

# HIGH COURT OF AUSTRALIA

GLEESON CJ,  
GAUDRON, McHUGH, GUMMOW, KIRBY AND CALLINAN JJ

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ARNOLD MANN

APPELLANT

AND

ANNE KATHERINE CARNELL

RESPONDENT

*Mann v Carnell* [1999] HCA 66  
21 December 1999  
C10/1999

## ORDER

*Appeal dismissed with costs.*

On appeal from the Federal Court of Australia

### **Representation:**

S J Odgers with J R Clarke for the appellant (instructed by the appellant in person)

R R S Tracey QC with C M Erskine for the respondent (instructed by ACT Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## CATCHWORDS

### **Mann v Carnell**

Practice and procedure – Preliminary discovery – Legal professional privilege – Loss of privilege – Waiver by disclosure to third party.

Australian Capital Territory – Separation of powers – Representative government – Nature of relationship between the ACT Legislative Assembly and the ACT Executive.

Words and phrases – "client legal privilege".

*Evidence Act* 1995 (Cth), ss 118, 122.

Supreme Court Rules (ACT), O 34A rr 2, 5.

*Australian Capital Territory (Self-Government) Act* 1988 (Cth).



1 GLEESON CJ, GAUDRON, GUMMOW AND CALLINAN JJ. The principal question in this appeal is whether legal professional privilege which attached to certain communications was lost by a subsequent disclosure of those communications.

2 The question arose in the context of an application made by the appellant, to the Supreme Court of the Australian Capital Territory, for pre-trial discovery of documents. The application was made pursuant to O 34A r 5 of the Supreme Court Rules. Order 34A is headed "Preliminary Discovery". Rule 5 provides:

"If –

- (a) it is reasonable to believe that the applicant has, or may have, the right to obtain relief from a person whose description has been ascertained;
- (b) having made reasonable inquiries, the applicant has not gained sufficient information to enable a decision to be made whether to institute a proceeding to obtain the relief;
- (c) it is reasonable to believe that the person –
  - (i) has, or is likely or have; or
  - (ii) has had, or is likely to have had;possession of a document relating to the question whether the applicant has the right to obtain the relief; and
- (d) inspection of the document by the applicant would assist in making the decision;

the Court may order the person to produce the document to the applicant."

3 Rule 2 of O 34A provides:

"An order made under this Order does not operate to require the person against whom the order is made to produce any document that, on the ground of privilege, the person could not be required to produce –

- (a) in the case of an order under rule 3 or 5 – if the applicant had commenced a proceeding against the person; or

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- (b) in the case of an order under subrule 6(1) or (2) – if the applicant had made the person a party to the proceeding."

4 The appellant, Dr Mann, believed that he had, or may have had, a right to damages against the respondent for defamation. The respondent is the Chief Minister for the Australian Capital Territory. The possible defamation was believed to have arisen out of the publication by the respondent to Mr Moore, a member of the Legislative Assembly of the Australian Capital Territory, of certain matter concerning the appellant. The matter was contained in four documents. All of those documents took the form of confidential communications between legal advisers and client, in relation to certain litigation. Three were advices of counsel, and one was a report from the Australian Capital Territory Government Solicitor.

5 It was common ground that the documents, when they were originally brought into existence, constituted written communications which were the subject of legal professional privilege. In that connection, nothing turned upon any dispute as to the test for determining the existence of such privilege. The communications were unquestionably privileged. The issue was whether that privilege was lost. The appellant, apprehending that the advices and report contained imputations defamatory of him, sought access to the copies of the documents which were, in the circumstances set out below, provided by the respondent to Mr Moore.

6 The application came before Miles CJ. Although, both at first instance and on appeal, the matter was determined upon the basis that the decisive question was whether legal professional privilege subsisted, or had been lost, there were other issues raised as well. The power to make an order under O 34A r 5 is discretionary, and the applicable principles are different from those governing discovery after action<sup>1</sup>. Furthermore, legal professional privilege was not the only basis upon which the respondent sought to resist the application in reliance upon O 34A r 2. The respondent also relied upon public interest immunity.

7 Miles CJ ruled against the respondent's argument based on legal professional privilege. He did not deal expressly with the subject of public interest immunity, although some of the observations in his reasons for judgment indicate that he would have held against the respondent on that question. Nor did his Honour deal with any discretionary considerations, simply stating, in effect, that, once it was concluded that legal professional privilege did not apply, there was no reason to refuse the order sought by the appellant. The respondent appealed successfully to

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1 *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133 at 191-192.

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the Full Court of the Federal Court<sup>2</sup>. The Full Court (Higgins, Lehane and Weinberg JJ) held that legal professional privilege had not been lost and, for that reason, the respondent was protected by the provisions of O 34A r 2. The Full Court indicated that if it had been necessary to decide other discretionary issues they would have been resolved in favour of Dr Mann. In the result, the Full Court ruled that Dr Mann was not entitled to an order that the documents be produced for his inspection. He now appeals to this Court.

- 8 The Full Court found it unnecessary to determine any issue of public interest immunity. Their Honours said<sup>3</sup> that the question whether, pursuant to s 130(4)(f) of the *Evidence Act* 1995 (Cth) ("the Evidence Act")<sup>4</sup>, it would be contrary to the public interest to require the respondent to produce the documents sought by the appellant had not been fully argued. The privilege which was relied upon in written and oral argument in this Court was legal professional privilege not public interest immunity.

#### The original litigation

- 9 The appellant was for many years a surgeon practising in the Australian Capital Territory. In 1990 and 1991 he commenced legal proceedings against the Australian Capital Territory Board of Health, certain public officials and various medical practitioners. The causes of action included breach of contract and defamation. By legislation enacted in 1993<sup>5</sup>, the Board was abolished, and the

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2 *Carnell v Mann* (1998) 159 ALR 647.

3 (1998) 159 ALR 647 at 662.

4 Section 130(1) of the Evidence Act states:

"If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence."

Paragraph (f) of s 130(4) provides that a document is taken for the purposes of s 130(1) to relate to matters of state if adducing it into evidence would "prejudice the proper functioning of the government of the Commonwealth or a State".

5 *Health (Consequential Provisions) Act* 1993 (ACT).

Gleeson CJ  
Gaudron J  
Gummow J  
Callinan J

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Australian Capital Territory, a body politic<sup>6</sup>, was designated to stand in the place of the Board in any unresolved litigation to which the Board was a party<sup>7</sup>.

10 The litigation finally came on for hearing in September 1997. It was brought to an end on the second day of the hearing when Dr Mann accepted the sum of \$400,000 paid into court on behalf of all defendants. That payment was made without any admission of liability.

11 It appears that, during the progress of the litigation, Dr Mann had been in contact with Mr Moore, who was an Independent member of the Legislative Assembly of the Territory. On 24 October 1997 he wrote a letter to Mr Moore describing what had occurred as a "monumental waste of public funds". Mr Moore thereupon wrote to the respondent, in her capacity as Chief Minister, repeating the assertion that there appeared to have been a monumental waste of public funds, and seeking from her some assurance that this sort of situation would not occur again. He sent a copy of the letter to the appellant. The appellant told Mr Moore that he had also written to the Auditor-General. The respondent, in December 1997, replied to Mr Moore in the following terms:

"I enclose for your information, a letter from the ACT Government Solicitor to the Department of Health and Community Care setting down the particulars of the litigation over the past six years. I also attach copies of briefs received from senior counsel engaged to represent the Territory in the matter.

The settlement of \$400,000 was arranged to protect the Territory's interests by avoiding the costs of a four week hearing and took into account Dr Mann's ability to pay costs had the Territory been successful in defending the matter.

Please do not hesitate to contact me if you have any further concerns in relation to this matter."

12 At the hearing before Miles CJ there was evidence, which was accepted, to the effect that it was established practice in the legislature of the Australian Capital Territory, and in other Australian legislatures, for Ministers, in appropriate cases, to provide members, confidentially, with background information concerning matters of Government administration. This practice assisted members of the legislature to be fully informed on issues of interest to them, and assisted

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6 *Australian Capital Territory (Self-Government) Act* 1988 (Cth), s 7.

7 *Health (Consequential Provisions) Act*, s 14.

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Government Ministers seeking to satisfy the concerns of members, without the necessity of ventilating, in an open and adversarial context, matters which were capable of appropriate explanation. Mr Moore gave evidence that, from time to time, he sought and obtained information from the Chief Minister on a confidential basis, and that he regarded this as a useful method of discharging his responsibilities. The arrangement was relatively informal, but, if it appeared that the Chief Minister desired that information provided to him in that fashion should remain confidential, then he would respect her wishes, without compromising his capacity to pursue the subject in other ways if necessary.

13 Mr Moore, upon receipt of the respondent's letter to him, checked with her office as to whether the legal documents were the subject of confidentiality. Having been told that they were, he returned the documents without making any copies, saying that he was doing so out of respect for "the agreement that has been reached between you and me". He sent the appellant a copy of the respondent's letter, but not the enclosures, and said he had formed the view that there was no justification for taking the matter any further.

14 The documents enclosed in the respondent's letter to Mr Moore were copies of the four privileged communications referred to above. It is apparent that they were provided to Mr Moore for the purpose of seeking to satisfy him that the litigation, and the settlement, did not involve a waste of public funds, and that those who represented the Australian Capital Territory had acted responsibly and in accordance with legal advice. It was suggested in argument that one purpose of the respondent was to denigrate the appellant. No such finding of fact was made in the courts below, and such a conclusion is not supported by the evidence. It was the appellant who prompted Mr Moore's letter to the respondent in the first place, and her conduct in seeking to satisfy him by providing, confidentially, the legal advice upon which the Government acted, was an understandable and natural response.

The privilege issue

15 The appellant made application for pre-trial discovery of the documents which had been enclosed with the respondent's letter to Mr Moore, on the basis that he believed that they contained, or repeated, defamatory imputations, and that he had a cause of action against the respondent for publishing such matter to Mr Moore. It being acknowledged that the original written communications had been the subject of legal professional privilege, there was an issue as to whether the privilege had been lost by reason of the disclosure by the respondent to Mr Moore of those communications.

- 16 The outcome does not turn upon the particular manner in which the content of the privileged communications was disclosed to Mr Moore. The privilege attached to the communications, not to the pieces of paper on which they were written. What Mr Moore was shown were copies, but they were relevantly copies of privileged communications<sup>8</sup>. The question is whether the disclosure to Mr Moore of the communications resulted in the loss of the privilege. The privilege was that of the Australian Capital Territory, but the arguments for both sides proceeded upon the assumption that the respondent, as Chief Minister, was acting within her authority in disclosing the communications to Mr Moore, and that the body politic was bound by whatever might have been the consequences of that disclosure. It was not, and could not be, argued that the body politic lost its privilege by disclosing the communications to the respondent, as Chief Minister. In her capacity as Chief Minister, she was entitled to see the legal advice given to the Territory by its lawyers. It is likely that she represented the Territory for the purpose of receiving the communication from the lawyers. In any event, unless the privilege in the communications was lost by the disclosure to Mr Moore, then O 34A r 2 meant that, on the ground of privilege, the respondent, who had documents in her possession in her capacity as Chief Minister for the Territory, could not be required to produce them.

#### The applicable law

- 17 The Evidence Act applies in relation to all proceedings in the Supreme Court of the Australian Capital Territory, including the subject proceedings (ss 2, 4). However, the provisions of the Act which concern what is called client legal privilege, in accordance with the general scheme of the Act, are expressed in terms which relate to the adducing of evidence. The reason for this was explained in the report of the Australian Law Reform Commission which proposed the legislation, and which said<sup>9</sup>: "The Terms of Reference limit the Commission to considering the application of the privilege in the courtroom where evidence is sought to be given."

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8 *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501; *Vardas v South British Insurance Co Ltd* [1984] 2 NSWLR 652.

9 Australian Law Reform Commission, *Evidence*, Report No 38, (1987), par 199.

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18 The relevant provisions are s 118 and s 122. They are as follows:

"**118.** Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:

- (a) a confidential communication made between the client and a lawyer;  
or
- (b) a confidential communication made between 2 or more lawyers acting for the client; or
- (c) the contents of a confidential document (whether delivered or not) prepared by the client or a lawyer;

for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.

...

**122. (1)** This Division does not prevent the adducing of evidence given with the consent of the client or party concerned.

**(2)** Subject to subsection (5), this Division does not prevent the adducing of evidence if a client or party has knowingly and voluntarily disclosed to another person the substance of the evidence and the disclosure was not made:

- (a) in the course of making a confidential communication or preparing a confidential document; or
- (b) as a result of duress or deception; or
- (c) under compulsion of law; or
- (d) if the client or party is a body established by, or a person holding office under, an Australian law – to the Minister, or the Minister of the State or Territory, administering the law, or the part of the law, under which the body is established or the office is held.

**(3)** Subsection (2) does not apply to a disclosure by a person who was, at the time, an employee or agent of a client or party or of a lawyer unless the employee or agent was authorised to make the disclosure.

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(4) Subject to subsection (5), this Division does not prevent the adducing of evidence if the substance of the evidence has been disclosed with the express or implied consent of the client or party to another person other than:

- (a) a lawyer acting for the client or party; or
- (b) if the client or party is a body established by, or a person holding an office under, an Australian law – the Minister, or the Minister of the State or Territory, administering the law, or the part of the law, under which the body is established or the office is held.

(5) Subsections (2) and (4) do not apply to:

- (a) a disclosure by a client to another person if the disclosure concerns a matter in relation to which the same lawyer is providing, or is to provide, professional legal services to both the client and the other person; or
- (b) a disclosure to a person with whom the client or party had, at the time of the disclosure, a common interest relating to a proceeding or an anticipated or pending proceeding in an Australian court or a foreign court.

(6) This Division does not prevent the adducing of evidence of a document that a witness has used to try to revive the witness's memory about a fact or opinion or has used as mentioned in section 32 (attempts to revive memory in court) or 33 (evidence given by police officers)."

- 19 The circumstances in which legal professional privilege may apply are not limited to the adducing of evidence in the course of a hearing in a court. The privilege may be invoked, and its application may be of importance, in pre-trial proceedings such as the discovery and inspection of documents. Documents may be discoverable even though they may not be admissible in evidence. Their importance may be, for example, that they indicate a useful line of investigation, or that they contain information which could affect the manner in which a party may decide to conduct proceedings. Furthermore, in *Baker v Campbell*<sup>10</sup> this

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10 (1983) 153 CLR 52.

Court held that the application of legal professional privilege is not confined to judicial or quasi-judicial proceedings. Deane J said<sup>11</sup>:

"Once one recognizes that the principle underlying legal professional privilege is that a person should be entitled to seek and obtain legal advice without the apprehension of being prejudiced by subsequent disclosure of confidential communications and that the privilege is not confined to such communications as are made in the course of or in anticipation of litigation but extends generally to confidential communications of a professional nature between a person and his lawyer made for the purpose of obtaining or giving legal advice, common sense points to a conclusion that the principle should not be seen as restricted to compulsory disclosure in the course of such proceedings."

20 Thus, the ambit of the common law doctrine of legal professional privilege exceeds that of ss 118 and 122 of the Evidence Act.

21 This gives rise to two difficulties, one of which is not material in the present case, but the other of which is.

22 The first difficulty is that the definition in s 118 of the circumstances which attract the privilege, based upon the concept of dominant purpose, differs in a significant respect from what was decided by this Court in *Grant v Downs*<sup>12</sup> as to what was necessary to attract the privilege at common law. That is not presently material, as it is common ground that, on either test, the communications in question were originally the subject of legal professional privilege.

23 The second difficulty is that the provisions of s 122 as to the circumstances in which privilege may be lost are not identical to the corresponding common law principles.

24 The difficulties are compounded by the fact that the parliaments of the Commonwealth and of New South Wales are the only Australian legislatures which, to date, have enacted legislation in the form of the Evidence Act. The New South Wales provisions are substantially the same as those quoted above.

25 There have been differences of judicial opinion as to the precise legal significance of ss 118 and 122, in those jurisdictions where they apply, in relation

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11 (1983) 153 CLR 52 at 115-116.

12 (1976) 135 CLR 674.

to issues such as have arisen in the present case at a pre-trial stage of litigation, before questions of adducing evidence have arisen. At the time of the proceedings before the Full Court of the Federal Court, the prevailing, although not uncontroversial, view in the Federal Court was that expressed in *Adelaide Steamship Co Ltd v Spalvins*<sup>13</sup>. In brief, the view was that, when a question arises at a pre-trial stage as to privilege, or loss of privilege, although ss 118 and 122 have no direct application, and the common law is to be applied, the common law must adapt itself to the statute, which thereby is applied derivatively. That approach was followed by the Court of Appeal of New South Wales in *Akins v Abigroup Ltd*<sup>14</sup>. Later, a specially constituted Full Court of the Federal Court, in *Esso Australia Resources Ltd v Commissioner of Taxation*, held that *Adelaide Steamship* was wrongly decided<sup>15</sup>. That decision has been the subject of an appeal to this Court, and judgment is delivered on the same day as this judgment.

26 The Full Court of the Federal Court in this case, following *Adelaide Steamship*, approached the matter on the basis that the central issue was to be resolved by reference to ss 118 and 122 of the Evidence Act. They concluded that the confidential disclosure to Mr Moore of the contents of the privileged communications from the legal advisers of the Australian Capital Territory did not result in loss of the privilege. They held that the case fell within s 122(2)(a), and that s 122(4), which they said applied to disclosures by someone other than the client or an agent or employee of the client, did not operate<sup>16</sup>.

27 Consistently with this Court's decision in *Northern Territory of Australia v GPAO*<sup>17</sup> and its reasoning in relation to the appeal in *Esso*<sup>18</sup>, it must be concluded that the Full Court in the present case erred in deciding that the applicable law was to be found (derivatively) in the Evidence Act. In that respect, it may be noted that no argument was advanced, either before Miles CJ, or in the Full Court, or in this Court, in support of an argument that could possibly have given the Evidence Act significance in another way. Bearing in mind the nature of the proceedings before Miles CJ, it might have been arguable that, if, when it came to adducing evidence

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13 (1998) 81 FCR 360.

14 (1998) 43 NSWLR 539.

15 *Esso Australia Resources Ltd v Commissioner of Taxation* (1998) 83 FCR 511.

16 *Carnell v Mann* (1998) 159 ALR 647 at 659-660.

17 (1999) 73 ALJR 470; 161 ALR 318.

18 [1999] HCA 67.

in any substantive proceedings brought by Dr Mann against the Chief Minister, the Evidence Act would make it impossible to prove the contents of the four documents in question, that would constitute a discretionary reason for not making the orders sought from Miles CJ. However, since no such argument was advanced, it is unnecessary to pursue that line of reasoning.

#### Waiver of privilege at common law

28 At common law, a person who would otherwise be entitled to the benefit of legal professional privilege may waive the privilege. It has been observed that "waiver" is a vague term, used in many senses, and that it often requires further definition according to the context<sup>19</sup>. Legal professional privilege exists to protect the confidentiality of communications between lawyer and client. It is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement. It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege<sup>20</sup>. Examples include disclosure by a client of the client's version of a communication with a lawyer, which entitles the lawyer to give his or her account of the communication<sup>21</sup>, or the institution of proceedings for professional negligence against a lawyer, in which the lawyer's evidence as to advice given to the client will be received<sup>22</sup>.

29 Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is "imputed by operation of law"<sup>23</sup>. This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege.

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19 *Ross T Smyth & Co Ltd v T D Bailey, Son & Co* [1940] 3 All ER 60 at 70; *Larratt v Bankers and Traders Insurance Co Ltd* (1941) 41 SR (NSW) 215 at 226; *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 406, 422, 467, 472.

20 *Cross on Evidence*, 5th Aust ed (1996), par 25005; *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 497-498.

21 *Benecke v National Australia Bank* (1993) 35 NSWLR 110.

22 *Lillicrap v Nalder & Son (a firm)* [1993] 1 WLR 94; [1993] 1 All ER 724.

23 eg *Goldberg v Ng* (1995) 185 CLR 83 at 95.

Thus, in *Benecke v National Australia Bank*<sup>24</sup>, the client was held to have waived privilege by giving evidence, in legal proceedings, concerning her instructions to a barrister in related proceedings, even though she apparently believed she could prevent the barrister from giving the barrister's version of those instructions. She did not subjectively intend to abandon the privilege. She may not even have turned her mind to the question. However, her intentional act was inconsistent with the maintenance of the confidentiality of the communication. What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.

- 30 In *Goldberg v Ng*<sup>25</sup> this Court considered a case in which there was disclosure of a privileged communication to a third party, for a limited and specific purpose, and upon terms that the third party would treat the information disclosed as confidential. The Court was divided upon whether, in the circumstances of the case, privilege was waived. However, the reasoning of all members of the Court was inconsistent with the proposition that any voluntary disclosure to a third party necessarily waives privilege. No application was made on the present appeal to re-open *Goldberg* or any of the earlier authorities on the subject. In *Goldberg*, reference was made<sup>26</sup> to the statement of Jordan CJ in *Thomason v The Council of The Municipality of Campbelltown*<sup>27</sup>:

"The mere fact that a person on some one occasion chooses to impart to another or others advice which he has received from his solicitor indicates no intention on his part to waive his right to refuse on other occasions to disclose in evidence what that advice was, and supplies no sufficient reason for depriving him of a form of protection which the law has deemed it specially necessary to throw around communications between solicitor and client".

- 31 His Honour's reference to intention must be read subject to what has been said above.

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24 (1993) 35 NSWLR 110.

25 (1995) 185 CLR 83.

26 (1995) 185 CLR 83 at 120.

27 (1939) 39 SR (NSW) 347 at 355.

32 Reference was also made<sup>28</sup> to *British Coal Corporation v Dennis Rye Ltd (No 2)*<sup>29</sup> and *Goldman v Hesper*<sup>30</sup>, in which the English Court of Appeal held that, in the circumstances of those cases, disclosure to a third party for a limited and specific purpose did not lead to a loss of the privilege as against a person opposed in litigation. To like effect is the recent decision in *Gotha City v Sotheby's*<sup>31</sup>.

33 It does less than justice to the respondent's position to describe what occurred in the present case as disclosure to a third party. The privilege was that of the body politic, the Australian Capital Territory. The head of the Territory's Executive, the Chief Minister<sup>32</sup>, in response to a question raised by a member of the Territory's Legislative Assembly as to the reasonableness of the conduct of the Territory in relation to certain litigation, gave the member, confidentially, access to legal advice that had been given to the Territory, and on the basis of which it had acted. Although "disclosure to a third party" may be a convenient rubric under which to discuss many problems of this nature, it represents, at the least, an oversimplification of the circumstances of the present case.

34 The purpose of the privilege was to enable the Australian Capital Territory to seek and obtain legal advice, in relation to the litigation which Dr Mann had instituted, without the apprehension of being prejudiced by subsequent disclosure of that advice. That included, and perhaps included above all, subsequent disclosure to Dr Mann. If Mr Moore had been given copies of the legal report and advice given to the Territory in relation to the proceedings brought by the appellant upon the basis that he was at liberty to show them to the appellant, (even if to nobody else), that would have waived the privilege, because it would have been inconsistent with the confidentiality protected by the privilege. It is not difficult to imagine other circumstances in which the basis on which the communications were made available to Mr Moore, even though limited, would have been inconsistent with the purpose of the privilege and thus would have resulted in waiver. Disclosure by a client of confidential legal advice received by the client, which may be for the purpose of explaining or justifying the client's actions, or for some other purpose, will waive privilege if such disclosure is inconsistent with the confidentiality which the privilege serves to protect. Depending upon the

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28 (1995) 185 CLR 83 at 107-108.

29 [1988] 1 WLR 1113; [1988] 3 All ER 816.

30 [1988] 1 WLR 1238; [1988] 3 All ER 97.

31 [1998] 1 WLR 114.

32 *Australian Capital Territory (Self-Government) Act*, s 40.

*Gleeson* CJ  
*Gaudron* J  
*Gummow* J  
*Callinan* J

14.

circumstances of the case, considerations of fairness may be relevant to a determination of whether there is such inconsistency. The reasoning of the majority in *Goldberg*<sup>33</sup> illustrates this.

35       The purpose of the privilege being to protect the Territory from subsequent disclosure of the legal advice it received concerning the litigation instituted by the appellant, there was nothing inconsistent with that purpose in the Chief Minister conveying the terms of that advice, on a confidential basis, to a member of the Legislative Assembly who wished to consider the reasonableness of the conduct of the Territory in relation to the litigation.

36       The conclusion of the Full Court of the Federal Court, that privilege was not lost, was correct.

37       The appeal should be dismissed with costs.

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33 (1995) 185 CLR 83 at 101-102.

38 McHUGH J. The question in this appeal is whether the Chief Minister of the Australian Capital Territory ("ACT") is able to resist an order for pre-trial discovery of documents which contain legal advice to the ACT Government. The question arises in circumstances where copies of the originals of those documents have been provided by the Chief Minister to Mr Michael Moore, a member of the ACT Legislative Assembly. The resolution of the question raises issues relating to the circumstances in which legal professional privilege may be claimed and waived and the application of concepts of waiver to transactions occurring within a single "body politic". In my opinion, the copies forwarded to Mr Moore were not privileged and, by communicating those copies to him, the Chief Minister waived the privilege in the original documents.

39 In an application for preliminary discovery heard in the Supreme Court of the ACT, Chief Justice Miles held that the communication to Mr Moore was not privileged and that no privilege attached to the documents sent to him<sup>34</sup>. Miles CJ appeared to apply the common law rules relating to the existence and waiver of privilege, rather than the provisions of the *Evidence Act* 1995 (Cth), although nowhere does his Honour expressly say so. Although Miles CJ was of the view that no privilege inhered in the documents, he nevertheless went on to consider whether, if privilege did inhere in the documents, the privilege had been waived. His Honour accepted<sup>35</sup> that "the confidential nature of the disclosure to Mr Moore" was "evident from the correspondence" but he thought that "the confidential nature is irrelevant to the question of waiver." Miles CJ said<sup>36</sup>:

"It is not to be overlooked that a document attracts legal professional privilege because it is a communication 'made confidentially and passing between client and legal adviser for the purpose of obtaining or giving legal advice or assistance'<sup>37</sup>. The confidentiality is between client and lawyer. That confidentiality is lost if the document is passed on to a third party who has no place in the client-lawyer relationship or the matters in respect of which legal advice or assistance is sought. It is lost whether the document is passed on by the client or by the lawyer, and whatever be the understanding between the third party and the client or lawyer who passes it on about how the document is to be treated. It is the occasion of publication between lawyer and client which confers the privilege, but the privilege does not extend to republication unless republication occurs on a privileged occasion.

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34 *Mann v Carnell* (1998) 145 FLR 222.

35 *Mann v Carnell* (1998) 145 FLR 222 at 228.

36 *Mann v Carnell* (1998) 145 FLR 222 at 227.

37 *R v Bell; Ex parte Lees* (1980) 146 CLR 141 at 144 per Gibbs J.

The distinction between a privileged occasion and a privileged communication is to be recognised<sup>38</sup>."

40 However, on appeal, the Full Court of the Federal Court held that the original documents were protected by legal professional privilege and that the privilege had not been waived by communicating copies of them to Mr Moore<sup>39</sup>.

41 The Full Court's finding that privilege had not been waived was based on a conclusion that whilst the *Evidence Act* did not directly apply to discovery and interlocutory matters, it had a derivative effect of modifying the common law principles applicable to those matters. Accordingly, the Full Court determined the issue of waiver by reference to s 122 of the *Evidence Act*<sup>40</sup>. For the reasons given by this Court in *Esso Australia Resources Ltd v The Commissioner of Taxation of the Commonwealth of Australia*<sup>41</sup>, the Full Court erred in applying s 122 of the *Evidence Act*. The issues of the existence of, and the waiver of, privilege must be determined solely with reference to the common law.

#### The factual history

42 The appellant, Dr Mann, was for many years a surgeon practising in the ACT. In 1990 and 1991, he began three sets of proceedings in the ACT Supreme Court against the ACT Board of Health and others, being proceedings with plaint numbers ACT SC 641 of 1990, ACT SC 717 of 1990 and ACT SC 458 of 1991. The causes of action in the proceedings brought by him included breach of contract and defamation. On 3 September 1997, the proceedings settled with Dr Mann's acceptance of the sum of \$400,000 paid into court on behalf of all defendants without admission of liability or an apology.

43 On 4 September 1997, the day after the proceedings settled, Dr Mann wrote a letter to the ACT Government Solicitor containing the following statement:

"May I suggest you warn your clients that if they repeat the allegations they have made in the past, or make fresh unsubstantiated allegations in the future, this whole matter will return to the Courts."

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38 See *Guise v Kouvelis* (1947) 74 CLR 102 at 117 per Dixon J.

39 *Carnell v Mann* (1998) 159 ALR 647.

40 *Carnell v Mann* (1998) 159 ALR 647 at 658.

41 [1999] HCA 67.

There the matter rested until 24 October 1997 when Dr Mann wrote a letter to Mr Michael Moore, an Independent member of the ACT Legislative Assembly. The letter was addressed to:

"Mr M Moore MLA  
Legislative Assembly of the ACT".

In the letter, Dr Mann referred to the \$400,000 settlement which he had received and concluded:

"It is surely time for a commission of enquiry into the Mann Affair. This monumental waste of public funds surely cannot be allowed to occur again."

- 44        Seemingly as a result of Dr Mann's letter of 24 October 1997, on 31 October 1997 Mr Moore wrote to the Chief Minister of the ACT. The letter was sent on letterhead styled:

"LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL  
TERRITORY

Michael Moore MLA

Independent".

The letter was addressed to:

"Ms Kate Carnell MLA  
Chief Minister  
ACT Legislative Assembly".

The letter referred to the settlement of \$400,000 and said:

"It seems to me that this issue has been a monumental waste of public funds. What measures have you put in place to ensure that this sort of situation does not occur again? How can I be assured in such a way that I can feel confident that we will not require an official Inquiry into this matter to ascertain how to avoid this situation arising in the future."

- 45        On 15 December 1997, Ms Carnell replied to Mr Moore. The letterhead was styled:

|                   |                         |
|-------------------|-------------------------|
| "Kate Carnell MLA | Chief Minister          |
|                   | Treasurer               |
|                   | Minister for Health and |
|                   | Community Care          |
|                   | Member for Molonglo     |

Australian Capital Territory".

The letter was addressed to:

"Mr Michael Moore MLA  
Member for Molonglo  
ACT Legislative Assembly".

The letter stated:

"I enclose for your information, a letter from the ACT Government Solicitor to the Department of Health and Community Care setting down the particulars of the litigation over the past six years. I also attach copies of briefs received from senior counsel engaged to represent the Territory in the matter.

The settlement of \$400,000 was arranged to protect the Territory's interests by avoiding the costs of a four week hearing and took into account Dr Mann's ability to pay costs had the Territory been successful in defending the matter."

46 On 8 January 1998, Mr Moore wrote to Dr Mann enclosing a copy of the letter from Ms Carnell dated 15 December 1997 but Mr Moore did not enclose the documents referred to in the letter. Dr Mann subsequently wrote to Mr Moore on 23 January 1998. In that letter, Dr Mann indicated his view that the documents referred to contained material defamatory of him and requested that Mr Moore forward the relevant documents to him.

47 On 30 January 1998, Mr Moore wrote to Dr Mann advising that he was unable to provide him with copies of the relevant documents. Mr Moore wrote:

"You will understand my reasons when you read a copy of the enclosed letter I have written to the Chief Minister."

The enclosed letter from Mr Moore to Ms Carnell dated 30 January 1998 referred to Ms Carnell's letter of 15 December 1997 and said:

"Our understanding has always been that in the interests of openness you would make documents available to me so that I could understand the full ramifications of any particular situation. After telephone conversations with your office, it is my understanding that you do not wish this material to be used in any broader sense.

You know I disagree with this approach, in principle, however I respect the agreement that has been reached between you and me.

I am therefore returning these documents to you and I assure you that I have made no copies."

- 48 In February 1998, Dr Mann made two written requests to Ms Carnell that the relevant documents be provided to him, but Ms Carnell refused to provide them. On 24 February 1998, Dr Mann filed an application in the ACT Supreme Court pursuant to O 34A r 5 of the Supreme Court Rules which relates to the preliminary discovery of documents. The application named Ms Carnell as the only respondent. Order 34A r 5 of the Supreme Court Rules provides:

"If –

- (a) it is reasonable to believe that the applicant has, or may have, the right to obtain relief from a person whose description has been ascertained;
- (b) having made reasonable inquiries, the applicant has not gained sufficient information to enable a decision to be made whether to institute a proceeding to obtain the relief;
- (c) it is reasonable to believe that the person –
  - (i) has, or is likely to have; or
  - (ii) has had, or is likely to have had;

possession of a document relating to the question whether the applicant has the right to obtain the relief; and
- (d) inspection of the document by the applicant would assist in making the decision;

the Court may order the person to produce the document to the applicant."

- 49 Order 34A r 2 provides:

"An order made under this Order does not operate to require the person against whom the order is made to produce any document that, on the ground of privilege, the person could not be required to produce –

- (a) in the case of an order under rule 3 or 5 – if the applicant had commenced a proceeding against the person; or
- (b) in the case of an order under subrule 6(1) or (2) – if the applicant had made the person a party to the proceeding."

50 Although the documents to which Dr Mann sought access were widely described in the Notice of Motion, there is now no dispute that the documents sought by Dr Mann are as follows<sup>42</sup>:

- (i) report from the ACT Government Solicitor to the Executive Director, Financial Management and Contracting, ACT Department of Health and Community Care, with chronology attached, dated 7 December 1997;
- (ii) counsel's opinion dated 21 February 1991;
- (iii) counsel's memorandum of advice dated 16 February 1997; and
- (iv) counsel's joint memorandum of advice dated respectively 9 and 11 September 1997.

51 As will later become clear, it is necessary to distinguish between the originals of these documents held by Ms Carnell and the copies of the documents sent by Ms Carnell to Mr Moore and later returned to Ms Carnell by Mr Moore. Accordingly, I will refer to the originals of these documents as "the original documents" and the copies of these documents sent by Ms Carnell to Mr Moore as "the copied documents".

#### The proceedings before Miles CJ

52 The application for discovery was heard before Miles CJ on 2 April 1998. On 4 June 1998, Miles CJ ordered that Ms Carnell produce the original documents to Dr Mann.

53 Before Miles CJ, Mr Moore gave evidence that it was his understanding that there was a practice in the ACT Legislative Assembly that the Chief Minister or other responsible Minister, when requested, would provide information to a member of the Assembly on a confidential basis for the purposes of explaining to the member the reasons why a particular official decision had been taken. Mr Moore said that although he was not in government:

"one of the things that I do is review Government decisions very regularly and in order to review Government decisions, to understand why the Government made particular decisions ... Ministers often make ... background documents available to me, that would be considered confidential so that I can understand why it is that they made any given particular decision."

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42 *Mann v Carnell* (1998) 145 FLR 222 at 223.

54 Mr Moore gave evidence to the effect that, if a document was provided on a confidential basis in accordance with this practice, but for some reason he considered that the document should be made public, he would go back to the person providing the document and ask him or her whether he could make the document public. If that person refused, Mr Moore would:

"make a judgment about it and if I wanted – and if I believed it was appropriate for those letters to – or the documents to be made either public or available to the person [requesting them] I would argue in that way, but it would be a matter of judgment as to what's in the best interests of the individual, what's in the best interests of the community. And in fact it's my judgment that I have to rely on in attempting to fulfil my duties as a member of the Assembly."

55 Mr Moore gave evidence that, although the copied documents were not marked "confidential" or referred to as being confidential in Ms Carnell's letter of 15 December 1997, subsequent telephone conversations that he had with Ms Carnell's staff, and with Ms Carnell herself, indicated that Ms Carnell desired that the copied documents not be made available. This explains the reference to an "understanding that you do not wish this material to be used in any broader sense" in Mr Moore's letter to Ms Carnell of 30 January 1998.

56 In addition to Mr Moore's evidence, Ms Carnell led evidence from Mr Keady, the Chief Executive of the ACT Attorney-General's Department, and Mr Butt, the Chief Executive of the ACT Department of Health and Community Care, which was accepted by Miles CJ<sup>43</sup>. The evidence from Mr Keady was that his experience in positions that he had held in the senior public service in New South Wales and the ACT, showed there was a:

"practice of confidential information sharing between Ministers and Members of the Assembly (in the ACT) and the Parliament (in NSW) who as Members of the legislature have a legitimate interest in issues related to the subject of the information provided. This practice often involves the provision of confidential information to member/s on the basis of an agreement that the information will not be disclosed or released to anyone else."

57 Mr Butt gave evidence to similar effect, based upon his experience in senior public service positions in the Commonwealth and Queensland governments. Mr Butt stated:

"I believe that the public interest is best served by adherence to this convention of providing confidential briefings where necessary, as has

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43 *Mann v Carnell* (1998) 145 FLR 222 at 228.

occurred in this case. It makes the political system less adversarial, and leads to better, more informed decision making. Matters do not need to be thrashed out on the Assembly floor in debate but can be handled much more expeditiously by a briefing, while still allowing for independent members of the Assembly to be satisfied with Government decision making as appropriate."

58 This evidence as to the practice of confidential briefings between Ministers and members of the Assembly is legally relevant in two respects. First, it is relevant as evidence bearing upon the issue of whether the copied documents were provided by Ms Carnell to Mr Moore on a confidential basis on 15 December 1997. Second, it may be relevant to a claim of public interest immunity – which would be a ground for resisting production of the documents distinct from the claim of legal professional privilege.

59 However, at the hearing before Miles CJ, counsel for Ms Carnell expressly disclaimed reliance on public interest immunity<sup>44</sup>. The doctrine of public interest immunity, or what is sometimes inaccurately called "Crown privilege", protects the disclosure of material if its disclosure would be prejudicial or injurious to public or state interest. As Gibbs ACJ said in *Sankey v Whitlam*<sup>45</sup>:

"An objection may be made to the production of a document because it would be against the public interest to disclose its contents, or because it belongs to a class of documents which in the public interest ought not to be produced, whether or not it would be harmful to disclose the contents of the particular document."

60 Public interest immunity is available in pre-trial proceedings such as discovery<sup>46</sup>. English cases suggest that it is also available to resist disclosure in proceedings before non-judicial bodies such as administrative tribunals<sup>47</sup>. There is no reason in principle why it would not also be available in the present context of preliminary discovery.

61 Arguably, the public interest immunity doctrine protects the disclosure of documents provided by members of the executive government to members of the legislature under an obligation of confidence when they are provided for the purpose of allowing the members of the legislature to understand government

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44 *Mann v Carnell* (1998) 145 FLR 222 at 227-228.

45 (1978) 142 CLR 1 at 39.

46 *Air Canada v Secretary of State for Trade* [1983] 2 AC 394.

47 *Rogers v Home Secretary* [1973] AC 388; *Science Research Council v Nassé* [1980] AC 1028 at 1071.

decisions. If they are disclosed, arguably it will discourage members of the executive from providing such documents in the future. Thus, Ms Carnell might have argued that there was a public interest in ensuring the documents in the present case should not be disclosed because that would promote the accountability of the executive government to the Assembly: it would assist in ensuring that members of the Assembly are fully apprised of the reasons for decisions made by the executive government.

- 62 The failure to rely on such an argument is surprising given that the evidence of Mr Keady and Mr Butt adduced by Ms Carnell seems to have been squarely directed to this issue. However, because the point was not taken before Miles CJ, or before the Full Court of the Federal Court, or relied on by the respondent in this Court, I express no view as to whether the doctrine of public interest immunity was a proper ground for refusing to produce the documents.

The existence and ownership of the privilege in the original documents

- 63 In this Court, the appellant conceded that at common law legal professional privilege attached to the original documents. However, it is necessary to determine who owned that privilege. That question is determined by the identity of the client in the relevant lawyer-client relationship giving rise to the privilege<sup>48</sup>.

- 64 In the proceedings ACT SC 458 of 1991 commenced by Dr Mann on 9 July 1991, the ACT Board of Health was originally named as the first respondent. Section 4 of the *Health Services Act* 1990 (ACT), which commenced on 31 January 1991, established the Board of Health. The Board of Health was established as a body corporate that could be sued and sue in its corporate name. The *Health (Consequential Provisions) Act* 1993 (ACT) repealed the *Health Services Act* effective 1 March 1993. Section 14 of the *Health (Consequential Provisions) Act* had the effect of substituting the ACT for the ACT Board of Health in any legal proceedings commenced before 1 July 1993.

*The purpose for which the documents were made*

- 65 The evidence of the solicitor employed by the ACT Government Solicitor indicates that the advice from counsel of 21 February 1991 "was requested for the purposes of obtaining legal advice on issues arising from the contract of employment between [Dr Mann] and the Australian Capital Territory ('the Territory')." The advices of 16 February 1997 and September 1997

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48 In *Wigmore on Evidence*, 3rd ed (1940), vol 8 at 625-626, Professor Wigmore states:

"Under the original theory of the privilege, it was the attorney's, not the client's ... But under the modern theory ... it is plainly the client's, not the attorney's; and this is now a commonplace, never disputed."

"were obtained for the purposes of litigation then under way between [Dr Mann] and the Territory."

66 The report and chronology dated 7 December 1997 was sent from the ACT Government Solicitor to the Executive Director, Financial Management and Contracting, ACT Department of Health and Community Care. The evidence of the solicitor having control of the matter for the ACT Government Solicitor was that "[t]his report summarised the progress of the litigation [ACT SC 458 of 1991] from the Territory's perspective, discussed possible outcomes and gave legal opinions on various possible outcomes as well as the final result obtained."

67 Thus, at a broad level, the ACT was the client for whom the ACT Government Solicitor was acting. It was therefore the owner of the privilege in the original documents. But what is meant by the expression "the ACT" in this context? Does it encompass each of the executive, legislative and judicial arms of the ACT government or is it a reference to the executive arm of government only? This is a question of importance in this case because, on one view, Mr Moore as a member of the Legislative Assembly was himself a person who shared ownership of the privilege. On this view, publication to him could not waive the privilege attached to the documents. In order to determine this issue, it is necessary to consider the position of the ACT as a body politic.

#### The Australian Capital Territory as a body politic

68 Section 7 of the *Australian Capital Territory (Self-Government) Act* 1988 (Cth) (the "ACT (SG) Act") provides:

"The Australian Capital Territory is established as a body politic under the Crown by the name of the Australian Capital Territory."

69 Part III of the ACT (SG) Act is headed "LEGISLATIVE ASSEMBLY". Section 8(1) of the ACT (SG) Act provides that "[t]here shall be a Legislative Assembly for the Australian Capital Territory." Division 1 of Pt III is headed "Constitution of Assembly". Sections 9 to 15 in this Division deal with various matters including the form of oath to be taken by a member of the Assembly, the term of office of a member, the election to, and the vacation of, the office of Presiding Officer, the resignation and disqualification of members, and conflicts of interest. Section 16 deals with the dissolution of the Assembly by the Governor-General.

70 Division 2 of Pt III relates to the procedure of the Assembly. The only place in Divs 1 or 2 of Pt III in which the Chief Minister is mentioned is s 19 which provides that:

"A resolution of no confidence in the Chief Minister has no effect unless:

25.

- (a) it affirms a motion that is expressed to be a motion of no confidence in the Chief Minister;
- (b) at least one week's notice of the motion has been given in accordance with the standing rules and orders; and
- (c) the resolution is passed by at least the number of members necessary to be a quorum."

71 Part IV of the ACT (SG) Act is headed "POWERS OF LEGISLATIVE ASSEMBLY".

72 Section 22 provides:

"(1) Subject to this Part and Part VA, the Assembly has power to make laws for the peace, order and good government of the Territory.

(2) The power to make laws extends to the power to make laws with respect to the exercise of powers by the Executive."

73 Section 24 provides:

"(1) In this section:

'powers' includes privileges and immunities, but does not include legislative powers.

(2) Without limiting the generality of section 22, the Assembly may also make laws:

- (a) declaring the powers of the Assembly and of its members and committees, but so that the powers so declared do not exceed the powers for the time being of the House of Representatives or of its members or committees; and
- (b) providing for the manner in which powers so declared may be exercised or upheld.

(3) Until the Assembly makes a law with respect to its powers, the Assembly and its members and committees have the same powers as the powers for the time being of the House of Representatives and its members and committees.

(4) Nothing in this section empowers the Assembly to imprison or fine a person."

- 74 Part V of the ACT (SG) Act is headed "THE EXECUTIVE". It is convenient to set out several of the relevant provisions in full.

### **"Australian Capital Territory Executive**

**36.** There shall be an Australian Capital Territory Executive.

### **General powers of Executive**

**37.** The Executive has the responsibility of:

- (a) governing the Territory with respect to matters specified in Schedule 4;
- (b) executing and maintaining enactments and subordinate laws; and
- (c) exercising such other powers as are vested in the Executive by or under a law in force in the Territory or an agreement or arrangement between the Territory and the Commonwealth, a State or another Territory.

...

### **Membership of Executive**

**39. (1)** The members of the Executive are the Chief Minister and such other Ministers as are appointed by the Chief Minister.

**(2)** The exercise of the powers of the Executive is not affected merely because of a vacancy or vacancies in the membership of the Executive.

### **Chief Minister for the Territory**

**40. (1)** At the first meeting of the Assembly after a general election, the members present shall, after electing a Presiding Officer and before any other business, elect one of their number to be the Chief Minister for the Territory.

...

**(3)** If a resolution of no confidence in the Chief Minister is passed, the members present shall elect one of their number to be the Chief Minister.

### **Ministers for the Territory**

**41. (1)** The Chief Minister must appoint Ministers for the Territory from among the members of the Assembly.

...

**(3)** A Minister may be dismissed from office at any time by a person holding office as Chief Minister at that time."

75 These provisions make it clear that responsible government exists in the ACT and that it reflects the system of government employed in Parliament at Westminster in the sense that the executive government sits in one of the houses of the legislature and must enjoy the confidence of a majority of that house to continue in office<sup>49</sup>.

76 Part VA of the ACT (SG) Act is headed "THE JUDICIARY" and deals with the Supreme Court of the ACT (which was established under the *Supreme Court Act 1933* (ACT)<sup>50</sup>).

77 Part VI of the ACT (SG) Act is headed "ADMINISTRATION". That Part contains provisions which create a public service for the conduct of the public administration of the government of the ACT<sup>51</sup>, and provide for a Head of Administration<sup>52</sup> and Associate Heads of Administration<sup>53</sup>. The Head of Administration is responsible to the Chief Minister<sup>54</sup>.

*The separation of the ACT Executive and the ACT Legislative Assembly*

78 Under the Westminster system of government as adopted in the Australian States, there is no strict separation of powers between the executive and the legislature. Nevertheless, the executive and the legislature are distinct entities. In

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49 See Lindell, "The Arrangements for Self-government for the Australian Capital Territory: A Partial Road to Republicanism in the Seat of Government?", (1992) 3 *Public Law Review* 5 at 26.

50 Originally enacted by the Commonwealth Parliament as the *Seat of Government Supreme Court Act 1933* (Cth), and taken to be an enactment of the ACT Assembly pursuant to s 34(2) of the ACT (SG) Act.

51 s 54.

52 s 49(1).

53 s 49(2).

54 ss 50(b)(i).

*Egan v Willis*<sup>55</sup>, I discussed the distinction between the executive and legislative arms of government in the Westminster system of responsible government. I said:

"In his Preface to the first volume of Professor Redlich's *The Procedure of the House of Commons*<sup>56</sup>, Sir Courtenay Ilbert, then Clerk to the House of Commons, stated that the business of the House of Commons was 'threefold – legislative, financial, critical'. He pointed out that Parliament, and the House of Commons in particular<sup>57</sup>:

'provides the money required for administrative purposes by authorising taxation; it appropriates, with more or less particularity, the purposes to which the money so provided is to be applied; *it criticises the mode in which money is spent and in which public affairs are administered*; its support is indispensable to those who are responsible for administration; but it does not administer. That task is left to the executive, that is to say, to Ministers of the Crown, responsible to, but not appointed by, Parliament.

It is this separation but interdependence of *the criticising and controlling power on the one hand*, and the executive power on the other, that constitutes the parliamentary system of government.' (Emphasis added.)

Sir Courtenay Ilbert went on to say that '[u]nless these vital and fundamental principles of the British constitution are understood and appreciated, British parliamentary procedure is unintelligible'<sup>58</sup>."

- 79 The statement that the legislature "does not administer", because "[t]hat task is left to the executive, that is to say, to Ministers of the Crown, responsible to, but not appointed by, Parliament" recognises that the constitutional separation of powers as understood in Britain, and which applies in the Australian States, prevents the legislature from directly exercising administrative or executive functions.

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<sup>55</sup> (1998) 195 CLR 424 at 475.

<sup>56</sup> (1908), vol 1 at vi.

<sup>57</sup> Redlich, *The Procedure of the House of Commons* (1908), vol 1 at vii. This statement accords with that of John Stuart Mill that the role of the legislature in a system of representative government is "to watch and control the government" (*Considerations on Representative Government* (1861) at 104).

<sup>58</sup> Redlich, *The Procedure of the House of Commons* (1908), vol 1 at viii.

80 All judgments of members of this Court in *Egan v Willis* proceeded on the assumption that it was meaningful to speak of a contest between the Legislative Council of New South Wales and the executive government of New South Wales in respect of rights to possession of documents. There was no suggestion in that case that the Legislative Council could obtain the documents held by the executive simply because the executive and the Legislative Council were all part of the one body politic, the State of New South Wales. The case instead turned on the nature and extent of the Legislative Council's powers and privileges.

81 Professor A V Dicey, one of the great authorities on British constitutional law, also believed that, while the executive could act only with the authority of the law, the Westminster Parliament could not exercise direct executive power or appoint the officials of the executive government<sup>59</sup>.

82 In my opinion, the position of the New South Wales and Westminster Parliaments in relation to their executive governments is relevant in considering the relationship of the ACT Legislative Assembly and the ACT Executive. The relationship between the Assembly and the Executive forms part of the Anglo-Australian constitutional tradition which was the background to the creation of a system of responsible government in the ACT under the ACT (SG) Act. That is so notwithstanding the fact that under s 40 of the ACT (SG) Act, the Assembly directly appoints the Chief Minister who, pursuant to s 39(1), in turn appoints other Ministers.

83 The relationship between the federal Parliament and the executive government of the Commonwealth also throws light upon the relationship between the ACT legislature and the ACT Executive. Chapter II of the Constitution deals exclusively with the executive government. Section 61 provides that:

"The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth."

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59 Dicey, *Law of the Constitution*, 8th ed (1931) at 402-404. Dicey expresses the point as follows (at 404):

"No doubt in modern times the House of Commons has in substance obtained the right to designate for appointment the Prime Minister and the other members of the Cabinet. But this right is, historically speaking, of recent acquisition, and is exercised in a very roundabout manner; its existence does not affect the truth of the assertion that the Houses of Parliament do not directly appoint or dismiss the servants of the State; neither the House of Lords nor the House of Commons, nor both Houses combined, could even now issue a direct order to a military officer, a constable, or a tax-collector; the servants of the State are still in name what they once were in reality – 'servants of the Crown'".

- 84 In *The State of New South Wales v The Commonwealth*<sup>60</sup>, Isaacs J discussed the "fundamental principle of the separation of powers as marked out in the Australian Constitution" and said:

"By Chapter II, headed 'The Executive Government', the executive power of the Commonwealth is vested in the Sovereign simply, the Governor-General again being the representative. There might be some ambiguity as to what is meant by executive power ...

And in order to avoid misapprehension as to what is meant by the executive power of the Commonwealth, to be vested in the Sovereign as 'the Executive Government' it is specifically defined as the one which 'extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.' The phraseology is important to remember.

This language accords with Blackstone, vol I, p 270, who observes that 'though the making of laws is entirely the work of a distinct part, the legislative branch, of the sovereign power, yet the manner, time, and circumstances of putting those laws in execution must frequently be left to the discretion of the executive magistrate.'

*Chapter II, taken alone, left, as a matter of law, the means and method of executing and maintaining the laws entirely to the Sovereign's discretion, and tacitly subjected the exercise of the power only to the conventions of responsible government."* (emphasis added)

- 85 Although the ACT (SG) Act and the Constitution are significantly different documents, the structure and content of the ACT (SG) Act give rise to implications about the relationship of the legislature and executive government which parallel those which are derived from the structure and content of the Constitution. For the body politic that is the Commonwealth, the ambit of executive power is fixed by reference to the prerogative or common law powers of the Crown<sup>61</sup> or particular statutes. In the ACT (SG) Act, no provision is made for appointment of a Governor, Administrator or Executive Council<sup>62</sup>, but s 7 of the ACT (SG) Act nevertheless provides that "[t]he Australian Capital Territory is established as a

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60 (1915) 20 CLR 54 at 88-89.

61 *Barton v The Commonwealth* (1974) 131 CLR 477.

62 Which is contrary to the position in the Northern Territory under the *Northern Territory (Self-Government) Act 1978* (Cth). See Lindell, "The Arrangements for Self-government for the Australian Capital Territory: A Partial Road to Republicanism in the Seat of Government?", (1992) 3 *Public Law Review* 5 at 20 and 26.

body politic under the Crown". It is because there is no Crown representative that it was necessary for s 37 of the ACT (SG) Act to vest executive power directly in the "Executive", as that term is defined by the provisions which follow s 37. However, the exercise of executive power is separate from the exercise of the legislative and judicial power conferred by the Act. The ACT (SG) Act deals with the Legislative Assembly in Pts III and IV, with "THE EXECUTIVE" in Pt V, with "THE JUDICIARY" in Pt VA and with "ADMINISTRATION" in Pt VI. The separation of different governmental functions into different parts of the Act strongly suggests a conception of the separation of powers.

- 86 The power to exercise executive and administrative functions, therefore, resides exclusively in the ACT Executive, subject "to the conventions of responsible government"<sup>63</sup> as partially codified in the ACT (SG) Act, and in particular ss 40 and 48 of that Act, and subject to the power of the Assembly to potentially change that state of affairs by passing valid legislation. Any power which the ACT Legislative Assembly has to influence the administration and executive governance of the ACT must derive from its ability to pass legislation, promulgate Standing Orders or pass a formal motion, which is within its power under the ACT (SG) Act. The ACT Legislative Assembly has no power to *directly* administer the affairs of the ACT or to *directly* engage in executive functions.

*The privilege was that of the ACT Executive*

- 87 It follows that, if documents are brought into existence at the behest of the Executive in the exercise of some executive or administrative function, the only way the ACT Legislative Assembly can obtain the production of those documents by the Executive is by passing an Act or promulgating Standing Orders for that purpose or, perhaps, by passing a motion to that effect. For the purpose of legal professional privilege, the Assembly is a stranger to documents produced for the Executive. The issue in *Egan v Willis*<sup>64</sup>, ie whether a simple motion of the Assembly would be sufficient to require the ACT Executive to produce the documents, does not fall to be considered here, as no such motion was passed by the Assembly.

- 88 Were the original documents brought into existence at the behest of the ACT Executive in the exercise of some executive or administrative function? Plainly, they were. Whatever the precise scope of the word "governing" in s 37(a) of the ACT (SG) Act, it covers operative decisions made in the course of instructing the ACT Government Solicitor to defend litigation brought against what was originally the ACT Board of Health. Those decisions constituted "governing the Territory with respect to matters specified in Schedule 4" within the meaning of

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63 *The State of New South Wales v The Commonwealth* (1915) 20 CLR 54 at 89.

64 (1998) 195 CLR 424.

s 37(a) of the ACT (SG) Act: one of the matters specified in Sched 4 is "[p]ublic health".

89 Furthermore, the documents were produced for purposes which attracted legal professional privilege and in circumstances which show that they were produced as the result of an executive government function. The ACT Government Solicitor was established as a body corporate by s 5 of the *Government Solicitor Act* 1989 (ACT). Section 5(3) of that Act relevantly states that:

"The Government Solicitor may act as legal practitioner for:

(a) the Crown in right of the Territory;

(b) the Territory;

...

(d) a Minister;

... "

90 Sections 5(4) and 5(6) create a chain of accountability to the Minister for acts done in the name of the Government Solicitor. Section 5(4) provides:

"The chief solicitor may act personally in the name of the Government Solicitor and may also, either generally or otherwise as provided by the instrument of authorisation, by writing signed by him or her, authorise a qualified officer of the relevant administrative unit to act in the name of the Government Solicitor."

91 Section 5(6) provides:

"In or in respect of the doing by a person of any act or thing pursuant to an authorisation under subsection (4), the person is responsible to the chief solicitor and, through the chief solicitor, to the Minister, and shall comply with such directions (if any) as are given to him or her by the chief solicitor."

92 The majority of the persons for whom the ACT Government Solicitor may act under s 5(3) can be broadly described as branches of the ACT Executive. In addition, the fact that the ACT Government Solicitor is responsible to a Minister is an indication that the ACT Government Solicitor is a body designed to represent the interests of the ACT Executive in legal proceedings. Alternatively, the decisions made in the course of instructing the ACT Government Solicitor to defend litigation brought against the ACT may be said to be acts of the public

service of the ACT "for the conduct of the public administration of the Government of the Territory"<sup>65</sup>, and the public service is ultimately responsible to the Chief Minister, the head of the ACT Executive.

- 93 Plainly, the original documents were brought into existence at the behest of the Executive for the purpose of exercising an executive or administrative function. That being so, the ACT Legislative Assembly had no power to deal with the documents other than by passing legislation, or perhaps a motion, requiring the documents to be produced. This conclusion is a complete answer to the respondent's contention that the privilege in the original documents was owned by the ACT as a body politic of which the ACT Legislative Assembly is part. Until such time as the ACT Legislative Assembly passes relevant legislation or perhaps a motion, the ACT Executive controls access to the original documents and the copied documents. It is incorrect, therefore, to suggest that the Legislative Assembly was just as much the owner of the privilege in those documents as the ACT Executive. The Legislative Assembly was a stranger to the privilege which was held by the ACT Executive.

#### Existence of privilege in the copied documents

- 94 Although the appellant conceded that privilege inhered in the original documents, he disputed that privilege attached to the copied documents. He argued that the existence of privilege in the copied documents had to be determined separately from the existence of privilege in the original documents and that the copied documents were created for a non-privileged purpose.
- 95 In *Buttes Gas and Oil Co v Hammer (No 3)*<sup>66</sup>, Lord Denning MR expressed the view that a copy of a privileged document would also be privileged. There is some support for this view in Australia<sup>67</sup>, but there are also cases expressing the opposite view<sup>68</sup>. But in my opinion, the controversy in the cases is a sterile one, once it is recognised that it is the communication which is or may be privileged,

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65 s 54(1) of the ACT (SG) Act.

66 [1981] QB 223 at 244.

67 *Vardas v South British Insurance Co Ltd* [1984] 2 NSWLR 652 at 656 per Clarke J; *Hooker Corporation Ltd v Darling Harbour Authority* (1987) 9 NSWLR 538 at 544 per Clarke J.

68 *Brambles Holdings Ltd v Trade Practices Commission (No 3)* (1981) 58 FLR 452 at 458 per Franki J; *Deputy Commissioner of Taxation v Citibank Ltd* (1988) 93 FLR 469 at 473 per Williams J; *Cole v Elders Finance & Investment Co Ltd* [1993] 2 VR 356 at 358.

not the document recording it. In *Commissioner of Australian Federal Police v Propend Finance Pty Ltd*, Gaudron J pointed out<sup>69</sup>:

"[L]egal professional privilege does not protect documents, as such, but protects communications between lawyer and client".

96 Documents are protected as part of a privileged communication. That means that the question whether a copied document recording a communication was made for a privileged purpose cannot be answered by asking whether the original document recording the communication was created for a privileged purpose. Privilege does not inhere in documents *per se*. Where a copy of a document, to which privilege attaches, has been communicated to another person, the question whether it is also protected by privilege depends on whether the copy was communicated for a privileged purpose.

97 That being so, whether privilege attached to the copied documents depends on whether they were sent by Ms Carnell to Mr Moore for a privileged purpose. In my opinion, they were not sent for such a purpose. The copied documents were not provided for the purpose of seeking or giving legal advice or for the purpose of use in litigation. They were provided by Ms Carnell to Mr Moore to address his concern at an alleged "monumental waste of public funds". It is clear that the copied documents are not protected by legal professional privilege. If Ms Carnell had orally communicated or summarised the contents of the original documents to Mr Moore, the communication would not have been privileged. The fact that the communication was in writing and included copies of the original documents cannot change the position.

98 If the copied documents are relevant to the litigation, as seems likely, they have to be produced to Dr Mann. If the copied documents sent to Mr Moore are in the possession of the respondent, they should have been produced in response to the appellant's application for preliminary discovery.

99 However, there also remains for consideration the question whether the privilege of the ACT Executive in the original documents was waived by Ms Carnell providing the copied documents to Mr Moore on 15 December 1997, given that those copies were not themselves privileged and had the effect of disclosing all of the contents of the original documents.

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69 (1997) 188 CLR 501 at 543; see also at 552 per McHugh J.

Waiver of privilege at common law

100 In *Attorney-General (NT) v Maurice*<sup>70</sup>, this Court held that the claimants in a land claim had not waived legal professional privilege in circumstances where they had lodged with the Aboriginal Land Commissioner a "claim book" which set out the basis of the claim. The claim book had been lodged in accordance with Practice Directions promulgated by the Commissioner. The claimants made general references to the claim book during the hearing. Subsequently, a further hearing took place before a different Commissioner and was treated as a hearing *de novo*. In those proceedings, the claim book was not filed or tendered, but the Attorney-General for the Northern Territory, who opposed the land claim, sought disclosure of some of the documents that provided the source material for the claim book.

101 The question considered by this Court was whether the claimants, by filing and attempting to tender the claim book in the earlier proceedings, had waived their privilege in the source material upon which the claim book was based. In determining that question, the Court applied a "fairness" test, with Gibbs CJ saying<sup>71</sup>:

"[I]n a case where there is no intentional waiver the question whether a waiver should be implied depends on whether it would be unfair or misleading to allow a party to refer to or use material and yet assert that that material, or material associated with it, is privileged from production."

102 The application of this test to the facts in *Maurice* resulted in a finding that there had been no waiver of privilege in the source documents. It seems likely that, in applying a fairness test, Gibbs CJ was not formulating a new principle of law but simply using fairness as a factual criterion in the circumstances of that case for determining whether the privilege had been waived.

103 The issue in this case is different from that in *Maurice* where the issue was whether the general references to the claim book in the earlier hearing constituted a waiver of privilege generally. In the present case, the issue is whether the voluntary disclosure of the contents of the original documents by Ms Carnell to Mr Moore, a stranger for privilege purposes, constituted waiver by the ACT Executive of its privilege in those documents. The present case is not concerned with a forensic contest where a party has disclosed a part, but not all, of a privileged document and has arguably obtained an unfair advantage by doing so.

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70 (1986) 161 CLR 475.

71 (1986) 161 CLR 475 at 481.

104 In *Goldberg v Ng*<sup>72</sup>, however, this Court applied the fairness test in *Maurice* to very different circumstances from those that arose in *Maurice*. In *Goldberg*, a solicitor who had been sued by a former client attended the Law Society's office to discuss a complaint made by the client to the Law Society arising out of the subject matter involved in the proceedings. The solicitor had prepared statements with annexures concerning those matters for his own solicitor. At a meeting with one of the Society's officers, the solicitor indicated that he wished to be frank with the Society and, after being assured by the officer of the Society that, even if he provided the Society with the documents, he would retain his legal professional privilege in them, the solicitor provided the Society with copies of the documents.

105 In the course of the proceedings between the client and the solicitor, the client subpoenaed the Law Society to produce documents relating to the dispute between the client and the solicitor. The Law Society produced documents which included the statements and the annexures referred to above. The solicitor sought a declaration that those documents were privileged.

106 Deane, Dawson and Gaudron JJ held that, in determining whether the solicitor had waived his privilege in the documents by disclosing them to the Society, the "critical question" was<sup>73</sup>:

"whether Mr Goldberg's disclosure of the privileged documents to the Law Society gave rise to a situation where ordinary notions of fairness required that he be precluded from asserting that those documents were protected from production for inspection by the Ngs in the related equity proceedings between the Ngs and the Goldbergs." (emphasis added)

107 Notions of fairness may be factually relevant in determining whether privilege has been waived in a case like *Maurice* where there was partial disclosure of privileged material. In such a case, there is a clear potential for unfairness arising out of the capacity of disclosed material – which is part of an undisclosed whole – to mislead by reason of it being removed from its context. If unfairness would arise from partial disclosure, it may be proper to conclude, as a matter of fact, that the person making the disclosure was waiving privilege rather than seeking to obtain an unfair advantage. If the party was obtaining an advantage or furthering his or her interests, it may be proper to conclude that the party waived or should be taken to have waived privilege.

108 However, in a case like *Goldberg*, concerned with whether A can assert privilege against B in circumstances where A has previously disclosed the privileged material to C, I find it difficult to see why notions of "fairness" are

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72 (1995) 185 CLR 83.

73 (1995) 185 CLR 83 at 98.

relevant. In a case like *Maurice*, it may be very unfair to a party for the opposing party in a forensic contest to give evidence of part of a privileged communication and claim privilege for the rest. That being so, it is legitimate to treat the owner of the privilege as having waived it. But notions of fairness have nothing to do with whether voluntary disclosure by A to B constitutes a waiver of privilege. Where A voluntarily discloses privileged material to a third party, both principle and the rationale of legal professional privilege require the conclusion that privilege in the material is waived and that A cannot assert that privilege against any other person. In my respectful opinion, for the reasons set out below, the fairness test of waiver is not of general application and, on the facts of *Goldberg*, that case was wrongly decided.

- 109        It is important to distinguish between two classes of case. The first is a communication between a client or lawyer and someone other than the lawyer or client for the purposes of litigation or legal advice (which is also often described in the textbooks as a "third party communication"). The second is a communication between a client or lawyer and some other person which is not made for the purposes of litigation or legal advice and which involves material to which privilege would otherwise attach. In the first case, the communication is made for a privileged purpose. No question of waiver arises. But in the second case, the communication is not made for a privileged purpose, and the question arises whether that communication also waives the privilege otherwise attaching to the primary material. It is the latter situation which is involved in the present case.

*The ambit of legal professional privilege should be confined to only the extent which is necessary to meet its rationales*

110 The first reason why I think *Goldberg v Ng*<sup>74</sup> was wrongly decided on its facts is that, in the context of determining whether voluntary disclosure by A to B entitles A to assert privilege in the disclosed material as against C, a "fairness" test of waiver is contrary to, or at all events is not supported by, the rationales of legal professional privilege.

111 An early statement of the common law's rationale for the existence of legal professional privilege was given in 1846 in *Pearse v Pearse*<sup>75</sup> by Knight Bruce V-C:

"The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects ... not every channel is or ought to be open to them. ... Truth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much. And 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."

112 Thus, the common law has adjudged that the search for truth, which usually has primacy in curial proceedings, must give way to the considerations inherent in legal professional privilege. Even though the privilege admittedly "frustrates access to communications which would otherwise help courts to determine, with accuracy and efficiency, where the truth lies in disputed matters"<sup>76</sup>, other aims of the system of administration of justice outweigh the general undesirability of the truth being obscured.

113 In *Grant v Downs*<sup>77</sup>, Stephen, Mason and Murphy JJ, in speaking of that head of legal professional privilege which protects lawyer-client communications made for the purpose of giving or obtaining legal advice, said:

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74 (1995) 185 CLR 83.

75 (1846) 1 De G & Sm 12 at 28-29 [63 ER 950 at 957].

76 *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 581 per Kirby J.

77 (1976) 135 CLR 674 at 685.

"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."

114 The rationale for the head of legal professional privilege which protects communication from a third party to the client or the lawyer made in connection with the litigation is related to, but distinct from, that discussed in *Grant*. The rationale for the second head of legal professional privilege arises from the need to maintain, in an adversary system of litigation, the freedom of the lawyer and client to make such investigations and inquiries and to engage in such preparation as they think fit in order to further their case. A party to litigation should not be forced to prepare his or her case knowing that statements, advices and other documents, which have been created, may be required to be disclosed to the other party who can then make use of the documents for his or her own advantage. As Brennan J said in *Baker v Campbell*<sup>78</sup>, the relevant purpose of the privilege is the "maintenance of the curial procedure for the determination of justiciable controversies – the procedure of adversary litigation". His Honour went on to say that "[i]f the prosecution, authorized 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".

115 Important though these rationales are, they nevertheless represent an exception to the common law's pursuit of the truth. Legal professional privilege is "the product of a balancing exercise between competing public interests"<sup>79</sup>, those competing public interests being the rationales for the privilege on the one hand and the search for truth on the other hand. In *Attorney-General (NT) v Maurice*, Mason and Brennan JJ described the principle thus<sup>80</sup>:

"Because of [the] conflict between the public interest in ensuring the availability of all relevant evidence in a particular case and the public interest in the administration of justice through effective legal representation, the

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78 (1983) 153 CLR 52 at 108.

79 *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 583 per Kirby J.

80 (1986) 161 CLR 475 at 487.

privilege is confined within strict limits: *Grant v Downs*<sup>81</sup>, per Stephen, Mason and Murphy JJ."

116 That being so, in my opinion any common law doctrine which would extend the scope of legal professional privilege must not go beyond the rationales for the privilege. Any extension of the scope of the privilege beyond that which is necessary for its rationales to be realised is an abrogation of the common law's basal pursuit of truth which is not justified by any countervailing consideration. The common law rules for waiver clearly affect the scope of legal professional privilege. A rule that permits a person to disclose a privileged communication to a stranger without waiving the privilege can only be maintained if it promotes the rationales for legal professional privilege.

117 Ensuring candid communications between a lawyer and a client is unlikely to be endangered if a privilege holder is held to waive privilege because he or she has voluntarily disclosed the communication to a stranger. Whether the communication will be disclosed in the future to a stranger to the privilege is entirely within the control of the client. At that stage, the client will determine whether his or her interests are best served by retaining the privilege or disclosing the communication. But it is difficult to see how the possibility of voluntary disclosure will prevent the client being candid with his or her lawyer. Why would the client prefer not to seek legal advice or make full disclosure to a lawyer because of the possibility of future disclosure? If no relevant communication is made with the legal adviser, there will be nothing to disclose in the future. It is much more likely that the client will prefer to seek advice, make a full disclosure of the facts to the legal adviser and make a decision later as to whether his or her interests are served by disclosure of those facts and that advice to others.

118 A client who voluntarily discloses privileged information to a stranger to the privileged relationship has made a choice, based no doubt on considerations personal to him or her, that the purpose for which the communication is disclosed to the stranger is more important than protecting the absolute confidentiality of the communication by preventing the stranger from having knowledge of it. The person may be encouraged to do so, as in *Goldberg v Ng*<sup>82</sup>, by an expectation that the stranger will not further disclose the communication. But in my opinion, if privileged material is voluntarily disclosed to a stranger to the privileged relationship, the fact that it may be received under an obligation of confidence should not be relevant to whether privilege is waived.

119 Although confidentiality, candour and privilege are related, mere confidentiality, in the absence of a privilege, has never been a ground on which

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81 (1976) 135 CLR 674 at 685.

82 (1995) 185 CLR 83.

one can refuse to produce material to a court<sup>83</sup>. Confidentiality is a matter *inter partes* between the privilege holder and the third party owing the obligation of confidence. It would extend the scope of legal professional privilege dramatically if the privilege holder could extend the shield of privilege by entering into confidentiality agreements with third parties who may happen to receive otherwise privileged information from the privilege holder. It would extend the shield of privilege beyond the realm of the lawyer-client relationship (which is the rationale for its existence) into the client's general social and commercial relationships.

120 Confidentiality provisions are an increasingly common part of modern commercial relationships. In a takeover bid, a bidder company may have lawyers, merchant bankers and other professionals advising it. Suppose the bidder company receives advice from its lawyers that its proposed course of action is possibly illegal and then sends a copy of this advice to its merchant bankers (who owe an obligation of confidence to the company) in order that they may factor the legal advice into their strategic advice. It seems impossible to hold that the communication to the merchant banker is privileged. Why then should the original documents continue to be protected by legal professional privilege? The objective of the privilege has been met as soon as the company has received advice from its lawyers.

121 No doubt in commercial relationships, it is often convenient and useful for legal advice to be circulated among non-lawyers who are not officers or employees of the client which owns the privilege. But the client who does so is furthering his, her or its personal or corporate interests, not the administration of justice which is the rationale of the privilege. If the banker has not retained the unprivileged copy of the document sent to him or her and so cannot produce it on discovery, why should the company be able to maintain privilege for its original communication? It has chosen to disclose the original communication, which hitherto was confidential to it and its legal advisers, for its own commercial purposes. Why should the client be able to pick and choose who should receive the communication under the shield of privilege?

122 In any event, the issue of waiver after disclosure is an academic one in many cases. Where the communication to the stranger remains in existence, documents recording it must be produced unless the communication also falls within legal professional privilege or some other head of privilege.

123 Furthermore, it cannot be said that, in order to further the first aim of the privilege, it is necessary to determine questions of waiver of privilege by reference to notions of fairness. The particular circumstances which may eventually be decisive of the issue of "fairness" may not even have existed at the time the client

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83 See McNicol, *Law of Privilege* (1992) at 1.

chose to disclose the information to the third party, let alone at the time of the communication being made between the lawyer and the client.

124 The other rationale of privilege is to ensure that the adversary system is preserved by not disclosing one party's preparations for litigation to the other party. It is difficult to see how the realisation of this objective is endangered by a rule which declares that the voluntary disclosure of privileged information to any stranger to the privilege results in a waiver of the privilege. Before disclosing information to a stranger to the privilege, the client must make a personal choice as to whether the risks associated with the other side seeing the document outweigh the advantage accruing to the client as a result of voluntarily disclosing the document to a stranger to the privilege.

125 If voluntary disclosure to a stranger *ipso facto* waives the privilege, the owner of the privilege will, if properly advised, make a choice as to where his or her interests lie in dealing with the communication. As the rationales for the privilege largely align with the interests of the privilege holder, this seems entirely appropriate. The holder of the privilege will make a judgment in his or her self-interest. This will ensure that the rationales for the privilege are furthered as privilege will be waived where the holder of the privilege considers that, on balance, that course favours his or her interests.

*The problems of different privilege positions for different parties*

126 Furthermore, there are serious conceptual difficulties with the proposition that, in respect of one communication, a person can be entitled to assert privilege in it against one person but not against another person. In *Giannarelli v Wraith* [No 2]<sup>84</sup>, I addressed the issue of whether a party to a taxation of costs could disclose privileged documents to the taxing officer and yet prevent its opponents from seeing those documents. After discussing the English cases of *Pamplin v Express Newspapers Ltd*<sup>85</sup> and *Goldman v Hesper*<sup>86</sup>, I said<sup>87</sup>:

"But in *Pamplin* expressly and in *Goldman* by inference, the courts said that ultimately a party either waives the privilege entirely and allows the taxing officer and the other side to see the privileged documents or asserts the privilege and maintains the confidentiality of his or her documents. This is the only acceptable view."

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84 (1991) 171 CLR 592.

85 [1985] 1 WLR 689; [1985] 2 All ER 185.

86 [1988] 1 WLR 1238; [1988] 3 All ER 97.

87 (1991) 171 CLR 592 at 607.

127 My opinion that this was the "only acceptable view" stemmed from the anomalies inherent in any other view. The unsatisfactory proposition that, in respect of one communication, a person may be entitled to assert privilege against one person but not against another is a necessary corollary of using an "unfairness" test in all cases in determining whether privilege has been waived. Considerations militating for or against a finding of "unfairness" in a particular situation will be a function of the particular relationship between the parties who are in dispute as to whether privilege has been waived. Thus, in a dispute as to whether A has waived its privilege in a document by reason of disclosing the document to B, it may be "fair" for A to assert privilege against C but "unfair" for A to assert privilege against D. However, privilege is something which inheres in a communication<sup>88</sup>. The logical consequence of this proposition is that whether or not the privilege is waived by disclosure must be answered solely by reference to the manner in which the *communication* is dealt with. To give effect to the "unfairness" test in all circumstances is to determine the issue by reference to the broader context of the manner in which the parties in dispute have dealt with one another, rather than the manner in which the communication has been dealt with.

128 To use an "unfairness" test for determining waiver after disclosure to a third party also changes the fundamental nature of privilege. It changes privilege from something which inheres in communications as a matter of law to a state of affairs which exists between the parties as a kind of equitable estoppel. This difficulty does not arise in relation to applying the unfairness test to situations of partial disclosure such as *Attorney-General (NT) v Maurice*<sup>89</sup>. In such cases, "unfairness" arises from the characteristics of the communication itself – ie whether partial disclosure of its contents is misleading – rather than from general concepts of "unfairness" as between the parties in dispute.

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88 *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 543 per Gaudron J, 552 per McHugh J.

89 (1986) 161 CLR 475.

*The uncertainty and expense created by "unfairness" as a legal criterion*

129 One of the main difficulties with the concept of "unfairness" as a criterion for determining whether privilege has been waived is, as Dr R J Desiatnik has recently pointed out, that<sup>90</sup>:

"[i]t is a peerless example of a 'legal category of indeterminate reference'<sup>91</sup>."

130 In *Perre v Apand Pty Ltd*<sup>92</sup>, I pointed out:

"[A]ttractive as concepts of fairness and justice may be in appellate courts, in law reform commissions, in the academy and among legislators, in many cases they are of little use, if they are of any use at all, to the practitioners and trial judges who must apply the law to concrete facts arising from real life activities. While the training and background of judges may lead them to agree as to what is fair or just in many cases, there are just as many cases where using such concepts as the criteria for duty would mean that 'each judge would have a distinct tribunal in his own breast, the decisions of which would be as irregular and uncertain and various as the minds and tempers of mankind'<sup>93</sup>. ...

Furthermore, when legislatures and courts formulate legal criteria by reference to indeterminate terms such as 'fair', 'just', 'just and equitable' and 'unconscionable', they inevitably extend the range of admissible evidentiary materials. Cases then take longer, are more expensive to try, and, because of the indeterminacy of such terms, settlement of cases is more difficult, practitioners often having widely differing views as to the result of cases if they are litigated. Bright lines rules may be less than perfect because they are under-inclusive, but my impression is that most people who have been or are engaged in day-to-day practice of the law at the trial or advising stage prefer rules to indeterminate standards."

131 Those comments are pertinent in the context of determining whether legal professional privilege has been waived. Claims for legal professional privilege are most often made at an interlocutory stage in legal proceedings. In modern commercial litigation, there will often be a large number of documents which have

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90 Desiatnik, *Legal Professional Privilege in Australia* (1999) at 122.

91 Stone, *Recent Trends in English Precedent* (1945) at 37.

92 (1999) 73 ALJR 1190 at 1203; 164 ALR 606 at 625-626.

93 *Donaldson v Beckett* (1774) 2 Brown 129 per Lord Camden cited in "The Judge and Case Law" in Devlin, *The Judge* (1979) at 180.

been copied and sent to strangers to the privilege for non-privileged purposes<sup>94</sup>. The nebulous concept of fairness would have to be applied to these documents. The wide-ranging nature of the inquiry dictated by fairness would mean that it would often not be apparent on the face of the communication or otherwise whether it was privileged. The circumstances of the communication coming into existence and the entire history of dealings between the parties would need to be precisely known in order for the criterion of "fairness" to be applied. What should be a relatively simple preliminary step in proceedings would have the potential to develop into an expensive trial within a trial. Ideally, whether privilege continues to inhere in a document should be *prima facie* determinable from the face of the document coupled with a knowledge of the roles of the recipients, even in cases where the document has been copied to numerous third parties.

132 Moreover, as Justice Davies of the Court of Appeal of Queensland, speaking extra-judicially, has pointed out<sup>95</sup>:

"[T]he richer litigant may use the system to the disadvantage of its poorer opponent. The richer party can afford the more extensive search and can, by its process of discovery, impose an oppressive cost burden on its poorer opponent. The same applies, of course, to interlocutory proceedings generally; it is thought to be a common tactic for a wealthy litigant to involve a poorer opponent in a great deal of preliminary skirmishing."

133 Uncertainty in the area of legal professional privilege, which is productive of long and protracted "preliminary skirmishing" over whether it may be relied upon, clearly has the potential to exacerbate this undesirable aspect of modern litigation. In contrast, a rule which holds that any voluntary disclosure to a third party who is a stranger to the privileged relationship (ie is not either the lawyer or the client) is certain and easy to apply.

### *The preferable rule*

134 In my respectful opinion, *Goldberg v Ng*<sup>96</sup> was wrongly decided, having regard to the facts of the case. Fairness to Mr Goldberg was not relevant in determining whether he had waived his privilege. In some cases, notions of fairness may play a part in determining whether privilege has been waived. In those cases, it will operate as a factual test for determining the issue of waiver. If

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94 The practice of copying documents to a large number of persons is increasingly common due to technologies such as e-mail with a "cc" facility.

95 "A Blueprint for Reform: Some Proposals of the Litigation Reform Commission and their Rationale", (1996) 5 *Journal of Judicial Administration* 201 at 204.

96 (1995) 185 CLR 83.

*Goldberg* were to be taken as deciding, as a matter of law, that questions of waiver always depend on notions of fairness, it would be wrong in principle, and its application would have consequences detrimental to the administration of justice. It should therefore be treated as a decision depending on its own facts and having no general application. If it is to be regarded as laying down a new legal test of waiver, it should be overruled. It should not be given refuge in the sanctuary of *stare decisis*. Once there is *voluntary* disclosure of privileged material to a stranger to the privileged relationship (ie to a person who is not the lawyer or the client), privilege in that material is waived as against the world.

The effect of disclosure of privileged material by the ACT Executive to a member of the ACT Legislative Assembly

135 The ACT was not named as a respondent in the proceedings in which Dr Mann sought preliminary discovery and which are now the subject of this appeal – Ms Carnell was the sole respondent. No point was taken by the respondent in this regard. All parties seemed to consider that Ms Carnell was a party to the proceedings in her capacity as Chief Minister of the ACT. As that is the basis on which the parties have conducted the litigation, it is appropriate to continue upon that assumption.

136 It is clear from the manner in which Mr Moore's letter of 31 October 1997 was addressed that it was written to Ms Carnell in her capacity as Chief Minister of the ACT and not merely in her capacity as another member of the ACT Legislative Assembly. It is equally clear that in providing the copied documents to Mr Moore on 15 December 1997, Ms Carnell was responding in her capacity as Chief Minister. As Ms Carnell is the Chief Minister of the ACT and head of the ACT Executive, she is in an analogous position to the Premier of New South Wales. In *New South Wales v Bardolph*<sup>97</sup>, Dixon J said that the Premier of New South Wales "as head of the administration ... must be assumed to speak with the authority of the Government." Ms Carnell's disclosure of the copied documents to Mr Moore was therefore a disclosure by the ACT Executive to a member of the ACT Legislative Assembly.

137 As I have already indicated, the privilege is that of the ACT Executive which was acting, pursuant to its exclusive powers in the ACT (SG) Act, as the client in the litigation giving rise to the privileged documents. The ACT Government Solicitor was responsible to the Executive. The only power of the ACT Legislative Assembly to affect the acts of the ACT Executive taken in relation to the litigation was such influence as could be exerted via the tenets of responsible government as reflected in the Act or by passing legislation.

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97 (1934) 52 CLR 455 at 507.

138 In my opinion, the relationship of the ACT Legislative Assembly and the ACT Executive concerning operative decisions taken in the course of litigation is analogous to the position of shareholders in a corporation and the board of directors of the corporation. Disclosure of legal advice by the board of directors of a corporation to the shareholders of that corporation (at least in a public company) is disclosure to a third party for the purposes of determining whether privilege has been waived<sup>98</sup>. The shareholders are no less members of the relevant body corporate than the members of the ACT Legislative Assembly are members of the relevant body politic. But, like the members of the ACT Legislative Assembly, the shareholders are not part of the controlling mind of the body which is the effective owner of the privilege. Nor are they agents of the board.

139 The circumstances in which Mr Moore obtained the copied documents from Ms Carnell and the informal arrangement which existed between them as to the confidentiality of those documents indicate that Mr Moore, as a member of the ACT Legislative Assembly, was ensuring that the ACT Executive remained accountable to the Assembly. His letter to Ms Carnell of 31 October 1997 asks: "How can I be assured in such a way that I can feel confident that we will not require an official Inquiry into this matter to ascertain how to avoid this situation arising in the future[?]" Mr Moore was canvassing the possibility of an inquiry, which could presumably be set up by the ACT Legislative Assembly passing appropriate legislation and which would be a means by which the ACT Legislative Assembly could ensure the ACT Executive Government was held to account for its actions taken in relation to the litigation. However, the disclosure to him was relevantly a disclosure to a stranger to a privilege. Mr Moore was not a member of the Executive.

140 Accordingly, there was disclosure by the owner of the privilege (the ACT Executive) to a person who was a stranger to that privilege. That means that the ACT Executive by sending the copied documents to Mr Moore has waived its privilege in the communication recorded in the original documents. There is no reason for treating the ACT Executive differently from the ordinary citizen in determining whether a voluntary disclosure constitutes a waiver. If the public interest would be advanced by a Minister showing the documents to a member or members of the Assembly, the communication will usually be protected by the public interest immunity doctrine. It may also be proper to extend that immunity to any original documents which are the source of the communication. In a case such as the present, the combination of legal advice to the Executive and inter-governmental communication may itself be enough to give the documents public

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98 As was assumed *sub silentio* in *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1996) 40 NSWLR 12, a case decided under the *Evidence Act* 1995 (NSW). A stay of the order that privilege had been waived pending a special leave application to this Court was refused by Kirby J – see *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1996) 70 ALJR 603; 137 ALR 28.

interest immunity in addition to and independently of the communication of the documents to a member of the Assembly. That being so, there is no need to develop the common law doctrine of waiver of legal professional privilege to accommodate any communication difficulties supposedly confronting the relationship between members of a legislature and members of the executive government. Public interest immunity, not legal professional privilege, is the natural, and best, protector of communications between such parties.

Orders

- 141       The appeal must be allowed. The orders of the Full Court of the Federal Court made on 4 December 1998 should be set aside and the orders of Miles CJ made on 4 June 1998 should be restored.

- 142 KIRBY J. In *Northern Territory of Australia v GPAO*<sup>99</sup>, I reserved my opinion on the ambit of the *Evidence Act* 1995 (Cth) ("the Act") in its application to obligations arising in ancillary proceedings in a court in which the Act applies. In that case what was in question was a response to a subpoena to produce documents, issued by the Family Court of Australia. By its terms, where the Act applies, it applies to interlocutory proceedings<sup>100</sup>.

The *Evidence Act* does not apply

- 143 The verb "adduce", used in the Act, means nothing more than to bring forward for consideration. A great deal of inconvenience would be avoided if the bringing forward of evidence for use in a later trial (as by responding to an order for discovery, a subpoena or some other ancillary process) were held to fall within the Act. This may not have been what the Australian Law Reform Commission subjectively intended because of its limited terms of reference. But the ultimate question for a court is what the Parliament meant by the words which it enacted<sup>101</sup>. A host of undesirable and even irrational distinctions between the law applicable to the ancillary and the substantive parts of the same proceedings would be avoided if a broad view were taken of the phrase "adducing of evidence". That is why, in *GPAO*, I preferred to reserve my opinion on the point. Upon my analysis in that case, the question did not arise for decision.

- 144 However, all the other members of this Court held in *GPAO* that the Act did not apply to the obligations of a person to whom a subpoena had been addressed<sup>102</sup>. That holding must be taken as settling the question of statutory construction notwithstanding the arguments that, in my view, exist for a wider operation of the Act and for its application to ancillary proceedings intimately connected with the adducing of evidence for use in a later court hearing<sup>103</sup>.

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99 (1999) 73 ALJR 470 at 520; 161 ALR 318 at 387; cf Nygh, "Case Notes: Northern Territory of Australia v GPAO", (1999) 13 *Australian Journal of Family Law* 170 at 171-172.

100 The Act, s 4(1)(b).

101 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518.

102 *Northern Territory of Australia v GPAO* (1999) 73 ALJR 470 at 474 per Gleeson CJ and Gummow J (with whom Hayne J agreed), 495 per Gaudron J, 508 per McHugh and Callinan JJ; 161 ALR 318 at 323-324, 352, 371.

103 cf *Adelaide Steamship Co Ltd v Spalvins* (1998) 81 FCR 360 at 364; *Akins v Abigroup Ltd* (1998) 43 NSWLR 539 at 547, 553.

The common law of legal professional privilege applies

145 Once this position is arrived at, it is necessary to resolve the present appeal not in accordance with the Act (which does not apply) but in accordance with the principles of the common law (which do apply). The principles concerned are primarily those relating to the client's privilege ("legal professional privilege") which attaches in the pre-trial discovery of documents comprising communications protected by that privilege. The communications in question in this case were undoubtedly protected by that privilege unless the client (the Australian Capital Territory), through the agency of the Chief Minister (the respondent), lost the privilege, as by waiver, by reason of the disclosure of the communications to a third party.

146 It is unthinkable that the common law would, in the circumstances, and in the context of the government of a self-governing Territory of the Commonwealth, effectively forbid a member of the Executive Government of the Territory from disclosing, in confidence, to a member of the legislature, communications relevant to the discharge of the governmental functions of the Territory except at the price of the loss of the legal professional privilege belonging to the Territory. The alternative has only to be contemplated. Unless some other privilege could be invoked the member of the legislature would insist that such disclosures be made in the chamber of the legislature in circumstances where the protection of parliamentary privilege would attach to their disclosure. A great deal of damage thereby might be done to innocent persons which the confidential provision, as happened here, would avoid.

Deriving the rule in the governmental context

147 There is a great deal in the opinion of McHugh J in this appeal with which I agree. Like him, I respectfully consider that *Goldberg v Ng*<sup>104</sup> was wrongly decided. My views in that case were stated in a minority opinion in the New South Wales Court of Appeal<sup>105</sup>. They did not attract the favour of a majority when the appeal was decided by this Court.

148 As will be plain from my opinion in the *Esso Case*<sup>106</sup>, I share McHugh J's concern that the ambit of legal professional privilege should not be expanded. If this is done, it will result in affording advantages to third parties and strangers who receive the information contained in the privileged communication but for

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<sup>104</sup> (1995) 185 CLR 83.

<sup>105</sup> (1994) 33 NSWLR 639 at 642.

<sup>106</sup> *Esso Australia Resources Limited v The Commissioner of Taxation of the Commonwealth of Australia* [1999] HCA 67.

purposes separate from the objects of the privilege. This could, in particular cases, prevent courts from getting at the truth of contested matters and, as a result, deny parties real access to materials necessary for the vindication of their legal rights. As McHugh J points out, this would, in turn, ordinarily act to the advantage of richer litigants (often corporations and government administration) at the expense of poorer opponents (usually individuals). With all of this I am in agreement with McHugh J.

149 Where I part company with McHugh J is that I cannot regard Mr Michael Moore in relation to the client (the Australian Capital Territory) as a third party, still less a stranger. With every respect, I consider that it is unrealistic to attempt to draw an analogy between Mr Moore's position in relation to the client, the Australian Capital Territory (or even the Executive of that Territory), and a shareholder in a corporation and its board of directors<sup>107</sup>. To attempt such an analogy is to ignore the constitutional and governmental setting in which Mr Moore made his request that led to his limited access to the privileged documents.

150 The Legislative Assembly exerts its authority over the Executive of the Australian Capital Territory for the governance of the Territory in ways other than the enactment of laws and the passing of resolutions. There are other procedures at the disposal of the Assembly and its members, such as Mr Moore. They include the asking of questions and the demand for information which Ministers, being accountable to the legislature, are obliged to answer, in the chamber or outside. Should Ministers fail to do so, or should they provide an answer which is judged inadequate or unsatisfactory, they risk losing the confidence of the legislature and consequently imperilling their retention of office.

151 Mr Moore's expressed concern about a possible "monumental waste of public funds" was directed at the precise circumstances of, and explanation for, the settlement of Dr Mann's earlier litigation. The only way that the justification for that settlement could be afforded convincingly in answer to his question was to allow Mr Moore, in his capacity as a member of the Assembly, to have confidential access to the advice of the Territory's lawyers. Doing so, in confidence and outside the chamber, actually protected the reputation of Dr Mann where the tabling of the documents in the Assembly would have had the possible consequence of traducing his reputation or that of others in an analogous situation.

152 The proof of this assertion is found in what ensued. Mr Moore was satisfied. He did not pursue further the allegation of "a monumental waste of public funds". The machinery for the government of the Australian Capital Territory operated as was intended by law. The confidences of the legal privilege of the Territory, as client, were safeguarded to the fullest extent possible. Those confidences were

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107 Reasons of McHugh J at [138].

retained to those who were part of the organs of government of the Australian Capital Territory and the lawyers engaged by the Executive to advise the Territory.

153 The common law always moulds itself to the constitutional statutes which establish the system of government in which it operates<sup>108</sup>. In the case of a self-governing Territory (such as the Australian Capital Territory) this means that the common law of legal professional privilege, disclosure, and waiver adapt themselves to the governmental system in which the Executive and its members respond to questions asked of them by elected members of the legislature. This Court should do nothing, and declare no rule of the common law, that would diminish the effectiveness of these fundamental principles of the system of responsible government which is observed in Australia. Yet that would be the consequence of upholding Dr Mann's submissions in this case.

154 The provision of the documents to Mr Moore might also have been protected by public interest immunity or under a legislative privilege derived from the ancient privileges of parliament, enjoyed in this case by a member of the Assembly of the Australian Capital Territory, such as Mr Moore. For whatever reason these points were not argued. Accordingly, it is unnecessary (and it would be inappropriate) to explore their application. However, legal professional privilege was invoked. It is too late to contend that, of its nature, it does not apply to government and governmental persons and institutions. Thus the issue remaining concerns its ambit. Where the client is the Australian Capital Territory, I would hold that disclosure to a legislator of the Territory performing his functions as such is not disclosure to a third party or stranger. There was therefore no waiver of the privilege by disclosure of the privileged communications to Mr Moore.

#### Conclusion and order

155 It follows that I agree with Gleeson CJ, Gaudron, Gummow and Callinan JJ that the Full Court of the Federal Court of Australia was correct in its conclusion that there had been no loss of legal professional privilege through waiver by the client in the circumstances disclosed in this case. I also agree with the order which their Honours propose to dispose of this appeal.

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108 cf *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566.