LEGAL PROFESSIONAL PRIVILEGE: ITS RATIONALE AND EXCEPTIONS

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A thesis submitted in partial fulfilment of the requirements for the degree of Master of Laws in the University of Melbourne.
This thesis contains neither material which has been accepted in
fulfilment of any of the requirements for the award of any other
degree, diploma or similar qualification in any institution of
tertiary education nor, to the best of my knowledge and belief, any
material previously published or written by another person, except
where due acknowledgement is made in the text.

Joseph Tsalanidis
December 1984
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PREFACE

The object of this thesis is to critically examine the rationale of legal professional privilege and its common law and statutory exceptions. It is contended that the effect of the privilege in excluding relevant and otherwise admissible evidence is justifiable so long as the privilege is applied consistently with its underlying rationale and is closely confined by its exceptions.

The traditional rationale of the privilege and the 'lawyer's brief' theory are discussed. The approach of the High Court of Australia to the privilege is analysed in light of recent decisions. It is noted that the privilege is no longer a mere rule of evidence but a general and substantive principle.

An important aim in examining the common law and statutory exceptions to the privilege is to consider the extent to which the exceptions can be reconciled with the policy of the privilege. Some common law exceptions have yet to be recognized in Australia. The third party exception, however, which appears to be accepted in this country, conflicts with the rationale of the privilege and should be abolished. With regard to the statutory exceptions, provisions expressly abrogating the privilege are rare. There is also legislation which may arguably override the privilege by necessary implication. The principles applied by courts in construing such legislation are discussed.

The increasing regulation of society coupled with the vesting of wide investigative powers on administrative officers have posed a major challenge to the continued existence of the privilege. It is necessary that the privilege be preserved. The functioning of our legal system depends on protecting the freedom of communication between legal advisers and their clients.
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CHAPTER 1

INTRODUCTION

A. HISTORY OF THE PRIVILEGE

Legal professional privilege is the oldest of the privileges relating to confidential communications and can be traced as far back as the reign of Elizabeth I. It arose almost contemporaneously with the then novel right of testimonial compulsion. At this early stage, the privilege was based on 'the oath and the honour' of legal advisers as gentlemen to keep the secrets of their clients. The privilege therefore belonged to the legal adviser not the client and could be waived by the former since only his honour was involved. The title 'legal professional privilege' was then quite apt.

During the latter part of the 18th century the notion of honour was rejected as a justification for the privilege. As Wigmore states, 'the judicial search for truth could not endure to be obstructed by a voluntary pledge of secrecy'. The new theory which emerged was that the privilege was that of the client and not of the legal adviser. In support of this view, it was claimed that the


3. 8 Wigmore, ibid. This reason for the privilege may have been influenced by the Roman precedent that the loyalty owed by a lawyer to his client prevented him from being a witness in his client's case: Radin M., 'The Privilege of Confidential Communication Between Lawyer and Client' (1928) 16 California Law Review 487, 488-9.

4. 5 Holdsworth, op. cit. 333.

5. The Duchess of Kingston's Case (1776) 20 St. Tr. 355 is often cited as conclusively overruling 'the point of honour' as a ground for refusing to disclose confidential information: 8 Wigmore, op. cit. 531; 9 Holdsworth, op. cit. 202 n.4.

6. 8 Wigmore, ibid. 543.

privilege served an important public interest. By allaying clients' fears regarding the disclosure of confidential information, freedom of communication in legal adviser-client relationships would be promoted. This rationale of the privilege was clearly articulated by Lord Brougham L.C. in the often-cited case of Greenough v. Gaskell:8

The foundation of this rule is not difficult to discover...it is out of regard to the interests of justice, which cannot be upheld, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.

The new theory was significant because it not only sustained the privilege at a time when other privileges based on obligations of honour among gentlemen were disappearing, but also ensured its continued existence. With the policy of the privilege in mind, Brett M.R. remarked almost 100 years ago in Pearce v. Foster:9

The privilege with regard to confidential communications between solicitor and client for professional purposes ought to be preserved, and not frittered away.

B. REQUIREMENTS OF THE PRIVILEGE

It is repeatedly stated10 that the range of communications to which legal professional privilege attaches are 'closely confined'. This observation is important, as the central contention of this thesis is

8. (1833) 1 My. & K. 98, 103; 39 E.R. 618, 620-1. For a critical examination of the case see Hazard Jr., op. cit. 1083-6 where it is argued that Brougham L.C. manipulated precedent and reformulated the privilege in such wide terms that it substantially departed from previous cases.


that the exclusionary effect of the privilege is justifiable so long as the privilege is applied within defined limits and subject to its exceptions. Wigmore enumerates four necessary conditions of a privilege: 11

1. The communications must originate in a confidence that they will not be disclosed.

2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

3. The relation must be one which in the opinion of the community ought to be sedulously fostered.

4. The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.

The main characteristics of legal professional privilege have been authoritatively stated as follows: 12

Communications passing between a client and his legal adviser together, in some cases, with communications passing between these persons and third parties may not be given in evidence without the consent of the client if they were made either (1) with reference to litigation that was actually taking place or was in the contemplation of the client, or (2) if they were made to enable the client to obtain, or the adviser to give, legal advice.

There are a number of specific requirements which must be fulfilled for the privilege to apply. The relationship of legal adviser and client must exist or at least be contemplated and the communication must be fairly referable to that relationship. 13 The term 'legal adviser' includes a barrister and solicitor, 14 a clerk or agent or

11. 8 Wigmore, op. cit. 527.


14. Gobbo, op. cit. 273 n.33. A police prosecutor is not, in relation to an informant, in the same position as a barrister or solicitor and any statements made to him are not privileged: Ex parte Dustings; Re Jackson [1968] 1 N.S.W.R. 257, 262 per Walsh J.A.
either,\textsuperscript{15} a salaried legal adviser,\textsuperscript{16} a foreign legal adviser\textsuperscript{17} and even a person whom the client mistakenly believes to be a legal adviser.\textsuperscript{18} The legal adviser must be consulted in his professional capacity in relation to a professional matter.\textsuperscript{19} Where a legal adviser is consulted in a social environment or merely as a friend,\textsuperscript{20} or where the advice given is in the nature of entrepreneurial advice,\textsuperscript{21} the privilege does not apply.

Legal professional privilege attaches only to communications made for the purpose of giving or receiving advice or for use in existing or anticipated litigation. If the communication is in the form of a document, it will only be privileged if it was brought into existence for the 'sole' purpose of submission to legal advisers for advice or

\begin{enumerate}
\item \textsuperscript{15} 8 Wigmore, \textit{op. cit.} 583.
\item \textsuperscript{17} McFarlan v. Rolt (1872) L.R. 14 Eq. 580; Great Atlantic Insurance Co. v. Home Insurance Co. [1981] 2 All E.R. 485.
\item \textsuperscript{18} Feuerheerd v. London General Omnibus Co. Ltd. [1918] 2 K.B. 565.
\item \textsuperscript{19} Lawrence v. Campbell (1859) 4 Drew. 485, 490; 62 E.R. 186, 188; Thomas v. Rawlings (1859) 27 Beav. 140; 54 E.R. 54.
\item \textsuperscript{20} Smith v. Daniell (1874) L.R. 18 Eq. 649.
\item \textsuperscript{21} Leary v. Federal Commissioner of Taxation (1980) 32 A.L.R. 221, 240 per Brennan J.
\end{enumerate}
use in legal proceedings. In the United Kingdom, the scope of the privilege is not so narrowly confined and it is sufficient if the 'dominant' purpose of the communication is legal advice or use in litigation.

Another important requirement is that the communication must be confidential. This accords with the policy of the privilege of conferring protection on the ground that the client intends the communication to be kept secret. In Parkhurst v. Lowten, Lord Eldon L.C. said that 'the moment confidence ceases, privilege ceases'. But mere confidentiality alone does not give rise to the

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25. (1819) 2 Swans. 194, 216; 36 E.R. 589, 596.
privilege. It is no longer correct to suggest that the privilege
is automatically lost if the communication is made in the presence of
a third party who is not the client's or legal adviser's agent. In R. v. Braham and Mason, it was stated that the presence of a
third party should be examined to see whether the communication was
not intended to be confidential, or whether the presence of the third
party was caused by some necessity which did not affect the
confidential nature of the communication.

It is clear that the privilege belongs only to the client. The
corollary right to waive the privilege therefore vests solely in the
client. But until the privilege is waived, the legal adviser is under
a duty to claim it. The privilege continues indefinitely and
enures for the benefit of the client's successors in title. An
exception exists in the case of testamentary dispositions where all
the parties to the action claim under the deceased client.

27. Cf. 8 Wigmore, op. cit. 601-3.
Some other features relating to the privilege may be noted. The question of who bears the onus of establishing the privilege was answered by the High Court in Grant v. Downs as follows:

It is for the party claiming privilege to show that the documents for which the claim is made are privileged. He may succeed in achieving this objective by pointing to the nature of the documents or by evidence describing the circumstances in which they were brought into existence. But it should not be thought that the privilege is necessarily or conclusively established by resort to any verbal formula or ritual.

A court is usually given power by its rules to inspect documents for the purpose of determining the validity of a claim of privilege. The extent to which this power should be exercised has led to divergent views. According to one approach, the power should seldom be used in order to avoid any complications which might arise if the documents inspected are privileged. In Grant v. Downs, the High Court rejected a restrictive view of the power of inspection and said:

The court has power to examine the documents for itself, a power which has perhaps been exercised too sparingly in the past, springing possibly from a misplaced reluctance to go behind the formal claim of privilege.

This flexible approach has been followed. It accords with the central argument that the obstructive effect of the privilege is reduced if the privilege is applied within defined parameters. Court inspection of documents for which privilege is claimed ensures that privilege is only available if the essential requirements are satisfied.


34. See Order 31 r.19(2) Rules of the Supreme Court of Victoria; regs. 90 and 92 Family Law Regulations made under the Family Law Act 1975 (Cth.).


37. In Trade Practices Commission v. Sterling (1979) 36 F.L.R. 244, Lockhart J. referred to Grant v. Downs and decided that he should inspect the documents for which privilege was claimed. His Honour held that the documents were privileged. Cf. Trade Practices Commission v. Bata Shoe Company of Australia Pty. Ltd. (No. 1) (1979) 44 F.L.R. 145.
A. THE TRADITIONAL RATIONALE

The reason for the existence of legal professional privilege was stated by the High Court in Grant v. Downs\(^1\) as follows:

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.

This explanation of the rationale emphasizes three important considerations. First, that the functions performed by legal advisers further the administration of justice. Second, that the proper administration of justice requires that there must be complete and unreserved disclosure by the client. Third, that to ensure complete and unreserved disclosure, the client must have no fear that what he confides in his legal adviser will be revealed.

It is often stated that legal professional privilege is essential for the proper administration of justice.\(^2\) As Lord Halsbury L.C. said in Bullivant v. Attorney-General for Victoria:\(^3\)

...for the perfect administration of justice, and for the protection of the confidence which exists between a solicitor and his client, it has been established as a principle of public policy that those confidential communications shall not be subject to production.

In Baker v. Campbell,\(^4\) Dawson J. said that 'the proper functioning of our legal system' depends on the operation of the privilege and

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added that the legal adviser-client relationship 'has a special significance because it is part of the functioning of the law itself'. Similar views have been echoed by courts in consistently refusing to recognize that any privilege attaches to confidential communications to physicians, clergy, accountants, journalists and social workers. The Law Reform Committee of England suggested that what distinguishes legal advice from other kinds of professional advice is that 'it is concerned exclusively with rights and liabilities enforceable in law'. It has been asserted that it is anomalous that the rationale underlying the privilege is not equally applicable to other professional relationships. But as Jessel M.R. remarked in Wheeler v. Le Marchant:

It [the privilege] does not protect all confidential communications which a man must necessarily make in order to obtain advice, even when needed for the protection of


12. (1881) 17 Ch. D. 675, 681.
his life, or of his honour, or of his fortune. There are many communications which, though absolutely necessary because without them the ordinary business of life cannot be carried on, still are not privileged.

The second and third considerations noted above demonstrate that the privilege serves an incentive function by encouraging resort to legal advisers unimpeded by fear of disclosure. This was acknowledged by Mason J. in *O'Reilly v. Commissioner of State Bank of Victoria* when he said:

> The one thing that is entirely certain about the privilege is that its basis is grounded in the public interest in the freedom of consultation of legal advisers.

The policy arguments for and against the privilege are extensively dealt with by Wigmore. Some specific reasons have been suggested in the cases and by academic writers for according protection to confidential communications between a legal adviser and his client. It is claimed that the privilege promotes candour in legal adviser-client relationships. It also ensures that clients are accurately advised as the legal adviser is acquainted with all the relevant facts. Full disclosure enables the merits of a case to be carefully assessed and unnecessary litigation avoided. The privilege also compensates for the presumption that everyone knows the law. Finally, it encourages lawful conduct.

The privilege has had its critics. Bentham was the most notable and his attack on the privilege was consistent with his general view that any obstacle to the discovery of truth should be removed. Bentham's central argument was that the privilege assists the guilty because an


14. 8 Wigmore, op. cit. 545-54.

innocent person will not be deterred from seeking legal advice as he
has nothing to fear from disclosure. He contended:

...let the law adviser say every thing he has heard, every thing he can have heard from his client, the
client cannot have any thing to fear from it.

The privilege was also opposed by Lord Langdale M.R. and Chief
Justice Appleton of Maine. Morgan challenged the rationale
underlying the privilege by asking: 'Is the privilege in order to
protect perjurers?'. He said that the extent to which the privilege
enhances the administration of justice is 'problematical' and that 'it
is more than offset not only by the harm done by the suppression of
the truth in particular cases, but by the unfounded litigation which
the privilege fosters'.

Some of these arguments are answered by considering the purported
conflict between the rationale of the privilege and the public
interest in the availability of all relevant evidence. The privilege
has been described as 'an obstacle to the investigation of the
truth' or 'the privilege of suppressing truth'. In Waugh
v. British Railways Board, Lord Edmund-Davies said:

...we should start from the basis that the public interest
is, on balance, best served by rigidly confining within
narrow limits the cases where material relevant to
litigation may be lawfully withheld.

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16. Rationale of Judicial Evidence (1827), 7 The Works of Jeremy
Bentham (Bowring ed. 1842) 473-9 cited in 8 Wigmore, op. cit. 549-51.
17. See 8 Wigmore, ibid. 549.
19. See 8 Wigmore, op. cit. 551 n.3.
21. Ibid. 27.
22. 8 Wigmore, op. cit. 554.
23. Morgan E.M. and Maguire J. Mac., 'Looking Backward and Forward
However, the view that the policy served by the privilege overrides the competing public interest in the full disclosure of evidence was clearly accepted by the High Court in *Grant v. Downs*: 25

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 early as 1846, the purpose of the privilege and its exclusionary effect were emphasized in clear terms. In *Reece v. Trye*, 26 Lord Langdale M.R. stated:

The unrestricted communication between parties and their professional advisers, has been considered to be of such importance as to make it advisable to protect it even by the concealment of matter without the discovery of which the truth of the case cannot be ascertained.

The same point was vehemently expressed by Knight Bruce V.C. in *Pearse v. Pearse*: 27

...surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness, and suspicion and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself.

Similar views have been repeated in recent cases. In *Air Canada v. Secretary of State for Trade (No. 2)*, 28 the House of Lords noted that the 'very existence of legal professional privilege' constitutes a qualification to the general rule that the court should have all relevant information. The majority of the High Court in *Baker v. Campbell* 29 also accorded much weight to the policy served by the

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27. (1846) 1 De G. & Sm. 12, 29; 63 E.R. 950, 957.

28. [1983] 1 All E.R. 910, 916 per Lord Fraser of Tullybelton. Also 919 per Lord Wilberforce, 921 per Lord Edmund-Davies and 924 per Lord Scarman.

privilege and the following view of Deane J. is characteristic of the approach taken:

...the underlying principle that a person should be entitled to preserve the confidentiality of relevant communications between himself and his attorney is regarded as of such importance by the common law that the courts themselves do not require disclosure of the content of such communications even if it appears that such disclosure would be conducive to justice in a particular case and even if the proceedings be between parties neither of whom is entitled to claim the protection of the privilege as regards the relevant documents or information. (My emphasis)

The above are unequivocal statements of the importance of and the need for the privilege.

A practical argument which is advanced against the privilege is that a client is usually unaware of its existence until told by his legal adviser and consequently, the privilege does not encourage free communications. It has been said in reply that 'this ignores the over-all pattern of general effect of the personal privileges, the strength of custom and tradition in the fabric of our society, and the picture of justice as a whole'. General community understanding of the nature of the legal adviser-client relationship is difficult to assess and, as Wigmore points out, the benefits of the privilege are 'all indirect and speculative'. These considerations and the

30. Ibid. 434.
31. This may be contrasted with the privilege against self-incrimination which has been observed 'is taken by the members of the criminal element in their infancy and with their mothers' milk': Gardner J.A., 'A Re-evaluation of the Attorney-Client Privilege' (1963) 8 Villanova Law Review 279, 336.
32. Gardner, ibid. 335.
33. In 1975, the Law Foundation of New South Wales conducted a survey in which 927 respondents were asked the following question: 'Most solicitors can be trusted to keep clients' personal matters to themselves'. The result was follows: 45.1% strongly agreed; 37.1% agreed with reservations; 15.0% were not sure; 1.4% disagreed with reservations and 1.4% strongly disagreed. It was suggested that the results indicated that most respondents had considerable faith in the trustworthiness of their legal advisers: Tomasic R., Law, Lawyers and the Community (1976) 81.
34. 8 Wigmore, op. cit. 554.
arguments opposing the privilege noted above, do not present a sufficient case for not allowing the privilege.

Modern theory of the rationale

The rationale of the privilege is an evolving principle. It is therefore of some interest to consider how the traditional rationale has been explained in relation to the demands made by the modern state. It was stated recently that 'the doctrine of legal professional privilege helps to alleviate the dialectic dilemma that faces a lawyer in everyday work'.35 Temby argues that the policy underlying the privilege reflects the broad development of the citizen-state relationship. As the modern state is characterized by a huge bureaucratic and administrative infrastructure, the fundamental nature of the privilege has assumed added importance in maintaining equality between the citizen and the state.36 Even Morgan, who was generally critical of the privilege, acknowledged that the privilege prevents 'intolerable prying and snooping by too-enthusiastic and none-too-ethical governmental investigators'.37 Comparable statements also appear in some of the judgments in Baker v. Campbell.38 Wilson J. considered that:

The multiplicity and complexity of the demands which the modern state makes upon its citizens underlines the continued relevance of the privilege to the public interest.39

Murphy J. said:

The client's legal privilege is essential for the orderly and dignified conduct of individual affairs in a social atmosphere which is being poisoned by official and unofficial eavesdropping and other invasions of privacy.40

36. Ibid. 15-6.
39. Ibid. 416.
40. Ibid. 411.
The same point was reinforced by Deane J. who stated that the rationale underlying the privilege is 'of fundamental importance to the protection and preservation of the rights, dignity and equality of the ordinary citizen under the law'. 41 He concluded his judgment as follows:

That general principle represents some protection of the citizen—particularly the weak, the unintelligent and the ill-informed citizen—against the leviathan of the modern state. Without it, there can be no assurance that those in need of independent legal advice to cope with the demands and intricacies of modern law will be able to obtain it without the risk of prejudice and damage by subsequent compulsory disclosure on the demand of any administrative officer with some general statutory authority to obtain information or seize documents. 42

It has been suggested that the above passages express the basis of the privilege in terms of the preservation of individual privacy and confidentiality rather than the administration of justice. 43 But these notions are not mutually exclusive. Rather, they are an inextricable part of the rationale of the privilege. As Dawson J. explained in Baker v. Campbell, 44 the law excludes otherwise relevant evidence because of its 'overriding regard for the confidentiality of communications between a legal adviser and his client'. His Honour earlier stated:

If a client cannot seek advice from his legal adviser confident that he is not acting to his disadvantage in doing so, then his lack of confidence is likely to be reflected in the instructions he gives, the advice he is given and ultimately in the legal process of which the advice forms part. 45

The current and increasing trend of governmental intrusion in legal adviser-client communications has necessitated major adjustments to the doctrine of legal professional privilege. The effect of Baker v. Campbell, which is discussed below, was that the privilege emerged

41. Ibid. 435.
42. Ibid. 436-7.
45. Ibid.
as a fundamental principle of general application. That is why its conventional rationale has had to be explained in terms which are not strictly applicable to rules of evidence and to the resolution of disputes in judicial or quasi-judicial forums.

B. THE 'LAWYER'S BRIEF' RATIONALE

Another justification for the existence of the privilege is that it enables a legal adviser to properly prepare his client's case unimpeded by the possibility that the evidence he has collected might be revealed to the other side. This has been described as the 'lawyer's brief' rule. From an early stage the privilege was applied to prevent a party from discovering the material contained in his opponent's brief to counsel: the key to a party's case. In Anderson v. Bank of British Columbia, James L.J. said:

...as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for the brief.

The 'lawyer's brief' rationale is derived from the adversary system of litigation. This rationale also complements the traditional rationale of the privilege. It is not only clients' fears of subsequent disclosure that must be allayed. Legal advisers must also be encouraged to search for evidence without any apprehension that the result of their endeavours might be revealed to

46. Susan Hosiery Ltd. v. Minister of National Revenue [1969] 2 Ex. C.R. 27, 33 per Jackett P.

47. 8 Wigmore, op. cit. 564. For an historical account of this additional theory for the privilege see Williams N.J., 'Discovery of Civil Litigation Trial Preparation in Canada' (1980) 58 Canadian Bar Review 1, 40-2.

48. (1876) 2 Ch. D. 644, 656. See also Southwark and Vauxhall Water Co. v. Quick (1878) 3 Q.B.D. 315, 320 per Brett L.J.; Wheeler v. Le Marchant (1881) 17 Ch. D. 675, 685 per Cotton L.J.

49. It is argued by Williams that the privilege was a 'logical' and 'necessary' consequence of the adversary model: op. cit. 47. As Jackett P. said in Susan Hosiery Ltd. v. Minister of National Revenue [1969] 2 Ex. C.R. 27, 34: 'If lawyers were entitled to dip into each other's briefs by means of the discovery process, the straightforward preparation of cases for trial would develop into a most unsatisfactory travesty of our present system'.
an opposing party. As one commentator observed recently:

First, an adversary who may sit back and secure by discovery the fruits of his opponent's trial-preparation efforts will be discouraged from independently investigating and analysing the case. Second, an adversary who will be required to turn over the fruits of his investigative and trial-preparation labours to his opponent may well decide not to exert such labours, since their fruits may prove more helpful to his opponent than to himself.50

This explanation for the privilege has not been frequently alluded to in the decided cases. In Waugh v. British Railways Board,51 Lord Wilberforce said, in endeavouring to discern the reason for the privilege:

It is sometimes ascribed to the exigencies of the adversary system of litigation under which a litigant is entitled within limits to refuse to disclose the nature of his case until the trial. Thus one side may not ask to see the proofs of the other side's witnesses or the opponent's brief or even know what witnesses will be called: he must wait until the card is played and cannot try to see it in the hand.52

The 'lawyer's brief' rationale was extensively considered by Lord Simon of Glaisdale in that case. He said:

This system of adversary forensic procedure with legal professional advice and representation demands that communications between lawyer and client should be confidential, since the lawyer is for the purpose of litigation merely the client's alter ego. So too material which is to go into the lawyer's (i.e. the client's) brief or file for litigation. This is the basis for the privilege...53

Lord Simon suggested that this reason for the privilege was historically based on the outlook of the common law courts. Chancery,

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52. This echoes the sporting theory of justice which is often used as a criticism of the adversary system. See Eggleston R., 'What is Wrong with the Adversary System' (1975) 49 Australian Law Journal 428.

however, favoured the conflicting principle that an opponent might be compelled to disclose relevant evidence in his possession. His Lordship then referred to the dictum of James L.J. in _Anderson v. Bank of British Columbia_54 which he explained as follows:

The adversary's brief will contain much relevant material; nevertheless, you cannot see it because that would be inconsistent with the adversary forensic process based on legal representation.55

Lord Edmund-Davies also cited the statement of James L.J. in _Anderson v. Bank of British Columbia_ and said that preparation with a view to litigation was the 'essential purpose' which protects a communication from disclosure.56

The 'lawyer's brief' theory has not received wide recognition in Australia. In _National Employers' Mutual General Insurance Association Ltd. v. Waind_,57 Barwick C.J. said that the documents in that case 'were not in any sense proofs of witnesses or statements prepared for submission to legal advisers'. It may be argued that the restriction of the doctrine of legal professional privilege in _O'Reilly v. Commissioner of State Bank of Victoria_58 to judicial or quasi-judicial proceedings may be attributed to a greater recognition of the adversary basis of the privilege rather than its traditional rationale. This point appears from statements made in _Baker v. Campbell_.59 Wilson J. said in that case:

In earlier times, of course, it has been the demands of the adversary system which enlivened the principle and nourished the notion that the privilege was a rule of evidence confined to judicial or quasi-judicial proceedings.60

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54. (1876) 2 Ch. D. 644, 656.
56. Ibid. 542.
57. (1979) 141 C.L.R. 648, 651.
60. Ibid. 416. The 'lawyer's brief' rationale may also historically account for the extension of the privilege to litigation related third party communications: Williams, op. cit. 40-2.
Mason J. drew a distinction between 'communications made in aid of litigation' and 'communications for advice'. He suggested that only the former should prevail over the competing obligation to disclose all relevant material because 'to compel the parties to disclose such communications made in the conduct of that litigation would be unfair to them, hamper the preparation of their cases and protract the determination of the litigation'.

In Baker v. Campbell, Brennan J. specifically examined the 'lawyer's brief' rationale. He said that one of the purposes of the privilege is 'the maintenance of the curial procedure for the determination of justiciable controversies - the procedure of adversary litigation' and added:

If the prosecution, authorised to search for privileged documents, were able to open up the accused's brief while its own stayed tightly tied, a fair trial could hardly be obtained...

Brennan J. cited with approval the statement of Lord Simon in Waugh v. British Railways Board and stated that even if the prosecution could obtain documents which had come into existence 'merely as the materials for the brief', a court would be 'bound' to reject them otherwise its own adversary procedures would be subverted. It is important to note that Brennan J. considered that this justification for the privilege clearly outweighed the public interest in admitting all relevant evidence. He remarked:

But there is no consideration favouring the admission of evidence if its admission subverts the court's procedure for conducting adversary litigation. Ordinarily, the admission of evidence serves the public interest by enhancing the court's capacity for determining the controversy before it. Where that capacity is impaired by the admission of evidence, there is no public interest favouring its admission.


65. Ibid. 428.
Litigant acting in person

If the 'lawyer's brief' rationale is based on the nature of the adversary system, then it is an irresistible conclusion that the privilege should extend to protect the evidence gathered by a litigant who conducts his own case. As Murphy J. stated in Baker v. Campbell:66

Parties should be able to prepare for litigation without that preparation being subject to search and seizure. This protection should apply not only to client-lawyer communications, but also to preparation by a litigant in person, and to communications between the litigant and others.

The existing state of authority in England67 and probably Australia,68 suggests that it is very doubtful whether there is any privilege for documents brought into existence for the purposes of an action to be conducted by a litigant in person. In Lyell v. Kennedy (No. 3),69 Cotton L.J. said:

...when a man will act for himself, and will not do that which is the very ground of privilege, viz., act by a solicitor, whatever he learns, when the proper interrogatories are put to him he must produce or disclose it.70

Even in the recent case of Baker v. Campbell,71 Gibbs C.J. observed in explaining the rationale of the privilege:

It is necessary for the proper conduct of litigation that the litigants should be represented by qualified and

68. National Employers' Mutual General Insurance Association Ltd. v. Waind (1979) 141 C.L.R. 648, 654 per Mason J. The learned editors of Cross on Evidence (2nd Australian ed. 1979) refer to Komacha v. Orange City Council (1979) 40 L.G.R.A. 32 as supporting the proposition that 'there can be no question of privilege for notes or memoranda of a legal character where a party is acting as his own lawyer': see Cumulative Supplement (1984) 24.
69. (1884) 27 Ch. D. 1, 25.
70. Cf. Anderson v. Bank of British Columbia (1876) 2 Ch. D. 644, 658 per Mellish L.J.
experienced lawyers rather than that they should appear for themselves...

A number of arguments can be made in favour of applying the privilege to an unrepresented litigant. The essential characteristic of legal professional privilege is that it belongs to and operates only for the benefit of the client. The extension of the privilege to a litigant acting in person is consistent with this. It is not necessary for privileged information to be obtained by the legal adviser himself to be protected. Cockburn C.J. said in Southwark and Vauxhall Water Co. v. Quick:72

I can see no distinction between information obtained upon the suggestion of a solicitor, with the view of its being submitted to him for the purpose of his advising upon it, and that procured spontaneously by the client for the same purpose.

The principal features of the adversary system are: party responsibility for the collection of evidence and party autonomy in presenting the evidence that would best advance the party's case or destroy that of the adversary.73 The Law Reform Committee of England74 noted that the reason for protecting communications between a client's legal advisers and third parties is 'to facilitate the obtaining and preparation of evidence by a party to an action in support of his case'. It is anomalous that this is no less applicable to a litigant who expends money and time in gathering evidence for his case. The Australian Law Reform Commission referred recently to some of the above considerations and suggested that communications between an unrepresented litigant and third parties in anticipation of litigation, should 'in fairness' be privileged from disclosure.75

In the recent case of R. v. Heston-Francois76 it was assumed, though not decided, that legal professional privilege may apply to material prepared by a defendant in conducting his own defence. In

72. (1878) 3 Q.B.D. 315, 318.
73. Williams, op. cit. 47.
76. [1984] 2 W.L.R. 309.
that case, the defendant was committed for trial on numerous burglary offences. Police officers searched the defendant's home pursuant to a warrant and removed documents and tape recordings prepared by the defendant for use in his defence. The defendant had not submitted the documents and tapes to legal advisers and it does not appear from the report of the case that these were prepared for this purpose. The Court of Appeal accepted, however, that the documents seized were 'legally privileged documents'.\footnote{Ibid. 319.} Watkins L.J., who delivered the judgment of the Court, stated:

...we do feel it right to say that police officers must regard documents, albeit that they are lawfully seized from a defendant following arrest and committal for trial with great caution lest they contain matters for which a defendant is entitled to claim the protection of privilege...\footnote{Ibid. 320.}

It is to be noted that although legal professional privilege may not be available where a person acts without a legal adviser, privilege may nevertheless be claimed on another ground. A document which relates solely to the case of the party giving discovery, in the sense that it does not support his opponent's case or impeaches his own case, is protected from production. This is recognized as a separate head of privilege.\footnote{O'Rourke v. Darbishire [1920] A.C. 581; National Employers' Mutual General Insurance Association Ltd. v. Waind (1979) 141 C.L.R. 648, 654 \textit{per} Mason J.} It is still available in some Australian jurisdictions.\footnote{But see Evidence Ordinance 1971 (A.C.T.) s.95(3); Court of Petty Sessions (Civil Jurisdiction) Ordinance 1982 (A.C.T.) s.166 and Evidence Act 1977 (Qld.) s.14(2). The Australian Law Reform Commission proposed that this head of privileged should be abolished provided adequate protection was given to an unrepresented litigant: op. cit. para. 95. This privilege was abrogated in the United Kingdom by the Civil Evidence Act 1968 s.16(2) and has been judicially excluded in some Canadian jurisdictions: see Williams, \textit{op. cit.} 19-20.}

C. THE RATIONALE AND RECENT AUSTRALIAN CASES

The doctrine of legal professional privilege has been subject to close examination by the High Court of Australia in the cases of Grant v.
Downs, O'Reilly v. Commissioner of State Bank of Victoria and Baker v. Campbell. These decisions will be discussed primarily from the point of view of the High Court's treatment of the rationale of the privilege. It will be argued that whether or not the privilege is an obstacle in the quest for truth is not any longer a relevant consideration. The exclusionary effect of the privilege has long been upheld. Also, the privilege should be regarded as a fixed rule rather than a flexible principle. The High Court's approach in the cases will be examined in light of the central submission that the obstructive effect of the privilege is justifiable when the privilege is applied consistently with its underlying rationale.

1. Grant v. Downs

The appellant sought discovery of certain reports concerning the death of her husband at a psychiatric centre. The respondent claimed that the reports were protected by legal professional privilege because one of the material purposes for their preparation was for submission to legal advisers. The claim of privilege was upheld at first instance and leave to appeal was refused. The appellant then successfully appealed to the High Court. It was unanimously held that legal professional privilege did not apply and the reports had to be produced for inspection. The importance of the decision in Grant v. Downs is that, in the three judgments which were delivered, the principle to be applied in documents brought into existence for submission to a legal adviser was explained by reference to the rationale of the privilege. However, three different tests were enunciated.

Barwick C.J. adopted a 'dominant' purpose test and remarked that his approach was based upon the premise that 'it is necessary in the public interest that professional privilege should be recognized and enforced'. The Chief Justice had no doubt about the effect of the

85. Ibid. 676-7.
privilege when he said:

That there is occasion for excluding from inspection documents which fall within that privilege cannot, in my opinion, be denied. There is no need, in my opinion, presently to explore or express the basis or justification for the existence of the privilege. Its necessity should be accepted.86

Barwick C.J. also added that he preferred the word 'dominant' to describe the relevant purpose because neither 'primary' nor 'substantial' satisfied 'the true basis of the privilege'.87

In a joint judgment, Stephen, Mason and Murphy JJ. referred extensively to the rationale of the privilege and observed wistfully that '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'.88 However, their Honours made a significant inroad when they said:

...unless the law confines legal professional privilege to those documents which are brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings the privilege will travel beyond the underlying rationale to which it is intended to give expression...we consider that the sole purpose test should now be adopted as the criterion of legal professional privilege.89 (My emphasis)

How was the 'sole' purpose test explained consistently with the rationale of the privilege? It was suggested that there were 'powerful considerations' which required that the privilege be confined within strict limits. The privilege, if accorded to a corporation (whether a statutory authority or a company), did not promote full and frank disclosure. The proliferation of day to day documents which too easily satisfied the privilege would exclude them from production or unfairly subject the other party to surprise. The exclusion of relevant documents made it difficult to test the veracity

86. Ibid. 677.
87. Ibid. 678.
88. Ibid. 685.
89. Ibid. 688.
These difficulties, it was claimed, were 'magnified' in the case of a corporation because the purpose of arming central management with actual knowledge of what its servants had done was unconnected with the privilege and was 'but a manifestation of the need of a corporation to acquire in actuality the knowledge it is always deemed to possess and which lies initially in the minds of its agents'. Their Honours further emphasized that the fact that documents are prepared for a 'second purpose', that of seeking legal advice or their use in litigation, did not justify according them protection in view of 'the principle which lies behind legal professional privilege'.

Jacobs J. stated that it was difficult to reconcile the competing interests served by the rationale of the privilege and the rule requiring disclosure of evidence relevant to litigation. In his opinion, 'the interests of a just resolution by the courts of litigation between parties' militated in favour of the latter rule. His Honour formulated the test to be applied as follows:

...does the purpose of supplying the material to the legal adviser account for the existence of the material? (My emphasis)

It is clear that all the members of the High Court articulated the test they propounded in accordance with what was perceived to be the rationale of the privilege. The fact that three distinct tests resulted suggests that the privilege was treated as a flexible concept rather than a fixed rule. This can be criticized for a number of reasons. The reference in the case to competing public interests and to the exclusionary effect of the privilege are matters which have

90. Ibid. 685-6.
91. Ibid. 687.
92. Ibid.
93. Ibid. 691.
94. Ibid. 692.
long been resolved in favour of the privilege.\footnote{As McMullin J. said recently in the New Zealand case of R. v. Uljee [1982] 1 N.Z.L.R. 561, 576: 'It is not now a question of weighing the public interest in each case to see whether the rule should be applied. Whether the principle operates as a bar to the emergence of the truth and to the overall public detriment is not now a relevant legal consideration'. Cf. Note, 'The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement' (1977) 91 Harvard Law Review 464.} To again raise these aspects inevitably leads to divergent views about what is necessary to satisfy the purpose served by the privilege. This produces uncertainty which tends to undermine the object of the privilege. As clients cannot be assured that confidential communications with their legal advisers are privileged, full and frank disclosure will be inhibited.

A majority of the High Court in \textit{Grant v. Downs} endorsed the 'sole' purpose test as the test to be applied by Australian courts in relation to documents brought into existence for submission to legal advisers for advice or for use in litigation. The effect was to restrict the scope of the privilege to a significant extent. It has been argued that a rigid application of the principle in \textit{Grant v. Downs} will lead to an undesirable reluctance on the part of employees to express opinions which might subsequently be used against their principals.\footnote{Gobbo J.A., Byrne D. and Heydon J.D., \textit{Cross on Evidence} (2nd Australian ed. 1979) 275.} It is noteworthy that the High Court in \textit{Grant v. Downs} did not refer to the 'lawyer's brief' theory for the existence of the privilege. The 'sole' purpose test was only propounded in light of the traditional rationale underlying the privilege. This point was made recently by the Australian Law Reform Commission. It was suggested that if the 'lawyer's brief' rationale is accepted, the 'sole' purpose test is too narrow. The Commission further considered that the 'dominant' purpose test achieved a correct balance and should be adopted.\footnote{Evidence Reference, op. cit. para. 98.} The decision of the House of Lords in \textit{Waugh v. British Railways Board}\footnote{[1980] A.C. 521.} is consistent with this view. Their Lordships unanimously adopted the 'dominant' purpose test of Barwick C.J. in \textit{Grant v. Downs}\footnote{(1976) 135 C.L.R. 674.} and stated that the 'sole' purpose test was
too strict and confined the privilege within narrow limits.\(^{100}\)

Notably, Lord Russell doubted whether the 'sole' purpose test gave sufficient weight to the policy underlying the privilege. He said:

...I am persuaded that the standard of sole purpose would be in most, if not all, cases impossible to attain, and that to impose it would tilt the balance of policy in this field too sharply against the possible defendant.\(^ {101}\)

Grant v. Downs has been referred to and applied in subsequent Australian cases.\(^ {102}\) It was uncritically accepted in those cases that the 'sole' purpose test gives effect to the public interest served by the privilege. Whether it does so in practice is unclear. Ironically, the 'sole' purpose test may have indirectly necessitated a greater resort to legal advisers in order to obtain the protection accorded by the privilege. As Mason J. said in National Employers' Mutual General Insurance Association Ltd. v. Waind,\(^ {103}\) which applied Grant v. Downs:

If it had been the practice of the appellant to refer every claim and every case with the relevant reports to its solicitor for advice or information, the appellant might have been in a position to establish the existence of an overriding purpose which would found a claim to legal professional privilege.

100. [1980] A.C. 521, 533 per Lord Wilberforce, 537 per Lord Simon, 543 per Lord Edmund-Davies and 545 per Lord Russell.

101. Ibid. 545.


103. (1979) 141 C.L.R. 648, 656.
2. O'Reilly v. Commissioner of State Bank of Victoria

A solicitor was served with a notice pursuant to s.264 of the Income Tax Assessment Act 1936 (Cth.) which required him to produce a number of documents. The solicitor did not comply with the notice on the basis that the documents were protected by legal professional privilege or the contractual duty of confidence. In relation to the latter ground, it was unanimously held by the High Court that the contractual duty of confidence was overridden by the duty to comply with the law of the land, including the requirements of s.264 of the Act. With regard to the claim for legal professional privilege, Mason J. stated:

It is now necessary to look to another important question: Is the privilege merely a rule of evidence confined to curial proceedings or does it have a wider ambit?

It was held by the majority (Gibbs C.J., Mason and Wilson JJ., Murphy J. dissenting) that legal professional privilege was confined to judicial or quasi-judicial proceedings and did not extend to an administrative inquiry such as that under s.264.

The rationale of the privilege was referred to in the judgments of Mason and Wilson JJ. and the relevant passages in Greenough v. Gaskell, Bullivant v. Attorney-General for Victoria and Grant v. Downs were cited. Mason J. spoke of 'the public

105. Ibid. 32 per Gibbs C.J., 39 per Mason J., 43 per Murphy J. and 50 per Wilson J.
106. Ibid. 41. In Parry Jones v. Law Society [1969] 1 Ch. 1, 9 Diplock L.J. expressed the view that 'privilege, of course, is irrelevant when one is not concerned with judicial or quasi-judicial proceedings because, strictly speaking, privilege refers to a right to withhold from a court, or a tribunal exercising judicial functions, material which would otherwise be admissible in evidence'.
interest which is universally acknowledged as the fundamental basis of the privilege\footnote{110} and later emphasized:

The one thing that is entirely certain about the privilege is that its basis is grounded in the public interest in the freedom of consultation of legal advisers.\footnote{111}

His Honour also noted, no doubt reflecting on similar words used by the majority in Grant v. Downs,\footnote{112} that 'the existence of the privilege is too well entrenched to be abolished by a flourish of the judicial pen'.\footnote{113} These general statements were qualified significantly.

Mason J. suggested that the privilege should be 'closely confined' and advanced a number of arguments to justify this. First, he said that it was impossible to assess the benefits of the privilege if it applied beyond judicial or quasi-judicial proceedings.\footnote{114} Second, he doubted whether a wide application of the privilege promoted candour on the part of clients and even if it did, he asked:

...is that public interest so much stronger than the public interest in having litigation determined in the light of the entirety of the relevant materials?\footnote{115}

These arguments have little merit. It has long been accepted that the public interest in preserving the secrecy of legal adviser-client communications outweighs the public interest in receiving all relevant evidence. As a final argument, Mason J. stated that by extending the privilege to non-judicial proceedings, 'unqualified persons' would have to decide difficult questions of legal professional privilege.\footnote{116} His Honour did not suggest what these difficult

\begin{enumerate}
\item \footnote{110} (1982) 44 A.L.R. 27, 40.
\item \footnote{111} Ibid. 41.
\item \footnote{112} See (1976) 135 C.L.R. 674, 685.
\item \footnote{113} (1982) 44 A.L.R. 27, 42.
\item \footnote{114} Ibid.
\item \footnote{115} Ibid.
\item \footnote{116} Ibid.
\end{enumerate}
questions might be. The High Court has not seen such problems in extending the privilege against self-incrimination to non-curial proceedings.\textsuperscript{117} It has been claimed that this is a 'strange paradox'.\textsuperscript{118} Moreover, the availability of legal professional privilege outside judicial or quasi-judicial proceedings was recognized in two reported Australian cases which were not cited in O'Reilly. In Commonwealth v. Frost,\textsuperscript{119} Ellicott J. held that legal professional privilege applied to investigative proceedings before a Board of Accident Inquiry appointed under the Air Navigation Regulations (Cth.). In Re Stanhill Consolidated Ltd.,\textsuperscript{120} Menhennitt J. said that a legal adviser 'would be acting in breach of his duty to keep the privileged communication confidential not only if he gave evidence of it in court but also if he disclosed it to anyone in any circumstances'. The formidable weight of Canadian\textsuperscript{121} and United States\textsuperscript{122} authority that the privilege extends to non-curial proceedings was also not cited in O'Reilly.

The judgment of Wilson J. in O'Reilly's case is marked by a narrow approach to the scope of the privilege and the public interest which supports the doctrine.\textsuperscript{123} His Honour was of the opinion that the law was correctly stated by Diplock L.J. in Parry-Jones v. Law Society.\textsuperscript{124} He referred to the rationale of the privilege but did

\begin{itemize}
\item \textsuperscript{118} Weinberg M., 'Recent Developments in Identification Evidence, Confessions and Privilege' (1983) 57 Law Institute Journal 1090, 1094.
\item \textsuperscript{119} (1982) 41 A.L.R. 626.
\item \textsuperscript{120} [1967] V.R. 749, 752.
\item \textsuperscript{123} Wilson J. later conceded this in Baker v. Campbell (1983) 49 A.L.R. 385, 415.
\item \textsuperscript{124} [1969] 1 Ch. 1, 9.
\end{itemize}
not explain how the need to confine the privilege to judicial or quasi-judicial proceedings was consistent with that rationale. Wilson J. merely concluded by saying:

...no such privilege exists other than in the context of disclosure in the course of judicial and quasi-judicial proceedings, and in my opinion it would be an unwarranted extension of the privilege to find otherwise.125

Murphy J. dissented in the case on the ground that 'the important public policy which justifies the privilege would often be defeated if the privilege were not generally available',126 Murphy J. therefore took a broad view of the rationale of the privilege. Unlike Mason J., he was not troubled by the exclusionary effect of the privilege and appeared to suggest that one exception to the privilege did satisfy a competing public interest. He remarked:

In general the privilege is a sufficient answer to any officer seeking the disclosure of the protected communication, whether written or oral. The common law exception that the privilege cannot be used to facilitate the commission of crimes is applicable in relation to the operation of federal statutes.127

Murphy J. also differed from Mason J. when he observed that the strict confinement of the privilege since Grant v. Downs128 was a 'powerful' reason for extending the protection generally and not limiting the privilege to judicial or quasi-judicial proceedings.129 This view was explicitly rejected by Mason J.130 The remaining judgment of the Court was given by Gibbs C.J. who merely agreed with both Mason and Wilson JJ.131

The approach of the majority in O'Reilly's case was similar to that adopted by the High Court in Grant v. Downs in the following respects. The rationale of the privilege was referred to extensively, bold statements were made about how the privilege was well established and

126. Ibid. 43.
127. Ibid.
130. Ibid. 42.
131. Ibid. 32.
should not be judicially 'exorcised' and then, quite strikingly, the scope of the privilege was confined within strict limits. If O'Reilly's case is rationalized in terms of the policy of the privilege, it would tend to support the narrow proposition that the promotion of freedom of communication in legal adviser-client relationships is only sound in judicial or quasi-judicial proceedings. This proposition cannot be logically maintained. As Mason J. subsequently conceded in Baker v. Campbell, a wider approach to the policy underlying the privilege 'might well have led to a different result in O'Reilly'. Fortunately, O'Reilly's case did not survive long.

3. **Baker v. Campbell**

The defendant, a member of the Australian Federal Police, attempted to seize documents under a search warrant issued pursuant to s.10 of the Crimes Act 1914 (Cth.). The documents were held at the time by the plaintiff's solicitors. They included opinions given by solicitors and counsel and documents brought into existence for the sole purpose of advice otherwise than in relation to existing or contemplated civil or criminal proceedings. The documents related to certain aspects of a scheme to minimize liability for sales tax. The plaintiff argued that the documents were protected by legal professional privilege. The defendant contended that privilege did not apply because of the purposes for which the plaintiff consulted his solicitors. It was unnecessary to decide this issue because the High Court was asked the following question in a case stated: 'In the event that legal professional privilege attached to and is maintained in respect of the documents held by the firm can those documents be properly made the subject of a search warrant issued under s.10 of the Crimes Act?'. A majority of the Court comprising Murphy, Wilson, Deane and Dawson JJ. (Gibbs C.J., Mason and Brennan JJ. dissenting) answered the question in the negative. It was held that s.10 of the Crimes Act did not expressly or by necessary implication abrogate legal professional privilege.134

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134. This aspect of the case is examined under 'Statutory Exceptions'. See infra 128-32.
The central issue in *Baker v. Campbell* was whether legal professional privilege was a mere rule of evidence limited to judicial or quasi-judicial proceedings or whether it was founded on a wider ground of public policy and therefore applied generally. The significance of the case is not so much what the High Court in fact decided but rather, the justification for this based on the rationale of the privilege. The decisions of the majority and the minority will be examined with this in mind.

(a) The majority decision

In a lucid judgment, Dawson J., with whom Wilson J. agreed, traced the emergence of the common law doctrine of legal professional privilege. He noted its underlying policy of promoting freedom of consultation with legal advisers and said that it became 'firmly' established in its present form 'not merely as a rule of evidence, but as a matter of public policy with a natural application wherever compulsory disclosure of evidence is involved, whether in judicial proceedings or not'.

His Honour stated that the justification for the privilege was to be found in the fact that 'the proper functioning of our legal system depends upon a freedom of communication between legal advisers and their clients'. Reference was made to the conflict between the principle that all relevant evidence should be disclosed and the principle that communications between legal adviser and client should be confidential. Dawson J. said that this had been resolved in favour of the latter. His Honour had little doubt that the underlying rationale of the privilege was equally applicable to administrative proceedings. He remarked:

> It is clear in my mind that the power to compel disclosure in an administrative inquiry of professional confidences is likely to destroy the freedom of communication, which the law seeks to protect, between legal adviser and client as effectively as would compulsory disclosure of those confidences in judicial proceedings.

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Dawson J. concluded by saying that the privilege was based upon a 'fundamental' principle and 'to view legal professional privilege as being no more than a rule of evidence would... be to inhibit the policy which supports the doctrine'.

Murphy J. also examined the rationale of, as he accurately described it, 'client's legal privilege'. He reiterated the statement he made in O'Reilly's case that 'the important public policy which justifies the privilege would often be defeated if the privilege were not generally available'. He stated:

The client's legal privilege is essential for the orderly and dignified conduct of individual affairs in a social atmosphere which is being poisoned by official and unofficial eavesdropping and other invasions of privacy... Denying the privilege against a search warrant would have a minimal effect in securing convictions but a major damaging effect on the relationship between the legal profession and its clients.

Deane J. said that the rationale underlying the privilege embodied a 'fundamental' and 'general and substantive' principle. He adopted the statement of the rationale in Grant v. Downs and explained that, in light of that rationale, the application of the privilege in administrative proceedings followed 'logically' and as a matter of 'common sense'. Deane J. articulated the rationale as follows:

...the general and substantive principle underlying legal professional privilege is of fundamental importance to the protection and preservation of the rights, dignity and equality of the ordinary citizen under the law in that it is a pre-condition of full and unreserved communication with his lawyer.

139. Ibid. 446.
142. Ibid. 411-2. Cf. 397 per Gibbs C.J.
145. Ibid. 435.
The judgment of Wilson J. was important. He reversed the view he had taken in O'Reilly's case and without this change a majority in support of the present view of the privilege would not have existed. His Honour conceded that he took 'too narrow a view' in O'Reilly. He explained his changed view in terms of the rationale of the privilege:

In my reliance upon English authority, culminating in Parry-Jones v. Law Society [1969] 1 Ch. 1, I allowed the public interest which supports the privilege to be confined too closely to the context in which the relevant common law has evolved.146

Wilson J. accepted the dictum of Earl of Halsbury L.C. in Bullivant v. Attorney-General for Victoria147 that an object of the public policy underlying the privilege is 'the perfect administration of justice' and added:

The perfect administration of justice is not confined to legal proceedings. The object and indeed the result of consulting a solicitor will often be the settlement of a dispute which otherwise may have had to be fought out in court.148

His Honour further observed that the extension of the privilege more than a century ago beyond communications in relation to litigation to embrace any communications in seeking or giving legal advice, emphasized that 'the public interest involved extends beyond legal proceedings'.149 Wilson J. therefore took a broad view of the policy served by the privilege. This is particularly evident from the following passage:

The multiplicity and complexity of the demands which the modern state makes upon its citizens underlines the continued relevance of the privilege to the public interest. The adequate protection according to law of the privacy and liberty of the individual is an essential mark of a free society and unless abrogated or abridged by statute the common law privilege attaching to the relationship of solicitor and client is an important element in that protection.150

146. Ibid. 415.
149. Ibid.
150. Ibid.
The language used is very similar to that of Murphy and Deane JJ. as was noted above under the modern rationalization of the policy of the privilege.

The majority in Baker v. Campbell therefore took an expansive view of the scope of legal professional privilege and the rationale which supports it. The privilege was recognized as a general and substantive principle, not a mere rule of evidence. The public interest which it served demanded that the privilege should apply beyond judicial or quasi-judicial proceedings. This approach was in clear conflict with O'Reilly's case. Different reasons were given by the majority for overruling that case.

Murphy J. noted that the majority in O'Reilly's case had relied on the Full Court of the Federal Court decision in Crowley v. Murphy, which in turn relied on the Canadian case of R. v. Colvin. But R. v. Colvin had been overruled even before Crowley v. Murphy was decided. Murphy J. said that this unfortunately was not brought to the attention of the Court in O'Reilly's case. For Wilson J., the need to reconsider O'Reilly's case had given him 'cause for much anxious thought' and in declining to follow the case he said that he had arrived at 'the only result which affords me lasting satisfaction'. He added that overseas developments had provided him with rich material for further reflection. Deane J. stated that he was influenced in departing from O'Reilly's case by the fact that the matter had now been heard by all the members of the Court and by the consideration that 'the general and substantive principle underlying legal professional privilege' is of fundamental importance to the protection of the rights of ordinary citizens. Dawson J.

156. Ibid. 414-5.
157. Ibid. 435.
strongly attacked the correctness of the majority decision in O'Reilly's case. He said that the majority had applied the dictum of Diplock L.J. in Parry-Jones v. Law Society\textsuperscript{158} which was 'but slender authority' for the proposition that the privilege is limited to judicial or quasi-judicial proceedings. He noted that the matter had not been argued at length in Parry-Jones, it was argued by the appellant in person and the decision of the Court of Appeal was not reserved.\textsuperscript{159} Dawson J. also disagreed with the view of Mason J. in O'Reilly's case that the privilege did not promote candour in legal adviser-client relationships.\textsuperscript{160} He said that the fear of disclosure would be a serious restriction upon the freedom with which advice could be given or sought.\textsuperscript{161}

A final point to be noted about the majority decision in Baker v. Campbell is that a number of New Zealand, Canadian and United states cases and even the European Court of Justice decision in A.M. & S. Europe Ltd. v. Commission of the European Communities\textsuperscript{162} were cited.\textsuperscript{163} These cases supported a broad view of the privilege and its underlying rationale.

(b) The minority decision

A number of common features emerge from the dissenting judgments of Gibbs C.J., Mason and Brennan JJ. Although their Honours said that they did not rest on the authority of O'Reilly's case but considered the question afresh, they nevertheless affirmed O'Reilly.\textsuperscript{164} The dissentients took a very narrow view of the underlying policy of the privilege. Gibbs C.J. said that 'greater emphasis has been laid on the fact that it conflicts with another important principle of public policy, namely that all relevant evidence should be adduced to the

\textsuperscript{158.} [1969] 1 Ch. 1, 9.

\textsuperscript{159.} (1983) 49 A.L.R. 385, 440.

\textsuperscript{160.} Ibid. 444.

\textsuperscript{161.} Ibid. 444-5.

\textsuperscript{162.} [1983] 1 All E.R. 705.

\textsuperscript{163.} See (1983) 49 A.L.R. 385, 408-9, 411-2 per Murphy J., 415, 417 per Wilson J., 435-6 per Deane J. and 440-2 per Dawson J.

\textsuperscript{164.} Ibid. 393 per Gibbs C.J., 404 per Mason J. and 426 per Brennan J.
He also suggested that the privilege exists for 'practical' reasons rather than to give effect to any basic principle. Mason J. referred to the strong judicial assertions about the value of the public interest promoted by the privilege, but said that it was not self-evident that this public interest is greater than the public interest in facilitating the availability of all relevant evidence. This echoes similar statements made by his Honour in O'Reilly's case.

Another reason suggested by the minority for not extending the privilege was that the privilege had only been applied in the context of judicial or quasi-judicial proceedings. Gibbs C.J. observed that 'the common law did not recognise legal professional privilege except in legal proceedings'. Brennan J. added that there was no warrant for expanding the scope of the privilege in Australia by relying on cases from other jurisdictions. An important consideration for the minority was that if the privilege could be claimed in administrative proceedings, no procedure existed for determining the validity of the claim. It was emphasized that a decision of a court would be required to provide a conclusive answer.

It may be noted that no member of the minority in Baker v. Campbell held, in absolute terms, that legal professional privilege should never apply outside judicial or quasi-judicial proceedings. Some important concessions were made. Gibbs C.J. and Mason J. left open the question whether the privilege would apply in the face of a search warrant relating to documents brought into existence for the purpose of pending or contemplated litigation. Brennan J., however,

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165. Ibid. 393.
166. Ibid. 394.
167. Ibid. 400.
170. Ibid. 426.
171. Ibid. 396-8 per Gibbs C.J., 401 per Mason J. and 425 per Brennan J.
172. Ibid. 396 per Gibbs C.J. and 407 per Mason J.
emphasized that the privilege protects two classes of documents which could not be seized under a search warrant. These are: 'mere expressions of legal opinion' and 'documents that are brought into existence by or on behalf of a party to litigation for the sole purpose of use in litigation, whether present or reasonably anticipated'.

The above examination of the approach of the High Court to the rationale of the privilege demonstrates that it is well accepted that the privilege serves an important public interest. However, the Court has not always analysed the scope of the privilege consistently with its rationale. Also, full effect has not been given to the rationale as a general and substantive principle. The need to do so was finally vindicated by the majority of the High Court in Baker v. Campbell. This is important because, as it is submitted in this thesis, the exclusionary effect of the privilege can be supported so long as the privilege is applied in accordance with its overriding rationale.

173. Ibid. 426-7. This followed from the view Brennan J. took of the words 'will afford evidence' in s.10(b) of the Crimes Act.
CHAPTER 3

COMMON LAW EXCEPTIONS

The doctrine of legal professional privilege is subject to important common law exceptions. As it was recently observed, the privilege 'is not absolute'. The exceptions recognize that the public interest in the disclosure of certain confidential information outweighs the policy which supports the privilege. For instance, the public interest in suppressing crime clearly overrides the privilege and any communications facilitating the commission of an unlawful act must be disclosed. However, the fact that there are exceptions to the privilege is not a reason for confining its scope on the ground that the public interest in the ascertainment of truth is paramount. As Dawson J. stated in Baker v. Campbell:

The exceptions do no more, however, than demonstrate that the basic principle is not absolute; they do not justify any general conclusion that the principle of confidentiality should yield to the principle that all relevant evidence should be disclosed.

It has been argued so far that the policy considerations against recognition of the privilege are answered so long as the privilege is applied within its defined scope and in accordance with its rationale. An important aim will therefore be to see the extent to which the exceptions can be reconciled with this rationale. The following exceptions will be discussed:

A. Communications in furtherance of crime or fraud.
B. Legal professional privilege and third parties.
C. Facts discovered in the course of the legal adviser-client relationship.
D. Information tending to establish a person's innocence.
E. Disclosure by a legal adviser in proceedings relating to his professional capacity.

There are some additional matters such as joint interests, joint retainers and public documents which are not examined. These are not exceptions to the privilege and can be rationalized on the basis that

2. Ibid. 444.
the necessary requirement of confidentiality is absent. Where a legal adviser is consulted by two or more parties who have a joint interest in the subject-matter of the communication (i.e. partners, a trustee and beneficiary, a company and its shareholders, a lessor and lessee), the communication is privileged from disclosure at the instance of a third party. If a dispute should arise between the interested parties, no privilege exists because the communication is not considered to be confidential as between them. Similarly, documents which are publici juris that is, in the public domain, cannot be the subject of privilege. This includes pleadings or copies of depositions filed in court, transcripts of proceedings in open court, or extracts of public documents. A different position may obtain where privileged documents are before a tribunal which is not open to the public.

It may be noted that an interesting exception has been suggested in the case of class actions. These actions are recognized in other jurisdictions. It has been contended that the privilege impedes absent class members from inquiring into the conduct of the litigation because the communications between the representative and his legal

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3. 8 Wigmore, op. cit. 603-6; Phipson on Evidence (13th ed. 1982) 297, 300-2. The communication might be privileged if it relates to matters outside the joint interest or was made to the legal adviser in confidence by one of the parties: Perry v. Smith (1842) 9 M. & W. 681; 152 E.R. 288; Woodhouse & Co. v. Woodhouse (1914) 30 T.L.R. 559.


5. Goldstone v. Williams, Deacon & Co. [1899] 1 Ch. 47; Milbank v. Milbank [1900] 1 Ch. 376.


7. Cf. Lyell v. Kennedy (No. 3) (1884) 27 Ch. D. 1 where it was held that extracts or copies of public documents obtained by a legal adviser as a result of his research and skill in preparing the client's case are privileged.


adviser are protected from disclosure. A limited exception to the privilege, it is argued, would improve the adequacy of representation in class actions. This exception has not been established. An analogy may be found in the case, noted above, of a legal adviser who is retained by parties having a joint interest but who later become adversaries.

A. COMMUNICATIONS IN FURTHERANCE OF CRIME OR FRAUD

It is well settled that confidential communications between a legal adviser and his client are not privileged from disclosure if they facilitate the commission of crime or fraud and a fortiori when both the legal adviser and the client are involved in unlawful conduct.

In an often-cited passage in Bullivant v. Attorney-General for Victoria, Lord Halsbury L.C. said that the privilege had been established as a principle of public policy 'for the perfect administration of justice' and added:

But to that, of course, this limitation has been put, and justly put, that no Court can be called upon to protect communications which are in themselves parts of a criminal or unlawful proceeding.

The leading case on the crime-fraud exception is R. v. Cox and Railton. A solicitor was consulted by judgment debtors as to whether a bill of sale could be executed to defeat the claim of a judgment creditor. The issue which arose before the Court for Crown Cases Reserved was whether the solicitor's evidence was admissible in a subsequent trial against the judgment debtors for conspiracy to defraud the judgment creditor. Stephen J. delivered the judgment of the Court and in a carefully reasoned decision said:

The reason on which the rule is said to rest cannot include the case of communications, criminal in themselves, or intended to further any criminal purpose, for the protection of such communications cannot possibly be otherwise than injurious to the interests of justice, and to those of the administration of justice.


13. (1884) 14 Q.B.D. 153.

Stephen J. noted that the Court was 'greatly pressed' with the argument that an exception in the case of criminal or fraudulent communications would diminish the value of the privilege, because the privilege must be violated in order to ascertain whether it exists.\textsuperscript{15} It was stated that it is up to the Court, having regard to the facts in each particular case, to determine whether a confidential communication is admissible. But Stephen J. added that 'every precaution should be taken against compelling unnecessary disclosures'.\textsuperscript{16}

R. v. Cox and Railton has been followed in Australia.\textsuperscript{17} In Jonas v. Ford,\textsuperscript{18} it was argued that a statement made by the defendant to a solicitor's clerk was admissible in evidence on the ground that the consultation was for the purpose of committing a fraud. The Full Court of the Supreme Court of Victoria, in a joint judgment, referred to the principle in R. v. Cox and Railton and stated that this principle should be 'fearlessly applied'.\textsuperscript{19} The Court enunciated the test to be applied in the following terms:

\begin{quote}
If upon the facts proved or proposed to be proved it appears probable to the Court that the accused person might have consulted his legal adviser for the purpose of being guided in the committing [sic] of a crime or a fraud, the privilege of these conversations does not exist.\textsuperscript{20}
\end{quote}

1. Elements of the crime-fraud exception

It has been recognized in the cases that it is not sufficient merely to allege crime or fraud; a prima facie case must be made out. In Bullivant v. Attorney-General for Victoria,\textsuperscript{21} Lord Halsbury L.C.

\begin{itemize}
\item[15.] Ibid. 175.
\item[16.] Ibid. 176.
\item[18.] (1885) 11 V.L.R. 240.
\item[19.] Ibid. 243.
\item[20.] Ibid. 242.
\item[21.] [1901] A.C. 196, 201.
\end{itemize}
observed that 'there must be some definite charge of something which displaces the privilege'. It was held that as there was no allegation of fraud or illegality on the evidence before the Court, the privilege continued to apply. What will be sufficient to exclude the privilege was therefore not discussed. This point was subsequently clarified by the House of Lords in O'Rourke v. Darbishire where Viscount Finlay said:

...there must be, in order to get rid of privilege, not merely an allegation that they [the communications] were made for the purpose of getting advice for the commission of a fraud, but there must be something to give colour to the charge. The statement must be made in clear and definite terms, and there must further be some prima facie evidence that it has some foundation in fact.

Lord Wrenbury stated that a prima facie case of fraud may be established by 'admissions on the pleadings of facts which go to show fraud — affidavits in some interlocutory proceedings which go to show fraud — possibly even without admission or affidavit allegations of facts which, if not disputed or met by other facts, would lead a reasonable person to see, at any rate, a strong probability that there was fraud'. In the recent case of Buttes Gas and Oil Co. v. Hammer (No. 3), the Court of Appeal suggested that very strong evidence of crime or fraud is required at the discovery stage to destroy the privilege.

The other requirement that needs to be established for the exception to apply, is that the communication must have been made in preparation for or in furtherance or as part of the crime or fraud. In Butler v. Board of Trade, a solicitor wrote a letter to the plaintiff.

23. Ibid. 604. This test was expressly adopted by Cardozo J. in Clark v. United States (1933) 289 U.S. 1, 15. It has been argued that the 'prima facie case' test eases the State's burden considerably because it is less difficult to establish that the client has committed a crime or fraud than to show that the consultations were for an unlawful purpose: Note, 'Criminal Syndicates and the Attorney-Client Privilege' (1954) 103 University of Pennsylvania Law Review 276, 277.
advising him that he might incur serious consequences if he did not take care. The letter was sought to be tendered in evidence in subsequent criminal proceedings against the plaintiff and it was argued on his behalf that the letter was protected by legal professional privilege. It was submitted by the Board of Trade that so long as the letter was relevant to a charge of crime or fraud, that was sufficient to destroy the privilege. Goff J. remarked that if relevance alone was the test, the privilege could never be claimed in cases of crime or fraud and in his view the submission was inconsistent with the decisions in R. v. Cox and Railton and O'Rourke v. Darbishire. He said:

...what has to be shown prima facie is not merely that there is a bona fide and reasonably tenable charge of crime or fraud but a prima facie case that the communications in question were made in preparation for or in furtherance or as part of it.

It was held that as the letter was nothing more than a warning to the plaintiff client, it could not be regarded as being in preparation for or in furtherance of any criminal design.

The requirement of a causal nexus between the communication and the crime or fraud was also considered by the High Court of Australia in Varawa v. Howard Smith & Co. Ltd. The plaintiff there sued the defendants for malicious arrest and abuse of the process of the Court. The plaintiff interrogated the defendants as to whether they had obtained advice from their solicitors about the plaintiff's liability with respect to the alleged sale of a steamship by the defendants to the plaintiff. The defendants objected to answer the interrogatory on the ground of legal professional privilege. The plaintiff contended that the privilege did not apply because the nature of the advice given to the defendants was that they did not have a good cause of

27. Ibid. 688-9.
28. (1884) 14 Q.B.D. 153.
31. (1910) 10 C.L.R. 382.
action. Griffith C.J. said that the communication must be 'part of' a
criminal or unlawful proceeding. O'Connor J. stated that the test
was whether the communication was 'a step in... or preparatory to or
in aid of the commission of a crime'. Isaacs J. suggested that
the communication must be 'in furtherance of' an illegal object.
It was unanimously held that the communication between the defendants
and their solicitor did not satisfy any of these requirements.

2. **Scope of the crime-fraud exception**

The crime-fraud exception is not limited to criminal cases but also
applies in civil cases. Fraud includes not only the tort of
deceit but all types of fraud and dishonesty. The exception has
been applied in the case of 'commercial dishonesty', in the case
of an improper exercise of a power of sale by a mortgagee in disregard
of the mortgagor's interests and also where there is a conspiracy
by senior employees in using their employers' time and money to
establish a competing business which they proposed to set up on
leaving their employment.

Courts are reluctant, however, to extend the exception to unlawful
acts which give rise to a civil claim but where there is no element of
dishonesty. This is illustrated by the case of **Crescent Farm (Sidcup) Sports Ltd. v. Sterling Offices Ltd.** The plaintiffs commenced an

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35. The various statements of the nexus requirement in Varawa were approved by Gibbs J. in *R. v. Bell; Ex parte Lees* (1980) 146 C.L.R. 141, 145.
37. *Ibid.* 755 per Kekewich J. A charge was there given by an insolvent company in favour of its agents in order to defeat the interest of the debenture holders.
40. [1972] 1 Ch. 553.
action against the defendants for breach of contract, the tort of inducing breach of contract and conspiracy to induce such a breach. Production was sought of a number of documents which the defendants claimed were subject to legal professional privilege. The plaintiffs argued that the crime-fraud exception applied to destroy the privilege and submitted that the exception extends to any act or scheme which is unlawful in the sense of giving rise to a civil claim. Goff J. reviewed the authorities dealing with this exception to the privilege and said:

I agree that fraud in this connection is not limited to the tort of deceit and includes all forms of fraud and dishonesty such as fraudulent breach of trust, fraudulent conspiracy, trickery and sham contrivances, but I cannot feel that the tort of inducing a breach of contract or the narrow form of conspiracy pleaded in this case come within that ambit.

It should be noted that Goff J. explained his reluctance to extend the scope of the crime-fraud exception in terms of the importance of the rationale of the privilege. He remarked:

I think the wide submission of the plaintiffs would endanger the whole basis of legal professional privilege. It is clear that parties must be at liberty to take advice as to the ambit of their contractual obligations and liabilities in tort and what liability they will incur whether in contract or tort by a proposed course of action without thereby in every case losing professional privilege.

This proposition is indirectly supported by the High Court decision in Varawa v. Howard Smith & Co. Ltd., where it was held that there is nothing unlawful in a legal adviser telling his client that he does not have a good cause of action. Wigmore, however, argues that the doctrine of legal professional privilege should be construed strictly and the crime-fraud exception extended to communications in furtherance of a deliberate plan to deprive another of his rights, even by a tortious act not involving moral turpitude. McCormick

41. Ibid. 564.
42. Ibid. 565.
43. Ibid.
44. (1910) 10 C.L.R. 382, 385 per Griffith C.J.
45. 8 Wigmore, op. cit. 573 and 577.
also favours the admissibility of confidential communications of proposed tortious conduct.\footnote{McCormick on Evidence (2nd ed. 1972) 201. The Law Reform Commission of Canada recommended a 'crime or tort' exception to the privilege: see Report on Evidence (1975) cl. 42(4)(a) draft Evidence Code.}

A recent Australian case which considered the scope of the crime-fraud exception is \textit{R. v. Bell; Ex parte Lees}.\footnote{(1980) 146 C.L.R. 141.} The Family Court of Australia initially granted custody of a child to the wife. The husband then successfully applied for an interim custody order. The wife failed to deliver the child and on further investigation, both the wife and the child could not be found. A solicitor was instructed by the wife to take steps to protect her interest in the matrimonial home. She told him how he might contact her and expressly requested that this method be kept confidential. The husband's solicitors telephoned the wife's solicitor with regard to her whereabouts but he refused to disclose this information on the ground that it was privileged. The husband then obtained an order from the Family Court requiring the solicitor to reveal all information which would assist in ascertaining the whereabouts of the wife and child. An application was subsequently made by the solicitor to the High Court for a writ of prohibition directed to the Judge who granted the order. Gibbs J., as the Chief Justice then was, referred to the crime-fraud exception to the privilege but doubted whether it applied in the present case. He said that the wife did not communicate her address to the solicitor for any illegal purpose but for the 'entirely proper purpose' of protecting her interest in the matrimonial home.\footnote{Ibid. 145.} However, Gibbs J. stated:

\begin{quote}
...there is another exception, which may possibly be regarded as an extension of the rule which excludes privilege in the case of crime or fraud, but which I incline to think rests upon an independent foundation. It has been held that a solicitor is obliged to give to the court any information (including his client's address) which will enable the court to discover the whereabouts of a ward of court whose residence is being concealed from the court, and that such information may not be the subject of a claim for professional privilege.\footnote{Ibid.} (My emphasis)
\end{quote}
The cases of Burton v. Earl of Darnley\textsuperscript{50} and Ramsbotham v. Senior\textsuperscript{51} were cited as long-standing authorities in support of this principle.\textsuperscript{52} Gibbs J. held that the principle applied not only to wards of court but also to a child in relation to whom a custody order had been made under the \textit{Family Law Act 1975} (Cth.). He said that in both cases the court must regard the welfare of the child as the paramount consideration.\textsuperscript{53}

The other members of the Court, Stephen, Murphy and Wilson JJ., Aickin J. agreed with Wilson J., did not regard that the wardship cases of Burton v. Earl of Darnley\textsuperscript{54} and Ramsbotham v. Senior\textsuperscript{55} as an extension of the crime-fraud exception. Rather, their Honours suggested that these cases were decided on general principles applicable to legal professional privilege.\textsuperscript{56} With respect to the facts in the present case, it was unanimously held that legal professional privilege did not apply. Different reasons were given for this conclusion. Stephen J. said that the legal assistance sought by the wife was not in itself in furtherance of an illegal object.\textsuperscript{57} However, he considered that privilege for an address could not be claimed if it would 'frustrate the processes of law', that is, the custody order of the Family Court.\textsuperscript{58} Murphy J. stated that the scope of the privilege has always been 'somewhat flexible'\textsuperscript{59} and in circumstances such as those in this case, the

\textsuperscript{50} (1869) \textit{L.R. 8 Eq. 576n.}
\textsuperscript{51} (1869) \textit{L.R. 8 Eq. 575.}
\textsuperscript{52} Cf. Heath v. Crealock (1873) \textit{L.R. 15 Eq. 257, 259 per} Bacon V.C.
\textsuperscript{53} (1980) 146 \textit{C.L.R. 141, 146.}
\textsuperscript{54} (1869) \textit{L.R. 8 Eq. 576n.}
\textsuperscript{55} (1869) \textit{L.R. 8 Eq. 575.}
\textsuperscript{56} (1980) 146 \textit{C.L.R. 141, 154-5 per} Stephen J., 159 \textit{per} Murphy J. and 163 \textit{per} Wilson J.
\textsuperscript{57} \textit{Ibid. 153.}
\textsuperscript{58} \textit{Ibid. 156.}
\textsuperscript{59} This is arguable because the privilege is closely confined. As Dawson J. stated in Baker v. Campbell (1983) 49 \textit{A.L.R. 385, 439}: 'The compass within which the doctrine of legal professional privilege operates is, therefore, narrow having regard to the principle which it protects'.

child's welfare prevailed over the privilege. Wilson J. said that the wife's communication of her address was not privileged because it enabled the continuance of a contempt of court and was therefore tainted with 'illegality'.

R. v. Bell; Ex parte Lees supports the proposition that legal professional privilege does not apply to confidential information relating to the whereabouts of a child who is the subject of a custody order. This can be viewed as falling within the general policy of the crime-fraud exception rather than amounting to an extension of the exception. In the words of Stephen J. in R. v. Cox and Railton, to accord protection to such information can only be 'injurious to the interests of justice, and to those of the administration of justice'.

A final point to be noted about the ambit of the crime-fraud exception is that the exception applies even though the legal adviser is ignorant of the client's criminal or fraudulent intentions. In Conlon v. Lensworth Interstate (Vic.) Pty. Ltd., Little J. explicitly rejected the submission that the legal adviser must be implicated in the fraud for the privilege to be destroyed. Wilson J. explained in R. v. Bell; Ex parte Lees that it is irrelevant that the legal adviser has no knowledge of the illegal object because the privilege belongs to the client, and it is the knowledge and purpose of the client which determines whether or not the privilege will apply. It is clear, of course, that if both the client and his legal adviser are involved in unlawful conduct, confidential communications

60. (1980) 146 C.L.R. 141, 159.
61. Ibid. 162.
64. [1970] V.R. 293, 295.
65. (1980) 146 C.L.R. 141, 162.
passing between them which relate to that conduct are not privileged from disclosure. 66

3. Past crime or fraud

The Court for Crown Cases Reserved pointed out in R. v. Cox and Railton 67 that what must be determined is whether the accused consulted his legal adviser 'not after the commission of the crime for the legitimate purpose of being defended, but before the commission of the crime for the purpose of being guided or helped in committing it'. Wigmore 68 also argues that the exception only applies in the case of future wrongdoing, not past wrongdoing. This distinction has been accepted in the cases. 69 But it should not be regarded as anything more than a general rule. The Court in R. v. Cox and Railton qualified the above-cited statement by adding:

We are far from saying that the question whether the advice was taken before or after the offence will always be decisive as to the admissibility of such evidence. 70

The issue concerning the relevant time at which advice is sought was raised in two cases. In Plumb v. Monck and Bohm, 71 the defendants were charged with conspiring to defeat s.47 of the Motor Vehicles Ordinance 1949-1973 (N.T.) by obtaining a back-dated third party insurance policy. Some time later the first-named defendant instructed a solicitor to appear on his behalf. At the hearing, the informant submitted that the solicitor should disclose the instructions he had received from the defendant. The solicitor argued that the instructions were protected by legal professional privilege.

66. Quaere whether the legal adviser may nevertheless refuse to disclose the information on the ground that to do so would tend to incriminate him.

67. (1884) 14 Q.B.D. 153, 175.

68. 8 Wigmore, op. cit. 573.


70. (1884) 14 Q.B.D. 153, 175-6.

Foster J. held that the privilege did not apply. He said:

The crime alleged is conspiracy which in one sense, of course, is complete when the agreement is made, but it is a continuing crime and the working-out of the conspiracy is all part of it or if not part of it is compelling evidence of the agreement.72

In Re Golightly,73 it was contended on behalf of the defendant that communications made to a solicitor related to alleged crimes committed some time ago and, in substance, the communications were made for the purpose of preparing possible defences. Mahon J. stated that it was not necessary to decide the point as the 'general tenor' of the communications demonstrated an attempt to obstruct the course of justice and therefore were not privileged.74 These cases illustrate that the fact that a legal adviser is retained after the commission of an alleged crime or fraud is not conclusive against the exception applying.

4. Communications in the course of a taxation consultation

As a general rule, where legal advice relates to 'loopholes' in the law or identifies means of circumventing the provisions of an Act, the privilege continues to apply. In the area of taxation, this issue is of both moral and legal importance.75 There is no reason why privilege should not attach to confidential communications between a legal adviser and a client in the course of a taxation consultation. In Baker v. Campbell,76 Dawson J. remarked:

The complexity of revenue laws is such that the availability of legal advice in relation to them is as necessary and desirable as it is in any other area of the law.

72. Ibid. 410-1.
74. Ibid. 305.
It has therefore been accepted that where legal advice given to a client has the effect of minimizing his liability to pay tax and does not amount to an unlawful evasion, that advice does not cease to be privileged.\(^77\) In *Bullivant v. Attorney-General for Victoria*,\(^78\) the House of Lords held that the word 'evade' was ambiguous and there was nothing illegal about a solicitor advising a client how to arrange his affairs so as not to come within the scope of the relevant taxation legislation. Some additional matters may be noted. A barrister is under a duty to accept a brief in the courts in which he professes to practise at a proper professional fee.\(^79\) A solicitor, however, may decline to accept instructions in a matter which his conscience tells him is dishonourable.\(^80\) Where the legal advice given is in the nature of entrepreneurial activity, it is not protected by the privilege.\(^81\) Any other limitation to the scope of the privilege should only be based on the strict requirements of the crime-fraud exception and not on the fact that the advice relates to a taxation matter.

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81. In *Leary v. Federal Commissioner of Taxation* (1980) 32 A.L.R. 221, 240 Brennan J. in the Federal Court said: 'Entrepreneurial activity does not attract the same privilege nor the same protection as professional activity; and the promotion of a scheme in which particular clients may be advised to participate is pregnant with the possibility of conflict of entrepreneurial interest with professional duty'.
5. The crime-fraud exception and rationale of the privilege

The crime-fraud exception can be reconciled with the policy of the privilege on a number of grounds. It is implicit in the justification for the privilege based on the freedom of communication between legal advisers and clients that the purpose for which the advice is sought is lawful. It is also said that by encouraging unrestrained recourse to legal advisers, the administration of justice is enhanced. This policy is undermined where resort to a legal adviser is motivated by the client's criminal or fraudulent designs. In R. v. Bell; Ex parte Lees, Stephen J. referred to the conventional rationale of the privilege and succinctly stated that 'this being its basis and purpose, it will also dictate its limits'. Wilson J. said in that case:

The privilege is grounded in public policy. It is in the public interest that confidential professional communications between solicitor and client should be uninhibited by any fear of disclosure. But it would be odd if the privilege extended to protect communications which were directed against the public interest. Wigmore states that one of the fundamental conditions for the establishment of a privilege is that 'the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation'. This recognizes that the rationale which supports the privilege is not absolute and must yield to a higher public interest. The prevention and suppression of crime constitutes such an overriding interest. As Gibbs J., as he then was, said in R. v. Bell; Ex parte Lees:

The privilege, which arises only because the public interest requires it, does not exist when it is seen that it would be contrary to a higher public interest to give effect to it.

82. (1980) 146 C.L.R. 141, 152.
83. Ibid. 161.
84. 8 Wigmore, op. cit. 527.
85. (1980) 146 C.L.R. 141, 147. Also 159 per Murphy J.
An interesting suggestion in reconciling the crime-fraud exception with the rationale of the privilege, is that it is essential for the operation of the privilege that there should be complete public confidence in the legal profession. It is therefore claimed that the exception enables a legal adviser to vindicate himself in the face of accusations that he is involved in his client's crime or fraud and, accordingly, the legal profession is not brought into disrepute. This may sound self-serving for the legal profession. In *R. v. Cox and Railton*, Stephen J. referred to the unreported decision in *Tichborne v. Lushington* where Bovill C.J. said:

I believe the law is, and properly is, that if a party consults an attorney, and obtains advice for what afterwards turns out to be the commission of a crime or a fraud, that party so consulting the attorney has no privilege whatever to close the lips of the attorney from stating the truth. Indeed, if any such privilege should be contended for, or existed, it would work most grievous hardship on an attorney, who, after he had been consulted upon what subsequently appeared to be a manifest crime or fraud, would have his lips closed, and might place him in a very serious position of being suspected to be a party to the fraud, and without his having an opportunity of exculpating himself...

This explanation is further supported by Wigmore who argues that the privilege should be construed strictly, 'especially' where to apply the privilege 'would tend to bring discredit upon the legal profession and to deprive it of that public confidence which alone justifies the privilege'. The crime-fraud exception, far from conflicting with the policy of the privilege, actually serves to reinforce it.

B. LEGAL PROFESSIONAL PRIVILEGE AND THIRD PARTIES

A third party who overhears a confidential communication between a legal adviser and his client or obtains a privileged document or a copy of it, is not precluded from giving evidence of the contents of the communication or the document on the ground of legal professional privilege. This is commonly called the third party exception or

86. (1884) 14 Q.B.D. 153, 172.
87. 8 Wigmore, *op. cit.* 578.
the rule admitting secondary evidence of privileged information. It has been stated that no valid distinction can be drawn between oral and documentary communications intercepted by a third party.\textsuperscript{89} It is also immaterial whether the communications are obtained intentionally, even by illegal means, or inadvertently.\textsuperscript{90} The third party exception applies in England,\textsuperscript{91} Australia\textsuperscript{92} and the United States.\textsuperscript{93}

It is necessary, at the outset, to put to one side those cases where the privilege does not apply for other reasons. For instance, where the presence of a third party, to the client's knowledge, indicates that the communication is not intended to be confidential;\textsuperscript{94} where documents have already been made available for inspection to the other party before privilege is claimed;\textsuperscript{95} or where the communications are in furtherance of crime or fraud.\textsuperscript{96} The third party exception will be examined from the point of view of authority and then as a matter of principle. Recent developments to the exception will also be discussed. It is submitted that the third party exception is not founded on sound authority and that in principle it conflicts with the rationale of the privilege.

\textsuperscript{89} R. v. Uljee [1982] 1 N.Z.L.R. 561, 563 per Cooke J. and 573 per McMullin J.

\textsuperscript{90} Calcraft v. Guest [1898] 1 Q.B. 759, 764 per Lindley M.R.; Lord Ashburton v. Pape [1913] 2 Ch. 469, 473 per Cozens-Hardy M.R. and 474 per Kennedy L.J.


\textsuperscript{92} Gobbo J.A., Byrne D. and Heydon J.D., Cross on Evidence (2nd Australian ed. 1979) 276.

\textsuperscript{93} 8 Wigmore, op. cit. 633-4.


\textsuperscript{95} Montgomery v. Macpherson (1895) 16 L.R. (N.S.W.) (Eq.) 81; Warner v. The Women's Hospital [1954] V.L.R. 410. These cases can be explained as involving a waiver of the privilege.

\textsuperscript{96} In Clark v. State (1953) 261 S.W. 2d 339, the evidence of a telephone operator who overheard admissions made by the defendant to his legal adviser was admitted on the basis of the crime-fraud exception. See Pullen J.H., 'Attorney's Illegal Advice Deprives Client of the Privilege' (1954) 32 Texas Law Review 615.
1. Authorities for the third party exception

Calcraft v. Guest\(^97\) is regarded as the leading authority in this area. In that case, one of the questions for the Court of Appeal was whether secondary evidence could be given of certain documents which had accidentally fallen into the appellant's hands but in respect of which the respondent claimed legal professional privilege. Lindley M.R.,\(^98\) with whom Rigby and Vaughan Williams L.JJ. concurred, said that the question was covered by the authority of Lloyd v. Mostyn.\(^99\)

That case deserves careful examination.

Lloyd v. Mostyn concerned an action on a bond given by the defendant and his father to the plaintiff's intestate. The bond had been deposited with a solicitor. A question arose at the trial in relation to the production of the bond and objection was taken on this on the ground of privilege. The objection was allowed and it appears that it was merely accepted that the bond was subject to legal professional privilege. The plaintiff then tendered in evidence a copy of the bond. This was rejected on the basis that a notice to produce the original was necessary. The plaintiff proved that a notice to produce had been served but only at a late stage in the proceedings. It was held that as the notice to produce was sufficient, the copy of the bond was admissible. Leave was given to the defendant to move to enter a nonsuit if the copy of the bond should not have been received.

In the course of argument, counsel for the defendant referred to Phillipps on Evidence\(^100\) where the unreported case of Fisher v. Heming is cited for the proposition that 'if a deed deposited confidentially with an attorney has been obtained out of his hands, for the purpose of being produced in evidence by another witness, it cannot be received'. In reply to this submission Parke B. said:

I have always doubted the correctness of that ruling. Where an attorney intrusted confidentially with a document communicates the contents of it, or suffers another to take a copy, surely the secondary evidence so

\(^{97}\) [1898] 1 Q.B. 759.  
^{98}\) Ibid. 762-3.  
^{100}\) 1 Phillipps on Evidence (8th ed. 1838) 182.
obtained may be produced. Suppose the instrument were even stolen, and a correct copy taken, would it not be reasonable to admit it?101

Apart from this statement in argument, there is surprisingly no discussion in the judgments given as to the admissibility of secondary evidence of a privileged document. Furthermore, Lord Arbinger C.B. and Parke B., with whom Gurney B. and Rolfe B. concurred, said that the 'only' question in the case was whether the notice to produce was sufficient.102 It is also arguable whether the bond in the case was a privileged document. It had not come into existence for the purpose of giving or receiving legal advice or for use in litigation, but was merely left in the custody of the solicitor. The proposition for which Lloyd v. Mostyn is said to be an authority is therefore not part of the ratio decidendi of the case. It is dubiously founded on what Parke B. said arguendo.

In Calcraft v. Guest,103 Lindley M.R. cited the above statement of Parke B. in Lloyd v. Mostyn and said that the other members of the Court 'all concurred in that'.104 The Master of the Rolls therefore concluded that Lloyd v. Mostyn 'is a distinct authority that secondary evidence in a case of this kind may be received'.105 It is notable that Lindley M.R. did not consider whether the document in Lloyd v. Mostyn was properly protected by legal professional privilege. This was merely accepted.106 There was also no discussion in Calcraft v. Guest, as a matter of principle, of whether the third party exception could be reconciled with the rationale of the privilege.107 In

102. Ibid. 483; 561.
103. [1898] 1 Q.B. 759.
104. Ibid. 764. This is incorrect as their concurrence only related to the question of the sufficiency of the notice to produce.
105. Ibid.
106. See Ibid. 763.
107. This issue was only alluded to by Cripps Q.C. who appeared for the unsuccessful party and contended: 'If it is open to any party who has wrongfully come into possession of a privileged document to give secondary evidence of its contents, the privilege, though still existing, may be defeated in every case': Ibid. 761.
light of the above, the correctness of Calcraft v. Guest can be seriously doubted. This was ultimately recognized by the New Zealand Court of Appeal in R. v. Uljee where McMullin J. stated:

As Calcraft v. Guest was founded on Lloyd v. Mostyn, a case which concerned secondary evidence of a non-privileged document, it should not be regarded as authoritative on the proposition for which it appears to speak.

Despite this background, Calcraft v. Guest has been referred to and applied in numerous cases. In Butler v. Board of Trade, Goff J. accepted the correctness of Calcraft v. Guest and held that a copy of a letter written by a solicitor to the accused and which had come into the possession of the Crown was admissible in a public prosecution. Butler's case was followed by the Court of Appeal (Criminal Division) in R. v. Tomkins. In that case, prosecuting counsel was permitted to cross-examine the defendant on the contents of a note which had been found in the court. The note was prima facie privileged because it had been written by the defendant to his counsel. The note was not put in evidence but Ormrod L.J., who delivered the judgment of the Court, stated that once the note was in the possession of the prosecution it was admissible and cited Butler v. Board of Trade. It is notable that Ormrod L.J. did not qualify the last statement with reference to how the privileged document was obtained. There was no impropriety on the part of the prosecution in that case. But even if there had been, it was accepted

109. Ibid. 574. Also 563 per Cooke J. and 570 per Richardson J.
111. Ibid. 690. Goff J. expressly left open the question whether the same result would obtain in civil litigation. A strict application of Calcraft v. Guest [1898] 1 Q.B. 759 would require an affirmative answer.
113. [1971] 1 Ch. 680.
in Calcraft v. Guest\textsuperscript{114} that a stolen document would still be admissible.\textsuperscript{115}

Some doubts about the authority of Calcraft v. Guest and the difficulties presented by the third party exception to the privilege emerge from cases where Calcraft v. Guest was sought to be distinguished. In the case of Lord Ashburton v. Pape,\textsuperscript{116} the defendant obtained by trick privileged letters from Lord Ashburton's solicitors. The defendant proposed to use copies of the letters in pending bankruptcy proceedings as secondary evidence of their contents. At first instance, Neville J. granted an injunction restraining the defendant from using the copies except for the purpose of the bankruptcy proceedings. Lord Ashburton successfully appealed against the exception and the Court of Appeal made the injunction absolute. Cozens-Hardy M.R., who had appeared as leading counsel for the successful party in Calcraft v. Guest,\textsuperscript{117} summarized the effect of that decision and distinguished it as follows:

The rule of evidence as explained in Calcraft v. Guest merely amounts to this, that if a litigant wants to prove a particular document which by reason of privilege or some circumstance he cannot furnish by the production of the original, he may produce a copy as secondary evidence although that copy has been obtained by improper means, and even, it may be, by criminal means. The Court in such an action is not really trying the circumstances under which the document was produced... But that does not seem to me to have any bearing upon a case where the whole subject-matter of the action is the right to retain the original or copies of certain documents which are privileged.\textsuperscript{118}

\textsuperscript{114} [1898] 1 Q.B. 759, 764.

\textsuperscript{115} In criminal cases, this is subject to the overriding discretion of the trial judge to exclude improperly obtained evidence: Kuruma v. R. [1955] A.C. 197. Cf. Bunning v. Cross (1978) 141 C.L.R. 54 and Clelland v. R. (1983) 57 A.L.J.R. 15 where the High Court of Australia held that the discretion is founded on broad questions of public policy and not only considerations of fairness to the accused.

\textsuperscript{116} [1913] 2 Ch. 469.

\textsuperscript{117} [1898] 1 Q.B. 759.

\textsuperscript{118} [1913] 2 Ch. 469, 473.
Kennedy L.J. stated that, although an injunction may be granted in separate proceedings to restrain the use of copies of privileged documents, if the existence of secondary evidence is revealed for the first time at the trial the court is bound to apply Calcraft v. Guest and admit that evidence.\(^{119}\)

It has been suggested that Calcraft v. Guest and Lord Ashburton v. Pape are fundamentally in conflict, whether or not they can be reconciled on a technical level.\(^{120}\) Heydon argues that a client should be able to seek an injunction during the principal proceedings and the success of the case should not depend on the date at which the wrongdoing is discovered or on the opportunity to institute independent proceedings for an injunction.\(^{121}\) The merits of a rule of evidence can only be of dubious purport if its operation depends on fortuitous events. Lord Ashburton v. Pape was in turn distinguished by Goff J. in Butler v. Board of Trade\(^{122}\) on the basis that the defendant in Butler was a Crown department which intended to use the copy letter in a public prosecution.

Another case in which the third party exception was not applied is I.T.C. Film Distributors Ltd. v. Video Exchange Ltd.\(^{123}\) Warner J. there declined to follow Calcraft v. Guest\(^{124}\) where a director of the defendant company had obtained privileged documents belonging to the plaintiff by means of a trick perpetrated in the courtroom. It was held that, balancing the public interest that the truth should be ascertained against the public interest that litigants should be able to bring their documents into court without fear that they may be filched by their opponents and used in evidence, the interests of the proper administration of justice required that the documents and any

\(^{119}\) Ibid. 474.

\(^{120}\) Heydon, op. cit. 604. Cf. Phipson on Evidence (13th ed. 1982) 293 where it is claimed that the cases are reconcilable by reference to the type of proceedings. See Matthews P., 'Breach of Confidence and Legal Privilege' (1981) 1 Legal Studies 77, 92.

\(^{121}\) Ibid. 605. Sir Rupert Cross endeavours to answer this criticism, though not convincingly, by contending that trials would be unduly protracted if there is a collateral inquiry into the circumstances in which a privileged document was obtained: Cross on Evidence (5th ed. 1979) 293.

\(^{122}\) [1971] 1 Ch. 680, 690.

\(^{123}\) [1982] 3 W.L.R. 125.

\(^{124}\) [1960] 1 All E. 775.
copies made should be excluded.\textsuperscript{125} I.T.C. Film Distributors Ltd. has also been explained on the ground that documents obtained by stealth or trickery within the precincts of the court constitutes a contempt of court.\textsuperscript{126} It may be noted that Warner J. distinguished \textit{R. v. Tomkins}.\textsuperscript{127} He said that the document in that case had come into the possession of the prosecution 'fortuitously' and 'the relevance of possible impropriety was not discussed'.\textsuperscript{128} It is submitted that this is erroneous. \textit{R. v. Tomkins} was not qualified by the Court of Appeal on any such basis.\textsuperscript{129} Moreover, the third party exception applies irrespective of how a privileged document was obtained. The decision in I.T.C. Film Distributors Ltd. can therefore be regarded as an attempt to reverse the rule in \textit{Calcraft v. Guest} at least in so far as privileged information is seized by improper means.\textsuperscript{130}

The above analysis of the cases which distinguished \textit{Calcraft v. Guest} demonstrates that the courts have had to make subtle and technical distinctions in order to overcome what is assumed to be \textit{Calcraft}'s binding authority. This compounds the problems created by the decision. It appears that in England at least, \textit{Calcraft v. Guest} still continues to apply.\textsuperscript{131}

In Australia, \textit{Calcraft v. Guest} has been accepted without any critical examination. In \textit{Bell v. David Jones Ltd.}\textsuperscript{132} and \textit{Warner v. The Women's Hospital},\textsuperscript{133} the rule in \textit{Calcraft v. Guest} was referred to

\begin{itemize}
\item \textsuperscript{125} [1982] 3 W.L.R. 125, 132. Some of the documents had already been used in evidence and it was held that these documents could not be excluded.
\item \textsuperscript{126} See \textit{Baker v. Campbell} (1983) 49 A.L.R. 385, 394 \textit{per} Gibbs C.J.
\item \textsuperscript{127} (1977) 67 Cr. App. R. 181.
\item \textsuperscript{128} [1982] 3 W.L.R. 125, 133.
\item \textsuperscript{129} Supra 59.
\item \textsuperscript{130} See Allan T.R.S., 'Filching Your Opponent's Papers in Court: When Privilege Cannot be Defeated by a Trick' (1983) 133 \textit{New Law Journal} 665, 667.
\item \textsuperscript{132} (1949) 49 S.R. (N.S.W.) 223, 227-8 \textit{per} Jordan C.J.
\item \textsuperscript{133} [1954] V.L.R. 410, 421 \textit{per} Sholl J.
\end{itemize}
with approval, but this was only in obiter. There does not appear to be any reported Australian decision which has explicitly applied Calcraft v. Guest.\textsuperscript{134} The Victorian Supreme Court case of R. v. Braham and Mason\textsuperscript{135} may even qualify the doctrine in some circumstances. The accused telephoned his solicitor in the presence of a police officer and in the course of the telephone conversation admitted his involvement in the alleged offence. During the trial, counsel for a co-accused sought to cross-examine the police officer about the conversation he had overheard. It was argued on behalf of the accused that the conversation was privileged notwithstanding that it was made in the presence of a third party. Lush J. held that legal professional privilege did not apply because the presence of the third party, the police officer, indicated that the communication was not intended to be confidential.\textsuperscript{136} His Honour added, however, that if the presence of the third party was caused by 'some necessity or some circumstance' beyond the control of the client\textsuperscript{137} which did not affect the confidential nature of the communication, the privilege might apply.\textsuperscript{138} It has been suggested that the approach of Lush J. could provide a solution to the difficulties raised by modern eavesdropping techniques.\textsuperscript{139}

It is submitted that if the dictum of Lush J. in R. v. Braham and Mason is applied to the interception of confidential communications by third parties which the client or the legal adviser cannot prevent, the decision in Calcraft v. Guest\textsuperscript{140} would need to be reconsidered. In any event, there does not appear to be any authoritative constraint in Australia in overruling Calcraft v. Guest.


\textsuperscript{135} [1976] V.R. 547.

\textsuperscript{136} Lush J. did not accept the 'categorical statement' of Innes J. in Re Griffin (1887) 8 L.R. (N.S.W.) 132, 134 that the presence of a third party will always destroy the privilege: ibid. 548.

\textsuperscript{137} Lush J. spoke of the client ceasing to be a 'free agent': ibid.

\textsuperscript{138} Ibid. 549. See also the unreported decision of Lush J. in R. v. Gray note [1976] A.C.L.D. 459. The writer has not been able to locate this case.

\textsuperscript{139} Gobbo, op. cit. 276.

\textsuperscript{140} [1898] 1 Q.B. 759.
The foundation of the third party exception, it has been shown, is questionable. Its status in Australia is based only on obiter dictum. Even the persuasive weight of the English decisions is mitigated by the highly technical way in which Calcraft v. Guest is explained in applying or distinguishing that case. The New Zealand Court of Appeal decision in R. v. Uljee,141 which discredited Calcraft v. Guest and the obiter statements in Baker v. Campbell,142 are the most recent contribution to the third party exception and are discussed below.

2. The third party exception, the rationale of the privilege and other policy considerations

A striking feature of the cases which have considered the third party exception is that they are devoid of any discussion of the exception in relation to the rationale underlying legal professional privilege. It has been claimed that the reason for the exception is that it enables more relevant evidence to be put before the court and therefore advances the public interest in the ascertainment of the truth.143 However, this justification can easily be frustrated by obtaining an injunction in separate proceedings.144

This explanation also recalls the competition between the policy served by the privilege and the public interest in the availability of all relevant evidence. It was contended above that the former should clearly prevail as the privilege is a fundamental principle. Another reason given for the third party exception is that a court is not concerned about the methods by which the parties have obtained their evidence.145 But surely a court cannot countenance conduct which amounts to a contempt of court.146 There are some other important policy considerations against the third party exception.

144. Lord Ashburton v. Pape [1913] 2 Ch. 469.
The exception, it is submitted, is inconsistent with the rationale of the privilege. Legal professional privilege is concerned with the freedom of communication between legal advisers and clients uninhibited by fear of disclosure by the legal adviser, and not with the conduct of third parties. But the possibility of disclosure by a third party who has intercepted a privileged communication, ought not realistically to be ignored. In *R. v. Bell; Ex parte Lees*, Stephen J. said that 'if the likelihood of disclosure... would operate as a real deterrent from his [the client] seeking professional advice, this would suggest that the privilege should apply'. In the Canadian case of *Re Director of Investigation and Research and Shell Canada Ltd.* Jackett C.J. referred to the traditional rationale of the privilege and said that the protection afforded by the privilege was dependent upon the client having:

... the aid and guidance of those skilled in the law untrammelled by any apprehension that the full and frank disclosure by him of all his facts and thoughts to his legal advisor might somehow become available to third persons so as to be used against him.

It is clear that the privilege and the right to waive it vest solely in the client. This essential characteristic is undermined if the privilege can be destroyed at the instance of a third party who acts without the client's knowledge. It is also well established, if authority is at all needed, that where privilege is claimed in respect of a document, a person is entitled to refuse to produce it and cannot be obliged to answer any questions about its contents. As Alderson B. remarked in *Davies v. Waters*:

...it would be perfectly illusory for the law to say that a party is justified in not producing a deed, but that he is compellable to give parol evidence of its contents; that would give him, or rather his client through him, merely an illusory protection, if he happens to know the contents of the deed...

The third party exception therefore renders the protection given by the privilege 'illusory' and impedes full and frank disclosure in legal adviser-client communications.

147. *Pearse v. Pearse* (1846) 1 De G. & Sm. 12, 29; 63 E.R. 950, 957 per Knight Bruce V.C.
The exception is also difficult to reconcile with two other principles. Where a client communicates confidentially with a person whom he mistakenly believes to be a legal adviser, that communication is nevertheless protected by the privilege. The leading case is Feuerheerd v. London General Omnibus Co. Ltd.\(^{151}\) where it was held that a statement made by the plaintiff to the defendant's claims inspector under the misapprehension that she was communicating with her solicitor's agent was privileged. It is also a well settled principle that if the original document is protected on the ground that disclosure would be contrary to the public interest, what is inaccurately called 'Crown privilege', secondary evidence of its contents will not be admitted.\(^{152}\) Higinbotham C.J. said in the early case of Foran v. Derrick:\(^{153}\)

...when an original document cannot be used in evidence at all on the ground that its production would be against public policy, in such a case secondary evidence could not be given of its contents, because the admission of such secondary evidence would defeat the purpose for which the power to exclude the original document is given.

It is not persuasive to argue in favour of the exception by analogy with the rule that a third party can give evidence of a confidential communication between a husband and a wife which he intercepted. The House of Lords in Rumping v. D.P.P.\(^{154}\) did not think that marital communications should be regarded as sacrosanct and held that there was no common law rule rendering such communications inadmissible.\(^{155}\) Legal professional privilege, however, and the reason for its existence, have long been accepted. Notably, Lord Reid said in Rumping's case that if the common law rule contended for applied, it


\(^{153}\) (1892) 18 V.L.R. 408, 412.


\(^{155}\) Cf. Evidence Act 1958 (Vic.) s.27.
would have operated to protect the communication against disclosure by one of the spouses or by a third person.\textsuperscript{156}

The third party exception arose at a time when eavesdropping was rare and the techniques for doing so were unsophisticated. With the advent of modern listening devices, the interception of confidential communications has been made relatively easy. In\textit{Baker v. Campbell},\textsuperscript{157} Murphy J. spoke of the prevailing 'social atmosphere which is being poisoned by official and unofficial eavesdropping and other invasions of privacy'. Wigmore argues, however, that it is up to the client and the legal adviser to take sufficient precautions to prevent being overheard by third parties. The risk of failing to do so is that the privilege is destroyed.\textsuperscript{158} In 1967, the English Law Reform Committee\textsuperscript{159} acknowledged that there were strong arguments in favour of the privilege applying where a document had been obtained as a result of a crime or a deliberate tort.\textsuperscript{160} But no recommendation was made because 'the circumstances envisaged seldom occur in practice, and in civil proceedings professional etiquette would militate against unfair advantage being taken of them'.\textsuperscript{161} The outcome in\textit{I.T.C. Film Distributors Ltd. v. Video Exchange Ltd.}\textsuperscript{162} illustrates that professional etiquette is inadequate to prevent an adversary using privileged documents obtained by a trick practised even within the court. In\textit{Baker v. Campbell},\textsuperscript{163} Brennan J. expressed strong concern about the methods by which evidence is obtained and 'if its admission subverts the court's procedure for conducting adversary litigation'.

Apart from criticism of the third party exception based on the rationale of the privilege, there is a wider countervailing policy

\textsuperscript{156} [1964] A.C. 814, 832.

\textsuperscript{157} (1983) 49 A.L.R. 385, 411. Also 416 per Wilson J. and 436-7 per Deane J.

\textsuperscript{158} 8 Wigmore, \textit{op. cit.} 633-4.

\textsuperscript{159} See \textit{supra} n.146.

\textsuperscript{160} \textit{Ibid.} para. 32.

\textsuperscript{161} \textit{Ibid.} para. 33.

\textsuperscript{162} [1982] 3 W.L.R. 125. It appears that the defendant was unrepresented in this case.

consideration. It is derived from society's recognition that the
right to legal assistance is a fundamental human right.\textsuperscript{164} A
corollary to that right is that confidential communications between
a legal adviser and his client ought to be protected. Legislation
with respect to legal aid gives effect to these principles. The
relevant Victorian legislation, for instance, explicitly refers to
'any privilege arising out of the relationship, between counsel and
solicitor and client'.\textsuperscript{165} The Evidence Act 1958 (Vic.) was very
recently amended to protect information disclosed by an applicant to
any person or member of a legal aid body.\textsuperscript{166} These developments
reflect a significant policy. It has been stated:

If society sets store on the right to legal services for
persons under investigation or charged with offending it
must undertake to ensure the confidentiality of
discussions between lawyer and client. It is an invasion
of their expectations of privacy if that confidence is
violated by a third party who listens in to the interview
unknown to them whether it is done deliberately or
accidentally.\textsuperscript{167}

In light of this background, the third party exception appears to be
an anomaly. It does not accord with the rationale of the privilege
and as a matter of general policy there is little justification, if
any, for its retention.

\textsuperscript{164} See Baker v. Campbell (1983) 49 A.L.R. 385, 435 per Deane J.;
A.M. & S. Europe Ltd. v. Commission of the European Communities
ratified the International Covenant on Civil and Political
Rights. Article 14(3)(b) of the Covenant embodies the principle
that those charged with criminal offences have the right to
communicate with counsel of their own choosing. In the United
States, this right is constitutionally enshrined by the Sixth
Amendment which has been construed to include a right to private
and confidential consultation: Coplon v. United States (1951)
191 F. 2d 749.

\textsuperscript{165} Legal Aid Commission Act 1978 (Vic.) s.31(1).

\textsuperscript{166} Evidence (Amendment) Act 1984 (Vic.) s.4(1) inserts a new
Division 6 (ss.21D-21Ar-in the Principal Act.

\textsuperscript{167} R. v. Uljee [1982] 1 N.Z.L.R. 561, 572 per Richardson J. A
similar view was expressed in the Canadian case of R. v.
Littlechild (1979) 51 C.C.C. (2d) 406, 410 per Laycraft J.A.
3. Recent developments in the third party exception

The third party exception was the subject of careful and critical examination in the New Zealand case of R. v. Uljee.\textsuperscript{168} The accused was charged with the attempted murder of his wife and wounding her with intent to cause grievous bodily harm. After the alleged incident which gave rise to the charges, the accused went to his solicitor's home. When the police arrived they were told that the accused did not wish to say anything. The accused then discussed the matter privately with his solicitor. The door of the room was shut but a constable, who was stationed outside near the window, unintentionally overheard the conversation. An issue arose whether the evidence of the constable was admissible in the subsequent trial. In the High Court, Wallace J. held that this evidence was admissible in view of the compelling authority of Calcraft v. Guest,\textsuperscript{169} Butler v. Board of Trade\textsuperscript{170} and R. v. Tomkins.\textsuperscript{171} The New Zealand Court of Appeal, in an unanimous decision, refused to follow Calcraft v. Guest and abolished the third party exception as part of the law of New Zealand.

The relevant authorities were reviewed in the judgments of Cooke and McMullin JJ. Their Honours considered that Calcraft v. Guest was not a sound authority because it was based on the questionable case of Lloyd v. Mostyn,\textsuperscript{172} it was 'of limited cogency in New Zealand in 1982'\textsuperscript{173} and 'it should not now be allowed to disturb the fundamental nature of the privilege'.\textsuperscript{174} Their Honours therefore stated that the Court must decide the question as one of principle.\textsuperscript{175} The third member of the Court, Richardson J.,

\begin{itemize}
  \item[168.] [1982] 1 N.Z.L.R. 561.
  \item[169.] [1898] 1 Q.B. 759.
  \item[170.] [1971] 1 Ch. 680.
  \item[171.] (1977) 67 Cr. App. R. 181.
  \item[172.] (1842) 10 M. & W. 478; 152 E.R. 558.
  \item[173.] [1982] 1 N.Z.L.R. 561, 566-7 per Cooke J.
  \item[174.] Ibid. 574 per McMullin J.
  \item[175.] Ibid. 567 per Cooke J. and 576 per McMullin J.
\end{itemize}
explicitly remarked that his decision was based on policy considerations. Various reasons were suggested by the Court for rejecting the third party exception. The main justification was that the rationale underlying the privilege was well settled and to extend the privilege to confidential communications overheard by a third party was a logical and necessary consequence of that rationale. As Cooke J. said:

"...if it seems logical, and may fairly be said to be necessary, to extend the scope of legal professional privilege to overheard communications, we should be ready to take the step."

The Court noted the trend in contemporary New Zealand legislation to protect privileged communications which had been intercepted. The Victorian case of R. v. Braham and Mason was also cited with approval. R. v. Uljee may be regarded as a 'policy decision' which repudiates a long line of English authority, but it is a decision which gives clear effect to the rationale of the privilege. More importantly, R. v. Uljee appears to be the only reported case since the dubious inception of the third party exception, in which that doctrine was critically analysed.

The Full High Court of Australia also had occasion to consider the third party exception in Baker v. Campbell. The Court referred to R. v. Uljee but its discussion on this point was only obiter. Gibbs C.J. described the exception as a 'rather remarkable rule' and noted that it is subject to qualifications. Mason J. referred to the rule and observed that it had been criticized, but added that

176. Ibid. 570.
177. Ibid. 567 per Cooke J., 572 per Richardson J. and 576-7 per McMullin J.
178. Ibid. 567.
179. Ibid. 569 and 571. The Court referred to s.27 of the Misuse of Drugs Amendment Act 1978 (N.Z.).
181. [1982] 1 N.Z.L.R. 561, 571 per Richardson J.
183. Ibid. 394.
it was not necessary to resolve these difficulties in the present case. He suggested that the decision was 'inconsistent' with his analysis of the extent to which privilege attaches to documents brought into existence merely as the materials for the brief. He said:

In my opinion, Calcraft v. Guest should not be followed in this country so far as it requires the admission of a document or of a copy of a document which is privileged because it has come into existence 'merely as the materials for the brief'.

Of the remaining members of the High Court who referred to the exception, Deane J. considered that the matter was still arguable and Dawson J. merely noted its existence. These statements, coupled with the broad view of the rationale of the privilege which the majority adopted in Baker v. Campbell, indicate that the continued existence of the exception in Australia is most uncertain.

It may be noted that the third party exception applies in the United States and has been recognized by the Supreme Court of Canada. The Ontario Law Reform Commission considered, however, that there is 'no rational basis' for admitting secondary evidence to prove privileged communications and recommended that the Evidence Act 1970 (Ontario) should be amended to provide that such evidence is inadmissible. The Australian Law Reform Commission stated

184. Ibid. 405.
185. [1898] 1 Q.B. 759.
187. Ibid.
188. Ibid. 431.
189. Ibid. 444.
recently that there is 'much force' in the criticism that limits should be placed on the use of secondary evidence of privileged communications. It was suggested that this question should be dealt with in the context of improperly obtained evidence.\(^{193}\) The third party exception has therefore been described as one of the least satisfactory aspects of Commonwealth law relating to the privilege.\(^{194}\) It is surprising that a rule which can be assailed from the point of view of authority and policy has survived so long. The New Zealand case of \textit{R. v. Uljee}\(^{195}\) should provide an incentive, where the opportunity to reconsider the third party exception arises, for finally removing it from the law on legal professional privilege.

C. FACTS DISCOVERED IN THE COURSE OF THE LEGAL ADVISER-CLIENT RELATIONSHIP

1. The exception and rationale of the privilege

Legal professional privilege only applies to confidential communications, whether oral or written, passing between a legal adviser and his client. It does not bar the legal adviser from giving evidence of what he has observed, as distinct from what his client has told him in the course of that relationship. It has been stated that 'a legal adviser may give evidence of a fact which is patent to his senses'.\(^{196}\) In \textit{Dwyer v. Collins},\(^{197}\) Parke B. remarked:

But the privilege does not extend to matters of fact which the attorney knows by any other means than confidential communication with his client, though, if he had not been employed as attorney, he probably would not have known them.\(^{198}\)

\(\text{\textit{\textcaps}}\)


\(^{195}\) \[1982\] 1 N.Z.L.R. 561.

\(^{196}\) Brown v. Foster (1857) 1 H. & N. 736, 739; 156 E.R. 1397, 1399 \textit{per} Pollock C.B.

\(^{197}\) (1852) 7 Ex. 639, 646; 155 E.R. 1104, 1107.

The main reason for the exception is that the legal adviser acquires knowledge of matters which would have been obtained in any event, irrespective of his professional skill or training. This was accepted by Lord Brougham L.C. in Greenough v. Gaskell\textsuperscript{199} who explained that the privilege did not apply:

\begin{quote}
...as where, for instance, a fact, something that was done, became known to him, from his having been brought to a certain place by the circumstance of his being the attorney, but to which fact any other man, if there, would have been equally [cognisant]...
\end{quote}

Another reason is that there is a lack of confidentiality for mere facts relating to a client which can be observed by all. The client's name and address, for instance, are matters which are not usually communicated confidentially to the legal adviser. It has also been suggested that some facts must be disclosed in the interests of the adversary system of litigation. Wigmore argues that a client's identity can never be the subject of privilege because every litigant is entitled to know who is his opponent.\textsuperscript{200}

The facts exception can be reconciled with the underlying policy of the privilege. The privilege promotes freedom of consultation of legal advisers and ensures complete disclosure by clients of matters they might otherwise have withheld. This presupposes that there are some facts which clients will disclose voluntarily irrespective of the existence of the privilege. To the extent therefore that the privilege does not protect those facts which would have come to the legal adviser's notice in any event, is quite consistent with the policy of the privilege. The difficulty, however, is to determine what facts are or are not protected. Can, for instance, the client's name and address, his handwriting, his peculiar gait, an identifying scar or the colour of his clothes, be the subject of privilege? If not, does it matter if the client requests that these facts be kept confidential? These issues are considered below.

2. **Specific facts not protected by privilege**

Some of the matters discovered by the legal adviser during the lawyer-client relationship and which have been held not to be privileged from

\begin{itemize}
\item \textsuperscript{199} (1833) 1 My. & K. 98,104; 39 E.R. 618, 621.
\item \textsuperscript{200} 8 Wigmore, op. cit. 609.
\end{itemize}
disclosure include: the client's mental capacity,201 the existence of a retainer between legal adviser and client,202 the client's handwriting,203 the fact that the client put in pleadings or swore an affidavit,204 the client's identity, the client's address and the existence, execution or location of documents. The last three matters have attracted considerable debate.

(a) The client's identity

It is well settled that the identity of the client is not something to which the privilege applies.205 In Cook v. Leonard,206 the defendant's solicitor was asked in court: 'On whose instructions did you prepare the document?'. Voumard Q.C. submitted on behalf of the defendant that the disclosure of the client's identity involved a disclosure of the instructions to prepare the document in the terms which appeared therein.207 The plaintiff relied on Bursill v. Tanner208 for the contrary proposition. Sholl J. indicated that he was attracted by the defendant's argument:

If I were not instructed by authority, I should reject that question on the ground that to allow it to be answered involved a disclosure by the witness of the communication made to him by the client of the matter to be included in the document.209

207. Ibid.
208. (1885) 16 Q.B.D. 1.
He held that, contrary to his own inclination, he 'must' follow *Bursill v. Tanner* and allow the question asked.\(^{210}\)

*Bursill v. Tanner* and *Cook v. Leonard* were cited with approval in the High Court case of *R. v. Bell; Ex parte Lees*.\(^{211}\) The issue there was whether privilege could be claimed in relation to a client's address. Stephen J. said:

> There may be cases in which knowledge of an opponent's address is an element essential to any real knowledge of his identity. In such cases it would seem right that privilege should not attach.\(^{212}\)

This statement was obiter. But Stephen J. added that if the likelihood of disclosure would operate as a deterrent to a client from seeking professional advice, this would suggest that the privilege should apply.\(^{213}\) This may explain Sholl J.'s reservation in *Cook v. Leonard*. Wigmore suggests that all that is required to be disclosed is no more than serves to establish the client's identity.\(^{214}\) Could it further be argued that where a client requests that his identity be kept secret, it ought to be privileged? This has been accepted in relation to a client's name.\(^{215}\) Wigmore does not support the view that a client's identity can ever be the subject of privilege:\(^{216}\)

> ...so far as a client may in fact desire secrecy and may be able to secure action without appearing as a party to the proceedings, it would be improper to sanction such a wish. Every litigant is in justice entitled to know the identity of his opponents.

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210. Ibid. 592.


212. Ibid.

213. Ibid.

214. 8 Wigmore, *op. cit.* 609.


216. 8 Wigmore, *loc. cit.*
It is submitted, however, that where the client communicates his identity to his legal adviser confidentially, it should be privileged. This is consistent with the rationale underlying the privilege. As the client desires that his identity remain secret, any fear that it might be disclosed by his legal adviser will adversely affect the freedom of consultation. Furthermore, the distinction between privilege attaching to a client's address but not his name is difficult to reconcile. In a number of United States cases, it has been held that a client's identity may be privileged where there is a strong probability that disclosure would implicate the client in the very criminal activity for which legal advice was sought.\textsuperscript{217} Notably, this qualification to the exception was regarded in those cases as 'consonant' with the policy of the privilege of promoting freedom of consultation with legal advisers. The Divisional Court of the Ontario High Court of Justice stated recently in Re Ontario Securities Commission and Greymac Credit Corporation\textsuperscript{218} that there may be circumstances in which a legal adviser would be justified in refusing to disclose the name of his client. A similar view has been expressed by McCormick.\textsuperscript{219} It is convincingly argued by one commentator who reviewed all the relevant English and United States authorities on this point, that the client's identity may be privileged subject to the following conditions:

1. The client must have disclosed his identity in confidence;
2. The solicitor must be acting as legal adviser, not as an agent;
3. The client must not be a party in litigation;
4. The client must either be acting in the public interest; or


\textsuperscript{218} (1983) 146 D.L.R. (3d) 73, 84.

\textsuperscript{219} McCormick on Evidence (2nd ed. 1972) 187: 'Cases may arise, however, where protection of the client's identity is conceivably in the public interest'.
5. The client's identity would, in the circumstances, be incriminating information.\footnote{220}

The above propositions confine the scope of the protection narrowly. Also, the circumstances in which privilege can be claimed for a client's identity will seldom arise.\footnote{221} These considerations would tend to support the view that legal professional privilege should apply in an appropriate case to protect a client's identity from disclosure.

It is clear, of course, that where concealment of a client's identity is in furtherance of an illegal object or fraud, no privilege will be allowed. This answers the argument that, by according privilege to a client's identity, an opposing party would not be able to enforce his legal rights in subsequent proceedings against the client who 'maliciously sued or prosecuted him or fraudulently evaded his claim'.\footnote{222} There are numerous United States cases which have held that the client's identity must be disclosed where there is illegality.\footnote{223} This is also implicitly supported by the High Court decision in \textit{R. v. Bell; Ex parte Lees},\footnote{224} where it was stated that privilege could not be claimed with respect to a client's address (\textit{a fortiori} a client's identity) in order to frustrate the processes of law.

\footnote{220}{Morrick C., 'Professional Privilege: the Client's Identity' (1980) 124 Solicitors' Journal 303, 305. In the recent case of \textit{Southern Cross Commodities Pty. Ltd. (In Liquidation) v. Crinis [1984]} V.R. 697, 703-4 Young C.J. referred to the above five conditions and said that as they were not all satisfied, the name and address of the client should be disclosed.}

\footnote{221}{See examples given by Morrick, \textit{ibid.} 304.}

\footnote{222}{8 Wigmore, \textit{op. cit.} 609.}


\footnote{224}{(1980) 146 C.L.R. 141, 156 \textit{per} Stephen J.}
(b) The client's address

As a general rule, a client's address is not protected by legal professional privilege because it is not a matter which relates to the engagement of the legal adviser in his professional capacity. In the case of Ex parte Campbell; In re Cathcart,225 James L.J. said:

What a solicitor is privileged from disclosing is that which is communicated to him sub sigillo confessionis - that is to say, some fact which the client communicates to the solicitor for the purpose of obtaining the solicitor's professional advice and assistance... The client's place of residence in such a case is a mere collateral fact, which the solicitor knows without anything like professional confidence...

But James L.J. added in obiter that if the client communicates his address to the legal adviser confidentially, for the purpose of being advised and does not disclose it to 'the rest of the world', it may be privileged.226 This dictum was applied by Cave J. in Re Arnott; Ex parte Chief Official Receiver.227 It was held in that case that as the client's address was a matter of professional confidence, it was privileged.

The dictum of James L.J. in Ex parte Campbell is subject to some qualifications. Where the communication of the client's address is in furtherance of crime or fraud, it is not protected by the privilege.228 It has also been held that where the client is a ward of court, no privilege can exist to prevent the court from discovering the ward's whereabouts.229 As was pointed out above, this principle was applied by the High Court in R. v. Bell; Ex parte Lees230 to a child in relation to whom a custody order had been made under the Family Law Act 1975 (Cth.). In that case, some members of the Court accepted that where a client's address is communicated confidentially

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225. (1870) 5 Ch. App. 703, 705.
226. Ibid.
227. (1888) 60 L.T. 109, 110.
for the purpose of seeking legal advice, it is prima facie privileged.\textsuperscript{231} Parliament can and has expressly abrogated the privilege from attaching to a client's name and address.\textsuperscript{232}

(c) The existence, execution or location of documents

The existence, execution or location of documents are facts which are not protected from disclosure.\textsuperscript{233} In Dwyer v. Collins,\textsuperscript{234} for instance, it was held that a legal adviser must disclose whether he had a relevant document in court with him, but he could not be compelled to produce it. Apart from the absence of the requirement of confidentiality,\textsuperscript{235} the cases can also be explained on the ground that privilege does not attach to a document merely by depositing it with a legal adviser. The cases also draw a distinction between transactions and communications. Only the latter are privileged. This is consistent with recent developments in Australia.

In Grant v. Downs,\textsuperscript{236} the High Court emphasized that for the 'sole' purpose test, the relevant purpose is not the purpose for which the document came into the hands of the legal adviser, but the purpose for which the document was brought into existence. This distinction was relied on by various members of the High Court in the subsequent cases of O'Reilly v. Commissioner of State Bank of Victoria\textsuperscript{237} and Baker v. Campbell\textsuperscript{238} for the following proposition: legal professional

\begin{itemize}
  \item \textsuperscript{231} Ibid. 145 per Gibbs J. and 161 per Wilson J. Cf. 156 per Stephen J.
  \item \textsuperscript{232} Infra 106-7. The Council of the Law Society of New South Wales recently ruled that a solicitor should not disclose a client's address to an enquirer other than under due process of law: Note, 'Council Ruling on Disclosure of Clients' Addresses' (1983) 21 Law Society Journal 308.
  \item \textsuperscript{233} Lord Say and Seal's Case (1712) 10 Mod. 40; 88 E.R. 617; Sandford v. Remington (1793) 2 Ves. Jr. 189; 30 E.R. 587; Crawcour v. Salter (1881) 18 Ch. D. 30. Cf. Brard v. Ackerman (1804) 5 Esp. 119; 170 E.R. 758.
  \item \textsuperscript{234} (1852) 7 Ex. 639; 155 E.R. 1104.
  \item \textsuperscript{235} See 8 Wigmore, op. cit. 596.
  \item \textsuperscript{236} (1976) 135 C.L.R. 674.
  \item \textsuperscript{237} (1982) 44 A.L.R. 27.
  \item \textsuperscript{238} (1983) 49 A.L.R. 385.
\end{itemize}
privilege does not attach to documents which constitute or evidence transactions such as contracts, conveyances, declarations of trust, arrangements, offers or receipts, even if they are received by the legal adviser for advice or for use in litigation.\textsuperscript{239} If privilege could be claimed in relation to these documents, then, as Wigmore points out, 'the client's obligation to produce could always be evaded in very simple fashion by placing the deed with the attorney'.\textsuperscript{240}

The distinction between a transaction and a communication was considered in the case of Re Furney.\textsuperscript{241} A solicitor was required to attend before the Registrar in Bankruptcy to give evidence relating to the financial dealings of his client, the debtor. In the course of the examination, the solicitor was asked whether he held any money on trust for the debtor and whether he had made any payments to the debtor from his trust account. The solicitor objected to answering the questions on the ground of privilege and refused to produce any related documents. Clyne J., in the Federal Court of Bankruptcy, held that the solicitor was bound to answer the questions and to produce the documents because legal professional privilege protected only communications and not matters of 'objective fact'.\textsuperscript{242} The decision in Furney's case has been approved in Australia\textsuperscript{243} and was recently followed by the Divisional Court of the Ontario High Court of Justice in Re Ontario Securities Commission and Greymac Credit Corporation.\textsuperscript{244} Southey J., who delivered the judgment of the Court in that case, stated that payments into and out of a solicitor's trust account do not constitute communications but mere transactions and accordingly, are not covered by the

\textsuperscript{239} O'Reilly v. Commissioner of State Bank of Victoria (1982) 44 A.L.R. 27, 41 per Mason J. and 43 per Murphy J.; Baker v. Campbell (1983) 49 A.L.R. 385, 409 per Murphy J., 430-1 per Deane J. and 439 per Dawson J.

\textsuperscript{240} 8 Wigmore, op. cit. 591. See O'Reilly v. Commissioner of State Bank of Victoria (1982) 44 A.L.R. 27, 40 per Mason J.


\textsuperscript{242} Ibid. 816. See also Crompton v. Commissioner of Highways (1973) 5 S.A.S.R. 301, 312.

\textsuperscript{243} Bizannes v. Bizannes (1977) F.L.C. 90-313, 76,670 (Full Court of the Family Court of Australia); Packer v. Deputy Commissioner of Taxation [1984] A.C.L.J. 449 (special leave to appeal to the High Court was refused: [1984] 18 Legal Reporter 1).

\textsuperscript{244} (1983) 146 D.L.R. (3d) 73.
privilege.\textsuperscript{245} It was added that a solicitor must give evidence of the source and the recipient of payments in answering questions as to the movement of funds into and out of his trust account.\textsuperscript{246}

3. **Communications by actions and privilege for physical objects**

It is clear that communications may be made by actions as well as by words. The facts exception, however, operates to require information communicated other than by oral or written means to be disclosed. As Martin B. said in *Brown v. Foster*,\textsuperscript{247} privilege does not attach to 'matters which the counsel sees with his eyes'. But in the United States case of *City and County of San Francisco v. Superior Court*,\textsuperscript{248} Traynor J. remarked:

> The privilege embraces not only oral or written statements but actions, signs, or other means of communicating information by a client to his attorney.

Commentators have argued that if acts are done by the client as part of the communication and are intended to be confidential, they should be privileged.\textsuperscript{249} As Wigmore states, a client who makes a specimen of his handwriting, or exhibits a scar, or shows a secret token to his legal adviser ought to be able to claim privilege.\textsuperscript{250} This accords with the policy of the privilege of promoting freedom of communication between legal advisers and clients.

Physical objects cannot be the subject of a claim for privilege. However, in *Frank Truman Export Ltd. v. Metropolitan Police Commissioner*,\textsuperscript{251} Swanwick J. agreed with the plaintiff's contention

\textsuperscript{245} Ibid. 83.

\textsuperscript{246} Cf. Legal Profession Practice Act 1958 (Vic.) ss.75 and 103; Note, 'Privilege for Trust Accounts and Solicitors' Nominee Companies to be Removed' (1984) 10 Commonwealth Law Bulletin 338.

\textsuperscript{247} (1857) 1 H. & N. 736, 740; 156 E.R. 1397, 1399.

\textsuperscript{248} (1951) 231 P. 2d 26, 30.

\textsuperscript{249} 8 Wigmore, op. cit. 590; McCormick, op. cit. 183.

\textsuperscript{250} Ibid.

\textsuperscript{251} [1977] 1 Q.B. 952.
that legal professional privilege attaches not only to documents but also to other 'subject matter' submitted by the client to his legal adviser.252 The Court of Appeal expressly declined to follow this dictum in *R. v. King*.253 It was there held that only communications between a legal adviser and an expert engaged on the client's behalf are privileged and not the 'chattels' on which the expert's opinion is based.254 In Australia, the position seems to be well settled. In *Baker v. Campbell*,255 Dawson J. remarked:

Legal professional privilege attaches only to communications... There is no privilege for physical objects other than documents...

Whether a sound or video tape recording of privileged information can be regarded as a 'document', or is merely an unprivileged physical article, is a controversial question. The weight of authority would support the view that it is a document.256

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252. Ibid. 961 and 963. It was conceded that 'such objects as a dagger, a gun or articles stained with blood would not be privileged': ibid. 961. But in *State v. Olwell* (1964) 394 P. 2d 681, 684 the Supreme Court of Washington stated the attorney-client privilege applies to a knife obtained by a legal adviser from his client after the commission of the alleged crime.


254. Ibid. 931.


Cf. *Evidence Act 1958* (Vic.) s.3(1) which defines 'Document' to include '(c) any disc tape sound track...' and '(d) any film negative tape or other device in which one or more visual images are embodied...'.

4. Use of facts to discover privileged communications

An interesting issue which arises in relation to the distinction between facts and communications is whether privilege can be claimed for facts which, if disclosed, might put the adversary on a train of inquiry that would lead him to discover the privileged communications. An analogous question was considered by the High Court in *Sorby v. Commonwealth* in relation to the privilege against self-incrimination. It was held that the privilege protects a witness not only from incriminating himself directly, but also from making a disclosure which may lead to incrimination or to the discovery of real evidence of an incriminating character. In relation to legal professional privilege, the type of facts which would be useful for the purposes of future investigations are the client's name and address and, in particular, whether certain documents have been prepared and where they can be found. These facts are not protected ordinarily by the privilege. Their disclosure may enable an opposing party or an investigating authority to discover the documents, or otherwise obtain secondary evidence of their contents.

The above issue has not been considered by the courts. It may be argued that a privilege that prohibits information being obtained directly ought not to be subverted by countenancing measures which have the effect of allowing that information to be obtained indirectly.


258. Ibid. 252 per Gibbs C.J., 260 per Mason, Wilson and Dawson JJ. and 261 per Murphy J. The contrary conclusion of Kaye J. in *Attorney-General (Victoria) v. Riach* [1978] V.R. 301 was disapproved.

259. Under ss.16(1)(d) and 16(2)(d) of the Companies (Victoria) Code and ss.11(1)(d) and 11(2)(d) of the Securities Industry (Victoria) Code, a legal practitioner who refuses to produce a document that contains privileged communications is nevertheless obliged to furnish sufficient particulars to 'identify' the document or parts of the document. This could mean providing all information which might be useful in order to obtain the document, or providing such information to identify only the physical characteristics of the document: Kluver J.B. and Woellner R.H., *Powers of Investigation in Revenue, Companies and Trade Practices Law* (1983) para. 4061.

260. The secondary evidence would be admissible under the rule in *Calcraft v. Guest* [1898] 1 Q.B. 759 irrespective of how it was obtained.
This is supported by the rationale underlying the privilege. A client's fear that the disclosure of certain facts would set in motion further inquiries, may seriously inhibit his freedom in communicating with his legal adviser. This would suggest that the privilege should apply.

D. INFORMATION TENDING TO ESTABLISH A PERSON'S INNOCENCE

A communication which is prima facie privileged is admissible in a criminal trial if it furthers the defence of the accused. In R. v. Barton, a legal executive with a firm of solicitors was charged with fraudulent conversion, theft and falsification of accounts arising out of the administration of certain estates. The defence served on a solicitor in the firm a subpoena to give evidence and to produce documents which would establish the defendant's innocence. The solicitor argued that the relevant documents were protected by legal professional privilege. Caulfield J. held that the documents must be produced and stated:

If there are documents in the possession or control of a solicitor which, on production, help to further the defence of an accused man, then in my judgment no privilege attaches. I cannot conceive that our law would permit a solicitor or other person to screen from a jury information which, if disclosed to the jury, would perhaps enable a man either to establish his innocence or to resist an allegation made by the Crown.

It has been suggested that the merits of the doctrine are obvious but its precise implications and limitations, if any, have not been worked out. Caulfield J. said in Barton's case that the principle he


262. It is arguable whether the documents were privileged because they were merely left in the custody of the solicitor and were not brought into existence for the purpose of advice or for use in litigation.


enunciated 'must be restricted to these particular facts in a criminal trial'.

Clearly the defendant bears the onus of showing that the privileged information tends to establish his innocence. The standard of proof required is unclear. Whether a mere allegation of innocence or a higher burden is necessary to exclude the privilege, is yet to be resolved.

The principle in Barton's case does not detract from the rationale of the privilege. Legal professional privilege is concerned not only with protecting confidential communications but also in furthering the administration of justice. Where non-disclosure of a privileged communication would result in grave injustice to an innocent person, the privilege should not apply. In the early case of Hutchinson v. Stephens, Lord Langdale M.R. said:

No counsel supposes himself to be the mere advocate or agent of his client, to gain a victory, if he can, on a particular occasion. The zeal and the arguments of every counsel, knowing what is due to himself and his honourable profession, are qualified not only by considerations affecting his own character as a man of honour, experience, and learning, but also by considerations affecting the general interests of justice.

The relevance of the exception in Barton's case to the administration of justice was adverted to by the Australian Law Reform Commission. The Commission stated that legal professional privilege should not be upheld where it would result in the withholding of evidence relevant to the defence of the accused.

265. [1973] 1 W.L.R. 115, 118. In civil proceedings, the adversary system of litigation entitles a party to refuse to disclose to his opponent the nature of his case and the evidence which will be relied on: Waugh v. British Railways Board [1980] A.C. 521, 531 per Lord Wilberforce. Cf. Lyell v. Kennedy (No. 2) (1883) 23 Ch. D. 387, 404 per Cotton L.J.: '...no one is to be fettered in obtaining materials for his defence'.

266. (1837) 1 Keen 659, 668; 48 E.R. 461, 464.


The above exception to the privilege is consistent with another parallel rule. It has been stated that the public interest against disclosure of the identity of police informers must give way when the information is required to prove the accused's innocence. As Lord Simon of Glaisdale explained in *R. v. Lewes Justices; Ex parte Secretary of State for the Home Department*: 269

Sources of police information are a judicially recognised class of evidence excluded on the ground of public policy, unless their production is required to establish innocence in a criminal trial.

This principle is well settled. 270 It may be noted that the exception in Barton's case has been accepted in the United States 271 and was approved recently by the High Court in *Baker v. Campbell*. 272 Gibbs C.J. said in obiter that if a privileged communication would tend to establish the innocence of a person charged with a crime, the document must be produced because 'the requirements of natural justice' override the privilege. 273

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271. It has been recommended that the principle in Barton's case should be incorporated in the Uniform Rules of Evidence: Levine H.D., 'Self-Interest or Self-Defense: Lawyer Disregard of the Attorney-Client Privilege for Profit and Protection' (1977) 5 Hofstra Law Review 783, 812 n.136, 824 and 826.


273. Ibid, 394-5. Cf. *Norwest Holst Ltd. v. Department of Trade* [1978] 3 All E.R. 280, 294 per Ormrod L.J.: 'The phrase "the requirements of natural justice" seems to be mesmerising people at the moment. This must, I think, be due to the apposition of the words "natural" and "justice". It has been pointed out many times that the word "natural" adds nothing except perhaps a hint of nostalgia for the good old days when nasty things did not happen.'
E. DISCLOSURE BY A LEGAL ADVISER IN PROCEEDINGS RELATING TO HIS PROFESSIONAL CAPACITY

There is a dearth of authority in England and Australia on this exception and it is not referred to in either country by any of the leading commentators on the law of evidence. However, the exception is recognized in the United States and Canada. It is stated by Wigmore that a communication is not privileged if the legal adviser subsequently becomes the client's opponent as in a suit for fees or an action for negligence because 'there was no secrecy as between them at the time of communication'. Wigmore cites two English authorities for this proposition, but these cases are actually to the contrary effect. In Chant v. Brown, it was held that a confidential communication made to a legal adviser about the title of certain property did not cease to be privileged when the legal adviser later became a devisee of that property and a party to the

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274. 8 Wigmore, op. cit. 607 and 638; McCormick, op. cit. 191. See excellent article by Levine, supra n.271. Rule 1.6 of the Model Rules of Professional Conduct, which was recently adopted by the American Bar Association, provides: '(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: ... (2) to establish a claim or defence on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client': (1983) 52 Law Week (Statutes) 1, 5.

275. The Canadian Bar Association's Code of Professional Conduct (1975) provides that disclosure by a lawyer of confidential information 'may be justified in order to establish or collect his fee or to defend himself... against an allegation of malpractice or misconduct': cited in Disney J. et. al., Lawyers (1977) 583.

276. 8 Wigmore, op. cit. 607-8.


278. Wigmore earlier conceded this by regarding the cases as 'apparently unsound': op. cit. 608 n.3. Wigmore's scholarship on this point has been described as 'shoddy' because even in Nave v. Baird (1859) 12 Ind. 318, the legal adviser who testified was not the legal adviser accused of misconduct: Levine, op. cit. 792 n.49.

279. (1849) 7 Hare 79; 68 E.R. 32.
proceedings. In Cleave v. Jones,\textsuperscript{280} the defendant executrix employed the plaintiff as her solicitor in winding up her husband's estate. The plaintiff requested the defendant to provide him with a statement of her late husband's debts in order to prepare a case for counsel. It appears that the plaintiff had earlier advanced money to the defendant and had been given a promissory note. The defendant, in response to the request, sent the plaintiff an account-book which also contained an entry of the interest paid on the promissory note. The plaintiff subsequently sued the defendant on the note and to overcome the Statute of Limitations, tendered in evidence the entry in the account-book. The defendant argued that the account-book was protected by legal professional privilege. The plaintiff submitted that the communication relating to the note was not privileged because no confidence was reposed in him as solicitor and he already knew about the payment. It was held that the account-book was privileged from disclosure. Parke B., with whom Alderson B. and Platt B. agreed, stated:

\textit{...the whole contents of that book are privileged, for it was given in the course of that free and unreserved communication which the law protects, in order that the entire facts may be disclosed by the client to the attorney.}\textsuperscript{281}

As a matter of principle, the decision in Cleave v. Jones is correct and the proposition stated by Wigmore is too wide. A communication between a legal adviser and his client should not automatically cease to be privileged when they become party opponents. This would appear to undermine the policy of the privilege in promoting the client's freedom of communication. How can the exception therefore be supported?

It is implicit in the justification for the privilege based on the encouragement of unrestrained recourse to legal advisers that the public has confidence in the legal profession. When a controversy arises between a legal adviser and his client with respect to the adviser's professional capacity, a case can be made against the privilege applying. The need to foster public confidence in members

\textsuperscript{280.} (1852) 7 Ex. 421; 155 E.R. 1013. This case has been regarded as 'one of the few English cases actually involving the potential use of the exception': Levine, \textit{op. cit.} 787 n.25.

\textsuperscript{281.} \textit{Ibid.} 426; 1015.
of the legal profession is served by investigating fully any allegation of incompetence. All relevant evidence, including privileged communications, should be available to determine the complaint. The exception can therefore be explained consistently with the underlying policy of the privilege. However, the next question which arises is what are the limits of the exception? It is asserted by Wigmore that 'the privilege of secret consultation is intended only as an incidental means of defence, and not as an independent means of attack, and to use it in the latter character is to abandon it in the former'. This recalls the shield-sword metaphor and does not add anything to understanding the scope of the exception. If the exception is to be formulated in accordance with the rationale of the privilege, it must be narrowly confined to the purposes sought to be achieved. The following conditions for the operation of the exception are suggested:

1. A controversy must exist between a legal adviser and a current or former client;
2. The controversy must arise out of the legal adviser's professional capacity or employment; and
3. The privileged information which the legal adviser may disclose must be no more than is necessary to answer the allegations made.

A number of additional points can be made about these requirements. It has been observed that it may be necessary for the client to commence proceedings against the legal adviser before disclosure would be permitted and a mere complaint against the legal adviser will not suffice. A legal adviser should not reveal privileged

282. An argument advanced in support of the exception is that it increases the amount of probative evidence that is received and improves the accuracy of findings of fact: Levine, op. cit. 817. This assumes that the exception exists to further the ascertaining of truth rather than serving a purpose which relates to the rationale of the privilege.

283. 8 Wigmore, op. cit. 638.

284. Disney, op. cit. 582. The Law Society of South Australia has stated in an etiquette ruling that a practitioner is not at liberty to divulge confidential information relating to a client's affairs, in order to answer criticisms about his conduct in handling those affairs: cited in Disney, ibid. 583. A more flexible position obtains in the United States: see McCormick, op. cit. 191.
communications in response to accusations by third parties. 285 The second condition requires that a causal nexus exist between the dispute and the legal adviser's professional capacity. Accordingly, where the controversy relates only to a private matter, as in Chant v. Brown 286 and Cleave v. Jones, 287 disclosure would not be justified. The third condition is an important limitation on the scope of the exception. Privileged communications which may be relevant but are not strictly necessary to refute an accusation should not be revealed.

In light of the suggested ambit of the exception, privileged information may be revealed in the course of disciplinary proceedings for misconduct or in an action against the legal adviser for negligence. It is interesting to consider whether the exception can or should be invoked where a legal adviser sues the client for his fees. 288 Wigmore 289 and McCormick 290 state that no privilege

285. In the United States, legal advisers have been allowed to disclose privileged information to answer third-party accusations: Meyerhofer v. Empire Fire and Marine Insurance Co. (1974) 497 F. 2d 1190 cert. denied (1975) 419 U.S. 998; Re Friend (1975) 411 F. Supp. 776. But these cases were decided under Disciplinary Rule 4-101(C)(4) of the Code of Professional Responsibility which is in wide terms. Levine cites Rochester City Bank v. Suydam (1851) 5 How. Pr. 254 as the only common law case where the exception was applied in response to third-party accusations and notes that even there, de facto opposition existed between the legal adviser and his former client: op. cit. 806 n.107.

286. (1849) 7 Hare 79; 68 E.R. 32.

287. (1852) 7 Ex. 421; 155 E.R. 1013.

288. A solicitor can sue a client in contract to recover unpaid fees but the position is less clear in relation to barristers. It has been authoritatively stated that no contractual relationship exists between counsel and client: Kennedy v. Broun (1863) 13 C.B.(N.S.) 677; 143 E.R. 268; Rondel v. Worsley [1969] 1 A.C. 191, 238, 261 and 278. This may not apply in jurisdictions where the legal profession is fused. In Victoria, the Bar Council has given a ruling that, save for the exceptional cases of non-contentious or patent work, it is improper for counsel to collect fees from a client: see Gowans G., The Victorian Bar (1979) 94. But s.10(1) of the Legal Profession Practice Act 1958 (Vic.) confers a right on a 'barrister' to maintain an action and recover from a client 'by whom he has been employed' his fees. The scope of that section and particularly the word 'barrister' has been questioned: Heerey P.C., 'Looking Over the Advocate's Shoulder: An Australian View of Rondel v. Worsley' (1968) 42 Australian Law Journal 3, 8.

289. 8 Wigmore, op. cit. 607.

will apply in such a case. This is nevertheless arguable. A dispute as to fees may not necessarily relate to the legal adviser's professional capacity. Furthermore, the policy of the privilege of promoting the client's freedom of communication may not appear to be served if disclosure is made in such proceedings. It has been argued that the exception could also be used as a tactical weapon to compel clients to pay up fees in order to avoid the disclosure of particularly delicate confidences. It is submitted, however, that the exception should be available in proceedings by legal advisers to recover their fees. McCormick's utilitarian argument in favour of the exception should be noted. He asserts that 'if effective legal service is to be encouraged the privilege must not stand in the way of the lawyer's just enforcement of his rights to be paid a fee'. A practical consequence of declining to recognize the exception might be that a legal adviser suing for his fees could not produce the bill of costs. The limitations to the exception noted above must be kept steadily in mind. The legal adviser should be permitted to disclose only so much as is necessary to establish his claim. For instance, evidence of the number of hours worked, the tasks performed and the expenses incurred would be admissible but not evidence tending to show the nature of the client's instructions or the advice given. Disclosure of the latter will often be unnecessary and cannot be justified in view of the rationale of the

291. Levine, op. cit. 811.
293. There is conflicting authority as to whether a bill of costs is protected by legal professional privilege. In White v. Hoddle (1880) 1 A.L.T. 147; Geraghty v. Woodforth and Stewart (No. 2) [1957] Q.W.N. 42 and recently, Waterford v. Department of the Treasury (No. 2) (unreported, Administrative Appeals Tribunal 14 March 1984) it was held that a bill of costs is not a privileged document. But in Chant v. Brown (1851) 9 Hare 790; 68 E.R. 735; Turton v. Barber (1874) L.R. 17 Eq. 329, 331 and Ainsworth v. Wilding (1900) 2 Ch. 315, 322-5 it was stated that privilege can be claimed for a bill of costs. Recently, in Packer v. Deputy Commissioner of Taxation (unreported, Supreme Court of Queensland, 4 June 1984) 5 noted in [1984] A.C.L.D. 449, Connolly J. said that privilege usually attaches to a bill of costs because it is 'the solicitor's history of the transaction in which he was concerned and commonly recites, with pardonable pride, the nature of the professional service for which he is proposing to charge his all too modest fee'.

49. s. 581 Some Court Act 1858 (Vic.)
privilege. The exception has been invoked in the United States in actions to recover fees. As one commentator there quipped, 'when a lawyer's fee is at stake, the quality of judicial mercy is not strained'.

It is possible to explain the exception allowing disclosure by legal advisers by reference to the doctrine of waiver. The privilege and the right to waive it, belong to the client. In deciding whether the privilege has been waived, not only is intention relevant but the elements of fairness and consistency are also important. Thus, the disclosure by the client may be such that fairness requires that the privilege should cease whether or not this was ultimately intended. In light of these principles it is stated by Wigmore:

When the client alleges a breach of duty to him by the attorney, the privilege is waived as to all communications relevant to that issue.

This proposition is supported by numerous United States decisions. It is emphasized in those cases that once the legal adviser's conduct is assailed, the privilege cannot apply to prevent the legal adviser from testifying in his own exculpation. The exception has now been statutorily embodied in the United States and an exception in identical terms was recommended by the Law Reform

294. Levine, op. cit. 800 n.80.


296. Levine, op. cit. 794.


298. 8 Wigmore, op. cit. 636.

299. Ibid. 638.


301. Rule 503(d)(3) of the Federal Rules of Evidence and Rule 26(2)(c) [Rule 502(d)(2) - 1974 revision] of the Uniform Rules of Evidence provide that the privilege does not apply 'to a communication relevant to an issue of breach of duty by the lawyer to his client, or by the client to his lawyer'.
The relationship between waiver and the present exception has not been considered in any English or Australian decision, though it is referred to by some academic writers. Even if the exception is approached from the point of view of waiver, it does not conflict with the rationale of the privilege. The policy of promoting the client's freedom of consultation without fear of disclosure is not violated by any disclosure which the client voluntarily decides to make. This becomes evident when coupled with the principle that waiver is not limited to what the client elects to reveal but extends to all relevant communications.

For completion, it may be added that legislation regulating the legal profession can abrogate the privilege by compelling a legal adviser to produce privileged documents relating to his practice. The statutory exceptions to the privilege are examined in the following chapter.

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302. Report on Evidence (1975) 82. Clause 42(4) of the draft Evidence Code contained in the Report is in the following form: 'There is no privilege under this section: ... (c) as to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer'.


304. Disney, op. cit. 582.


CHAPTER 4

STATUTORY EXCEPTIONS

Legal professional privilege is derived from the common law and, accordingly, can be abrogated by legislation. However, it is an established rule of construction that Parliament is presumed not to intend to take away common law rights unless this intention clearly emerges, whether by express words or by necessary implication. In an often-cited passage from Maxwell on Statutes, the principle is explained as follows:

It is thought to be in the highest degree improbable that Parliament would depart from the general system of law without expressing its intention with irresistible clearness, and to give any such effect to general words merely because this would be their widest, usual, natural or literal meaning would be to place on them a construction other than that which Parliament must be supposed to have intended.

Legal professional privilege is clearly a doctrine which falls within this rule.

The statutory exceptions to the privilege are considered under the following headings:

A. Express abrogation of the privilege.

B. Implied abrogation of the privilege.


The legislation which is discussed in this chapter is not intended to be exhaustive of the statutory exceptions. It is examined with a number of aims in mind: to identify the types of situations in which the legislature has resolved that the privilege should not be available; to analyse the extent of the abrogation of the privilege and to discern the approach and principles applied by courts in construing such legislation.

A. EXPRESS ABROGATION OF THE PRIVILEGE

It has been observed that statutes purporting to abrogate the privilege expressly are rare. Some of the few Australian examples are the following:

1. **Legal Practitioners Act 1936-1972** (S.A.) s.24k

The common law privilege is usually recognized in explicit terms in legislation which provides for the granting of legal assistance to persons of limited means. However, s.24k of the **Legal Practitioners Act 1936-1972** (S.A.), which has no counterpart in the other Australian jurisdictions, provides:

   (1) A legal practitioner shall disclose to the Society any fact or information relating to an assisted person that the Society may require, and may disclose any such information that the legal practitioner considers relevant to the provision of legal assistance for that person, and the assisted person shall be deemed to have waived any right or privilege that might prevent such disclosure.

   (2) Except as provided in sub-section (1) of this section, the relation of legal practitioner and client, and the privileges arising therefrom, are unaffected by the fact that the client is an assisted person.

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6. Legal Aid Ordinance 1977 (A.C.T.) s.13; Legal Assistance Act 1943 (N.S.W.) s.12; Legal Aid Act 1978 (Qld.) s.14; Legal Aid Commission Act 1978 (Vic.) s.31; Legal Aid Commission Act 1976-1982 (W.A.) s.51.

7. Cf. **Legal Practitioners (Legal Aid) Act 1970** (N.S.W.) s.16.
Sub-section (1) expressly abrogates legal professional privilege by deeming an assisted person to have waived the privilege. The disclosure of 'any' information relating to an assisted person, which would include privileged information, 'shall' be made when required by the Law Society. A legal practitioner may also disclose any 'such' information that he considers relevant to the provision of legal assistance for the client. This is very wide indeed because it is left to the practitioner to determine what information is relevant and whether or not to disclose it. Sub-section (2) affords some protection as it otherwise saves the privilege 'except as provided in sub-section (1)'.

2. Limitation of Actions Act 1958 (Vic.) s.23A(3)(f)

Section 23A of the Limitation of Actions Act 1958 (Vic.) empowers a court to extend the period within which an action may be brought in respect of personal injuries. In exercising this power, a court is required under sub-section (3) to have regard to all the circumstances of the case including the following:

(f) The steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

(My emphasis)

It may be argued that the 'nature' of the advice does not require disclosure of precise details of the advice but only its general effect. However, to serve the underlying object of the sub-section, something more than revealing whether the advice concerned liability or quantum is necessary. These arguments were accepted by the Court of Appeal in Jones v. G.D. Searle & Co. Ltd.8 in construing an identical paragraph in s.20(3) of the Limitation Act 1939 (U.K.).9 Roskill L.J. said in that case:

I think that the phrase shows that when the court has to consider the nature of the advice, it has to consider its characteristics in so far as they bear upon the question whether or not the plaintiff has been guilty of unreasonable delay once he or she became aware of the information which might give rise to a cause of action against the defendant. I do not believe it is possible to define the phrase 'the nature of any such advice' with any


greater precision. What is relevant is likely to vary from case to case. But, for my part, I do not think the phrase can be given so restrictive a meaning so that it is limited to who gave the advice or whether the advice was directed to liability or to quantum or matters of that kind. 10

It was held that the plaintiff must answer an interrogatory inquiring whether the legal advice received was favourable or unfavourable to her action. Roskill and Eveleigh L.JJ., with whom Michael Davies J. agreed, accepted that the relevant section expressly restricted the privilege. 11 But Roskill L.J. said that the plaintiff should only state 'quite generally' the nature of the legal advice 12 and earlier emphasized that nothing in his judgment was intended to suggest that the opinions of counsel were liable to discovery or production. 13

In light of Jones' case, s.23A(3)(f) of the Limitation of Actions Act 1958 (Vic.) removes the protection of the privilege to the extent that the plaintiff is required to disclose whether the legal advice obtained was favourable or unfavourable to his case. The plaintiff cannot be compelled, however, to reveal the nature of that advice in any greater particularity. 14

3. Social Security Act 1947 (Cth.) ss.141 and 142

These sections provide as follows:

141. The Director-General, a Deputy Director-General, an Assistant Director-General, a Director or a Registrar may, by writing served by post on a person whom he believes to be in a position to do so, require that person to furnish to him a confidential report relating to any matter which might affect the grant or payment of a pension, allowance, endowment or benefit under this Act to any other person and the person so required shall not fail to furnish a report accordingly within 14 days after the writing is served upon him and shall not furnish a report which is false or misleading in any particular.

Penalty: $40.

11. Ibid. 106.
12. Ibid.
13. Ibid. 104.
142. Nothing contained in any law of a State or Territory shall operate so as to prevent any person from furnishing any information, or making any books, documents or papers available to the Director-General or to an officer for the purposes of this Act.

Section 141 does not appear to be sufficient to abrogate the privilege. There is no indication, whether express or implied, that the words 'confidential report relating to any matter' require the disclosure of privileged information.

In relation to s.142, it was contended by Isaacs that 's.142... is a clear, express and unambiguous removal of the privilege'. The crucial issue for this view is whether the words 'any law of a State or Territory' include common law principles and, in particular, the doctrine of legal professional privilege. Isaacs answered this in the affirmative and merely concluded by saying that information sought under the section is not privileged from disclosure. With respect, Isaacs view is not convincing, though it has been accepted elsewhere as correct. In the phrase 'law of a State or Territory', the word 'of' suggests something particular to that State or Territory such as legislation and not the common law which applies generally. It may be argued in reply that this is an unreasonable reading down of the preceding word 'law'. There may also be a jurisdictional problem with s.142. As the section is expressly limited to State or Territory law, it does not purport to deal with legal professional privilege as part of the federal common law. The existence of federal common law has not been decisively

15. Isaacs S., 'Solicitors' Privilege' (1964) 2 Law Society Journal 46, 48. See also Note, 'Disclosure of Confidential Information to Government Departments' (1951) 25 Law Institute Journal 3 where it is stated that 'it might be argued that section 142 of the Act expressly negatives privilege'.

16. Isaacs, ibid.

resolved in Australia, although the concept is well established in the United States. In Australian Broadcasting Commission v. Industrial Court of South Australia, Murphy J. said:

Federal common law completes the statutory patterns enacted by the Parliament and is as necessary for the effective operation of those laws as the common law of the Constitution is for the effective operation of the Constitution.

In Baker v. Campbell, Murphy J. examined the nature and scope of federal common law in relation to legal professional privilege. He remarked that the common law in the States is not decisive of the content of federal common law and a federal common law rule can be adopted even if the common law in the States has been altered. This point was not taken up by the other members of the High Court.

In view of the above difficulties, the better view is that s.142 of the Social Security Act does not abrogate the privilege and should be construed subject to it.

4. Royal Commissions Act 1923 (N.S.W.) s.17(1)

The above section is a clear example of a provision which abrogates legal professional privilege and is in the following terms:

17. (1) A witness summoned to attend or appearing before the commission shall not be excused from answering any question or producing any book, document, or writing on the ground that the answer or production may criminate or tend to criminate him, or on the ground of privilege or on any other ground.

Although this section explicitly removes the privilege against self-


22. Cf. ibid. 404 per Mason J.
incrimination, the words 'shall not be excused... on the ground of privilege' also embrace the doctrine of legal professional privilege. Even the concluding words 'or on any other ground', if read *ejusdem generis*, are capable of abrogating the latter privilege.

It was argued by Isaacs 23 that all privilege, professional or otherwise, is taken away by s.17 of the *Royal Commissions Act*. 24 In *R. v. S.*, 25 Street C.J. said:

Section 17 commences by imposing an absolute obligation on any witness summoned to attend, to answer any questions on any matter relevant to the inquiry, and there is no ground permitted upon which he can refuse to answer such questions... and there is nothing in the Act which cuts down this obligation.

Sub-sections (2) and (3)(a) of the Act give some protection to a witness by rendering answers given or documents produced inadmissible in civil or criminal proceedings, except in proceedings for an offence against the Act. 26

5. **Freedom of Information Act 1982 (Cth.) s.42** 27

Section 42(1) of the *Freedom of Information Act 1982 (Cth.)* exempts a document from mandatory access under the Act if the document is of such a nature that it would be 'privileged from production in legal proceedings on the ground of legal professional privilege'. It has been said that this incorporates the common law principles relating to

26. The effect of a so-called 'use-community' provision is discussed *infra* 103.
27. s.32 of the *Freedom of Information Act 1982 (Vic.)* is in identical terms.
the privilege. But s.42(2) provides:

A document of the kind referred to in sub-section 9(1) is not an exempt document by virtue of sub-section (1) of this section by reason only of the inclusion in the document of matter that is used or to be used for the purpose of the making of decisions or recommendations referred to in sub-section 9(1).

Sub-section (2) abrogates the privilege by requiring a document of the kind in s.9(1) of the Act to be made available notwithstanding that it contains privileged communications. This statutory exception to the privilege is designed to ensure that public access to government information is not thwarted by a mere claim of privilege.

6. Ombudsman Act 1976 (Cth.) s.9(4)

This section provides:

Notwithstanding the provisions of any enactment, a person is not excused from furnishing any information, producing a document or other record or answering a question when required to do so under this Act on the ground that the furnishing of the information, the production of the document or record or the answer to the question - ...

(b) would disclose legal advice furnished to a Minister, a Department or a prescribed authority,

but the information, the production of the document or record or the answer to the question is not admissible in evidence against him in proceedings other than -

(c) an application under sub-section 11A(2); or

(d) proceedings for an offence against section 36.


Section 9(4) appears to abrogate legal professional privilege, if at all, to a very limited extent. First, the requirement to disclose legal advice is expressed to be notwithstanding the provisions of any 'enactment'. The word 'enactment' is defined in s.3(1) of the Act, but it does not include the general law. As the privilege is a common law doctrine, it is arguable whether s.9(4) extends to it. Second, what is required to be disclosed is 'legal advice'. Legal professional privilege protects not only advice given by a lawyer to his client but also other communications passing between them and third parties with reference to actual or contemplated litigation. To this extent, s.9(4) does not abrogate the privilege. Third, the legal advice to be disclosed is advice furnished 'to' a Minister, a Department or a prescribed authority. Whether this further requires the disclosure of privileged communications made by or on behalf of a Minister, a Department or a prescribed authority to the legal adviser is unclear.

The reverse problem arose under the former s.367 of the Companies Act 1961 (Vic.) which referred to privileged communications made 'to' a duly qualified legal practitioner. In Re Stanhill Consolidated Ltd., Menhennitt J. said in relation to s.367:

...to reveal the communication by the solicitor would inevitably at the same time reveal the communication to him, because the advice tendered would either expressly refer to the advice sought or, from the very nature of the advice given, reveal the subject-matter of the advice sought.

It can therefore be argued that, as legal advice furnished to a Minister may reveal the instructions given, the disclosure of that advice under s.9(4) incidentally abrogates any privilege attaching to the communications passing between them.

30. Cf. s.3(1)(e) which refers to 'a law' in force in the Territory of Christmas Island or the Territory of Cocos (Keeling) Islands.

31. See now Companies (Victoria) Code s.308.

A final matter which may be noted about s.9(4) is that it contains a 'use-immunity' provision\(^{33}\) which renders the information or document disclosed inadmissible except in proceedings specified in (c) and (d). 'Use-immunity' provisions are commonly used in relation to the privilege against self-incrimination\(^{34}\) and it has been contended that they indirectly abrogate that privilege.\(^{35}\) The effect of a 'use-immunity' provision with respect to legal professional privilege has not been judicially considered. One commentator has stated that if the client is granted immunity from prosecution, the legal adviser has no right to remain silent since the privilege is only for the client's protection.\(^{36}\) It is submitted that the 'use-immunity' provision in s.9(4) is not, of itself, sufficient to remove the privilege.

7. **Ombudsman Act 1973 (Vic.) s.18(3), (4) and (5)\(^ {37}\)**

The above sub-sections are as follows:

(3) No obligation to maintain secrecy or other restriction upon the disclosure of information obtained by or furnished to persons in the service of the Crown or authority, where imposed by any enactment or any rule of law, shall apply to the disclosure of information for the purposes of an investigation under this Act.

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\(^{34}\) See Royal Commissions Act 1902 (Cth.) s.6DD; Commissions of Inquiry Act 1950-1954 (Qld.) s.14(2); Royal Commissions Act 1917 (S.A.) s.16; Evidence Act 1910 (Tas.) s.21(4); Evidence Act 1958 (Vic.) s.30; Royal Commissions Act 1968 (W.A.) s.20.


\(^{37}\) See also Parliamentary Commissioner Act 1974-1976 (Qld.) s.19(2), (3) and (4); Ombudsman Act 1972-1974 (S.A.) s.20; Parliamentary Commissioner Act 1971-1982 (W.A.) s.20(2) and (3). Cf. Ombudsman Act 1974 (N.S.W.) s.21; Ombudsman Act 1978 (Tas.) s.24(2) and (3).
(4) The Crown shall not, in relation to an investigation under this Act, be entitled to any such privilege in respect of the production of documents or the giving of evidence as is allowed by law in legal proceedings.

(5) Subject to sub-sections (3) and (4) a person shall not be compelled for the purposes of an investigation under this Act to produce any document or give any evidence which he could not be compelled to produce or give in proceedings before a court.

Section 18(3), it may be contended, does not deal with legal professional privilege but is directed to duties to maintain secrecy or similar restrictions on the disclosure of information imposed on public servants. There are many provisions imposing such obligations, particularly on persons exercising investigative powers. This construction of s.18(3) requires reading the words 'or other restriction' ejusdem generis with the preceding words. What is therefore covered are obligations which restrict the disclosure of information. This is inappropriate to legal professional privilege. A legal adviser is only bound to withhold privileged information from disclosure so long as the client does not waive the privilege. Once the privilege is waived, no restriction upon the disclosure of information exists. The other difficulty of s.18(3) extending to legal professional privilege is that only privileged information 'obtained by' or 'furnished to' employees of the Crown or authority is not protected. It follows that privileged information originating from Crown or authority employees would not have to be disclosed.

This issue was discussed in relation to the Commonwealth Ombudsman Act.

The argument that s.18(3) abrogates the privilege is derived from a wide reading of the words 'or other restriction upon the disclosure of information... imposed by... any rule of law'. Legal professional privilege is clearly an exclusionary rule of law. But this construction removes the words cited from their context. Furthermore, there is no indication that the word 'information' is intended to embrace all privileged communications or specifically, only legal

38. See Income Tax Assessment Act 1936 (Cth.) s.16; Evidence Act 1958 (Vic.) ss.21E-21G; Land Tax Act 1958 (Vic.) s.4(5); Legal Profession Practice Act 1958 (Vic.) s.77; Ombudsman Act 1973 (Vic.) s.20; Public Trustee Act 1958 (Vic.) s.59(3).
advice. A manifestation of legislative intent to override the privilege cannot be inferred from s.18(3).

Section 18(4) is concerned with, so-called, 'Crown privilege'. The use of the word 'such' in the sub-section is, however, unfortunate. It tends to suggest that other related privileges which the Crown might claim are also excluded. Legal professional privilege is, in the terms of the sub-section, a 'privilege in respect of the production of documents or the giving of evidence as is allowed by law in legal proceedings' and is available to the Crown. This construction of s.18(4) is not tenable. Quite clearly, s.18(4) does not deal with legal professional privilege let alone evince any intention to exclude that doctrine.

The view that ss.18(3) and (4) do not abrogate the privilege is reinforced by s.18(5) which, subject to those sub-sections, is wide enough to preserve the privilege. Section 13(3) of the Act may be noted in this regard as it provides:

Nothing in this Act shall authorize the Ombudsman to investigate any administrative action taken - ...

(b) by a person acting as legal adviser to the Crown or as counsel for the Crown in any proceedings;

The words 'administrative action' are inclusively defined in s.2 of the Act. In Glenister v. Dillon, the Victorian Full Court of the Supreme Court held that the exemption in s.13(3)(b) applied to the Crown Solicitor and all other officers acting under him.

39. Cf. Ombudsman Act 1976 (Cth.) s.9(4)(b) and Ombudsman Act 1978 (Tas.) s.24(3) where the term 'legal advice' is used.


41. But s.18(5) is expressed to be confined to producing documents or giving evidence in court proceedings. After Baker v. Campbell (1983) 49 A.L.R. 385, the privilege extends to non-curial proceedings and the privilege clearly covers communications made in obtaining or giving legal advice irrespective of litigation.

8. Legislation relating to the name and address of clients

Sections 16(1)(c), 16(2)(c) and 308 of the Companies (Victoria) Code, s.11(1)(c) and 11(2)(c) of the Securities Industry (Victoria) Code and s.30(3) of the National Crime Authority Act 1984 (Cth.)\(^43\) purport to save the privilege, but then provide that a legal practitioner\(^44\) who refuses to disclose a privileged communication 'shall' furnish the name and address of the person to whom or by whom the communication was made. The obligation to disclose a client's name and address is imposed without qualification. These provisions are an extension of the common law facts exception because the client's name and address must be revealed even if communicated confidentially.\(^45\)

Regulations 27 and 28 of the Income Tax Regulations made under the Income Tax Assessment Act 1936 (Cth.), require a taxpayer to state in a return an address in Australia for service and to give written notice to the Commissioner of any change of address. It has been suggested that the regulations abrogate the privilege attaching to a taxpayer client's address irrespective of whether it was communicated confidentially to a legal adviser.\(^46\) It may be argued that if a common law right as important as legal professional privilege is to be excluded, it should be done so by principal

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43. Formerly, s.21(3) National Crimes Commission Act 1982 (Cth.). Cf. s.19(3) National Crime Authority (State Provisions) Act 1984 (Vic.).

44. This is interpreted in s.4(1) of the National Crime Authority Act 1984 (Cth.) to mean a barrister, a solicitor, a barrister and solicitor, or a legal practitioner, of the High Court or of the Supreme Court of a State or Territory.


legislation rather than by regulation. As Gresson J. said in Commissioner of Inland Revenue v. West-Walker:

That a principle so long and so well-established, and so essential in the interests of justice, should be abrogated by the Legislature in an indirect way is not to be expected.

It seems, however, that once a client's address is provided in an income tax return, it ceases to be privileged because it is publici juris.

B. IMPLIED ABROGATION OF THE PRIVILEGE

It is difficult to discern from the cases any clear principles in determining whether legislation overrides the privilege by necessary implication. In Baker v. Campbell, Brennan J. stated the 'true approach' to be followed in statutory interpretation in these terms:

One must look first to the words which Parliament has used and ascertain whether the scope or operation of a fundamental principle would be affected by construing Parliament's words in their natural sense and in their context. If the scope or operation of a fundamental principle would be affected, it is right to consider a presumption... that the Parliament intended to give effect to the fundamental principle and did not intend the words of the statute to be given their natural or widest meaning... When the presumption applies, the courts read down the general words used by Parliament to give effect to the applicable legal principle... but where general terms are used, the courts have no mandate to narrow the general meaning of those terms unless the rules of statutory interpretation so require.

47. Unless, of course, the empowering Act clearly authorizes the making of regulations which override the privilege: see Pearce D.C., Delegated Legislation in Australia and New Zealand (1977) 186-9. This does not appear from s.266 of the Income Tax Assessment Act.


49. E.P.G., loc. cit. Cf. McJarrow v. McJarrow (1979) F.L.C. 90-721, 78,883 where Bell J. in the Family Court of Australia expressly left open the question whether a postmark on an envelope was publici juris and could be used to discover a client's address which had been communicated confidentially to the legal adviser.


51. Ibid. 424.
This passage may be contrasted with the view of Dawson J. in that case who said:

But it does not seem to me that the law should ease the way for the legislature to expand the practice [the legislative imposition of an obligation to disclose professional confidences] nor should it disguise the fact that a principle which the law regards as fundamental is involved. 52

These observations, though useful as a general guide, do not provide much assistance in deciding whether the privilege is legislatively abrogated in a given case. The following matters are examined in detail:

1. Principles applied in construing legislation which impliedly abrogates the privilege against self-incrimination.
2. The policy of strict interpretation of legislation which restricts legal professional privilege.
3. Purposive interpretation and legal professional privilege.
4. Specific provisions that may impliedly abrogate legal professional privilege.

Ideally, where Parliament intends to exclude the privilege, it should do so expressly. This would avoid much of the uncertainty that exists in this area.

1. Principles applied in construing legislation which impliedly abrogates the privilege against self-incrimination

These principles were recently expounded by the Full High Court of Australia in Pyneboard Pty. Ltd. v. Trade Practices Commission53 and Sorby v. Commonwealth54 and were considered by the Full Court of the Supreme Court of Victoria in Martin v. Police Service Board55 and

52. Ibid. 446.
55. [1983] 2 V.R. 357.
Controlled Consultants Pty. Ltd. v. Commissioner for Corporate Affairs. Marks J. in Martin's case summarized the relevant principles as follows:

3. Any issue of availability of the privilege is to be decided by reference to the statute itself said to abrogate it;

4. In considering whether the common law right has been abrogated by statute it is necessary to bear in mind the 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;

5. It will be more readily concluded that the privilege is impliedly excluded by statute where the obligation to answer questions or provide information does not form part of an examination on oath or an examination on oath before a judicial officer;...

6. In deciding whether a statute impliedly excludes a 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...

These are only general propositions. The above cases also demonstrate that the privilege against self-incrimination is not abrogated by statute except in the clearest terms.

The issue which arises is whether the above principles can be relied on when examining legislation which may impliedly override the doctrine of legal professional privilege. In Baker v. Campbell, only Wilson, Brennan and Dawson JJ. referred to Sorby's case on the question of statutory interpretation. The view that the above principles may be inapplicable in relation to legal professional

privilege, derives some support from the statement in Pyneboard's case that the privilege against self-incrimination is 'too fundamental a bulwark of liberty to be categorized simply as a rule of evidence'. 59 Mason J. also remarked in Baker v. Campbell that the privilege against self-incrimination rests on a 'more enduring foundation' than does legal professional privilege. 60 The majority in Baker v. Campbell held that the legal professional privilege is not a mere rule of evidence but a substantive principle available beyond judicial or quasi-judicial proceedings. Notably, Dawson J. said that the privilege stems from a right which is no less fundamental than that which supports the rule against self-incrimination. 61 If this can be taken to reflect the prevailing view of the High Court, the statutory principles developed in relation to the implied abrogation of the privilege against self-incrimination serve as a valuable guide to the resolution of similar questions concerning legal professional privilege.

2. Policy of strict interpretation of legislation which restricts legal professional privilege

Courts are reluctant to hold that the privilege has been impliedly abrogated in the absence of a clear manifestation of legislative intent. In Nokes v. Doncaster Amalgamated Collieries Ltd., 62 Viscount Simon L.C. said:

...where, in construing general words the meaning of which is not entirely plain there are adequate reasons for doubting whether the Legislature could have been intending so wide an interpretation as would disregard fundamental principles, then we may be justified in adopting a narrower construction.

This passage was cited with approval by the New Zealand Court of Appeal in Commissioner of Inland Revenue v. West-Walker 63 as stating

60. (1983) 49 A.L.R. 385, 405. Also 394 per Gibbs C.J.
61. Ibid. 443.
the general principles governing the interpretation of a provision which purports to override the privilege. In the recent case of Descoteaux v. Mierzwinski, which was approved by the High Court in Baker v. Campbell, the Supreme Court of Canada stated that legislation which interferes with legal professional privilege 'must be interpreted restrictively'. The strict approach of courts is exemplified by a number of cases.

In Commissioner of Inland Revenue v. West-Walker, the sole question in a case stated for the opinion of the New Zealand Court of Appeal was whether s.163 of the Land and Income Tax Act 1923 (N.Z.) abrogated the common law doctrine of legal professional privilege. That section provided that 'every person, whether a taxpayer or not... shall, if required by the Commissioner... furnish in writing any information or produce any books or documents which the Commissioner... considers necessary or relevant for any purpose relating to the administration or enforcement of this Act or any other Act imposing taxes or duties...'. A formal notice, issued pursuant to the above provision, had been served on the defendant solicitor requiring him to disclose information relating to the affairs of a client. A majority of the Court (Fair, Gresson, Hay and North JJ., Stanton J. dissenting) held that s.163 did not override the privilege. Although it was acknowledged by some members of the Court that a 'literal interpretation' of s.163 would operate to extinguish the privilege, Fair J. remarked that 'very clear language' is required to achieve this. He said:

It seems to me (to quote from Stradling v. Morgan (1560) 1 Plowden 199; 75 E.R. 305) 'consonant with reason and good discretion' (ibid., 205; 315) to consider that this general

68. Ibid. 211 per Gresson J. and 217 per Stanton J.
69. Ibid. 207.
principle affording special protection in respect of legal advice was not intended to be invaded by the general provision in s.163. At best, it is doubtful whether its wide terms were intended to extend to nullify, in effect, the general rule of public policy expressed by the recognition of this privilege, and so it cannot be held to have done so.\(^{70}\)

Gresson J. expressed the same view in strong terms:

*I recoil from the proposition that it was the intention of the Legislature to trample underfoot in such an oblique fashion an old and cherished principle... In my opinion, this common-law right has been left untouched by the statute. If the Legislature had meant to alter this common-law right, it is to be expected that it would have done so expressly-plainly and unambiguously.*\(^{71}\)

The remaining members of the majority delivered similar judgments.

In *Frank Truman Export Ltd. v. Metropolitan Police Commissioner*,\(^{72}\) police officers acting under a search warrant issued pursuant to s.16(1) of the *Forgery Act 1913* (U.K.), searched a solicitor's office for forged documents and removed many documents in order to sort them. The solicitor subsequently claimed that all the documents were protected by legal professional privilege. Swanwick J. held that, as s.16(1) expressly authorized the seizure of the documents alleged to be forgeries, the police were entitled to retain them. With regard to the remaining non-forged documents he said:

*...section 16 is restrictive of common law rights, and that it must, therefore, be strictly construed... The document in the second category is not a forged document. I would, therefore, hold that it does not fall within the statute...*\(^{73}\)

Swanwick J. concluded, however, that having regard to the balance of public policy and the extent of police powers under the warrant, the police were also entitled to retain the non-forged documents.\(^{74}\)

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70. Ibid. 208.
71. Ibid. 213.
73. Ibid. 959.
74. Ibid. 960 and 965.
A recent example of the reluctance of courts to infer an intention to abrogate the privilege is the case of Commonwealth v. Frost.\textsuperscript{75} Legal professional privilege was claimed by the Commonwealth in the course of investigative proceedings before a Board of Accident Inquiry appointed under the Air Navigation Regulations (Cth.). Regulation 291(2) provides that the Board is not bound by legal rules of evidence and pursuant to regulation 291(4) and (5), a person may be granted leave to appear before the Board and may be represented by counsel or a solicitor. Regulation 292(5) and (6) states:

(5) A person served with a summons to attend before the Board of Accident Inquiry shall not, after payment to him of reasonable expenses, fail, without reasonable excuse -

(a) to attend before the Board...

(b) to produce the books, documents or writings or the part or component of an aircraft in his custody or control which he is required to produce.

(6) A person appearing as a witness before the Board of Accident Inquiry shall not refuse to be sworn or make an affirmation instead of taking an oath, or answer a question relevant to the proceedings put to him as a witness.

The Chairman of the Board held that the effect of the regulations was that legal professional privilege was not available to a witness. The Commonwealth then applied to the Federal Court of Australia under the Administrative Decisions (Judicial Review) Act 1977 (Cth.) for an order of review of the Board's decision. Ellicott J. held that the right to legal representation before the Board which regulation 291(5) conferred, carried with it the right to claim legal professional privilege.\textsuperscript{76} His Honour also stated that the Board was 'bound' to respect the privilege. The fact that the rules of evidence did not apply and the words 'without reasonable excuse' were not used in regulation 292(6), but only in regulation 292(5), did not affect the position.\textsuperscript{77} It is important to note that Ellicott J. referred to

\textsuperscript{75} (1982) 41 A.L.R. 626.

\textsuperscript{76} Ibid. 632.

\textsuperscript{77} Ibid. 631 and 632.
the United States case of Civil Aeronautics Board v. Air Transport Association of America\textsuperscript{78} and cited the following passage from the judgment of District Judge Holtzoff:

\begin{quote}
The attorney-client privilege is deeply imbedded and is part of the warp and woof of the common law. In order to abrogate it in whole or in part as to any proceeding whatsoever, affirmative legislative action would be required that is free from ambiguity. The very existence of the right of counsel necessitates the attorney-client privilege in order that a client and his attorney may communicate between themselves freely and confidentially.\textsuperscript{79}
\end{quote}

Ellicott J. said that this passage was consistent with the view he took in the case.\textsuperscript{80}

The approach of the majority of the High Court in Baker v. Campbell\textsuperscript{81} in relation to s.10 of the Crimes Act 1914 (Cth.), clearly supports the policy of strictly construing legislation which might otherwise extend to the privilege.\textsuperscript{82} Murphy J. stated that legal professional privilege applies unless Parliament 'unmistakably excludes or confines it'.\textsuperscript{83} Wilson J. said that a general provision will not be regarded as evincing an intention to remove the privilege unless this emerges expressly or by necessary implication.\textsuperscript{84} Deane J. considered that there is nothing in s.10 or in any other provision of the Crimes Act which indicates that Parliament intended to modify or destroy the doctrine of legal professional privilege.\textsuperscript{85} Dawson J. referred to the presumption that there is no intention to interfere with basic common law doctrines unless the words of the statute expressly or necessarily require that result.\textsuperscript{86}

\textsuperscript{78} (1961) 201 F. Supp. 318.
\textsuperscript{79} Ibid.
\textsuperscript{81} (1983) 49 A.L.R. 385.
\textsuperscript{82} The decision of the Court on s.10 is examined infra 128-32.
\textsuperscript{83} (1983) 49 A.L.R. 385, 413.
\textsuperscript{84} Ibid. 418.
\textsuperscript{85} Ibid. 435.
\textsuperscript{86} Ibid. 439.
pointed out that if the legislature wants to abrogate the privilege, it should do so by 'express words' and said:

...but the Court should not assist that result by reading that intention into the general words of the statute.  

Another aspect of the narrow approach to statutory interpretation is that even if the privilege is abrogated, the legislation in question must further provide, in clear terms, that the legal adviser or his client are obliged to disclose the privileged information. In R. v. Bell; Ex parte Lees, Gibbs J., as he then was, pointed out:

To say that a communication is not privileged means no more than that a party or witness may not decline to give evidence, or produce documents, in the ordinary course of legal proceedings. A person is not obliged to supply information to someone else simply because, if he were called as a witness, he would have no privilege from giving evidence revealing that information.

It was argued on behalf of the wife in R. v. Bell; Ex parte Lees that the Family Law Act 1975 (Cth.) did not evince a sufficient intention to override legal professional privilege. It was unnecessary for the High Court to decide this question because it was unanimously held that the privilege did not apply on general law principles. A further issue for the Court was whether Bell J. in the Family Court had power to order the wife's solicitor to disclose her address. Different and even conflicting views were expressed on this point. The widest view was taken by Wilson J., with whom Aickin J. agreed, who said that the power to make the order was to be found in ss.114(3) and 70(6)(d) of the Family Law Act.  

87. Ibid.
89. Ibid. 143.
90. See supra 48-50.
91. The case at first instance was McJarrow and McJarrow (1979) F.L.C. 90-721.
only s.70(6)(d) and not s.114(3) was appropriate to support the order. Murphy J. relied on the applicant's concession that the Family Court had power to make the order. Gibbs J. took a strict view of the provisions in question and stated that there was no statutory power to support the order. He added, however, that the Family Court had inherent jurisdiction in custody cases to order the disclosure of a client's address. The view of Gibbs J., it is submitted, is to be preferred. The fact that a communication is not privileged does not, of itself, require its disclosure and even where a statute appears to authorize this, it must do so in clear and definite language before effect is given to it.

A final matter to be noted about the current approach of strictly construing a provision which impliedly abrogates the privilege, is that the privilege is abrogated only in so far as it is necessary to achieve the underlying purpose of the provision. This principle was accepted by the Supreme Court of Canada in Descoteaux v. Mierzwinski and was stated in the following proposition:

When the law gives someone authority to do something which, in the circumstances of the case, might interfere with that confidentiality [of communications between solicitor and client], the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.

The above principle was also recognized by the Court of Appeal in Parry-Jones v. Law Society. Lord Denning M.R. there held that

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93. Ibid. 157.
94. Ibid. 159.
95. Ibid. 147-8.
98. [1969] 1 Ch. 1.
rule 11 of the Solicitors' Trust Accounts Rules 1945 (U.K.) was valid to override any privilege which might otherwise subsist between solicitor and client. Notably, the Master of the Rolls confined the extent of the abrogation only to what was required to achieve the purpose of the rule. He said:

But they [the Law Society] and their accountant must, of course, themselves respect the obligation of confidence. They must not use it [the rule] for any purpose except the investigation, and any consequential proceedings... In all other respects the usual rules of legal professional privilege apply...

Diplock L.J. agreed with Lord Denning M.R. on this point and Salmon L.J. concurred with both judgments.

3. Purposive interpretation and implied abrogation of legal professional privilege

An issue which emerges implicitly from some cases is whether a purposive approach to the construction of legislation facilitates the implied abrogation of the privilege. This question has been addressed by courts in relation to the privilege against self-incrimination. In Martin v. Police Service Board, Crockett J. noted that:

...the cases where the rule has been held to have been excluded by implication are cases where the express object of the statute has been that information of a particular kind is to be disclosed for a particular purpose in circumstances where, should that information be unobtainable, the objects of the enactment would thereby be stultified.

99. Ibid. 8.

100. Ibid. Section 46(6) of the Solicitors Act 1957 (U.K.) was referred to.

101. Ibid. 10.

The High Court in *Pyneboard Pty. Ltd. v. Trade Practices Commission,*\(^{103}\) cited with approval the case of *Mortimer v. Brown*\(^{104}\) for the proposition that it is relevant in determining whether there has been an implied abrogation of the privilege against self-incrimination to ask whether the 'purpose' of the provision would be defeated if the privilege were available.

Statements have also been made in favour of a purposive interpretation of legislation which restricts legal professional privilege. In *Commissioner of Inland Revenue v. West-Walker,*\(^{105}\) Fair J. referred to what Viscount Simon L.C. said in *Nokes v. Doncaster Amalgamated Collieries Ltd.*\(^{106}\)...

...if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result.

Stanton J., who dissented in *West-Waker,* stated that the 'purpose' and 'object' of the provision in question would be 'completely nullified' if the obligation to furnish information was subject to legal professional privilege.\(^ {107}\)

The extent to which a purposive construction will be relied upon in order to exclude legal professional privilege by implication is unclear. This issue is of some importance because recent statutes dealing with the interpretation of legislation require courts to construe a provision not only by having regard to its underlying purpose or object, but also so as to 'promote' that purpose or

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106. [1940] A.C. 1014; 1022.
object. 108 In Baker v. Campbell, 109 Mason J. said that the nature and force of the considerations relating to the availability of the privilege in administrative and investigative proceedings 'depend on the object and purpose of the procedures for which the relevant statute makes provision'. He added:

But it may be deduced from the very existence of the statutory obligation to answer questions, provide information or produce documents that there is a strong public interest in obtaining the materials the provision of which is the object of the statute. 110

The decision of the majority in Baker v. Campbell, in holding that the general words in s.10 of the Crimes Act 1914 (Cth.) were not sufficiently clear to abrogate the privilege, indicates that the Court was not prepared to go behind the terms of that section to give effect to any underlying object overriding the privilege. Rather, as Dawson J. observed:

...s.10 is not a new provision and the fact that it is only now that the present question falls to be determined by this Court is some indication of the measure of acceptance of the view that the power of search and seizure which the section confers in general terms does not extend to documents to which legal professional privilege attaches. 111

In view of the assertion of the privilege in Baker v. Campbell as a fundamental doctrine, it is unlikely that general statutory provisions will be interpreted purposively so as to abrogate the privilege.

108. Interpretation of Legislation Act 1984 (Vic.) s.35; Acts Interpretation Act 1901 (Cth.) s.15AA as amended by the Acts Interpretation Amendment Act 1984 (Cth.); Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980 (Cth.) s.5A as inserted by the Companies and Securities Legislation (Miscellaneous Amendments) Act 1983 (Cth.).


110. Ibid. Cf. Commissioner of Inland Revenue v. West-Walker [1954] N.Z.L.R. 191, 219 per North J.: '...the mere circumstance that the client may be obliged to give his own testimony or give information does not of itself exclude the privilege'.

4. Specific provisions that may impliedly abrogate legal professional privilege

There are some important statutory provisions that arguably operate to exclude the privilege. These will be examined to identify the type of legislation tending to restrict the privilege and whether they can be reconciled with the rationale underlying the privilege. Acts conferring a general power to obtain evidence or to require production of documents will also be considered as they relate to the privilege.

(a) Legal Profession Practice Act 1958 (Vic.) ss.46, 75 and 103

These sections compel a solicitor to produce books, accounts or other documents and empower the Supreme Court to authorize their seizure. It has been stated that on the authority of Parry-Jones v. Law Society and Brayley v. Wilton, legal professional privilege cannot be claimed under the above sections. The Legal Profession Practice Act is specifically directed to legal practitioners and legislative intent to abrogate the privilege can be inferred more readily.

(b) Income Tax Assessment Act 1936 (Cth.) ss.263 and 264

The above sections are in the following terms:

263. The Commissioner, or any officer authorized by him in that behalf, shall at all times have full and free access to all buildings, places, books, documents and other papers for any of the purposes of this Act, and for that purpose may make extracts from or copies of any such books, documents or papers.

264. (1) The Commissioner may by notice in writing require any person, whether a taxpayer or not, including any officer employed in or in connexion with any department of a Government or by any public authority -

   (a) to furnish him with such information as he may require; and

113. [1976] 2 N.S.W.L.R. 495.
(b) to attend and give evidence before him or before any officer authorized by him in that behalf concerning his or any other person's income or assessment, and may require him to produce all books, documents and other papers whatever in his custody or under his control relating thereto.

(2) The Commissioner may require the information or evidence to be given on oath and either verbally or in writing, and for that purpose he or the officers so authorized by him may administer an oath.

(3) The regulations may prescribe scales of expenses to be allowed to persons required under this section to attend.115

Some other related provisions may be noted. Failure to allow access under s.263 may contravene s.232 of the Act as amounting to an obstruction of an officer acting in the discharge of his duty. Also, failure to furnish information, or refusal or neglect to attend and give evidence or produce documents constitutes an offence under ss.223 and 224 respectively. It is significant that s.224 is qualified by the words 'unless just cause or excuse for the refusal or neglect is shown',116 which do not appear in s.223.117 If a person is convicted, he could be ordered pursuant to s.225 to do whatever he has failed or refused or neglected to do under ss.223 and 224.

Section 263 is drafted in apparently broad terms as it provides for 'full and free' access at 'all' times to 'all' buildings and documents for 'any' of the purposes of the Act. Access can be obtained under the section not only to documents held by a taxpayer, but also to documents held by other persons such as legal advisers, accountants

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116. It has been claimed that legal professional privilege may be just cause or excuse for not giving evidence: Davies G.L., 'Tax and Stamp Duty: Investigators -v- Solicitors' (1982) 12 Queensland Law Society Journal 3, 7 n.20.

117. In an opinion given to the Council of the Law Institute of Victoria in 1954, it was argued that the word 'fails' in s.223 imports an element analogous to that required by the words 'refuses or neglects... unless just cause or excuse... is shown' in s.224: Note, 'Disclosure of Confidential Information' (1954) 28 Law Institute Journal 242, 243.
and bankers. It is submitted, however, that s.263 should be construed subject to legal professional privilege. In Baker v. Campbell, the majority of the High Court indicated that legislative intention to override the privilege will seldom be inferred from a general provision. This point is developed below in relation to s.264. Even if it can be contended that s.263 abrogates the privilege, some important limitations exist. Notably, s.263 does not confer a power of seizure. The Commissioner cannot therefore take away a client's privileged documents from his legal adviser's office. Only copies of the documents may be made. The Commissioner cannot ask the legal adviser questions about the documents because the words 'have... access' are inappropriate to an interrogation. Unlike s.264, there is no obligation imposed on the taxpayer or other person to furnish information or produce documents under s.263. It has therefore been held that a person is not required to assist actively the Commissioner in obtaining access. In view of these constraints upon s.263, the issue of whether s.264 impliedly excludes the privilege is of some importance.

There is no direct Australian authority on whether s.264 abrogates legal professional privilege. In O'Reilly v. Commissioner of State Bank of Victoria, the High Court unanimously held that s.264 overrides the contractual duty of confidence that a solicitor

118. Southwestern Indemnities Ltd. v. Bank of New South Wales (1973) 129 C.L.R. 512, 519-20 per Barwick C.J.; Federal Commissioner of Taxation v. Australia and New Zealand Banking Group Ltd. (1979) 143 C.L.R. 499, 534 per Mason J. and 545 per Murphy J. It was there held that the explicit reference in s.264 to any person 'whether a taxpayer or not' could not be relied on to read down s.263.


120. It was argued one time that the documents could be seized pursuant to a search warrant issued under s.10 of the Crimes Act 1914 (Cth.) as the Income Tax Assessment Act is a 'law of the Commonwealth' within the meaning of that section: Burges K.J., 'The Rights of Taxpayers and Their Agents' (1974) 9 Taxation in Australia 8, 90; Kluver, op. cit. paras. 9113-6. Section 10 cannot now be used to obtain documents to which legal professional privilege attaches: infra 128-32.

121. O'Reilly v. Commissioner of State Bank of Victoria (No. 2) (1983) 46 A.L.R. 225, 229 per Gibbs C.J., Wilson and Dawson JJ. and 235 per Mason, Murphy, Brennan and Deane JJ.

owes to a client. As a majority of the Court also held that legal professional privilege was not available in non-judicial proceedings, it was unnecessary to decide whether s.264 overrode the privilege. This point was explicitly acknowledged by Mason and Wilson JJ. In obiter, however, Wilson J. said:

…it seems to me that any reading down of the powers which s.264 vest [sic] in the Commissioner could seriously inhibit the investigatory process, which is essential to a proper administration of the Act.

This tends to support the view that s.264 should operate without being subject to the privilege.

In Federal Commissioner of Taxation v. Australia and New Zealand Banking Group Ltd., the High Court dealt with the question of whether a notice served on the A.N.Z. Bank under s.264 overrode the duty owed by the bank to its customer to treat documents held on his behalf as confidential. Gibbs A.C.J., as he then was, said:

It is likely that documents which relate to the income or assessment of a taxpayer will often be entrusted by him to another, for example, to a bank, a solicitor or an accountant. The Parliament cannot have intended that a person whose taxation affairs were under consideration could protect his documents from disclosure simply by binding the person to whom they were entrusted to refrain from producing them.


124. Some commentators have interpreted O'Reilly's case as deciding that s.264 abrogates legal professional privilege: Bowne A., 'High Court Confines Privilege' (1983) 18 Australian Law News (January/February) 9, 10; Cf. MacLean D.M., 'O'Reilly's Case and Legal Professional Privilege' (1983) 12 Australian Tax Review 163, 164.

125. (1982) 44 A.L.R. 27, 42 per Mason J. and 50 per Wilson J.

126. Ibid. 50.


128. Ibid. 521.
As the case was not concerned with the doctrine of legal professional privilege, the above dicta cannot be relied on for the proposition that s.264 impliedly removes the privilege. Rather, the passage supports the principle that a person cannot make a document, otherwise not privileged, the subject of privilege simply by handing it to his legal adviser for safe-keeping.129

A highly persuasive authority against s.264 abrogating the privilege is the New Zealand case of Commissioner of Inland Revenue v. West-Walker.130 The Court of Appeal there carefully examined the nature and scope of s.163 of the Land and Income Tax Act 1923 (N.Z.), a 'statutory provision similar to s.264'.131 It was held by the majority that a solicitor was entitled to decline to furnish information or to produce documents protected by legal professional privilege, because the general words of the section were not sufficient to override the common law doctrine. Fair J. stated:

It would seem most improbable that a specific privilege of this kind was intended to be overridden or withdrawn by a section in such wide general terms. If such special privileges, and special protection was intended to be withdrawn, the ordinary course would be specifically to refer to them...132

Gresson J. also remarked:

...the Commissioner of Taxes must exercise the powers given by the section subject to the common-law privilege protecting communications with solicitors which has been established in order that legal advice may be safely and effectively obtained. I do not think that the statutory provision overrides the common-law rule.133

These observations, it is submitted, apply equally to s.264 of the Income Tax Assessment Act.


133. Ibid. 213.
The decision in West-Walker was approved by the Full High Court of Australia in Baker v. Campbell. The latter case also implicitly suggests that s.264 cannot be construed so as to exclude the privilege. The majority in Baker v. Campbell indicated that a statutory provision which is in wide terms will not be interpreted as evincing an intention to abrogate the privilege. Wilson J. in a decided reversal of his earlier view in O'Reilly's case, cited with approval what Channell J. said in R. v. Bishop of Salisbury:

A general Act must not be read as repealing the common law relating to a special and particular matter unless there is something in the general Act to indicate an intention to deal with that special and particular matter.

The terms of s.264 are also as general, if not broader, than those of s.10 of the Crimes Act 1914 (Cth.). The High Court in Baker v. Campbell had little hesitation in holding that s.10 did not remove the privilege.

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134. (1983) 49 A.L.R. 385, 411 per Murphy J., 431 per Deane J. and 440-1 per Dawson J. The case of Parry-Jones v. Law Society [1969] 1 Ch. 1 has been regarded as 'conflicting' and impossible to reconcile with West-Walker: see Smorgon v. Australia and New Zealand Banking Group Ltd. (1976) 134 C.L.R. 475, 488 per Stephen J.; Crowley v. Murphy (1981) 34 A.L.R 496, 519 per Lockhart J. But the decision in Parry-Jones, unlike West-Walker, was not concerned with taxation legislation. The Court of Appeal in Parry-Jones correctly held that rule 11 of the Solicitors' Trust Accounts Rules 1945 (U.K.), which specifically applied to the legal profession, impliedly overrode the privilege. The cases can therefore be reconciled as a matter of statutory interpretation.


137. [1901] 1 K.B. 573, 579.
The view that s.264 does not override the privilege has been shared by many commentators. The section has caused much concern amongst legal practitioners. In Case H42, counsel for the Commissioner of Taxation urged the Taxation Board of Review to give a ruling on whether s.264 overrode the privilege. Dr. Gerber, the only member of the Board to express a view on this point, said that the doctrine of legal professional privilege 'was not intended to be abrogated by such general provisions as ss.263 and 264' and cited the New Zealand case of West-Walker. In the very recent case of Packer v. Deputy Commissioner of Taxation, legal professional


privilege was claimed in relation to a s.264 notice served on the taxpayer's solicitor which required him to produce all trust account ledgers in his custody. Unfortunately, it was unnecessary to decide whether the privilege was statutorily abrogated. It was held at first instance and by the Full Court of the Supreme Court of Queensland that privilege cannot attach to trust account ledgers which do not disclose legal adviser-client communications. But in the course of an unsuccessful application to the High Court for special leave to appeal, it was submitted that s.264 should be reviewed by the Court. Recent decisions on legal professional privilege, it was argued, had probably reduced the scope of the Commissioner's power under s.264. Mason, Deane and Dawson JJ. did not comment on this point.\footnote{143}

A reading down of ss.263 and 264 of the Income Tax Assessment Act subject to the privilege will not stultify their operation and would tend to accord with the underlying policy of the privilege. Taxation legislation is complex and clients need to be accurately advised. But clients will not communicate fully and frankly with their legal advisers if they fear that what is disclosed might be discovered by the Commissioner. The existence of the privilege allays these fears.

It may be noted that there will be many documents in the possession of a legal adviser to which ss.263 and 264 will apply. For instance, documents which are submitted to a legal adviser for advice or for use in litigation but which were not prepared solely for that purpose will not, in accordance with Grant v. Downs,\footnote{144} be privileged from disclosure. Also, documents which constitute or evidence transactions and are not part of the communications between the taxpayer client and his legal adviser will not be protected. One of the essential requirements of the privilege may also be absent, as where it is not intended that the communication be confidential or where the legal adviser is not consulted in his professional capacity but in order to

\footnote{143. See [1984] 18 Legal Reporter 2. In the Full Court of Queensland, Andrews S.P.J. said: 'It was submitted for the appellants that s.264 of the Income Tax Assessment Act does not evince an intention to exclude the doctrine of legal professional privilege and should be construed accordingly. I have already demonstrated that I accede to this submission' (unreported, transcript of judgment, 6 September 1984, 7).

\footnote{144. (1976) 135 C.L.R. 674.}
engage in entrepreneurial activity. Finally, if a common law exception to the privilege applies (the crime-fraud exception being that which is most likely to be relevant), no privilege will attach to communications in the course of the taxation consultation.

Although it has been asserted so far that ss.263 and 264 do not abrogate legal professional privilege, it is submitted that the doubts which do exist should be expressly removed by legislative amendment. This has been done in the United Kingdom and New Zealand where the privilege is recognized under their respective taxation legislation. In Australia, it is hoped that the following observation of Gibbs C.J. in Baker v. Campbell will be attended to expeditiously:

... I should have thought it right to suggest that the time is ripe for Parliament to give consideration to such sections as ... s.264 of the Income Tax Assessment Act with the purpose of at once extending the doctrine of privilege to documents sought under such provisions...

(c) Crimes Act 1914 (Cth.) s.10

This section provides as follows:

10. If a Justice of the Peace is satisfied by information on oath that there is reasonable ground for suspecting that there is in any house, vessel, or place -

(a) anything with respect to which any offence against any law of the Commonwealth or of a Territory has been, or is suspected on reasonable grounds to have been, committed;

(b) anything as to which there are reasonable grounds for believing that it will afford evidence as to the commission of any such offence; or

(c) anything as to which there is reasonable ground for believing that it is intended to be used for the purpose of committing any such offence;


he may grant a search warrant authorizing any constable named therein, with such assistance as he thinks necessary, to enter at any time any house, vessel, or place named or described in the warrant, if necessary by force, and to seize any such thing which he may find in the house, vessel, or place.148

The essential conditions for a validly issued search warrant under s.10 have been comprehensively examined elsewhere.149 Whether s.10 impliedly overrides legal professional privilege has become recently an important issue. In Crowley v. Murphy,150 the Full Court of the Federal Court held that the privilege did not protect the search and seizure of a client's files pursuant to a search warrant issued under s.10. As Frank J. said in that case:

...where a statute provides for access to documents to be available to a person the fact that those documents are held by a solicitor and were entrusted to him by a client does not provide a ground for the solicitor to refuse access to the documents.151

In Baker v. Campbell,152 however, a majority of the High Court declined to follow Crowley v. Murphy and held that s.10 did not evince an intention to abrogate the privilege. Deane J. stated:

In accordance with the ordinary principles of construction, the section should be construed as not including, in the things which it authorises to be inspected or seized, documents whose confidentiality would be protected in the courts of the land by the doctrine of legal professional privilege.153


149. Pearce D.C., 'Judicial Review of Search Warrants and the Maxwell Newton Case' (1970) 44 Australian Law Journal 467. It may be noted that it is unlikely that any valid claim to privilege can exist in relation to the matters in paras. (a) and (c) of s.10 as these would be ordinarily excluded by the crime exception to the privilege: see Baker v. Campbell (1983) 49 A.L.R. 385, 395 per Gibbs C.J. and 434 per Deane J.


151. Ibid. 501.

152. (1983) 49 A.L.R. 385, 413 per Murphy J., 418 per Wilson J., 435 per Deane J. and 439 per Dawson J.

153. Ibid. 435.
Wilson J. noted that a contrary argument on s.10 was not advanced on behalf of the defendant.\textsuperscript{154} The minority in \textit{Baker v. Campbell} took a broad view of the scope of s.10. It was said that there was nothing in that section to suggest that legal professional privilege was intended to be recognized.\textsuperscript{155} The minority were influenced by their conclusion that the privilege did not apply outside judicial or quasi-judicial proceedings. This is well illustrated in the judgment of Gibbs C.J.\textsuperscript{156} Mason J. stated that 'practical considerations' must be kept steadily in mind and added:

To say that the section excluded documents the subject of legal professional privilege from the scope of the authority given by the warrant would unduly inhibit the investigation of crime and lead to the institution of legal proceedings before trial...\textsuperscript{157}

Brennan J. expressed the general view that 'there is no indication in s.10 that the legislature intended the interest served by the privilege to prevail'.\textsuperscript{158} He subsequently qualified this, in view of the words 'will afford evidence' in s.10(b), by holding that mere expressions of legal opinion and documents created for the sole purpose of use in present or reasonably anticipated litigation were exempt from s.10(b).\textsuperscript{159}

After the majority decision in \textit{Baker v. Campbell}, documents to which legal professional privilege attaches cannot be properly made the subject of a search warrant. But \textit{Baker v. Campbell} does not resolve some of the practical difficulties that legal practitioners might encounter when confronted by a police officer armed with a search

\textsuperscript{154} Ibid. 418.
\textsuperscript{155} Ibid. 395 \textit{per} Gibbs C.J., 407 \textit{per} Mason J. and 420 \textit{per} Brennan J.
\textsuperscript{156} Ibid. 395-6.
\textsuperscript{157} Ibid. 407.
\textsuperscript{158} Ibid. 425.
\textsuperscript{159} Ibid. 426-7.
warrant. It is clear that police officers are not entitled to conduct a 'negative' search, that is, a search of all files and documents in a legal adviser's office to ensure that there are no documents otherwise within the terms of the warrant. Gibbs C.J. said in Baker v. Campbell that the execution of a search warrant in a solicitor's office calls for 'tact and consideration' or 'a little elementary good sense and courtesy'. This has not convinced one commentator who advised legal practitioners as follows:

If necessary you should adopt the unseemly expedient of tucking the papers under your arm and making a dash for the nearest judge, (or perhaps better still, tucking some other papers under your arm and making a dash for a judge).

It may be added that reading s.10 of the Crimes Act subject to the privilege is consistent with the underlying rationale of the privilege. The resort to legal advisers is encouraged if clients have


163. The latter phrase was used by Lord Widgery C.J. in R. v. Peterborough Justice; Ex parte Hicks [1977] 1 W.L.R. 1371, 1376.

164. Hart, op. cit. 30. In the recent case of Brewer v. Castles and Others (No. 3) (1984) 52 A.L.R. 581, Beaumont J. held that a warrant issued pursuant to s.10 of the Crimes Act should be set aside to the extent that it authorized the seizure of 'opinions of counsel' held on the premises of a firm of solicitors. But correspondence and other documents which were 'equivocal in character' could be seized: ibid. 583.
no fear that what they disclose confidentially will be discovered
pursuant to a search warrant. 165

(d) Bankruptcy Act 1966 (Cth.) ss.69 and 81

Section 69 of the Bankruptcy Act deals with public examinations of
bankrupts and s.81 empowers the Court or the Registrar to summon
persons to give evidence and produce books relating to the bankrupt.
Pursuant to ss.69(12) and 81(11) the bankrupt or a person being
examined 'shall' answer all questions put to him. It has been
observed that it is a 'vexed' issue whether a legal adviser can refuse
to answer questions relating to the affairs of a bankrupt client on
the ground of privilege. 166 In Re Wagner, 167 Stable J. said that
'the foremost thing to emphasize' is that the application is in
bankruptcy. It was held that advice given by counsel as to what
courses should be followed by the bankrupt was the subject of
'absolute' privilege. But communications with respect to financial
matters unrelated to the actual advice were not protected from
disclosure.

It is submitted that ss.69 and 81 do not abrogate impliedly legal
professional privilege. 168 The general words used in the sections
cannot be regarded as a clear and unambiguous removal of the
privilege. 169 Sections 69(8) and 81(7) enable a person to be
represented by counsel or a solicitor during an examination. The
right to legal representation usually carries with it the right to

165. See Morse and Thompson v. Harlock [1977] W.A.R. 65, 69 where the
Solicitor-General for Western Australia, Wilson Q.C. as he then
was, submitted in relation to s.711 of the Criminal Code (W.A.)
(which is similar to s.10 of the Commonwealth Crimes Act) that
the public interest that a crime should be promptly and
efficiently investigated should give way to the higher public
A.L.R. 385, 396 per Gibbs C.J.

166. Darvall C. and Feron N.T.F., McDonald, Henry and Meek's
Australian Bankruptcy Law and Practice (5th ed. 1977) 183.


168. This view is supported by academic writers: Rose D.J.,
Lewis's Australian Bankruptcy Law (7th ed. 1978) 160;
Darvall, loc. cit.; Howard Beale O., 'Professional Privilege and

169. Cf. s.69(12) which expressly abrogates the privilege against
self-incrimination.
claim legal professional privilege.\textsuperscript{170} This construction of ss.69 and 81 is reconcilable with the rationale of the privilege. Bankrupt clients might be deterred from seeking legal assistance if they feared that their confidential communications will not be protected from disclosure.

(e) \textbf{Trade Practices Act 1974 (Cth.) s.155(1)}

This section provides as follows:

Where the Commission, the Chairman or the Deputy Chairman has reason to believe that a person is capable of furnishing information, producing documents or giving evidence relating to a matter that constitutes, or may constitute, a contravention of this Act... a member of the Commission may, by notice in writing served on that person, require that person -

(a) to furnish to the Commission... any such information;

(b) to produce to the Commission... any such documents; or

(c) to appear before the Commission at a time and place specified in the notice to give any such evidence, either orally or in writing, and produce any such documents.

Section 155(1) is similar to s.264(1) of the \textit{Income Tax Assessment Act 1936 (Cth.)} and it is generally accepted by commentators that it does not override legal professional privilege.\textsuperscript{171} The Trade Practices Review Committee\textsuperscript{172} also considered that s.155 did not abrogate the privilege but recommended that any doubts should be expressly removed.

\textsuperscript{170} \textit{Commonwealth v. Frost (1982) 41 A.L.R. 626, 632 per Ellicott J.}


\textsuperscript{172} Report to the Minister for Business and Consumer Affairs (1976) paras. 11.45-6.
This view of s.155(1) is supported by the approach of the majority in Baker v. Campbell. Very clear language is now required to take away the fundamental principle supported by the privilege. The general words of s.155(1) do not evince this intention.

(f) Rules of the Supreme Court of Victoria made under the Supreme Court Act 1958 (Vic.)

Order 31(A) of the Supreme Court Rules, which was inserted in 1983, requires parties to personal injury litigation to exchange medical and hospital reports. It is submitted that the Order indirectly abrogates legal professional privilege. This has been accepted in relation to equivalent rules in other Australian jurisdictions. In England, it is stated that rules 37 and 41 of Order 38 of the Rules of the Supreme Court 1965 have the effect of nullifying the privilege which previously prevented the court from ordering the exchange of medical reports. Order 31(A) does not detract from the rationale of the privilege. It facilitates the speedy resolution of disputes by clarifying the matters in issue between the parties.

Order 65 r.27(20) of the Supreme Court Rules of Victoria confers power on the Court or Judge to disallow costs of pleadings or other matter which are improper or unnecessary and where this question has not been raised before, the taxing officer is under a duty to 'look into' the matter. The issue which arises is whether the taxing officer can require a party to disclose privileged communications when examining the alleged impropriety. It is submitted that the words used in the rule do not evince a clear legislative intention to override the privilege. This may be compared with Order 62 r.8(3) of the English Rules of the Supreme Court which is broadly similar to Order 65 r.27(20). It is stated in Cordery on Solicitors that the


English rule excludes legal professional privilege. Such an intention cannot be easily inferred from the rule. 177

(g) General powers of obtaining evidence or documents

There are numerous Acts which confer a wide power to obtain evidence or to require production of documents. 178 There are also many Acts which empower a person to enter and inspect buildings, places, books, documents and other papers. 179 Whether these provisions have the effect of impliedly abrogating legal professional privilege has not been judicially considered. When faced with a claim of privilege in such cases, a court will more readily apply the presumption that Parliament does not intend to extinguish common law rights unless it says so clearly. This presumption may be significant with the increasing use of compulsory disclosure provisions in legislation.

In Sorby v. Commonwealth, 180 Brennan J. said that one of the considerations in applying the presumption is 'in the case of modern statutes, the increase of statutory activity'. The decision in Baker v. Campbell 181 demonstrates that the presumption will be resorted to, to read down general words which do not reveal a sufficient intention to oust the privilege.

It may be added that some Acts provide that a person shall not, without reasonable or lawful excuse, refuse or fail to answer questions, furnish information or produce documents. 182 It is submitted that the words 'reasonable excuse' or 'lawful excuse' preserve the right to claim legal professional privilege. A fortiori where these words are further defined to mean 'an excuse which would

177. See Hobbs v. Hobbs [1959] 3 All E.R. 827 (note (1960) 13 Australian Lawyer 64) where it was held that a litigant is not entitled to inspect his opponent's brief to counsel in the taxation of a bill of costs.

178. See Appendix A.

179. See Appendix B.


182. See Appendix C.
excuse an act or omission of a similar nature by a witness or a person summoned as a witness before a court of law. \textsuperscript{183}
CHAPTER 5

CONCLUSION

Legal professional privilege protects a fundamental public policy which enhances the administration of justice and is linked to our adversary system of litigation. This policy is of such importance that it overrides the public interest in the availability of all relevant evidence. But the general principle of the privilege is not absolute. It is closely confined by the common law and statutory exceptions examined above. It has been argued that the rationale of the privilege, which is the need for freedom of consultation with legal advisers, should dictate its limitations. Consistent with this rationale, the exceptions to the privilege must also be certain as clients will hesitate to consult their legal advisers if they cannot be assured that their communications will remain confidential.

Most of the common law exceptions are well established. Some, however, have yet to be recognized, or even considered in Australia, e.g. information which tends to prove a person's innocence and the accused or unpaid legal adviser exception. It is submitted that they draw support from the rationale of the privilege. There is a strong case to be made against the rule in Calcraft v. Guest.¹ This is anomalous and should not be allowed to disturb the fundamental basis of the privilege. Certain aspects of the facts exception, particularly as to the client's identity and address, should continue to be privileged when they are communicated confidentially. If not, the policy served by the privilege will be undermined.

The statutory exceptions do not always appear to have been enacted by Parliament with the rationale of the privilege in mind. This is exemplified by the frequency of legislative obligations which purport to require the disclosure of confidential information. Courts have responded by strictly construing such provisions. In the case of express removal of the privilege, it can be accepted that Parliament clearly intended that the underlying policy of the privilege should

¹. [1898] 1 Q.B. 759.
not prevail. The same assumption cannot, however, be made with legislation which could only be said to abrogate the privilege by implication. There is much uncertainty in this area. This may have adverse consequences on legal adviser-client relationships because clients cannot be assured that their communications will be protected against a person exercising wide investigative powers.

The High Court decision in Baker v. Campbell\(^2\) is therefore important. It suggests that a general statutory provision which empowers an administrative officer to obtain information or documents will not be regarded as evincing a sufficient intention to exclude the privilege. Moreover, Baker v. Campbell confirms that the privilege is a substantive doctrine and should be accorded where it is necessary to achieve the purpose for which it exists. These considerations highlight the continued relevance of the privilege to the public interest and ensure that the scope and effect of the privilege will not in future be easily diminished.

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APPENDIX A

POWER TO OBTAIN EVIDENCE OR TO REQUIRE FURNISHING OF INFORMATION OR PRODUCTION OF DOCUMENTS

The following are examples under Commonwealth and Victorian legislation.

Commonwealth

Apple and Pear Stabilization Export Duty Collection Act 1971 s.16
Beef Industry (Incentive Payments) Act 1977 s.12
Cotton Research Act 1982 s.25
Dairy Produce Act 1924 s.26
Defence Act 1903 s.94
Designs Act 1906 s.42A
Diesel Fuel Taxation (Administration) Act 1957 s.18
Dried Vine Fruits Equalization Act 1978 s.26
Egg Export Control Act 1947 s.20
Environment Protection (Impact of Proposals) Act 1974 s.15
Estate Duty Assessment Act 1914 s.45
Gift Duty Assessment Act 1941 s.39
Health Insurance Act 1973 s.99
Income Tax Assessment Act 1936 s.264
Industries Assistance Commission Act 1973 s.34
Insurance Act 1973 s.115
Liquid Fuel Emergency Act 1984 s.30 (cf. s.30(6))
Merit Protection (Australian Government Employees) Act 1984 s.59
Migration Act 1958 s.42 (s.41 confers right to obtain legal advice)
National Crime Authority Act 1984 s.22
National Health Act 1953 s.126
Navigation Act 1912 s.370
Nitrogenous Fertilizers Subsidy Act 1966 s.20
Ombudsman Act 1976 s.9
Prices Justification Act 1973 s.23
Public Accounts Committee Act 1951 s.13
Public Works Committee Act 1969 s.21 (s.25 preserves privileges of witnesses)
Royal Commissions Act 1902 s.2 (s.6FA confers right of legal representation)
Seamen's War Pensions and Allowances Act 1940 s.10
Steel Industry Authority Act 1983 s.22
Tobacco Charges Assessment Act 1955 s.15
Trade Marks Act 1955 s.119
Trade Practices Act 1974 s.115
The above power appears as a standard provision in the bounty Acts.

See:

Bounty (Agricultural Tractors) Act 1966 s.15
Bounty (Books) Act 1969 s.14
Bounty (Metal-Working Machine Tools) Act 1978 s.16
Bounty (Polyester-Cotton Yarn) Act 1978 s.17
Bounty (Injection-Moulding Equipment) Act 1979 s.17
Bounty (Penicillin Act) 1980 s.19
Bounty (Room Air Conditioners) Act 1983 s.16
Bounty (Tractor Cabs) Act 1983 s.15
Bounty (Two-Stroke Engines) Act 1984 s.16

Victorian
Abattoir and Meat Inspection Act 1973 s.13
Agricultural Chemicals Act 1958 s.18A
Audit Act 1958 s.44
Barley Marketing Act 1958 s.9A
Business Franchise (Tobacco) Act 1974 s.15
Business Names Act 1962 s.13
Co-operation Act 1981 s.118
Criminal Injuries Compensation Act 1972 s.7(2)
Environment Protection Act 1970 ss.54 and 54A
Gift Duty Act 1971 s.41
Health Act 1958 s.400
Lifts and Cranes Act 1967 s.17B
Liquified Petroleum Gas Subsidy Act 1980 s.14
Liquor Control Act 1968 s.11
Local Government Act 1958 ss.491 and 492
Marine Act 1958 s.96(c) and (d)
Motor Car Act 1958 s.77(2)
Patriotic Funds Act 1958 s.19
Pawnbrokers Act 1958 ss.19(2) and 30
Pipelines Act 1967 s.40(1)
Public Trustee Act 1958 ss.59 and 62
Statistics Act 1958 s.10
Superannuation Act 1958 s.70
Taxation Appeals Act 1972 s.14
Tobacco Leaf Industry Stabilization Act 1966 s.11(a)
Transfer of Land Act 1958 s.104
Wheat Marketing Act 1979 s.23
Wine Grape Processing Industry Act 1978 s.19(3)
Workers Compensation Act 1958 s.53

The provisions of Part I Division 5 of the Evidence Act 1958 confer wide investigative powers on boards and commissions and are incorporated by numerous other Acts. See:
- Architects Act 1958 s.15
- Chiropodists Act 1968 s.17
- Chiropractors and Osteopaths Act 1978 s.14
- Community Welfare Services Act 1970 ss.162 and 185
- Credit Act 1981 s.181
- Dental Technicians Act 1972 s.4
- Dentists Act 1958 s.6
- Dietitians Act 1981 s.16
- Estate Agents Act 1980 s.9
- Legal Profession Practice Act 1958 s.27
- Medical Practitioners Act 1970 s.16A
- Nurses Act 1958 s.12
- Optometrists Registration Act 1958 s.19
- Pharmacists Act s.17
- Physiotherapists Act 1978 s.18
- Public Service Act 1974 s.65
- Railways Act 1958 s.173
- Soil Conservation and Land Utilization Act 1958 s.34
- Surveyors Act 1978 s.19
- Valuation of Land Act 1960 s.17
APPENDIX B

POWER OF ACCESS OR ENTRY TO OR INSPECTION OF BUILDINGS,
BOOKS, DOCUMENTS AND PAPERS

The following are examples under Commonwealth and Victorian legislation.

Commonwealth
Apple and Pear Export Charge Collection Act 1976 s.9
Coal Industry Act 1946 s.51
Estate Duty Assessment Act 1914 s.44
Honey Levy Collection Act 1962 s.11
Income Tax Assessment Act 1936 s.263
Insurance Act 1973 s.115A
Taxation Administration Act 1953 s.14J

Victorian
Associations Incorporation Act 1981 s.47
Business Franchise (Tobacco) Act 1974 s.14
Consumer Affairs Act 1972 s.64
Dairy Products Act 1958 s.14
Drugs, Poisons and Controlled Substances Act 1981 s.42
Environment Protection Act 1970 s.55
Evidence Act 1958 s.58G
Explosives Act 1960 s.55
Farm Produce Merchants and Commission Agents Act 1965 s.67
Filled Milk Act 1958 s.8
Fisheries Act 1968 s.48
Forests Act 1958 s.95
Fruit and Vegetables Act 1958 s.44
Industrial and Provident Societies Act 1958 s.20
Labour and Industry Act 1958 s.186 (incorporated by Bread Industry Act 1959 s.10)
Land Tax Act 1958 s.72
Lifts and Cranes Act 1967 s.20
Liquefied Gases Act 1968 s.17(3)
Margarine Act 1975 s.21
Milk and Dairy Supervision Act 1958 s.28
Money Lenders Act 1958 s.47
Ombudsman Act 1973 s.21
Pay-roll Tax Act 1971 s.45 (s.45A - search warrants)
Petroleum Act 1958 s.32(2)
Pharmacists Act 1974 s.19
Stamps Act 1958 s.166A
Unclaimed Moneys Act 1962 s.13
Wheat Marketing Act 1979 s.26
APPENDIX C

REASONABLE OR LAWFUL EXCUSE PROVISIONS

The following are examples under Commonwealth and Victorian legislation.

Commonwealth
Bankruptcy Act 1966 s.264C
Broadcasting and Television Act 1942 s.21AB
Commonwealth Grants Commission Act 1973 s.23(1)
Departure Tax Collection Act 1978 s.8(1)
Designs Act 1906 s.42C
Environment Protection (Impact of Proposals) Act 1974 s.18
Health Insurance Act 1973 s.102
National Crime Authority Act 1984 ss.29(3) and 30
Ombudsman Act 1976 s.36
Prices Justification Act 1973 s.23(3)
Royal Commissions Act 1902 s.3(2)
Steel Industry Authority Act 1983 s.25
Trade Marks Act 1955 s.122

Victorian
Barley Marketing Act 1958 s.9A(2)
Consumer Affairs Act 1972 s.64(2)
Evidence Act 1958 ss.16 and 19
Gift Duty Act 1971 s.45
Liquified Petroleum Gas Subsidy Act 1980 s.16
Liquor Control Act 1968 s.10A(2)
Ombudsman Act 1973 s.22
Securities Industry (Victoria) Code s.10(1)
Wheat Marketing Act 1979 s.23(2)
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Inglis M.W., 'Legal Professional Privilege - the Recent High Court Decision in Grant v. Downs' (1977) 51 Law Institute Journal 77.


- 'Solicitor-Client Privilege' (1978) 142 Justice of the Peace 484.


- 'Tax Investigations Revisited (1975-6) 29 Tax Lawyer 477.


- 'Disclosure of Confidential Information to Government Departments' (1951) 25 Law Institute Journal 3.


- 'Legal Professional Privilege - Sole or Dominant Purpose' [1979] Australian Current Law Digest 281.


Sharwood M.S., 'Legal Professional Privilege' (1965) 6 Australian Lawyer 57.


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