

Legal Professional Privilege: A Comment

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INTRODUCTION

This paper is intended to provide a brief commentary to the paper of Michael Schoenberg and cover other considerations which might arise where a right to legal professional privilege is asserted. The commentary sets out some brief comments made at the AMPLA Conference on 20 October 2006.

This commentary does not attempt an exhaustive analysis of the topics covered.

JOINT INTEREST PRIVILEGE

Joint interest privilege may arise when two or more persons join in communicating with a legal adviser for the purpose of retaining his or her services or obtaining advice.¹ Those communications are protected from disclosure and belong to all the persons who joined in seeking the service or obtaining the advice.²

The two or more people need not be (although often are) in a formal legal relationship such as a partnership or a joint venture.³

Privilege cannot be claimed by one joint holder of the privilege against the other with respect to matters within the joint interest even if they subsequently fall out.

There must be a shared interest and a mutual benefit. In the common situation where a vendor and purchaser engage the same solicitor the privilege does not arise.⁴ That is because their interest is adverse.⁵ The mere fact of engagement of the same solicitor by two people is not enough to give rise to a joint retainer for the purposes of the rule.⁶

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¹ *Farrow Mortgage Services Pty Ltd (in liq) v Webb* (1996) 39 NSWLR 601, 608 (Sheller JA).

² *Farrow Mortgage Services Pty Ltd (in liq) v Webb* (1996) 39 NSWLR 601, 608 (Sheller JA).

³ *Rochefoucauld v Boustead* [1897] 1 Ch 196.

⁴ *Perry v Smith* (1842) 152 ER 288.

⁵ *Perry v Smith* (1842) 152 ER 288.

⁶ *Re Doran Constructions Pty Ltd (in liq)* (2002) 194 ALR 101, 116 (Campbell J).

Joint privilege does, however, extend to those who bona fide believe on reasonable grounds that the person giving the advice was their solicitor.⁷ Further, it does not depend on who paid for the solicitor's services⁸ or who engaged the solicitor.⁹

COMMON INTEREST PRIVILEGE

The distinction between common interest privilege and joint interest privilege is blurry.

Contrary to what one might assume, common interest privilege is not a privilege at all. Instead it is a defence to an assertion that legal professional privilege has been waived.¹⁰ For an exposition of the rules relating to waiver I commend to you Michael Schoenberg's paper.

Common interest privilege would arise where privileged material is made available to others who, though not agents or confidants, nonetheless are persons standing alongside the privilege holder who have the same self-interest.¹¹ Such disclosure would not amount to a waiver of privilege. A joint venture arrangement will often (but not always) attract the common interest defence.

Common interest privilege is not a rigidly defined concept¹² and it is not by any means a well-developed area of the law.¹³ To some extent it has been consumed by the developing law of waiver.

Before a common interest can be recognised circumstances must exist whereby two or more entities could be treated as if they were partners in a single firm or departments in a single company.

For example, the operator in a joint venture or one party may receive advice about common legal rights of the joint venture and disclose such advice to their joint venturers. Privilege would not be waived as the same self-interest applies.

Where each party is concerned only to assess its own position common interest privilege does not arise.¹⁴

⁷ *Global Funds Management (NSW) Ltd v Rooney* (1994) 36 NSWLR 122, 130 (Young J).

⁸ *Pioneer Concrete (NSW) Pty Ltd v Webb* (1995) 13 ACLC 1749, 1751 (Simos J).

⁹ *Mercantile Mutual Insurance (NSW Workers Compensation) Ltd v Murray* [2004] ANZ Ins Cas 61-612, 77,419 (Mason P).

¹⁰ *Bulk Materials (Coal Handling) Services Pty Ltd v Coal & Allied Operations Pty Ltd* (1988) 13 NSWLR 689, 696 (Giles J).

¹¹ *Buttes Gas & Oil Co v Hammer (No 3)* [1981] QB 223, 243 (Lord Denning MR).

¹² *Farrow Mortgage Services Pty Ltd (in liq) v Webb* (1996) 39 NSWLR 601, 609 (Sheller JA).

¹³ *Todd v Novotny* (unreported, Supreme Court of Western Australia, 18 May 1999), [15] (Master Sanderson).

¹⁴ *Network Ten Ltd v Capital Television Holdings Ltd* (1995) 36 NSWLR 275, 283 (Giles J).

PRIVILEGE AGAINST SELF-INCRIMINATION

The privilege against self-incrimination entitles an individual to refuse to answer any question or produce any document if the answer to the question or production of the document would tend to incriminate that person.

A corporation cannot claim the privilege against self-incrimination although the Parliament may give that right to a body corporate. Section 110(3) of the *Workers Rehabilitation & Compensation Act 1986* (SA) is an example of the legislature giving a body corporate such a right.

ABROGATION OR MODIFICATION OF COMMON LAW RIGHTS

Legal professional privilege, common interest privilege, joint interest privilege and the privilege against self-incrimination are all fundamental common law rights.

Common law privileges may only be excluded or modified by express words in a statute or by necessary implication provided the intention of parliament is clear. For example, *Environment Protection Act 1993* (SA),¹⁵ *Environment Protection Act 1994* (Qld)¹⁶ and the *Fire and Rescue Service Act 1990* (Qld)¹⁷ all exclude the privilege against self-incrimination to varying degrees.

STATUTORY REPORTING OBLIGATIONS

Many statutes impose personal and corporate obligations to report incidents or events to regulatory authorities in particular circumstances.

For example, environmental and health and safety acts throughout Australia require the timely reporting of notifiable environmental and workplace related incidents. For public companies the *Corporations Act* requires the prompt disclosure of certain information in accordance with the listing rules.¹⁸

Criminal or civil sanctions apply for non-compliance.

¹⁵ *Environment Protection Act 1993* (SA) s 82 (2)(b), (3).

¹⁶ *Environment Protection Act 1994* (Qld) s 320(6)-(8).

¹⁷ *Fire and Rescue Service Act 1990* (Qld) s 58.

¹⁸ *Corporations Act 2001* (Cth) s 674.

INVESTIGATORY POWERS

It is also common for legislation relating to the environment and health and safety to grant specific investigatory powers or powers to compel the disclosure of information. The *Petroleum Act 2000* (SA) is an example of industry specific legislation that contains such powers.¹⁹

The powers granted are generally very broad and are exercisable by authorised officers at any time, irrespective of cause. They often involve the power to enter, inspect and require the production of documents. They often allow the taking of photographs or video and the seizure of materials and machinery. Importantly they may require a person to answer questions relating to the particular topic of the legislation or specific incidents or events.

FURTHER CONSIDERATIONS

Other considerations which arise where privilege is asserted include: obligations under policies of insurance; contractual obligations relating to supply, payment and indemnity; corporate reputation; workplace relations; and market reaction.

Most corporations have in place a management plan for significant environmental and health and safety incidents.

I have just touched upon the range of issues which should be considered. They are broad and will involve a coordination between the various functions within the organisation. Legal professional privilege is but one of the factors relevant to a response to a serious incident. The other matters I have mentioned also need to be taken into account.

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¹⁹ *Petroleum Act 2000* (SA) s 120-123.