Bastin.

¹² Graham J, 'Legal Professional Privilege For In-House Counsel' (Speech delivered at the 12th Annual In-House Counsel Forum, 27 February 2008).

¹³ Although the tide seems to have be turning anyway (*Archer*).

notes to the New South Wales or Victorian Uniform Law. Indeed there is no guidance in the extrinsic materials to the 2004 Victorian *Legal Profession Act*, where this provision historically originates from. Despite this silence, it is sufficiently noteworthy that Victorian authorities have not adopted independence as a condition precedent to in-house counsel Privilege claims.¹⁴ It stands to reason that this may be because of the longstanding presence of section 38 within that state, combined with the mandatory requirement of holding a practicing certificate. It is plausible to suggest that it is because of that statutory framework that the concerns of in-house counsel independence have never been as prominent in that state as it has in ours.

12. In any event, my first point to practitioners is to simply be aware of the possible arguments that may be run in the case of asserting Privilege for in-house counsel in this new Uniform Law environment.
13. Even if the Courts do not construe section 38 as requiring an abandonment of the two-tier approach, the fact that all in-house counsel must now have a practicing certificate will in itself effect the court's assessment of independence. Essentially, by making all things equal in relation to practicing certificates, greater focus will inevitably be had on other factors. Again, practitioners should be aware of and plan for this shift in focus.

(2) Inconsistencies in the application of the *Evidence Act* privilege

14. I'll now turn to my second practice point, which focuses on the subtleties in the application of the *Evidence Act* privilege. The basic thing to bear in mind with the *Evidence Act* is, 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.
15. 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.¹⁵ 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. However, from the beginning, this extension began to unravel. For instance, the UCPR only

¹⁴ See Gillard J's approach in *Australian Hospital Care (Pindara) Pty Ltd v Duggan* [1999] VSC 131 considered in *Archer*.

¹⁵ *Mann v Carnell* [1999] HCA 66; (1999) 201 CLR 1.

extended the *Evidence Act* privilege to civil pre-trial proceedings, not criminal ones.

16. As a result, in 2007 section 131A was inserted in the 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. Regrettably however, complications still plague this section. 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.
17. While the historical path to this outcome for this State's courts may appear tortious, 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.¹⁶ This however was overturned in 1998 by a full Federal Court of Appeal, a result which was affirmed by the High Court the following year.¹⁷
18. In response, the Federal Court enacted a rule, similar to the UCPR, to expand the *Evidence Act's* application. However for some reason the expansion was only made to apply 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.¹⁸ 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*.¹⁹ 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*.

¹⁶ *Adelaide Steamship Co Ltd v Spalvins* (1998) 81 FCR 360.

¹⁷ *Esso Australia Resources Ltd v Commissioner of Taxation* [1999] HCA 67; (1999) 201 CLR 49.

¹⁸ J Campbell, 'Some aspects of privilege concerning communications with lawyers' (2006) 27 *Australian Bar Review* 264 (Campbell), 270-272.

¹⁹ 1976 (Cth). Campbell, 272.

19. In a nutshell therefore, while the *Evidence Act* privilege extends to pre-trial processes 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.²⁰
20. 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.²¹ Needless to say the Court continues to confirm that it is in fact the common law principles that apply.
21. 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 between courts is just *one* example of a broader problem. The nature of the *Evidence Act* means 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.²² As it is however, the *Evidence Act* has created a parallel privilege, distinct but similar to the common law. It is therefore vital to first identify which test applies.

(3) Unusual alternatives to Privilege: s 120 and Division 1A

22. However, before you throw your hands up in despair at all of the inconsistencies the *Evidence Act* privilege has, 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*. This essentially confers the section 119 right on unrepresented parties.²³ It states that “evidence is not to be adduced if, on objection by an unrepresented party, 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 by the party for the dominant purpose of preparing for or conducting the proceeding.”²⁴
23. This is a more narrow form of the section 119 privilege, as it does not extend to anticipated proceedings. It also does not apply in situations where a previously

²⁰ 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” (N Williams, J Anderson, J Marychurch, J Roy, *Uniform Evidence in Australia* (LexisNexis Butterworths, 2015), 660).

²¹ See for instance *Domain Paper (Australia) Pty Ltd v Galloway* [2014] FCA 936.

²² 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 (McNicol).

²³ K Smark, ‘Privilege under the Evidence Acts’ (1995) 18(1) *UNSW Law Journal* 95 (Smark), 99.

²⁴ McNicol, 198.

unrepresented litigant employs a lawyer last minute before trial.²⁵ It is however, “wholly novel”, with the common law not recognising any such privilege.²⁶

24. The rationale behind the provision is presumably based on considerations of fairness²⁷ and constitutes an attempt to create a level playing field or sense of equality between represented and unrepresented litigants. Suffice to say, the mere existence of the provision is an important one for practitioners to keep in mind whenever dealing with unrepresented litigants.
25. Another strength of the New South Wales’ *Evidence Act* is Division 1A. This introduces the concept of a confidential relationship privilege. Despite the terminology, really this “does not create a true privilege, but allows the court a discretion to direct that evidence not be adduced where it would involve the disclosure of a protected confidence.”²⁸ A protected confidence is defined to mean a communication made by a person in confidence to another person. The communication needs to have been made in the course of a relationship, where the person who the communication was made to was acting in a professional capacity. They must also be under an express or implied obligation, arising under law or from the nature of the relationship, not to disclose its contents.²⁹
26. The Division 1A discretion on the court becomes a mandatory obligation if the court is satisfied that it is likely harm would or might be caused to the person who made the protected confidence. The nature and extent of that harm must also outweigh the desirability of the evidence being given.³⁰ It is perhaps somewhat strange that 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.”³¹
27. The rationale behind this 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”.³² In light of this rationale, and despite the express

²⁵ McNicol, 198 and Smark, 99.

²⁶ McNicol, 198.

²⁷ Judicial Commission of New South Wales, ‘Civil Trial Bench Book-Evidence, Privilege’ (26 November 2014) Judicial Commission of New South Wales Publications <<http://www.judcom.nsw.gov.au/publications/benchbks/civil/privilege.html>>, 4-1525.

²⁸ Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102, (2006) (ALRC 102) at 15.10

²⁹ Section 126A *Evidence Act*.

³⁰ Section 126B(3) *Evidence Act*.

³¹ New South Wales, Parliamentary Debates, Legislative Council, 22 October 1997, 1121 (Attorney General Shaw).

³² Australian Law Reform Commission, *Evidence*, Interim Report No 26, (1985) at [955]; ALRC 102 at 15.4. Note Justice Campbell’s comments that, “[t]he enactment of a professional confidential relationships privilege

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.³³

28. 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 fallback position if arguments under the common law or sections 118 and 119 fail. For instance, 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.³⁴ 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.³⁵
29. From such cases as this it seems a good idea to remember the unusual alternatives to traditional avenues of Privilege. Both section 120 and Division 1A mean evidence of unrepresented litigants or professionals can be excluded in a way previously unavailable. 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.

(4) Legal professional privilege limitations: what it actually means to be a 'substantive' right

30. This brings me to my last practical point for practitioners, which concerns the limitations on legal professional privilege and an analysis of just how substantive this right is today.
31. As Justice Campbell has identified, “[o]ne of the consequences of [legal professional privilege] being a substantive right is that once the conditions for the existence of [the]... privilege are established, there is no room for the court to decide whether, in light of some particular public interest, the privilege should be overridden or disregarded.”³⁶ Thus, unlike other rights, once it is in place, legal professional privilege appears unaffected by questions of proportionality.

gives legislative recognition to the importance of professional confidential relationships, and to some extent alters the balance between the importance of all relevant evidence being available, and the importance of professional confidential relationships being maintained” (Campbell, 286).

³³ *Urquhart v Lanham* [2003] NSWSC 109 (*Urquhart*).

³⁴ *Urquhart* 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.

³⁵ *Urquhart* at [12].

³⁶ Campbell, 266.

32. However, there is yet to be any authority indicating the right to legal professional privilege is protected by some implication arising from Chapter III of the *Constitution*. It would appear therefore that while the privilege is fairly substantive *when* it applies, there is little other than the principle of legality and the rationality of parliament to safeguard the circumstances when it in fact does.³⁷
33. 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 intended for a proper or lawful purpose. This thereby excludes communications tainted with a “wide species of fraud” from the privilege’s protection.³⁸ In our modern day world this has led to exceptions to the privilege in cases of ad hoc legal investigations and the coercive information gathering powers of federal investigatory bodies.³⁹ Most recently, the Australian Law Reform Commission inquiry into encroachments on traditional rights and freedoms has identified that some of the laws abrogating this right “may warrant further review by an appropriate body, to ensure they do not unjustifiably abrogate” the privilege.⁴⁰
34. A recent high profile example of the legal professional privilege coming to blow with considerations of national security was the International Court of Justice’s decision in the spying scandal between Australia and East Timor.⁴¹ 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).
35. 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.⁴²

³⁷ Australian Law Reform Commission, *Traditional Rights and Freedoms-Encroachments by Commonwealth Laws*, Issues Paper No 46, (2014) (ALRC 46) at 13.23.

³⁸ S Tully, ‘Recent Developments Legal professional privilege and national security’ (Winter 2014) *Bar News* 24 (Tully), 25; *AWB Limited v Honourable Terence Rhoderic Hudson Cole (No 5)* [2006] FCA 1234; (2006) 155 FCR 30 at [210]-[212] and [229].

³⁹ ALRC 46 at 13.33. See also Australia Law Reform Commission, *Client Legal Privilege in Federal Investigatory Bodies*, Discussion Paper No 73, (2007).

⁴⁰ ALRC 46 at 13.96.

⁴¹ *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)(*Timor Leste v Australia*).

⁴² Tully, 24.

36. 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.⁴³
37. If legal professional privilege can be so readily exempted, it does raise a genuine question for practitioners to consider. Just how substantive is this substantive right? The subtleties of that answer are no doubt yet to be fleshed out.

CONCLUSION

38. 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 four points I have made today are of some assistance in navigating this murky area. Remember to also stay informed of any trends in process between courts. Some commentators for instance have identified "an increasing trend of courts [generally, to be]...more ready to inspect documents...rather than rely exclusively on broad descriptions by the party claiming privilege".⁴⁴ Even more importantly is the need to understand the fundamental rationale and operation of the Privilege. I believe Justice Nicholas will now provide his 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.

⁴³ *Timor Leste v Australia*, dissenting opinion of Judge ad hoc Callinan at [26].

⁴⁴ P Van Den Dungen, R Wyld and K Chan, 'Protecting in-house counsel privilege' (May 2014) 52(4) *Law Society Journal* 26, 27.