WAIVER AND THE GOVERNMENT ADVISER: HOW PRIVILEGED IS THAT LEGAL ADVICE?

A Introduction

1 Given the fundamental role legal professional privilege has traditionally played in our common law system, it might be thought that it would be strongly defended.

2 However, recent authority, particularly in the Federal Court, suggests an apparent readiness to find a waiver of legal professional privilege.

3 This paper examines such authority, and further examines the implications, particularly for the government adviser.

4 Given the fact that the statutory provisions of the *Evidence Act* 1995 (Cth) have been confined to the adducing of evidence in the course of a hearing in court[1], this paper will concentrate on the situation at common law. As will be seen in the cases below, the vexed question of waiver frequently arises in the course of discovery in interlocutory proceedings.

B Legal professional privilege and the government adviser generally

5 Legal professional privilege ("**LPP"**) applies to confidential communications between a client and a legal adviser if made either for the dominant purpose of obtaining or giving legal advice or with

[1] *Esso Australia Resources Ltd* v *Federal Commissioner of Taxation* (1999) 201 CLR 49

reference to litigation that is actually taking place or is in the contemplation of the client.

6 In approaching LPP it is important to recognize that it is no mere rule of evidence but a substantive and fundamental common law doctrine that "affords a practical guarantee of fundamental rights."[2]

7 The fact that the advice emanates from a solicitor in government employment does not preclude the privilege from attaching. Nor does the fact that the advice relates to the exercise of a statutory power or the performance of a statutory duty.[3] Instead the question turns on whether the lawyer retains independence despite his or her "in-house" capacity.

8 The question of whether a practising certificate is necessary in this context appears to have been settled in the recent case of *Commonwealth of Australia and Air Marshal Errol John McCormack in his capacity as Chief of Air force v Russell Vance*[4]. In that case, the Full Federal court found that the absence of a practising certificate was not fatal to an LPP claim.

9 The fundamental rights offered by the privilege should therefore generally apply to the independent government adviser absent a waiver.

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[2] *Goldberg* v *Ng* (1995) 185 CLR 83 at 121 per Gummow J citing *Baker* v *Campbell* (1983) 153 CLR 52 at 88, 95-96, 116-117, 113-132 and *AG (NT*) v *Maurice* 161 CLR 475 at 480, 490-1

[3] *Waterford* v *Commonwealth* (1987) 163 CLR 54 at 63-4, 74-5

[4] [2005] ACTCA 35 (23 August 2005)

C Waiver-General

10 Prior to the High Court authority of *Mann* v *Carnell*[5] the guiding principle was whether it would be "unfair" to allow a party to refer to or use material and yet at the same time assert that the material was privileged from production. [6]

11 However, in *Mann* v *Carnell*, the High Court formulated a test of "inconsistency" so that at common law waiver occurs where the party entitled to the privilege performs an act which is *inconsistent* with the maintenance of the confidentiality, assessment of such inconsistency being "informed, where necessary" by considerations of fairness; although the assessment is not by reference to some overriding principle of fairness operating at large.[7]

12 *Mann* v *Carnell* arose out of circumstances wherein the Australian Capital Territory government compromised an action brought by a member of the public. The litigant complained to a member of the Legislative Assembly about the conduct of the government in the litigation and the member passed the complaint on to the Chief Minister. The Chief Minister then sent to the member in confidence copies of documents containing legal advice about the litigation which the government had received- and which were the subject of LPP- to

[5] (1999) 201 CLR 1
[6] *Attorney-General (NT)* v *Maurice* (1986) 161 CLR 475; *Goldberg* v *Ng* (1995) 185 CLR 83
[7] *Mann* v *Carnell,* (1999) 201 CLR 1 at [29]

enable him to consider the reasons for the conduct. The member then returned the copies to the Chief Minister but retained the covering letter a copy of which he sent to the litigant.

13 A majority of the High Court (Gleeson CJ, Gaudron, Gummow, Kirby and Callinan JJ, McHugh J dissenting) found that the conveyance by the Chief Minister of the terms of the advice on a confidential basis, was not inconsistent with the purpose of the privilege.

14 It remains to be seen whether the test of "inconsistency" provides a more predictable test than 'unfairness" for those at the coalface trying to determine whether a waiver has occurred. Both formulations suggest a high level of generality. It is for this reason that it is necessary to examine what the courts have done in particular contexts and according to particular categories.

15 A waiver may be described as "express" or "implied". However, if it is express it is generally easy to find. It is in the area of implied or imputed waiver that issues generally occur and the two particular categories of waiver which arise in this context are "disclosure waiver" and "issue waiver."

16 "Disclosure waiver" arises in circumstances where a privileged document, or part thereof, is referred to or otherwise disclosed in some way. "Issue waiver" tends to arise in the context of pleadings in litigation where it may be alleged that the holder of the privilege has

"put in issue" the confidential communication and thereby waived privilege in it.

17 It is important to remember however, that no matter what has occurred in a given fact situation, or in a particular "category" of waiver, the overall test pursuant to *Mann* remains the same, that is, has some conduct occurred which is inconsistent with the maintenance of the confidentiality of the communication? [8]

D Disclosure Waiver

18. A number of issues arise in the context of disclosure waiver including:

a. Whether there has been disclosure of the "*substance of the legal advice";*
b. Whether the purpose for which the disclosure is made is relevant;
c. Whether inadvertence plays a part;
d. What, if any, is the role of "fairness";
e. Whether disclosure at a "without prejudice" meeting can ever amount to a waiver.

substance of the advice

[8] And see the general discussion of the principles by Allsop J in *DSE Holdings* v *Intertan Inc* [2003] FCA 384 particularly at [11]-[15]

19.In order for there to be a disclosure of a privileged communication, the substance of that communication must be disclosed. A mere reference to the advice is not enough.[9]

20. Whether the "substance" will have been disclosed is very much a case by case question. Moreover, the cases of *Bennett v Chief Executive Officer of the Australian Customs Service* [10]and *Rio Tinto Ltd v Commissioner of Taxation*[11] appear to represent a "high water mark" in the jurisprudence on waiver, given the apparent readiness with which waiver findings were made

21. Prior to *Bennett*, although there was no absolute unanimity, there were cases which supported a cautious approach to waiver. Thus, in the case of *Ampolex*[12], there were two entries in a report that were said to constitute a waiver. In the first, found by the court to be a waiver, the relevant disclosure referred to a specific conversion ratio of 1:1 saying of that formula that Ampolex "had legal advice supporting this position." In the words of Rolfe J the reference disclosed the "essence or vital part of the advice." By contrast the other reference contained a disclosure of views which were said to "have regard to" certain legal advice. This reference was seen as more generic and did not amount to a waiver.

[9]see *Attorney-General (N.T.) v. Maurice* (1986) 161 CLR 475 at 481 and 499
[10] (2004) 210 ALR 220
[11] [2005] FCA 1336
[12] *Ampolex Ltd v Perpetual Trustee Company (Canberra) Ltd & Ors* (1996) 40 NSWLR 12-

22. Further, in *Temwood*, disclosure of a position which was said to have been "based on legal advice" was also found not to be a waiver. [13]

23. In *Bennett,* the issue centred on whether there had been a waiver of LPP with respect to a letter dated 29 September 1999 from the Australian Government Solicitor to Bennett's solicitors. The said letter was a proposal to settle litigation between the parties and included the following:

> (2) *AGS* [Australian Government Solicitor] *has now advised Customs that Public Service Regulation 7(13) does not prohibit all public comment* by an officer on matters of public administration Rather, the sub-regulation must be construed or "read down" so as not to apply to public comment on matters of administration which are not already on the public record …
> (9) *AGS has advised Customs that your client is not correct in asserting that he is not subject to the Act and Regulations* if he *makes public statements about Customs-related matters* in his capacity as President of COA [Customs Officers' Association]. It is a matter for your client, in the light (perhaps) of legal advice provided by you, whether he adheres to or moderates his position on this question … [Emphasis added]

24. The primary judge drew a distinction between the conclusion expressed in legal advice on the one hand and the reasons for that conclusion on the other and took the view that disclosure of the conclusion did not involve disclosure of the substance of the advice.
25. However on appeal, both Tamberlin and Gyles JJ found there had been a waiver of privilege in these circumstances. Tamberlin J found that once the conclusion of the advice was stated, together with the effect of it, there was an imputed waiver (at [6]). Gyles J also found that the primary judge had been in error in drawing a distinction between conclusion and reasoning and also found a waiver (at [65]).

[13] *Temwood Holdings Pty Ltd -v- Western Australian Planning Commission &* anor [2003] WASCA 112

26. Whilst the precise consequences of *Bennett* are yet to be determined, the case has been considered since in the Federal Court cases of both *Rio* and *Ninox*.

27. In *Rio Tinto Ltd* v *Commissioner of Taxation*[14], Sundberg J cited *Bennett* and found a disclosure waiver (and an issue waiver).

28. *Rio* turned on whether s46A of the *Income Tax Assessment Act* 1936 applied to a dividend paid to the applicant. That provision applied to a dividend which arose out of an arrangement which the Commissioner "was satisfied" was by way of dividend stripping. A further issue arose in terms of whether the respondent Commissioner had properly exercised the discretion to remit additional tax imposed by way of penalty.

29. In terms of disclosure waiver, the respondent had produced an audit report in answer to a notice to produce and to an application under the *Freedom of Information Act* 1982 which stated:

> "The Commissioner will be relying on the following grounds which have **been confirmed by senior Tax Counsel** (Mr John Evans) and **supported by AGS (**Mr Jonathan Todd) and opinions obtained from Counsel
>
> [the grounds A-E thereafter being fully set out]" (emphasis added)

30. In dealing with disclosure waiver His Honour set out the general test in *Mann* and also referred to *Bennett, Ampolex*[15] *and Australian Unity Health v Private Health Insurance Administration Council*[16] (at [50]-[53]).

[14] [2005] FCA 1336
[15] though not to the second disclosure referred to in para 21 above
[16] (1999) FCA 1770

31. His Honour rejected the contention that the Report did not disclose the "gist" or "substance" of the advice finding that *Bennett* in particular meant that disclosure of the conclusion reached amounts to waiver notwithstanding the reasoning may not be disclosed (at [59]-[60]).
32. His Honour further rejected the suggestion that the purpose for which the report was produced was in any way relevant, again citing *Bennett* at [65] for this conclusion (at [58]).
33. It might have been thought, consistently with cases such as *Temwood*, that disclosing a position "confirmed" by legal advice would not be sufficient to amount to waiver and that the *Rio* case was distinguishable from *Bennett* given that the relevant reference appeared more generic. The *Rio* case may therefore suggest that *Bennett* was the beginning of an irreversible trend, although, at the time of writing, a decision on appeal in *Rio* is reserved.
34. Against this is the other recent case of *Nine Films & Television Pty Ltd v Ninox Television Ltd*[17] which case was also decided post *Bennett* but prior to *Rio*.
35. In *Ninox*, despite the fact that there was a reference to an entity moving forward "based on" a particular piece of legal advice, Tamberlin J was not prepared to find a waiver.
36. Instead, His Honour referred to the need for "clear conduct or language" to evidence waiver (at [8]) and stated that the task for the Court is to

[17] [2005] FCA 356

determine whether the specific disclosure "is so clear and inconsistent with the maintenance of the privilege" (at [8]).

37. In the result his honour found the conduct was insufficiently "clear and unequivocal" to amount to waiver, finding the evidence for the waiver inadmissible and that the substance of the advice was not disclosed with enough "specificity or clarity" (at [26]).

38. Given Tamberlin J was a member of the majority in *Bennett*, the case of *Ninox* tends to suggests that *Bennett* may ultimately be a high water mark. However, in the light of cases such as *Rio*, the matter remains to be tested.

Whether purpose is relevant

39. There were some suggestions in *Bennett* that the context in which the relevant disclosure takes place is important.

40. Thus, at [5],Tamberlin J said:

> 5 In the present case it is evident from the letter of 28 September 1999, which was written by the Australian Government Solicitor to the solicitors for Mr Peter Bennett that the substance of the advice for the Australian Government Solicitor was conveyed **in a context which did not attract an obligation of confidentiality** in relation to the letter. It is apparent that the substance and effect of the advice was being communicated **in order to emphasise and promote the strength and substance of the case to be made against Mr Bennett…**
>
> 6 The above extracts express the substance of the advice that was given by the Australian Government Solicitor in each of the paragraphs. In my view, it would be inconsistent and unfair, **having disclosed and used the substance of the advice in this way**, to now seek to maintain privilege in respect of the relevant parts of that advice which pertain to the expressed conclusion. It may perhaps have been different if it had been simply asserted that the client has taken legal advice and that the position which was adopted having considered the advice, is that certain action will be taken or not taken. In those circumstances, the substance of the advice is not disclosed but merely the fact that there was some advice and that it was considered. However, once the conclusion in the advice is stated, together with the effect of it, then in my view, there is imputed waiver of the privilege. The whole point of an advice is the final conclusion. This is the situation in this case."(emphasis added).

41. Further, at [68] Gyles J stated:

> "The authorities to which I have referred to which I have referred show that it is well established that for a client to deploy the substance or effect of legal advice **for forensic or commercial purposes** is inconsistent with the maintenance of the confidentiality that attracts legal professional privilege."(emphasis added).

42. Bearing in mind the overriding test of inconsistency, it seems unremarkable to suggest that the context/ purpose of disclosure would be important and that disclosure of the substance of the advice not determinative. Thus in *Mann* v *Carnell* itself the full advice was actually disclosed to the Minister but the circumstances were nevertheless held not to justify a waiver.

43. However, as indicated above, Sundberg J in *Rio* appears to cast doubt on the purpose for disclosure being relevant. Thus at [58] His Honour states:

> "The respondent's fourth contention [that the documents were not disclosed for any commercial or forensic purpose] must also fail. Again, once it is determined that the respondent voluntarily disclosed the "gist" or "substance" of the privileged Audit Report documents by producing the Audit Report, **the purpose in aid of which he sought to deploy those documents is irrelevant.** (See Bennett at [65] per Gyles J.)" (emphasis added)

44. It may be that this passage simply means that given the purpose for which the documents were disclosed did not assist in the particular case of *Rio,* the purpose in aid of which the respondent sought to deploy the documents thereafter took the matter no further.

45. In any event, given the overriding requirement of "inconsistency" in line with *Mann* and the comments of both Tamberlin and Gyles JJ the better view is that the purpose for which the document is disclosed should be a relevant consideration.

Whether inadvertence plays a part

46. In *Mann*[18], the majority state that the law recognizes an inconsistency and determines its consequences "even though such consequences may not reflect the subjective intention of the party who has lost the privilege." The majority referred to the case of waiver in the *Benecke* case[19] where a client was held to have waived privilege by giving evidence 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. Although "she did not **subjectively intend** to abandon the privilege… her **intentional act** was inconsistent with the maintenance of the confidentiality of the communication."

47. Prior to *Mann*, it had been held in a number of authorities that where a litigant is bound by the court to comply with an accelerated compulsory discovery process and inadvertently, or unintentionally includes a protected document in a list of documents, which is subsequently produced and inspected, the privilege which would otherwise attach to the document will not necessarily be held to have been waived by the litigant.[20]

[18] (1999) 201 CLR 1 at 13
[19] (1993) 35 NSWLR 110
[20] E.g. *Hooker Corporation –v- Darling Harbourside* (1987) 9 NSWLR 538; *Woolhara MC* v *Westpac Banking Corp* (1994) 33 NSWLR 529 at 539; *BT Australasia* v *NSW* (1998) 154 ALR 202 at 208

48. The courts in such cases tended to emphasise the notion of *fairness* such that it needs to be ascertained whether it would be fair in all the circumstances of the case to allow the claim of privilege to be maintained.
49. The only case which appears to have considered inadvertence post *Mann* is a case of *FKP Constructions v Smith.* [21] In that case, Gzell J considered the view taken in earlier cases. Further, despite the fact that the statutory provisions for waiver were relevant, His Honour made reference to the *Mann* principles in considering the test of inconsistency under the *Evidence Act* 1995 (Cth)(at [20]).
50. His Honour concluded that there was no **conflict** between the inadvertent inclusion of the documents in the accelerated production ordered by the court in that case and the maintenance of the privilege. No implied waiver was therefore found and the documents were ordered to be protected.
51. There may therefore still be room for the inadvertence principles despite references in *Mann* to the irrelevance of subjective intention. Perhaps, given the statements of the majority in *Mann*, the best way to reconcile the cases at this point is to suggest that the inadvertence principles may still be arguable where the **act**- as opposed to the mindset- has been unintentional.

The role of fairness

52. In *Mann*, the majority stated that what brings about waiver is inconsistency "where necessary informed by consideration of fairness'' not some

[21] [2005] NSWSC 126

overriding principle of fairness (at [29]). Further, that depending on the circumstances of the case, "considerations of fairness may be relevant to a determination of whether there is such inconsistency" (at [34]).

53. It is unclear precisely what role is thereby left for unfairness although it still appears to be referred to in some of the recent cases. [22]

54. As is demonstrated by all the cases, the application varies tremendously according to the individual case. As Allsop J has said:

> "The governing principle is *Mann* v *Carnell* at [29]. Examination, too closely, of other cases runs the risk of transforming factual questions of judgment into (inconsistent) statements of principle."[23]

55. Further, it might be said that the facts in *Mann* may have readily led to the same result whether the test was inconsistency or unfairness.

56. Whatever be the precise role, fairness will undoubtedly remain relevant to any judge if he or she so chooses. This however, tend to underline the unpredictability of the *Mann* principles.

Disclosure at "without prejudice" meetings

57. If there was a disclosure of an advice at a without prejudice meeting it is arguable that everything said – including about such an advice- should be inadmissible. On this view, no waiver could be subsequently proved.

58. Unfortunately, the matter is surprisingly free from doubt. The traditional view in Australia is that the privilege only protects admissions (*Field* –v-

[22] e.g. *Nine Films & Television Pty Ltd v Ninox Television Ltd* [2005] FCA 356 at [8]); *Switchcorp Pty Ltd* v *Multimedia Ltd* [2005] VSC 425 at [22]
[23] *DSE (Holding) Pty Ltd* v *Intertan Inc* [2003] FCA 384

Commissioner for railways (NSW)[24]*)* However, the recent English court of appeal decision in *Unilever* –v-*Proctor Gamble* [25]suggests that the "without prejudice" exclusion extends to all conversations at such a meeting, it being undesirable to separate out admissions from other statements.

59. Whatever the precise state of any such communication in terms of admissibility, it would seem difficult to suggest that there is inconsistency with the confidentiality inherent in the privilege if the only disclosure occurs at a without prejudice and confidential meeting, wherein confidentiality is specifically preserved.[26]

60. Unfortunately, again, there is a lack of clear authority[27] and, given the state of Australian law generally, great caution should be exercised in disclosing the contents of an advice even at a without prejudice meeting. If such disclosure is to be made it should be made expressly clear that the entire meeting is to be treated as a without prejudice confidential meeting with nothing about it to be revealed in subsequent proceedings.

Summary-disclosure waiver

61. The *Mann* test of inconsistency suggests that all the circumstances of a case are relevant. Further, the examples wherein waiver will operate

[24] (1955) 99 CLR 285 *at 291-2*
[25] (2001) 1 ALL ER 783
[26] And note in *Bennett*, Gyles J refers to the absence of any special arrangements as to confidence in that case (at [66])
[27] The only authority directly on point, *Argyle Brewery Pty Ltd* v *Darling Harbourside* (1993) 120 ALR 537 suggests a waiver may be found although there was some doubt whether the relevant document was even privileged. Further, although the document was prepared in settlement discussions, the "without prejudice" privilege was not argued.

given by the High Court suggest a relatively narrow operation for waiver[28]. Against this, both *Bennett* and *Rio* highlight how readily the "substance of an advice" may be found to have been disclosed. *Rio* also tends to discount any contextual circumstances, further broadening the scope for waiver.

62. Pending further authority, it remains to be seen whether *Bennett* and *Rio* herald an irreversible trend.

E Issue Waiver

63. LPP may be waived where the content of a confidential communication is put in issue in a proceeding by the party entitled to the privilege. The question often arises where the party is said to have put their "*state of mind"* in issue, in which case any legal advice said to have contributed to that state of mind, may be said to have been waived.

64. The Full Federal court in *Telstra Corp Ltd & Anor* v *BT Australasia Pty Ltd & Anor* [29] considered this issue in a commercial case where the respondent had sought damages for misleading and deceptive conduct. The appellant sought inspection of documents in respect of which LPP had been claimed being advice to the respondent as to its entitlement to rely upon certain alleged representations. Branson & Lehane JJ (constituting the majority) at 166-7 stated:

[28] (1999) 201 CLR 1 at [28]; examples given included disclosure of a client's version of a communication with a lawyer and the institution of proceedings for professional negligence
[29] (1998) 85 FCR 152

> "Where, as in this case, a party pleads that he or she undertook certain action *"in reliance on"* a particular representation made by another, he or she opens up as an element of his or her cause of action, the issue of his or her state of mind at the time that he or she undertook such action. The court will be required to determine what was the factor, or what were factors, which influenced the mind of the party so as to induce him or her to act in that way. That is, the party puts in issue in the proceeding a matter which can not fairly be assessed without examination of relevant legal advice, if any, received by that party. In such circumstances, the party, by putting in contest the issue of his or her reliance, is to be taken as having consented to the use of relevant privileged material, or to put it another way, to have waived reliance on the privilege which such material would otherwise attract.
>
> Within that framework, the conduct of a party which leads to the implication of consent to the use of otherwise privileged material, or to an implied waiver of such privilege, in undue influence cases, legal professional negligence cases and, in my view, the *"state of mind"* cases, is that of raising for determination in legal proceedings, as an element in the cause of action relied upon, an issue incapable of fair resolution without reference to that material."

65. Dissenting, Beaumont J highlighted that the advice was not central to the issues and that pleading reliance per se was insufficient (at [157-8]).
66. As is apparent from the above reference, the *Telstra* case was decided on the basis of fairness principles given it was decided prior to *Mann*. This point was taken up by Allsop J in *DSE Holdings Pty Limited v Intertan Inc* at [95] [30]

> The enunciation of principle by the Full Court of this Court in *Esso* and by the Full Court in *Telstra,* might be seen, at the very least, as having been overtaken by *Mann v Carnell.* It is the inconsistency between the act by the holder of the privilege and the confidentiality of the communication which destroys the privilege. I would have thought that it is too broad a statement to say that a pleading of a state of mind to which legal advice is or might be materially relevant is an adequate surrogate for the expression of principle in *Mann v Carnell*.

67. In the result, however, His Honour was able to distinguish *Telstra* on the basis that a mere denial of an assertion that the holder of the privilege had a certain state of mind was insufficient to lead to a waiver.
68. The precise scope of the *Telstra* case may be unclear. Consistently with the comments of Allsop J, above in *DSE*, reservations as to the scope or correctness of the decision have been expressed by other single judges of

[30] [2003] FCA 384 ; see also at [5], [99] & [112]

the Federal Court.[31] The decision has also not been followed in New Zealand or England[32] and there is also tension between the principle of "issue waiver" enunciated by the majority in T*elstra* and that stated by an earlier Full Court in *Adelaide Steamship Co Ltd* v *Spalvins.*[33] However, the pending decision in the *Rio* appeal may mean that the status of the *Telstra* case is determined in the near future.

69. In *Rio*, the Commissioner had filed a statement of facts issues and contentions referring to his satisfaction that a dividend was one to which s46A of the ITAA applied. Further, in a response to a request for particular he had referred to the fact that certain advices had been taken into account in relation to reaching the said state of satisfaction.

70. Sundberg J found that "however one approaches the question" there was a waiver. On the basis of, inter alia, the majority in *Telstra*, the respondent as part of a "positive case" had raised as an issue his state of mind. Alternatively, on the basis of the judgment of Allsop J in *DSE* and the dissent of Beaumont J in *Telstra*, the Commissioner had necessarily laid open the confidential communication to scrutiny and at the same time made use of the advice and asserted that he relied on the advice in forming a state of mind "central" to questions in the proceedings (at [45]).

71. The case of *Rio* again represents a broad scope for waiver in terms of issue waiver, particularly given the finding was made in a public law

[31] E.g. *Temwell Pty Ltd* v *DKGR Holdings Pty Ltd* [2003] FCA 1296 at [40] per Ryan J; *Macteldir Pty Ltd* v *Dimovski*
[32] See *Paragon Finance plc* v *Freshfields* [1999] 1 WLR 1183 at 1188 and *Shannon* v *Shannon* [2005] 3 NZLR 757 at [36] – [49]
[33] (1998) 81 FCR 360 at 371-2

context and against a respondent. Nevertheless, some support for a more confined approach for issue waiver also appears in the more recent case of *Seven Network Limited v News Limited.*[34]

72. In the *Seven* case, the question centred around representations alleged to have been made prior to the entry into certain agreements. However Sackville J found, that despite *Telstra,* the mere pleading of reliance does not necessarily result in waiver (at [44]). Instead, the Court would be required to take a number of factors into account including:
    a. the centrality to the proceeding of the issue to which the privileged communication is said to relate;
    b. the likelihood that legal advice played a significant part in the foundation of that state of mind;
    c. any apparent inconsistency between the position taken by the party claiming privilege and the likely contents of the privileged communication (at [48]).
73. In the result, His Honour did not find a waiver.

Consideration in the context of a decision-maker relying on the advice

74. The application of the issue waiver principles to the public law context also raises the question of waiver when decision-makers refer to advices for the purposes of making judicially reviewable decisions.
75. Given the relative frequency with which the state of mind of a decision-maker may be alleged to be in issue in judicial review proceedings, a

[34] [2005] FCA 1721

broad approach here potentially represents substantial inroads into the protection offered by LPP.

76. Again there seem to be two streams of authority.

77. In the more restrictive is *Webb*-v *The Commissioner of Taxation* (1993) 44 FCR 312 (pages 317-8) where Cooper J considered the position of LPP attaching to advice provided to a government department in aid of the exercise of an administrative function in the performance of a statutory power. His Honour found that if LPP applies, then the reference to the legal advice in the decision, or reasons for decision, does not per se constitute a waiver of LPP. There must be some additional conduct on that decisions maker's part, which would make it unfair for the LPP to attach to the documents.

78. Also suggestive of a narrow approach is *Minister for Education -v- Lovegrove Turf Services Pty Ltd & Anor.*[35]. In that case, the court overturned a decision of a trial judge, Johnson J ([2003] WASC 213) which had found waiver by reason of "incorporation" of legal advice into an administrative decision, noting:

> 26 In my opinion her Honour erred when she concluded at [27] that the applicant had incorporated legal advice "... into an administrative decision ..." and that this was "... inconsistent with maintaining the confidentiality of that advice." The defence does not say, expressly or by implication, that the legal advice was incorporated into the applicants' decision. Furthermore, it had not been, and could not have been resolved at that interlocutory stage whether there was an administrative decision amenable to judicial review. That remained a live issue to be resolved at trial.

79. Against these cases, Lee J's approach in *Candacal Pty Ltd v Industry Research & Development Board* [36]appears to consitute a different

[35] [2004] WASCA 305
[36] [2005] FCA 649 (24 May 2005)

approach. The case concerned a dispute over legal professional privilege in relation to a decision to refuse registration of a syndicate under a scheme that provided tax incentives for research and development.

80. One argument was that an advice had been "incorporated" into an administrative decision thereby bringing about a waiver. In relation to this mattter, Lee J stated:

> 85 The minutes of the meeting of the Board held on 18 September 2001 (Ex. G(1) Doc 41) which considered whether the earlier recommendation of the TCC that registration of the applicants be refused was to be accepted, suggest that concern had been expressed by some members of the Board as to whether it was necessary, or appropriate, to make a decision that the applicants be registered in respect of the year of income ending 30 June 1994 given that the Board had "already approved the Scheme". The minutes recorded that in relation to the foregoing issue "the Board was advised that the Syndicate was registered on a yearly basis...[o]ther approvals do not alter the fact that the Syndicate was not registered for the year 1993/94".
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> 86 It may be assumed that the advice referred to and relied upon by the Board was legal advice. The briefing paper prepared for the TCC meeting held on 25 June 2001 which recommended that registration of the syndicate "in respect of the 1993/94 year of income" be refused, (Ex. G(1) Doc 38), indicated that legal advice to that effect had been obtained. (See also: Ex. G(1) Doc 36 (at p.169)).
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> 87 **If that is so, it should be concluded that the Board incorporated that advice into the administrative decision it made and that proper understanding of the decision, and of the decision-making process undertaken by the Board, will depend upon examination of the advice relied upon. It follows as a matter of fairness that the Board could not purport to maintain a claim to client legal privilege in respect of that advice**. (See: *Lovegrove Turf Services Pty Ltd & Anor v Minister for Education* [2003] WASC 213 per Johnson J at [21]) (emphasis added).

81. The reference to the decision of *Lovegrove* is a reference to a decision which, as indicated above, was overruled. Further, paragraph 87 above may suggest a relatively narrow operation for waiver in the context of a decision-maker's reasons.

82. Nevertheless, the approach of *Candacal* is consistent with the *Rio* approach given advice may be relevant to the state of mind of a decision-maker. Further, it is also consistent with some earlier dicta in the case of

Australian Unity Health v Private Health Insurance Administration Council.[37]

82 The case of *Australian Unity Health*[38] involved an application for judicial review of an administrative decision. In reasons provided pursuant to s13 of the *Administrative Decisions (Judicial Review)* 1977 (Cth) Act certain legal advice was listed under the heading of "Evidence and Other Material on which Findings were Based." Further, an affidavit filed in the proceedings exhibited a document stating that "legal advice supporting [the respondent's] view of the rule has been received."

83. Goldberg J held that the exhibited document- though not the reasons effected a disclosure waiver. However, His Honour also said at [21]:

> " It seems to me that when it is established that part of the evidence or other material on which the finding was based was the letter of advice and that the letter of advice supports the respondent's view of the rule, it can be said with some force that it is an issue in the case as to what activated or motivated the decision-maker, in circumstances where part of the material relied on was legal advice. For those reasons legal professional privileged cannot be claimed."

84. It appears that although simply relying on an advice may not be enough to support a waiver on *Webb*, not much in the way of "additional conduct" may be necessary.

Summary-issue waiver

[37] (1999) FCA 1770
[38] [1999] FCA 177

85. Yet again, the decision of *Rio* when taken with cases such as *Candacal* suggest a broadening approach to waiver. This may have important ramifications in the public law context where the taking of advice has become such an important part of the decision-making process.

(F) Practical Steps to avoid waiver

86. Given the state of the case law a highly prescriptive approach is virtually impossible. Accordingly the following merely represents some guidelines. It may sometimes be in the public interest to disclose the substance of an advice. However, if such an approach is to be taken, it should be done in an informed manner having regard to the likelihood of a waiver finding in the particular circumstances.

87. Having said this, the following represent some general guides if privilege is to be maintained:

(a) Do not release or disclose documents/extracts of documents that refer to advices,

(b) If possible, try to avoid "incorporating" an advice into an administrative decision;

(c) If reference is to be made to an advice such reference should only be in the most non-specific terms;

(d) Do not even outline advices at without prejudice meetings;

(e) In pleadings/ court documents, avoid raising a party's state of mind unless absolutely necessary.

(G) CONCLUSION

88. Despite the early recognition in *Waterford v Commonwealth*[39] that LPP may apply in the public law area to advices relevant to the exercise of a statutory power or performance of a statutory duty, recent cases suggest that this principle may be vulnerable.

89. Accordingly, although it is often prudent and desirable for decision-makers to obtain legal advice, great care should be taken in utilizing that advice and/or otherwise disclosing the fact that the advice has been so utilized.

90. Whether *Bennett* and *Rio* represent a high water mark for waiver or an irreversible trend remains to be tested.

91. In the meantime, both the generality of the test of "inconsistency" and the uncertain state of the authorities call for a highly cautious approach.

MAREE KENNEDY SC

FEBRUARY, 2006

[39] (1987) 163 CLR 54 at 63-4 per Mason J; at 74-5 per Brennan J