PRIVILEGE AND CONFIDENTIALITY

Legal Professional Privilege ("Privilege") is the 'client's' privilege.

"The rationale of this head of privilege, according to traditional doctrine, 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 in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available." - Grant v Downs.

Grant v Downs (1976) - High Court

Privilege is confined to documents which are brought into existence for the sole purpose of their being submitted to legal advisers for advice or for use in legal proceedings.

A Court can examine a document to determine whether the claim is made out.

See per Barwick CJ (minority) – test is 'dominant purpose'.

Baker v Campbell (1983) – High Court

Held by majority that doctrine of Privilege is not confined to judicial or quasi judicial proceedings.

Evidence Act (1995) – Cth., NSW and ACT

Only applies in respect of proceedings.

Applies the 'dominant purpose' test.

Read the various Sections extracted in the Course Book.

Waterford (1987)

Burden of proof, to prove existence of Privilege, rests on the party claiming it.
Propend (1997) – High Court

1. Whether Privilege may extend to copy documents in circumstances where the original may not be privileged.

See McHugh J for example – Privilege turns on purpose “and no argument is needed to show that the purpose of a client or lawyer in making a copy document may be very different from the purpose of the person who created the original” The actual form of the communication or recording was irrelevant.

2. Communication made for an illegal or improper purpose.

What test to apply in determining whether illegal or improper purpose.

Gaudron J (similarly McHugh and Gummow JJ) – will vary from cases to case. What will shift the onus on the person claiming privilege is evidence which, “if accepted, which “raises a prima facie case of illegality…”

Kirby J – test is lower – what would be required is material that would “…lead a reasonable person to see a strong probability that there was a disqualifying crime or fraud…(falling) short of the requirement to make out with strong evidence a prima facie case of crime or fraud “.

Displacing privilege.

Brennan CJ and Gaudron J – evidence to displace privilege because of alleged illegal or improper purpose must be in admissible form.

Kirby J – hearsay evidence could be relied upon but a mere assertion is not enough.

Esso (1999) – High Court

Court overturns Grant v Downs after going through the historical reasoning of the earlier judgement.

Dominant purpose test should be preferred to the sole purpose test – Per Gleeson CJ, Gaudron and Gummow JJ – dominant purpose test “strikes a just balance, and suffices to rule out claims of the kind considered in Grant v Downs …and it brings the common law of Australia into conformity with other common law jurisdictions.”

Compulsion of Law

Privilege is not waived if a disclosure of a communication was made under a "compulsion of law".

See also Section 122(2)(c) of the Evidence Act.

Communications for illegal or improper purposes.

Communications which might otherwise attract Privilege, will not be privileged if they were brought into existence for an illegal or improper purpose.

See Propend above.

A G (NT) v Kearney (1985) - High Court

Prima facie case that the communications came into being as part of a scheme to defeat land claims.

"exception is not confined to cases of crime and fraud, even in the wide sense "fraud" has been used...unless the meaning of that word is extended to include anything that might be described as a fraud on justice".

O’Donovan v Vereker, O’Donovan v Forsyth (1987)

Privilege cannot be claimed for advice that goes to the promotion of an illegal act.

Note the comments by the Court on determining "the liability of a barrister when giving advice in his professional capacity as a barrister."

Other qualifications

Citibank v FCT (1985)

"must be accepted...since the judgement of the Full High Court in Baker...that S 263 does not override legal professional privilege. Baker...is an authoritative statement that the doctrine of legal professional privilege is not confined to judicial and quasi-judicial proceedings and that, in the absence of some legislative provision restricting its application, the doctrine applies to all forms of compulsory disclosure of evidence. Section 263 is a section which requires the compulsory disclosure of evidence and I see no basis for negating the application of legal professional privilege to the section."

Time and opportunity should have been given to argue the question of Privilege.
CAC v Yuill (1991)

High Court held that Privilege did not apply to excuse the production of documents required pursuant to an order for production served pursuant to Section 295(1) of the Companies (NSW) Code. As for reasoning see also Pyneboard below.

Pyneboard Pty Ltd V TPC (1983) - High Court

General principle that a statute will not be construed to take away a common law right unless the legislative intent to do so clearly emerges, whether by express words or by necessary implication.

"[In] deciding whether a statute impliedly excludes (Privilege) much depends on the language and character of the provision and the purpose which it is designed to achieve. The privilege will be impliedly excluded if the obligation to answer, provide information or produce documents is expressed in general terms and it appears from the character and purpose of the provision that the obligation was not intended to be subject to any qualification. This is so when the object of imposing the obligation is to ensure the full investigation in the public interest of matters involving the possible commission of offences which lie peculiarly within the knowledge of persons who cannot reasonably be expected to make their knowledge available otherwise than under a statutory obligation. In such cases it will be so, notwithstanding that the answers given may be used in subsequent legal proceedings."

The Daniels Corporation International Pty Limited v ACCC [2002] HCA 49 (7 November 2002).

Notices under the Trade Practices Act.

The ACCC issued section 155 notices on the Daniels Corporation in order to obtain, among other things, privileged material. The Daniels Corporation complied with the section 155 notices, except for the requirement to produce privileged material.

The ACCC commenced proceedings, seeking a declaration that the Daniels Corporation could not claim privilege in answer to a section 155 notice and orders compelling the production of the privileged material.

The Full Federal Court unanimously held that the ACCC had the power, under section 155, to obtain privileged communications. The matter proceeded to the High Court.

All seven members of the High Court held that the ACCC could not use its powers under section 155 to obtain privileged material.
Gleeson CJ, Gaudron, Gummow and Hayne JJ described client legal privilege as a “common law right” or a “common law immunity.”

McHugh J said that it was an important immunity.

Callinan J characterised it as an important common law right.

Kirby J said that privilege was a fundamental human right, although he acknowledged the difficulty with this description when referring to a corporation.

The High Court again pointed to the well-settled rule that statutory provisions should not be construed as overriding common law rights, privileges or immunities without the legislation providing so by express words or as a necessary implication.

If investigations by authorities were to be hampered by the Court’s ruling then, the Court suggested, that would be short-lived since Parliament would intervene to amend the legislation.

Kirby J and Callinan J noted that the task of finding the right balance between the competing public interests of preserving privilege and allowing investigations by regulatory bodies is best left to Parliament.

See Yuill above - a majority of the High Court said that Yuill might be decided differently today.

**Government and Corporate Lawyers.**

See Kearney *supra*.

**Farrow Mortgage Services.**

Question of joint privilege as, for example, in the case of joint directors.

Where two or more persons communicate with their legal advisor and certain communications attract Privilege, that Privilege ‘belongs to all the persons who joined in seeking the advice. The privilege is a joint privilege.’

All to whom the Privilege ‘belongs’ must concur in its waiver.

Privilege attached to legal advice obtained by a company is not lost when the advice is disclosed to its directors - not because of their common interest but because the company can only ‘function’ by the “actions and declarations of human beings”.

“Common interest is not in this context a rigidly defined concept. A mere common interest in the outcome of litigation will be sufficient to enable any party with that interest to rely on it.”
Confidentiality

See PCPR Rules 2 and 3.

Mallesons..v KPMG (1990)

The Court “would restrain a solicitor from acting where there is a real and sensible possibility of confidential information being disclosed or used to the detriment of a former client”.

Spincode Pty Ltd v Look Software Pty Ltd & Ors [2001] VSC 287 (17 August 2001)

Victorian judgement on application to have Solicitors cease acting.

“Inevitably in (sic) these type of applications are a matter of impression.” - Warren J.