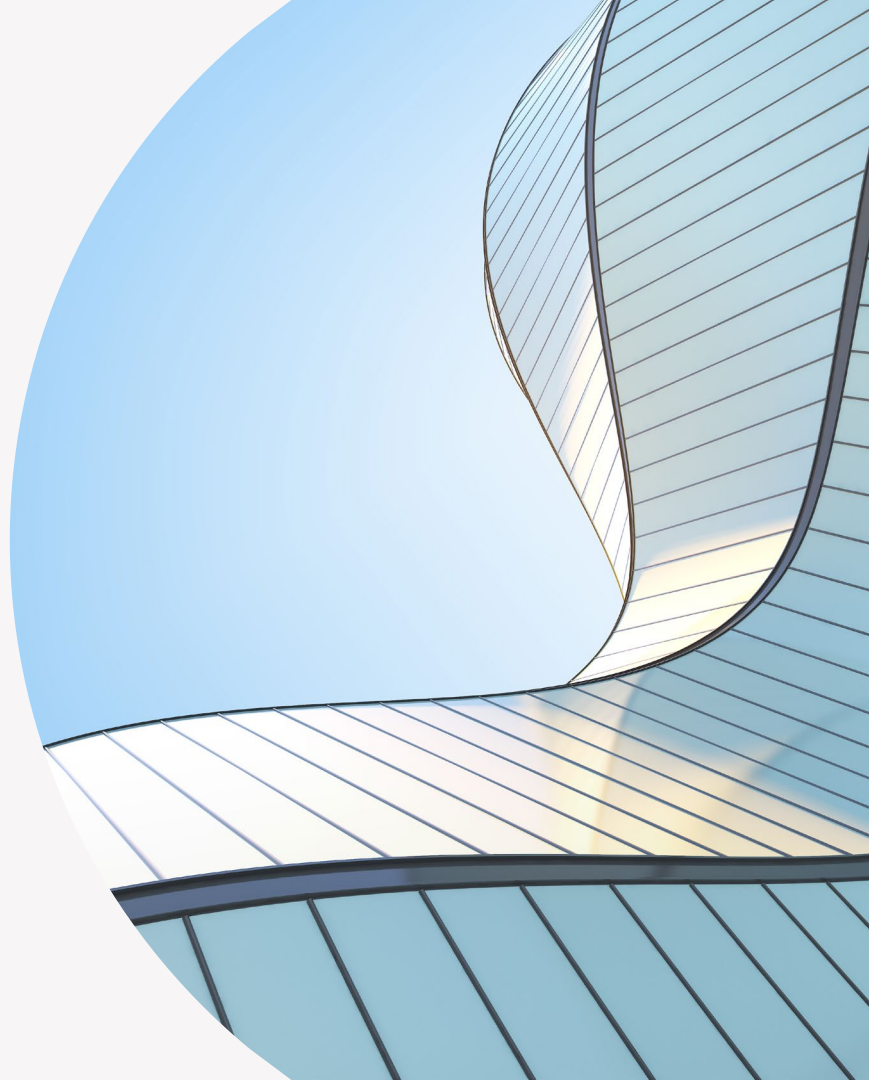


**Colin
Biggers
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Insurance Seminar Series.

**Privilege and waivers in the
insurance claims context**

Tuesday 3 March 2026



What is Privilege?

"...the proper functioning of our legal system depends upon a freedom of communication between legal advisers and their clients which would not exist if either could be compelled to disclose what passed between them for the purpose of giving or receiving advice..."

Baker v Campbell (1983) 153 CLR 52 at 21 (Dawson J)

Advice Privilege

Evidence Act 2008 (Vic) - Section 118 - Legal advice

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, lawyer or another person -

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

Litigation Privilege

Evidence Act 2008 (Vic) - Section 119 - Litigation

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 between the client and another person, or between a lawyer acting for the client and another person, that was made; or
- b) the contents of a confidential document (whether delivered or not) that was prepared—

for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.

Common Interest Privilege

Limits and Requirements

- **Common legal interest:** The parties must share a legal interest, not merely a commercial or strategic one.
- **Dominant purpose:** The communication must have been made for the dominant purpose of advancing the common legal interest.
- **Non-adversarial relationship:** The parties asserting common interest privilege must not be adversaries.
- **Confidentiality:** The communication must be confidential.

Key Criteria - *Douglas v Morgan* [2019] SASCFC76

The Full Court set out a useful summary to determine the existence of the privilege:

- Privilege protects communications between client and lawyer rather than information or documents per se
- Privilege only protects confidential communications.
- The communication/information must be created for the dominant purpose of the provision of legal services by the lawyer to the client.
- The purpose of providing legal services must be the dominant purpose (see recent decision in *Robertson v Singtel Optus Pty Ltd* [2024] FCAFC 58).
- Find the purpose/purposes pertaining to the communication/information.
- The purpose must be determined by reference to the time at which the communication/information was created/conveyed.
- Determining the purpose involves the application of a subjective test.
- The onus of proof lies with the person seeking to claim privilege.

What is not protected?

- Communications made for illegal or improper purposes (i.e. fraud)
- Purely commercial or business advice (even if a lawyer is copied)
- Facts themselves (only the communication about them)
- Communications that are not confidential



Singtel Optus Pty Ltd v Robertson [2024] FCAFC 58

1. What did the Court say about privilege?

- i. *Privilege applies only where the dominant purpose of a communication or document is obtaining legal advice or providing legal services in relation to existing or reasonably anticipated litigation.*
- ii. *The onus lies on the party asserting privilege to prove that dominant purpose with focused and specific evidence.*
- iii. *It is not sufficient that legal advice or litigation was one purpose, or even an important purpose.*
- iv. *Where a document is created for multiple purposes, privilege will fail unless the legal purpose is predominant, paramount and most influential.*

2. Why did privilege fail?

- i. *The evidence showed that non-legal purposes were substantial and independent, not merely incidental and that public statements as well as board documents described the Deloitte review as an “independent external review”, with no clear emphasis on legal advice or litigation.*

3. What is the significance of the decision?

- i. *Reinforces strict application of the dominant purpose test*
- ii. *High risk for multi-purpose investigation reports*
- iii. *Objective evidence matters more than labels*

Diawara v National Australia Bank Ltd [2023] FCA 1048

1. What did the Court say about privilege?

- i. *Privilege protects confidential communications and documents created for the dominant purpose of obtaining legal advice or legal services.*
- ii. *The dominant purpose test focuses on why the document was brought into existence, not how it might later be used.*
- iii. *A document may still be privileged even if it has ancillary or subsidiary non-legal uses, provided the legal purpose dominates.*
- iv. *The critical inquiry is the purpose of the person who authorised the document's creation and had responsibility for procuring it.*

2. Why was privilege upheld?

- i. *The dominant purpose of the report's creation was legal advice.*
[insert quote from case here]

3. What is the significance of the decision?

- i. *Confirms privilege can apply to workplace investigations*
- ii. *Sharp contrast with Optus v Robertson*
- iii. *Practical guidance for in-house and external counsel*
- iv. *Reinforces limits on fishing expeditions*

State of Queensland v Allen [2011] QCA 311

1. What did the Court say about privilege?

- i. *Legal professional privilege is a fundamental common law right, including litigation privilege over documents created for the dominant purpose of anticipated litigation.*
- ii. *Parliament may abrogate privilege by clear statutory language.*
- iii. *Personal Injuries Proceedings Act 2002 (Qld) (PIPA) expressly addresses privilege in section 30, preserving privilege generally (section 30(1)) but removing it for specific categories of documents (section 30(2)).*

2. Why did privilege fail in-part?

- i. *One of the documents was characterised as a “medical report” under section 30(2) of PIPA.*
- ii. *Privilege did not fail in respect of the solicitors’ file notes, which were held not to be “reports” at all and therefore remained privileged.*

3. What is the significance of the decision?

- i. *Clarifies statutory abrogation of privilege*
- ii. *Defines “medical report” narrowly but practically*
- iii. *Preserves core lawyer–client privilege*

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Waiver

Waiver occurs where the party entitled to privilege performs an act which is inconsistent with the confidence preserved by it.

Toohey J in *Goldberg v Ng* (1995) 185 CLR 83 at 106.

Waiver - what is it?

- Waiver is the process whereby a person can lose the benefit of legal professional privilege.
- The abandonment of privilege.
- Key question - whether conduct inconsistent with maintenance of privilege.
- Judged objectively (not based on subjective intention).
- Clear conduct required.

privilege 'is not to be waived unless there is clear conduct or language which evidences an intention to waive the privilege either expressly or by necessary implication'

RCI Pty Ltd v
Commissioner of
Taxation (Cth) (2009)
76 ATR
591 at [39] per Stone
J

Who can waive privilege?

- Only the person(s) entitled to claim legal professional privilege may waive it.
- But it is a capacity which can be delegated, ie. the privilege holder can authorise another to waive privilege
- So, for example, a solicitor can waive on behalf of a client.

Requires 'clear conduct or language which evidences an intention to waiver the privilege either expressly or by necessary implication.'

*RCI Pty Ltd v
Commissioner of
Taxation (Cth) (2009) 76
ATR 591 at [39] per Stone
J.*

Express waiver

- Usually little or no difficulty identifying the act of waiver.
- Usually deliberate and intentional disclosure.
- Examples:
 - Reading out document in open court;
 - Tendering a document in a proceeding;
 - Sharing a document with an adversary;
 - Giving evidence of conversations with one's solicitor.

... the clearest example of waiver occurs when a party deliberately and intentionally discloses protected material. Such a waiver is usually described as an express waiver ...

Goldberg v Ng (1994)
33 NSWLR 639 at
670 per Clarke JA

Limits of express waiver

- Mere reference to communication without reference to its content will not constitute a waiver.
- No waiver where privileged document shared with a confidant, e.g.:
 - an agent; or
 - their insurance broker; or
 - an expert (at least before service of report).

The mere fact that a document is in the hands of a person other than the parties to the litigation... does not of itself deprive the document of its privilege character.

Abigroup Ltd v Akins
(1997) 42 NSWLR 623 at 632 per Bainton J

Implied waiver

- No clear line between express and implied waiver.
- Situations where the Courts deem privilege holder to have acted inconsistently with maintenance of confidentiality, even if not intentional.
- *Goldberg v Ng*: sharing documents with the NSW Law Society for purpose of conduct complaint resulted in waiver in relation to distinct professional negligence claim.

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...

Mann v Carnell
(1999) 201 CLR 1 at [29] per Gleeson CJ, Gaudron, Gummow and Callinan JJ

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Expert reports

- Waiver will occur in relation to instructions to an expert (at least after service of a report) because:
... the letter may be expected to set out the assumptions on which the expert was to proceed in forming his or her opinion. For this reason, the letter will have had some influence on the content of the report, and a reading of the letter may be necessary to a proper understanding of the report.

Collins Debden Pty Ltd v Cumberland Stationery Co Pty Ltd
[2005] FCA 1194 at [9] per Lindgren J.

Issue waiver

- When parties make allegations raising the issue of their states of mind, and legal advice is relevant to the formation of that state of mind, they cannot claim legal professional privilege for such advice.
- Must show that the legal advice in question was relevant in the formation of the state of mind or belief.

... the legal advice in question was relevant in the formation of that state of mind or belief or that the advice itself in some way becomes an issue in the action.

Southern Equities Corporation Ltd (in liq) v Arthur Anderson and Co (1997) 70 SASR 166 at 193 per Bleby J

Waiver and pleadings

- If the contents of a privileged communication are set out in a pleading, then privilege may be waived.
- Waiver occurs where a pleading '*implicitly puts in issue the content of an otherwise privileged communication.*'

Brisconnections Finance Pty Ltd (Receivers and Managers Appointed) v Arup Pty Ltd [2016] FCA 438 at [18] per Flick J

The onus of establishing waiver rests upon the person alleging waiver.

Bradford v Devlot 17 Pty Ltd (No 3) [2021] VSC 368 at [248] per Matthews AsJ

Joint privilege

- Privilege may be held jointly between 2+ persons.
- Eg: partnership, joint venture, joint clients of a lawyer, company and shareholders, lot owners and OC, **insured and insurer**.
- Privilege can't be claimed by one holder against another.
- Must be waived jointly by all privilege holders.

Logically the joint nature of the privilege means that all to whom it belongs must concur in waiving it. Theirs is one inseverable right.

Farrow Mortgage Services Pty Ltd (in liq) v Webb (1996) 39 NSWLR 601 at 608 per Sheller JA

Common interest privilege

- Not really a type of privilege. Rather a defence to an assertion of waiver.
- Can disclose to a person with whom one has a common interest without waiving privilege.
- Communication must relate to common interest.
- Eg. Underwriters sharing privileged documents with an insured plaintiff will not waive privilege.

Bulk Materials (Coal Handling) Services Pty Ltd v Coal & Allied Operations Pty Ltd (1988) 13 NSWLR 689 (at 691 per Giles J)

...commonality of interest supplies a rational basis for inferring an intention that the party's privilege should be maintained, even though the subject matter of the disclosure has passed into the hands of the other person.

Marshall v Prescott
[2013] NSWCA 152,
[65] Barrett JA

Inadvertent disclosure

- Inadvertent disclosure refers to the accidental or mistaken disclosure of documents that contain privileged information, such as legal advice or communications between clients and their solicitors.

Inadvertent disclosure - An English classic

- A classic English case.
- Privileged docs accidentally disclosed in discovery.
- No waiver occurred because the recipient must have known the disclosure the result of an obvious error.
- Parties were compelled to '*shut out of their minds the information their solicitor obtained on inspection.*'

*Guinness Peat
Properties Ltd v
Fitzroy Robinson
Partnership [1987] 2
All ER 716*

The Federal Court weighs in

- Documents were produced by mistake, contrary to instructions given to claim legal professional privilege for them.
- An application for production of the documents refused.
- Documents still privileged.
- but Court noted that the privilege would have been waived by the inadvertent disclosure if complete knowledge of the documents gained.

*Kabwand Pty Ltd v
National Australia
Bank (1987) 81 ALR
721*

The High Court has its say

- 60,000 document discovery review task.
- Privileged documents accidentally coded by inexperienced solicitor as non-privileged.
- Recipient spotted the error, but refused to return the privileged documents.
- The sender of the documents applied to the Court for relief.
- Court found the documents were still privileged and orders documents be returned and deleted.

*Expense Reduction
Analysts Group Pty
Ltd v Armstrong
Strategic
Management and
Marketing Pty Ltd
(2013) 250 CLR 303.*

Australian Solicitor's Conduct Rules 2015

31.1 Unless otherwise permitted or compelled by law, a solicitor to whom material known or reasonably suspected to be confidential is disclosed by another solicitor, or by some other person and who is aware that the disclosure was inadvertent must not use the material and must—

31.1.1 return, destroy or delete the material (as appropriate) immediately upon becoming aware that disclosure was inadvertent, and

31.1.2 notify the other solicitor or the other person of the disclosure and the steps taken to prevent inappropriate misuse of the material.

31.2 A solicitor who reads part or all of the confidential material before becoming aware of its confidential status must—

31.2.1 not disclose or use the material, unless otherwise permitted or compelled by law,

31.2.2 notify the opposing solicitor or the other person immediately, and

31.2.3 not read any more of the material.

31.3 If a solicitor is instructed by a client to read confidential material received in error, the solicitor must refuse to do so.

The ASCR sets out a solicitor's obligations upon becoming aware of an inadvertent disclosure.

Inadvertent disclosure - hot tips

- Call the other side ASAP to inform them that documents were sent in error and ask them to delete the contents.
- Consider recalling the email (provides evidence of attempt even if unsuccessful).
- Ultimately, it is the prompt steps taken following the inadvertent disclosure that can protect you or your client.

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Ethical Considerations

Key Ethical Considerations for practitioners

- *Privilege is the client's right, not the lawyer's*
- *Paramount duty to the court and proper claims of privilege*
- *In-house counsel and independence concerns*
- *Professional discipline and misconduct risk*

Presenters.



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