

Hunter Valley Family Law Seminar

19 – 20 October 2007

When can the other side see your file? – Implied waiver of legal professional privilege

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‘Authorities on waiver of legal professional privilege do not speak with one voice’ –
Sackville J in *Seven Network Ltd v News Ltd (No 7)* [2005].¹

Introduction

In recent litigation in the Family Court and in other jurisdictions there has been an increase in applications to see what is in the file of the other party’s lawyers. Claims asserting that there has been an implied waiver of legal professional privilege require the court to consider:-

- If the communication is one to which legal professional privilege applies; and
- Whether there has been some action resulting in the waiver of the privilege.

What is legal professional privilege?

Legal professional privilege is a principle that certain communications between a lawyer and a client and/or material prepared for a case are privileged and cannot be disclosed. It will arise in relation to “communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the

* I am grateful to Ms Carolyn Jones, former Legal Associate, Sydney Registry and now a solicitor at Watts McCray in Sydney, for her assistance in preparing this paper.

¹ [2005] FCA 1092 at par 19

provision of legal services, including representation in legal proceedings”.² So the privilege may apply in respect of both actual and contemplated litigation.

A distinction has been drawn at common law between two categories of privilege, being “advice privilege” and “litigation privilege”. The distinction has been maintained in s 118 and s 119 of the *Evidence Act 1995* (Cth). Lord Carswell in *Three Rivers District Council and Others v Governor and Company of the Bank of England (No 6)* described the distinction as follows:

[Legal professional privilege] is commonly classified in modern usage under the two sub-headings of legal advice privilege and litigation privilege (terminology which appears to owe its origin to the submission of counsel in *Re Highgrade Traders Ltd* [1984] BCLC 151, adopted by Oliver LJ at page 161G-H). The former covers communications passing between lawyer and client for the purpose of seeking and furnishing legal advice, whether or not in the context of litigation. The latter, which is available when legal proceedings are in existence or contemplated, embraces a wider class of communication, such as those passing between the legal adviser and potential witnesses.³

However whilst the distinction between advice and litigation privilege continues to be recognised⁴ there is also opinion that the distinction is “artificial” with “no legal or policy grounds to maintain it” and that it:

...primarily fails to appreciate the fact that legal advice may often depend on an appreciation of issues of an expert nature, which are outside of the domain of the lawyer and may therefore require the contribution of other persons. It is a distinction which does not reflect recent pronouncements of the High Court as to the substantive right which legal professional privilege seeks to protect.⁵

Rational of the privilege

The High Court in *Grant v Downs* (1976) 135 CLR 674 provided the following rationale for legal professional privilege:

² *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 per Gleeson CJ, Gaudron, Gummow and Hayne JJ at 552.

³ *Three Rivers District Council and Others v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610 at par 65.

⁴ For example, see Dr R.J. Desiatnik, ‘Legal professional privilege and the Pratt Holdings saga’, (2006) 80(7) *Australian Law Journal* 462 at 464.

⁵ A. Lo Surdo, ‘Commercial litigation: when are communications with third parties protected by legal professional privilege?’, (2006) 44(4) *Law Society Journal* 68 who cites as examples the decisions of *Commissioner of Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501; *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 and *Mann v Carnell* (1999) 201 CLR 1.

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. 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. None the less there are powerful considerations which suggest that the privilege should be confined within strict limits.⁶

However there is also acknowledgment by the Full Federal Court that “there is not uniform agreement as to the policies informing, and the purposes of, the privilege”⁷.

Since 1995, in Federal jurisdictions and in NSW State Courts, the existence of privilege is determined by the dominant purpose test⁸. The High Court has held that at common law the question of whether communication will be privileged is to be determined by the dominant purpose test rather than the previously favoured sole purpose test which had been applied following the decision of *Grant v Downs* (supra).⁹

Thus since 1995 the scope of documents protected by the privilege has been expanded.¹⁰

Who does the privilege belong to?

Legal professional privilege is also known as “client legal privilege” and the terms may be used interchangeably, though client legal privilege is more accurate.¹¹ The

⁶ *Grant v Downs* (1976) 135 CLR 674 per Stephen, Mason and Murphy JJ at 685; see also the decision of Stone J with whom Finn and Merkel JJ agreed in *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217 for a comprehensive overview of the history and rationale for legal professional privilege from par 69 and the joint judgment of Gleeson CJ, Gaudron and Gummow JJ in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 4 at par 35.

⁷ *Adelaide Steamship Co Ltd v Spalvins* (1998) 81 FCR 360 per Olney, Kiefel and Finn JJ at 374

⁸ See s 118 and s 119 *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW).

⁹ *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 per Gleeson CJ, Gaudron and Gummow JJ at 73.

¹⁰ Dr R.J. Desiatnik, *Legal Professional Privilege in Australia* (2nd ed), 2005, LexisNexis Butterworths, Sydney at 38-39.

privilege belongs to the client who is the only person entitled to expressly relinquish the privilege.¹²

Does the Evidence Act or common law apply?

The majority in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 have held that the common law of legal professional privilege governs pre-trial procedures.¹³ Therefore the provisions of the uniform evidence legislation only apply to the adducing of evidence in proceedings in court.

The privilege and third parties

The traditional position in relation to third parties has been to extend the privilege to communications passing between the lawyer or client and a third party “if made for the dominant purpose of obtaining legal advice and either the third party is the agent of the client or the communication is made in relation to litigation existing, anticipated or contemplated”¹⁴

Communications with third parties have alternatively been described as the third category of privilege being an extension of litigation privilege which will apply where:

...confidential communications pass between a lawyer (or the lawyer’s agent) and a third party, or the client (or the client’s agent) and a third party, for the dominant purpose of use in existing or reasonably anticipated judicial or quasi-judicial proceedings.¹⁵

However a recent decision of the Full Federal Court has gone even further and held that:

...in circumstances where no litigation is current or anticipated, where a person requests a third party to prepare a documentary communication for the dominant purpose of that person to whom the document is furnished

¹¹ See ss 117, 118 and 119 *Evidence Act 1995* (Cth); *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 per Kirby J at 88.

¹² Per Gleeson CJ, Gaudron, Gummow and Callinan JJ in *Mann v Carnell* (1999) 201 CLR 1 at 13.

¹³ Per Gleeson CJ, Gaudron and Gummow JJ in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at par 18 to par 28.

¹⁴ Per Stone J with whom Merkel J agreed referring to the “*Wheeler* proposition” based on the decision in *Wheeler v Le Marchant* (1881) 17 Ch D 675 in *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217 at par 96.

¹⁵ Dr R.J. Desiatnik, ‘Legal professional privilege and the Pratt Holdings saga’, (2006) 80(7) *Australian Law Journal* 462 at 464 referring to the decision of *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority* (2002) 4 VR 332 at 336 per Batt JA with whom Callaway and Charles JJA agreed.

sending it to a lawyer to obtain legal advice, that document attracts legal professional privilege.¹⁶

An important consideration was:

...not the nature of the third party's legal relationship with the party that engaged it but, rather, the nature of the function it performed for that party. If that function was to enable the principal to make the communication necessary to obtain legal advice it required, I can see no reason for withholding the privilege from the documentary communication authored by the third party. That party has been so implicated in the communication made by the client to its legal adviser as to bring its work product within the rationale of legal advice privilege.¹⁷

The effect is that it will now be much easier to maintain confidentiality in reports prepared by third parties, but only if the common law applies. In circumstances where the uniform evidence legislation applies communications with third parties for the dominant purpose of assisting a lawyer to provide legal advice are not privileged from production.¹⁸ This may result in such documents being privileged before being adduced into evidence but losing that protection once tendered in a hearing.¹⁹

The irony of the *Pratt Holdings*' decision is that although an pre litigation expert report might be privileged at a pre-trial stage, the distinction created between s 118 and s 119 *Evidence Act* (Cth) may mean that that report is not privileged in circumstances where it is called for at the hearing and it is sought to be tendered in evidence.

Waiver of legal professional privilege

At common law, a client who would otherwise be entitled to the benefit of legal professional privilege may waive the privilege and this waiver may be express or implied.²⁰ The uniform evidence legislation also provides statutory recognition of the

¹⁶ Dr R.J. Desiatnik, 'Legal professional privilege and the Pratt Holdings saga', (2006) 80(7) *Australian Law Journal* 462 at 466 discussing the effect of the decision in *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217.

¹⁷ *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217 per Finn J with whom Merkel J agreed at par 41.

¹⁸ See s 118 and s 119 *Evidence Act 1995* and A. Lo Surdo, 'Commercial litigation: when are communications with third parties protected by legal professional privilege?', (2006) 44(4) *Law Society Journal* 68 who discusses the "clear distinction between advice privilege and litigation privilege in relation to the protection afforded to communications with third parties".

¹⁹ Dr R.J. Desiatnik, 'Legal professional privilege and the Pratt Holdings saga', (2006) 80(7) *Australian Law Journal* 462 at 468.

²⁰ Per Gleeson CJ, Gaudron, Gummow and Callinan JJ in *Mann v Carnell* 210 CLR 1 at 13.

right to consent to the loss of client legal privilege and for the adducing of documents which by implication are “reasonably necessary to enable a proper understanding of the communication”.²¹

Difficulty arises in relation to determining when there has been implied waiver of the privilege. On one view judicial decisions provide no clear guidance as to what constitutes waiver by implication.²² This lack of guidance is probably appropriate given the need for flexibility and discretion in the evaluation of each factual circumstance. However in order to avoid an implication of waiver there is still a need to identify some signposts.

Privilege can be lost by publication

Of course, privilege can also be lost by knowingly and voluntarily disclosing material.²³ But what happens if privileged material is knowingly and voluntarily disclosed by inadvertence? The likelihood of this happening has increased with the use of electronic communication. Again the authorities on disclosure through inadvertence do not speak with the one voice. There are conflicting single instance decisions in the Federal Court and the State Court.²⁴ One line of authorities says that mere inadvertence or unintentional disclosure in itself is not sufficient to maintain privilege particularly where documents have been inspected. The other says an inadvertent or unintentional disclosure will not be sufficient to amount to waiver. A facsimile or email sent to the wrong address by mistake is probably safe. It is unclear whether a document mistakenly listed in an affidavit of documents or produced under a notice to produce and inspected by the other party is still privileged and the answer may turn on the facts in an individual case.²⁵

²¹ See s 122 and s 126 *Evidence Act 1995*.

²² Dr R.J. Desiatnik, *Legal Professional Privilege in Australia* (2nd ed), 2005, LexisNexis Butterworths, Sydney at 157; Dr R.J. Desiatnik, ‘Legal professional privilege and the Pratt Holdings saga’, (2006) 80(7) *Australian Law Journal* 462 at 463; Sackville J has also recently stated that ‘...authorities on waiver of legal professional privilege do not speak with one voice’ in *Seven Network Ltd v News Ltd (No 7)* [2005] FCA 1092 at par 19.

²³ S 122 *Uniform Evidence Acts*

²⁴ Gyles J lists many of the conflicting decisions at paras 6-8 of *Unsworth & Tristar Steering and Supervision Australia Limited* [2007] FCA 1081.

²⁵ See the fine factual differences in *Meltend Pty Ltd v Restoration Clinics of Australia Pty Ltd* (1997) 145 ALR 391 at 450 as compared with *Sovereign Motor Inns Pty Ltd v Bevillesta Pty Ltd* [2000] NSWSC 521.

When will waiver of legal professional privilege be imputed?

It is generally accepted that there are two main ways²⁶ in which waiver can be implied, these being through:-

- Issue waiver including putting state of mind in issue.
- The partial disclosure of privileged material.

Gyles J says, resolving this issue has been made no easier by some misapprehensions as to the application of fairness in this field that were corrected by the High Court in *Mann v Carnell* (1999) 201 CLR 1.²⁷

These acts are discussed in greater detail below but firstly it is important to state the basic test governing the consideration of conduct as it relates to maintenance of confidentiality.

The basic test

The High Court has set the objective test for the implied waiver of privilege in *Mann v Carnell* (1999) 201 CLR 1.

At paragraph 29, the majority (Gleeson CJ, Gaudron, Gummow and Callinan JJ) stated:

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...

²⁶ There are other manners in which privilege may be lost such as failing to assert it when it is available. See *Spedley Securities Ltd (in Liq) v Bank of New Zealand* (1991) 26 NSWLR 711 per Cole J at 730 discussing circumstances in which there was a failure to make a claim of privilege over material that had been in the hands of the Court and possibly a third party for a period of 12 days. Cole J's reasoning has been held to apply equally to the test of inconsistency per Jacobson J in *Lombe v Pollack* [2004] FCA 264 at 38-41; see also *Norman v O'Mahony* [2006] FCA 1169 per Cowdroy J at 25.

It has also been held in *Goldberg v Ng* (1995) 185 CLR 83 that express waiver for one purpose acted to waive privilege by implication for a related purpose.²⁶ The High Court stated:

...we are firmly of the view that where two or more distinct proceedings or procedures are related in the sense that there is general correspondence between the parties and they arise out of either the same dispute or closely connected disputes, conduct in relation to one proceeding or procedure, whether anticipated or already commenced, can found an imputed waiver for the purposes of all proceedings and procedures.

[per Deane, Dawson and Gaudron JJ at 98; see also the discussion of this decision in Dr R.J. Desiatnik, *Legal Professional Privilege in Australia* (2nd ed), 2005, LexisNexis Butterworths, Sydney at 179-182.

²⁷ *Unsworth v Tristar Steering and Suspension Australia Limited* [2007] FCA 1081 at para 1.

This statement has changed previous approaches.

However the final determination of whether there has been waiver by implication will be guided by whether there is conduct by a party who is entitled to a privilege or their legal representative which is inconsistent with the confidence preserved by the privilege.

The central issue of *Mann* was whether the disclosure to a member of parliament of the terms of legal advice a territory government had received in relation to litigation with a member of the public resulted in a loss of privilege in those communications.

In finding that a disclosure for the purposes of considering a complaint was not inconsistent with the purpose of the privilege to allow the government to seek legal advice without apprehension of being prejudiced by subsequent disclosure, the majority held that the waiver of legal professional privilege is brought about by inconsistency between the conduct of the person entitled to the benefit of confidentiality of communication between a lawyer and client and maintenance of the confidentiality.²⁸

The emphasis on inconsistency changed the test set out in early cases which examined the “fairness” of allowing the privilege to stand in light of disclosing behaviour. 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

²⁸ Per Gleeson CJ, Gaudron, Gummow and Callinan JJ at 13 and Kirby J at 48.

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 recognises 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. (footnotes omitted); [emphasis added]**

[34]... Depending upon the circumstances of the case, considerations of fairness may be relevant to a determination of whether there is such inconsistency.²⁹

Issue waiver

The first main category of implied waiver arises in cases where the privileged holder has made the nature of legal advice or the way a lawyer has given advice or conducted a case, an issue in the litigation. A common example of "issue waiver" is where a person's state of mind and how it has been affected by legal advice becomes an issue in the case. This commonly occurs in proceedings under s 79A(1)(a); s 90K and s 90KA *Family Law Act*.

Modern discussions on the concept of "issue waiver" in Australia commence with *Thomason v Campbelltown Municipal Council* (1939) 39 SR (NSW) 347.³⁰ In this case the fact and nature of the legal advice received by the plaintiff was an issue in the case and it was held that privilege could not be raised to prevent proof of the legal advice.³¹ Parallels were drawn with undue influence cases in which an assessment of the degree of countervailing effect of any relevant legal advice received was required.³²

The Full Court of the Federal Court has considered issue waiver in detail on a number of occasions.³³ In *Adelaide Steamship Co Ltd v Spalvins* (1998) 81 FCR

²⁹ Per Gleeson CJ, Gaudron, Gummow and Callinan JJ. In light of the move from "fairness" to "inconsistency" caution must now be exercised when referring to case law predating *Mann v Carnell*.

³⁰ For example, see discussions of this decision in *Commissioner of Taxation v Rio Tinto Ltd* (2006) 229 ALR 304 per Kenny, Stone and Edmonds JJ from par 48 and *DSE Holdings Pty Ltd v Intertan Inc* (2003) 127 FCR 499 per Allsop J from par 36.

³¹ *Thomason v Campbelltown Municipal Council* (1939) 39 SR (NSW) 347 per Jordan CJ at 358-359.

³² *Commissioner of Taxation v Rio Tinto Ltd* (2006) 229 ALR 304 per Kenny, Stone and Edmonds JJ at par 49.

³³ *Adelaide Steamship Co Ltd v Spalvins* (1998) 81 FCR 360; *Telstra Corporation Ltd v BT Australasia Pty Ltd* (1998) 85 FCR 152 and *Commissioner of Taxation v Rio Tinto Ltd* (2006) 229 ALR 304.

360 the Full Court determined that the matter before them involved disclosure waiver not issue waiver and that privilege had not been waived by implication.³⁴ However in relation to issue waiver the Full Court stated:

On the present appeal reference was also made to, and the respondents sought to rely upon, what was described as "issue waiver". In our view however it is no more than a particular manifestation of the principles applying either to waiver by disclosure or to implied consent to disclosure. The usual type of case said to illustrate issue waiver at common law is one in which, in order to establish a particular right, claim, or defence a party who previously has been legally advised, or has provided advice, needs to show that the advice so given did, or did not, have a particular character, for example that it was or was not negligent where the claim is for professional negligence against the adviser: see *Kershaw v Whelan* [1996] 1 WLR 358; that it was not based on full information or was not meaningful, in an undue influence claim: see *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127 at 130-131; see also *Bester v Perpetual Trustee Co Ltd* [1970] 3 NSW 30 and *Brusewitz v Brown* [1923] NZLR 1106 or that it did not address or properly address a matter which, if addressed or properly addressed, would defeat or call into question the right or claim asserted as in claims where the applicant has to demonstrate he or she acted with or without adequate knowledge of a matter: see *Thomason v Campbelltown Municipal Council* (1939) 39 SR (NSW) 347; *Hongkong Bank of Australia Ltd v Murphy* [1993] 2 VR 419; *Pickering v Edmunds* (1994) 63 SASR 357. In other words the cases are ones in which, in the substantive proceeding brought, the privilege holder has put in issue the very advice received. We observe in passing that it is questionable whether advice can properly be said to be in issue in a proceeding merely because it may be relevant to an issue in it: see *Rhone-Poulenc Rorer Inc v The Home Indemnity Company* (3rd Cir 1994) 32 F (3d) 851 at 863; save, perhaps, where the proceeding is between client and legal adviser and the advice is relevant to the adviser's defence of that proceeding: see *Lillicrap v Nalder & Son* [1993] 1 WLR 94; 1 All ER 724.³⁵

This passage was recently endorsed by a differently constituted Full Court in *Commissioner of Taxation v Rio Tinto Ltd* (2006) 229 ALR 304 as correctly summarising the effect of previous authorities on issue waiver.³⁶ The Full Court in this case also noted that whilst *Adelaide Steamship* (supra) was decided before *Mann* (supra) the passage did not require modification in light of the ratio in *Mann*, stating:

[54] Although the Full Court was necessarily guided by the authorities prior to *Mann*, there is little, if anything, in the passage quoted above that would

³⁴ Per Olney, Kiefel and Finn JJ at 375.

³⁵ Per Olney, Kiefel and Finn JJ at 371-372.

³⁶ Per Kenny, Stone and Edmonds JJ at par 53.

require modification to take account of *Mann*. It is plain enough that the majority in *Mann* also saw the 'issue waiver' cases as a species of waiver, to which the same basic principle applied. Their Honours' analysis in *Spalvins* emphasises, as does the majority in *Mann*, that waiver comes about because the privilege holder's conduct is inconsistent with the continued confidentiality of the communication because he or she has put in issue the character or contents of the communication in pursuing a right or claim, or has created a situation where another party must reasonably do so by way of a defence.

In *Telstra Corporation Ltd v BT Australasia Pty Ltd* (1998) 85 FCR 152 the majority reasoned that when a party pleads that they undertook certain action in reliance on a particular representation, such as legal advice, their state of mind is put in issue as an essential element of their claim and the court must determine what factors influenced the mind of the party to act in that way.³⁷ In other words it would be unfair to allow the party to assert a state of mind as part of their claim without an opposing party having the opportunity to have reference to the material relevant to the formation of that state of mind and thus the privilege over otherwise confidential material will be waived by implication.

The majority in *Telstra* also noted that it is not "a consequence of the principle that whenever a person's state of mind is relevant to an issue in proceedings, privilege is taken to be waived in relation to legal advice that may have played part in the formation of that state of mind".³⁸ That is, it is not enough that a communication may be material to the formation of a state of mind relevant to an issue in the proceedings rather the advice must be material to a state of mind which is relied upon as part of the cause of action.³⁹

Following the decision of the High Court in *Mann* (supra) there have been a number of decisions questioning the statements of the majority in *Telstra v BT* (supra).⁴⁰ However the Full Federal Court in *Commissioner of Taxation v Rio Tinto* (supra) have made it clear that the decision in *Telstra v BT* (supra) turned upon the particular circumstances of the case stating:

³⁷ *Telstra Corporation Ltd v BT Australasia Pty Ltd* (1998) 85 FCR 152 per Branson and Lehane JJ at 166-167.

³⁸ *Telstra Corporation Ltd v BT Australasia Pty Ltd* (1998) 85 FCR 152 per Branson and Lehane JJ at 167.

³⁹ *Commissioner of Taxation v Rio Tinto Ltd* (2006) 229 ALR 304 per Kenny, Stone and Edmonds JJ at par 56.

[60] Some academic and judicial discussions of *Telstra* have, perhaps, made too much of the differences between the majority and Beaumont J and have sought to impute a statement of general principle to the majority when in truth the decision turned upon its particular circumstances, including the pleadings in the case. Hence, whether or not an applicant will waive privilege in alleging reliance on misleading or deceptive conduct will, as in every instance of waiver, depend very much on the particular character of the case and how it is conducted...

[61] Both before and after *Mann*, the governing principle required a fact-based inquiry as to whether, in effect, the privilege holder had directly or indirectly put the contents of an otherwise privileged communication in issue in litigation, either in making a claim or by way of defence...

Therefore if a privilege holder in pursuing a cause of action indicates reliance upon their state of mind as informed by a particular communication, privilege in that communication may be lost for being inconsistent with the maintenance of continued confidentiality. The key is not whether the state of mind is relevant to a fact in issue but rather whether it would be inconsistent to allow a party to rely on their stated beliefs as substantiated by reference to source material without the foundation of their beliefs being capable of scrutiny.

In *Stamp & Stamp* (2007) FLC 93-314 the wife raised the existence of a mental disability at the time of entering into consent orders as an issue when seeking to set those orders aside. The majority in the Full Court of the Family Court (May & Boland JJ) found that claim by implication raised as an issue the extent to which her disability affected her capacity to give instructions to her solicitors. The majority concluded that that inevitably drew attention to the role played by her solicitors and any advice to and influence upon the wife and consequently the privilege was lost by implication.

In reaching that conclusion the majority relied upon the key passage in *Mann v Carnell* and commented at paragraph 54:-

“There is a move away from considerations of general fairness. The focus is on the inconsistency of an act, in this case the wife providing particulars of her claim, while maintaining the confidentiality of the communications between herself and her former solicitors.”

⁴⁰ For example, *DSE Holdings Pty Ltd v Intertan Inc* (2003) 127 FCR 499 per Allsop J at pars 4-5 and pars 74-92; *Seven Network Ltd v News Ltd (No.7)* [2005] FCA 1092 per Sackville J at par 24 and *Australian Agricultural Company Limited v AMP Life Limited* [2006] FCA 371 per Cowdroy J at par 28 and par 29.

It should be noted that the mere act of denying an allegation as to state of mind does not put in issue the state of mind held or waive privilege in any legal advice received which materially contributed to that state of mind.⁴¹ Also the privilege will be lost only in relation to the legal advice received before or at the time of the relevant events material to the formation of the state of mind.⁴²

Partial disclosure

The second main way client legal professional privilege can be waived by implication is if there is a partial disclosure.

Lets say in pre-action procedures a lawyer writes to the other side and says:-

“My client has got advice from Ms SC who strongly says that our client should get a 70/30 division of the property in her favour. Based on that advice our client requires the following division of assets....”

Is the husband entitled to see, firstly the whole of Ms SC’s opinion and secondly all of the documents in the brief provided to Ms SC?

Again the fundamental test is that stated in *Mann v Carnell* (cited earlier):-

“What brings about the waiver is the inconsistency, which the court’s, where necessary informed by consideration of fairness, perceive, between the conduct of the client and the maintenance of the confidentiality; not some overriding principal of fairness operating at large....”

An implication of waiver may be made where it is inconsistent and unfair to allow a party to disclose and use part of a document and then seek to claim privilege over the remainder of the document.⁴³ Revelation of the remainder can be important to avoid having an opposing party “misled by an inaccurate perception of the disclosed communication”.⁴⁴

⁴¹ *DSE Holdings Pty Ltd v Intertan Inc* (2003) 127 FCR 499 per Allsop J at pars 114-115.

⁴² *DSE Holdings Pty Ltd v Intertan Inc* (2003) 127 FCR 499 per Allsop J at pars 124-125.

⁴³ Dr R.J. Desiatnik, *Legal Professional Privilege in Australia* (2nd ed), 2005, LexisNexis Butterworths, Sydney at 163; see also *N and E* (1994) FLC 92-502 per Graham J at 81,230 for a pre *Mann v Carnell* finding of partial disclosure on the basis of unfairness.

⁴⁴ *Attorney-General for the Northern Territory v Maurice* (1986) 161 CLR 475 per Mason and Brennan JJ at 488.

Waiver is more likely to be implied where a document deals with a single subject matter as a document dealing with different subjects may be capable of severance without a loss of meaning.⁴⁵

In *Bennett v Chief Executive Officer, Australian Customs Service* (2004) 210 ALR 220 (Tamberlin, Emmett and Gyles JJ) Gyles J with whom Tamberlin J agreed (Emmett J dissented) applied the reasoning of the majority in *Mann v Carnell* and held that the voluntary disclosure of the gist or conclusion of legal advice in the circumstances of the case (in a letter containing a settlement proposal a solicitor had included a statement which set out the effect of advice given to their client) amounted to waiver in respect of the whole of the advice including the reasons for the conclusion.

In *Bennett* it was important that “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”.⁴⁶ As such a distinction was drawn in the following manner:

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.⁴⁷

Important passages from *Bennett* have been recently quoted and applied in the Federal Court by Young J in the decision of *AWB Limited v Cole [2006] FCA 571*.

⁴⁵ Dr R.J. Desiatnik, *Legal Professional Privilege in Australia* (2nd ed), 2005, LexisNexis Butterworths, Sydney at 163. Tamberlin J in *Bennett v Chief Executive Officer, Australian Customs Service* (2004) 210 ALR 220 has also noted that “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.” at par 14.

⁴⁶ *Bennett v Chief Executive Officer, Australian Customs Service* (2004) 210 ALR 220 per Tamberlin J at par 5. Note however the decision of Sackville J in *Seven Network Ltd v News Ltd (No 12)* [2006] FCA 348 where a voluntary disclosure of the gist or conclusion of the legal advice recorded in a discovered document was held to waive privilege despite the legal advice not being relied upon in the proceedings.

⁴⁷ *Bennett v Chief Executive Officer, Australian Customs Service* (2004) 210 ALR 220 per Tamberlin J at par 6. The reasoning of Gyles J and Tamberlin J has recently been applied by Young J in *AWB Limited v Cole* (2006) 152 FCR 382 where it was held that the inadvertent disclosure of a “Draft Statement of Contrition” did not “allow a reader to know or infer the nature, content or substance of any legal advice given” and as such did not waive privilege in the advice, at par 143.

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. In that case a 'Draft Statement of Contrition' known as Ex 665 during the hearing had been inadvertently produced by the AWB in response 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 relation to the distinction between recording the receipt of legal advice and disclosing the substance of that 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 of the Australian Customs Service (2004) 140 FCR 101 ('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. The primary judge was in error in drawing a distinction between conclusion and reasoning in the context of such a disclosure.

Tamberlin J found that the disclosure expressed the substance of the advice that had been given and consequently it would be inconsistent and unfair to now seek to maintain privilege in respect of the relevant parts of the advice. His Honour continued at 104 [6]:

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.

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 by 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 was concerned with whether the discovery of a document recording a conclusion stated in legal advice waives privilege in the advice. His Honour 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 In Bennett v Chief Executive Officer of the 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 certain 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 via disclosure of legal advice Whelan J restated the principal and catalogued cases falling either side of the line:

[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 emphasised 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; 11 *Queensland Law Society Incorporated v Albietz*; 12 *Australian Unity Health Ltd v PHIAC*, 13 in relation to the statement "legal advice supporting PHIAC'S view of this rule has been received"; 14 *Bennett v CEO of Australian Customs Service*; 15 and *Ashfield Municipal Council v RTA of NSW*.¹⁶

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 ... ";¹⁷ *Australian Unity Health Ltd v PHIAC* 18 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*; 19 *British American Tobacco Australia Services Ltd v Cowell*; 20 *Temwood Holdings Pty Ltd v Western Australian Planning Commission*; 21 and *Nine Films & Television Pty Ltd v Ninox Television Ltd*.²²

10 *Ibid*, [29] (Gleeson CJ, Gaudron, Gummow and Callinan JJ).

11 (1996) 40 NSWLR 12, 15 and [1996] HCA 15.

12 [2000] 1 QdR 621.

13 [1999] FCA 1770.

14 *Ibid*, [6].

15 (2004) 140 FCR 101.

16 [2004] NSWSC 917.

17 (1996) 40 NSWLR 12, 14.

18 [1999] FCA 1770.

19 [2000] NSWLEC 231.

20 (2002) 7 VR 524.

21 [2003] WASCA 112.

So in *Switchcorp* Whelan J drew the distinction between:

Statements revealing contents of legal advice (generally equals waiver); and

Statements of belief based on or associated with legal advice (generally does not equal waiver).

Partial disclosure may also have the effect of waiving privilege over associated materials which deal with the same subject matter and are necessary to gain a

proper understanding of the disclosed documents.⁴⁸ For example the Full Court of the Victorian Supreme Court has held:

...A reference in one letter of advice to an earlier letter of advice does not expose the latter to scrutiny by the other party to litigation merely because legal professional privilege is waived in relation to the former: implied waiver is not so generous a doctrine. As we apprehend it, where legal professional privilege is waived in relation to one piece (or part) of advice, the privilege is impliedly waived in relation to another if - and only if - that other is necessary to a proper understanding of the first. As established by the High Court (at least since *Mann v Carnell*) the test in such cases is whether it would be "inconsistent" for a party to rely upon, and so to waive legal professional privilege in respect of, the one without also being taken to have waived privilege in respect of the other.⁴⁹ (footnotes omitted)

The High Court has held that the lodgement of a book setting out the particulars of the claim as per a Practice Direction requirement did not waive privilege in the source materials which were used to prepare it.⁵⁰ Gibbs CJ, Mason and Brennan JJ thought it important that the claimants did not rely upon the claim book in evidence.⁵¹

Deane J stated that where a claimant:

...does no more than make use of privileged material (e.g. legal advice, expert opinion or statements of potential witnesses) for the purpose of formulating the statement in such a document of the details of the case which he proposes to make, it would be an affront to ordinary notions of fairness to hold that the effect of his compliance with that procedural requirement was that he has waived his professional privilege in relation to such material.⁵²

Conclusions

When:

1. Explaining delay;
2. Asserting what previous solicitors have done;

⁴⁸ Dr R.J. Desiatnik, *Legal Professional Privilege in Australia* (2nd ed), 2005, LexisNexis Butterworths, Sydney at 164.

⁴⁹ *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524 at par 121.

⁵⁰ *Attorney-General for the Northern Territory v Maurice* (1986) 161 CLR 475.

⁵¹ *Attorney-General for the Northern Territory v Maurice* (1986) 161 CLR 475 per Gibbs CJ at 483 and per Mason and Brennan JJ at 489, though note that Dawson J was of the opinion that it was immaterial as to whether or not the claim book went into evidence at 497.

⁵² *Attorney-General for the Northern Territory v Maurice* (1986) 161 CLR 475 per Deane J at 493. As noted above the High Court has now advocated a test of "inconsistency" rather than "fairness", however considerations of inconsistency may still be informed by notions of fairness depending upon the circumstances of the case.

3. Putting a client's state of mind in issue;
4. Making representations about a client's state of health;
5. Partially disclosing the contents of documents;
6. Disclosing part of what is in counsel's advice;
7. Drafting particulars of a client's claim under s 79A, s 90K or s 90KA *Family Law Act*;
8. Giving reasons for making offers;
9. Drafting affidavits, particularly for interlocutory proceedings

Consider whether by implication you are waiving your client's legal privilege.

CASE STUDIES

In each of these case studies you are asked to advise whether the spouse has waived legal professional privilege. Each is based on a real recent case.

Case study 1

The husband applies to set aside final property orders and a financial agreement on grounds including a miscarriage of justice by reason of suppression of evidence or the giving of false evidence.

The husband was legally represented at the time that the orders and agreement were made. He says he relied upon information provided by the wife.

The wife says the husband has put his state of mind in issue and she is entitled to see the legal advice he received from his lawyers prior to him consenting to the orders and entering the agreement.

N & N [2006] FamCA 558 per Brown J.

Case Study 2

The wife sought that a financial agreement made between the parties be set aside on grounds including undue influence and the wife's special disadvantage being a psychological disorder.

The husband submitted that the wife had waived privilege via her express reliance on her state of mind and via paragraphs in her affidavit which provided evidence of her relying on representations made by the husband to her and her restating those representations to her solicitor and another person, as well as evidence that she had received legal advice at the time of signing the agreement.

The husband sought to see the whole of the wife's lawyer's file.

B & B [2005] Fam CA289 per Le Poer Trench J.

Case Study 3

The wife applied to set aside property orders made by consent. In support of her application she set out the particulars of her reliance upon s 79A(1)(a) which included:

...the status of her health at the time she entered into the consent orders is affecting her capacity to provide proper instructions in relation to the proposed terms.

The husband submitted that in particularising her claim in this way the wife had waived privilege to the file of the solicitors who acted for her at the time the consent orders were made. This was said to be because she had “put directly in issue her alleged lack of capacity to provide proper instructions to [the solicitors] regarding the consent orders” and that “the question of whether the nature and quality of the applicant’s instructions to her then lawyers was affected by her health cannot be fairly determined without reference to the advices, file notes and other correspondence”.

S & S [2005] FamCA 1449 per Stevenson J.

Stamp and Stamp (2007) FLC 93-314 per May and Boland JJ (Finn J dissenting)

Case Study 4

Property orders were made in 1988.

On 30 April 2002 the wife commenced proceedings under s 79A.

The wife claims that:-

1. The solicitors who acted for her at the time the orders were made were incompetent.
2. That she did not know about the substantial superannuation entitlements, which the husband had at the time of the orders, until December 1995.

3. She did not receive advice from new solicitors about her rights under s 79A until December 1999. They took no action.
4. Her current solicitors were engaged in 2001 and took about one year to gather the information necessary to advise her a s 79A application was feasible.

The husband wants to see the whole of all the files of any solicitors who acted for the wife prior to her filing her s 79A application.

H & N [2003] FamCA 613 per Le Poer Trench J.

Case Study 5

A bank sought to have consent property orders made on 25 August 2004 between the husband and the wife set aside on the grounds of a miscarriage of justice by reason of fraud and suppression of evidence.

A subpoena was issued by the bank seeking production of documents including instructions given by the wife to her legal advisors and accounting documents kept by the firm relating to her representations.

The wife swore an affidavit which she continued to rely upon saying:-

1. The negotiations had taken place between the husband and wife between March and May 2004 and an agreement was reached in May 2004.
2. Setting out a history of delay in getting the husband, who was overseas, to sign and resign necessary documents.

The bank sought access to the following:-

1. Instructions by the wife to [Mr S] about the agreement reached between she and her husband.
2. Documents which show the time taken by [Mr S] to have the husband properly sign necessary documents evidencing the agreement and/or to have the agreement made orders of the Court.
3. Instructions to [Mr S] by the wife in relation to the timeliness with which the matters relating to the Court orders were to be carried out or attempted.

4. Any document which touches upon any possible delay on the part of the wife or her solicitor in having the instructions to her solicitors, to which she refers, carried out.
5. Communications comprising or confirming advice from her solicitor as to the steps required to be taken to give effect to her instructions.
6. Communications confirming or advising of any steps taken by her solicitor endeavouring to communicate with her husband to give effect to the instructions to which she refers.
7. Any communications between [the wife's previous solicitors] and the husband.

M Bank Limited v B and Anor [2006] FamCA 1052 per Le Poer Trench J.

Case Study 6

Both parties have cross applied for final property orders.

The wife's solicitor swore and filed an affidavit in interlocutory proceedings saying:-

"The wife has instructed me that she (sic) in a poor state of health and that she was diagnosed with breast cancer in 2003. In August this year she was diagnosed to have a boney (sic) secondary involvement from her breast cancer, when x-rays and scans disclosed that the disease had moved to the pelvis."

The wife's life expectancy was an issue in the final hearing.

The husband sought access to all documents relating to the wife's state of health and/or life expectancy, held by the wife's solicitors.

T & De C (delivered 3 March 2006) per Le Poer Trench J.

Case Study 7

Both parties had cross applied for final property orders.

In an application for spousal maintenance and interim costs, the wife's solicitor had sworn:-

"From my instructions and initial investigation and enquiries I believe that the true financial position of the Applicant Father is significantly conceded (sic) behind corporate veils and entities with no apparent nexus to him. I believe that

the financial position of the Applicant Father might be greater than \$40,000,000.00 but because of the manner by which the [company] and the Applicant Father organise their business affairs ascertaining the full extent of the Applicant Father's assets and financial position will, in my respectful submission require extensive forensic investigation before the full extent of the assets and financial position can be identified and valued."

The wife did not seek to read or rely on the paragraph during the hearing.

The husband submitted that this paragraph in the wife's solicitor's affidavit waived legal professional privilege in relation to all written instructions from the wife and any other person or entity about the financial position of the husband as well as in relation to any material documenting initial investigations and inquiries by the solicitor.

The husband sought by subpoena:-

"All written instructions from the wife in relation to the financial position of the husband, instructions from any person or entity in relation to the financial position of the husband, copies of investigations, copies of inquiries, reports, files, correspondence, copies of correspondence and other documents that comprise "my instructions and initial investigations and inquiries", from the date of the wife's solicitor first taking instructions from the wife up to and including the swearing of the wife's solicitor's affidavit on 2 September 2005."

M & M[2006] FamCA 776 per Watts J.