



**New South Wales  
Division**

**27 & 28 May 2008  
The Westin, Sydney**

## **ANNUAL TAX FORUM**

### **WAIVER OF LEGAL PROFESSIONAL PRIVILEGE ATO'S ACCESS AND INFORMATION GATHERING POWERS**

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## I. Purpose of Paper

1. The object of this Paper is to examine the manner in which legal professional privilege ("LPP") may be lost where the Australian Taxation Office ("ATO") purports to utilise its powers pursuant to sections 263<sup>1</sup> and 264 of the ITAA 1936<sup>2</sup> to obtain access to premises, compel production of documents and gather information relating to the contents of confidential communications. The legal principles expounded and analysed transcend the exercise of those powers for tax administration purposes and apply mutatis mutandis to the curial process. Other tax legislation contains similar provisions<sup>3</sup>. The Paper considers the practical context within which those powers may be exercised and their limitations. It is a considerable understatement to observe that the principles relating to the application of LPP at common law and the various categories of waiver of LPP have become complicated and at the margins quite obscure.
2. Since *Baker v Campbell*<sup>4</sup> it has been recognised that LPP is a legal doctrine and not a rule of evidence; and further that absent clear and express statutory language to the contrary that doctrine will not be overridden by any provision that purports to do otherwise. In *Commissioner of Taxation v Citibank Ltd*<sup>5</sup> the Full Court of the Federal Court held that the exercise by the Commissioner of the powers granted by sections 263 and 264 are subject to the operation of LPP. In *Perron Investments Pty Ltd v Federal Commissioner of Taxation*<sup>6</sup> the Full Court of the Federal Court held that section 264 is likewise subject to LPP; and the Commissioner did not contend otherwise.
3. As noted the ATO has far reaching powers which enable it to investigate the affairs of any taxpayer and compel strangers to assist this endeavour. Those powers exceed those of the Australian Federal Police in the investigation of crimes. This arises both from the broad statutory language and a number of High Court cases particularly, *Commissioner of Taxation v ANZ Banking Group Ltd*<sup>7</sup>; and *Industrial Equity Limited v Deputy Commissioner of Taxation*<sup>8</sup>. Notwithstanding those wide powers the doctrine of LPP renders their exercise subject to the establishment of a valid claim for LPP which precludes the ATO from ascertaining what is the nature and content of privileged communications and from obtaining any information whatsoever relating thereto.

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<sup>1</sup> Section 263 Income Tax Assessment Act 1936.

<sup>2</sup> Section 264 Income Tax Assessment Act 1936.

<sup>3</sup> Section 12E Sales Tax Procedure Act 1934; section 127 Fringe Benefits Tax Assessment Act 1986; section 66 Taxation Administration Act 1953; and section 58 Debits Tax Administration Act 1982.

<sup>4</sup> *Baker v Campbell* (1983) 153 CLR 52.

<sup>5</sup> *Commission of Taxation v. Citibank Ltd* (1989) 20 FCR 403: followed in *Allen Allen & Hemsley v. Deputy Commissioner of Taxation* (1989) 20 FCR 576.

<sup>6</sup> *Perron Investments Pty Ltd v. Federal Commissioner of Taxation* (1989) ALR 1.

<sup>7</sup> *Commissioner of Taxation v ANZ Banking Group Ltd* (1979) 143 CLR 499.

<sup>8</sup> *Industrial Equity Limited v Deputy Commissioner of Taxation* (1990) 170 CLR 649.

4. LPP relates both to the giving and obtaining of advice and to communications made in the course of actual or pending litigation. The ambit of LPP at common law was extended by the High Court in *Esso Resources Australia Limited v Commissioner of Taxation*<sup>9</sup>. That decision established that provided the communication is made for the **dominant** purpose of giving advice or conducting litigation pending or contemplated then a valid claim exists. Formerly the majority of the High Court in *Grant v Downs*<sup>10</sup> held that the requisite standard was whether the **sole** purpose of the communication was the giving of advice or the conduct of litigation.
  
5. The *Evidence Act, Commonwealth*<sup>11</sup> and the *Evidence Acts* in New South Wales<sup>12</sup> and Tasmania<sup>13</sup> create a concept of "*client legal privilege*" which is broadly comparable to LPP at common law. This description adopts the language employed by Murphy J in *Baker v Campbell*<sup>14</sup> and is a salutary reminder that the owner of the privilege is the client. The *Evidence Act, Commonwealth*<sup>15</sup> applies to the adducing of evidence in all Courts exercising federal jurisdiction but not to pre-trial and interlocutory curial proceedings or administrative procedures and hearings. Thus it does not apply to the use of the ATO's access and information gathering powers pursuant to sections 263 and 264 or the other tax legislation referred to in paragraph one hereof. The exercise of those powers is governed by common law principles.

## II. Conceptual Issues

6. The authorities on this topic have failed to adequately consider what is the essential conceptual nature of the doctrine of LPP. There has been little meaningful discussion as to whether it is a fundamental juristic right; an advantage or benefit; or an immunity or exemption. The term "privilege" does not denote clearly which of these alternative meanings may be applicable.
  
7. It is important to remember that LPP does not confer on the client who is the holder of the privilege an enforceable right which may be used as a sword; rather it is a shield or protection against disclosure of the contents of the confidential communication. Unlike a statutory, contractual, tortious or equitable right the existence of the privilege does not create or result in a concomitant obligation owed by other parties or strangers. A lawyer is bound as a matter of ethics and proper professional practice to uphold the privilege of a client but the remedy for failure to do so flows from the retainer of solicitor and client not as a result of dealings or a relationship existing between the client and third parties.

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<sup>9</sup> *Esso Resources Australia Limited v Commissioner of Taxation* (1999) 201 CLR 49.

<sup>10</sup> *Grant v Downs* (1976) 135 CLR 674.

<sup>11</sup> *Evidence Act, Commonwealth* 1995.

<sup>12</sup> *Evidence Act, New South Wales* 1995.

<sup>13</sup> *Evidence Act, Tasmania*, 2001.

<sup>14</sup> *Supra* n. 4, at p. 84.

<sup>15</sup> *Supra* n. 11.

8. In this context a privilege should be viewed as an exceptional right analogous but not identical to an immunity or exemption belonging to a person by virtue of status or office, the most common form being the immunity from arrest of diplomats and that enjoyed by members of parliament in respect of statements made in the chamber. For the purposes of the law of evidence other privileges exist relating to inter alia self-incriminating statements and the title deeds of a stranger to a criminal action; and matrimonial communications as to whether intercourse has taken place. In the law of defamation certain otherwise defamatory statements are absolutely privileged or have the benefit of qualified privilege. The doctrine of LPP having been elevated to a rule of law creates a right that does not depend upon the status or office of the individual nor the existence of particular proceedings; rather the privilege or protection arises out of the relationship of client and lawyer with respect to the provision of advice or the conduct of litigation.
  
9. By reason of the failure of the Courts to examine the essential nature of the entitlement of the privilege holder there is an associated misconception in applying notions of waiver which seek to confine the doctrine of LPP at common law. In Equity the holder of an earlier equity may by waiver postpone his interest to a later equity where interests in land are concerned; a surety's right of subrogation may be waived by him expressly in a contract of guarantee; and an insurer may waive its right of subrogation against certain persons.<sup>16</sup> The distinction if any between equitable estoppel and waiver is the subject of much contention as revealed by the different opinions expressed by the members of the High Court who decided *Commonwealth v Verwayen* ("Verwayen")<sup>17</sup>. The cases dealing with waiver of LPP do not demonstrate with clarity whether and if so in what manner those equitable principles may be apposite to a correct understanding of the juristic nature of the concept.
  
10. As will be seen in the last of a trilogy of cases between 1986 and 1999 the High Court has established an **inconsistency** test to determine whether the privilege holder has waived or lost the benefit of the advantage of maintaining the confidentiality of the contents of advice or communications made in the course of contemplated or pending litigation.
  
11. Mason CJ in *Verwayen*<sup>18</sup> stated that the term waiver should be used to describe the result of the application of various principles rather than to designate a particular legal concept or doctrine and noted that the expression has been criticised because it is an imprecise term capable of describing different legal concepts, notably election and estoppel. According to one legal connotation waiver is an intentional act done with knowledge whereby a person abandons a right by acting in a manner inconsistent with that right as explained by Isaacs J in *Craine v The Colonial Mutual Fire Insurance*

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<sup>16</sup> R. Meagher, D. Heydon, M. Leeming, *Meagher Gummow & Lehane's, Equity Doctrines & Remedies*, 4<sup>th</sup> Edition, pp. 316, 378 and 381.

<sup>17</sup> *Commonwealth v Verwayen* (1990) 170 CLR 394, ("Verwayen").

<sup>18</sup> *Supra* n. 17 at p. 406.

*Company Ltd & Anor* (“*Craine*”)<sup>19</sup>. However, the better view may be that such abandonment occurs only where the person purportedly waiving the right has alternative rights inconsistent with one another. This second category of waiver is an example of the doctrine of election. A third category of waiver is where a person is prevented from asserting, in response to a claim made against him, a particular defence or objection which would otherwise have been available; here the person agrees not to raise the particular defence or so conducts himself as to be estopped from raising it. The Chief Justice appears to have left open the determination of which characterisation of the term “*waiver*” is the most apposite depending upon the particular context in which it is used.

12. In *Verwayen* Brennan J stated<sup>20</sup> that election, estoppel and waiver are cognate concepts in that each relates to the sterilisation of a legal right otherwise than by contract. His Honour cited a passage from the judgment of Mason J (as he then was) in *Sargent v. ASL Developments Limited*<sup>21</sup> to the effect that waiver recognises the unilateral divestiture of certain rights which in the setting of a contract for the sale of land is referred to as election. He embarked upon an analysis of the general principles relating to waiver starting with the judgment of Alderson B in *Graham v Inglebey*<sup>22</sup> who had held that it is a characteristic of a right susceptible of waiver that it exists solely for the benefit of one party. In *Verwayen*<sup>23</sup> there was conferred on the Commonwealth the right to defeat the plaintiff's claim which had been brought outside the time limited by the *Limitation Act*<sup>24</sup>.
13. Deane J stated in *Verwayen*<sup>25</sup> that the somewhat arbitrary doctrine of waiver increasingly had been absorbed and rationalised by the more flexible doctrine of estoppel by conduct. Dawson J stated<sup>26</sup> that waiver is an imprecise term that is used to describe what is done in a variety of circumstances rather than to assert any particular legal process; his honour cited the well known passage of Isaacs J in *Craine*<sup>27</sup> which is quoted with approval in *Spencer Bower & Turner*<sup>28</sup>. Gaudron J<sup>29</sup> also referred with approval to the judgment of Isaacs J in *Craine*<sup>30</sup>.
14. It is difficult to distil a ratio decidendi from the judgments in *Verwayen*<sup>31</sup> however it can be discerned that the term “*waiver*” may be viewed as arbitrary and imprecise and as an expression of a number of different legal principles depending upon the context in which it is being deployed.

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<sup>19</sup> *Craine v The Colonial Mutual Fire Insurance Company Ltd & Anor* (1920) 28 CLR 305 (“*Craine*”).

<sup>20</sup> *Supra* n. 17 at p. 421.

<sup>21</sup> *Sargent v. ASL Developments Limited* (1974) 131 CLR 634, at p. 655.

<sup>22</sup> *Graham v Inglebey* (1848) 1 Ex 651, at p. 657.

<sup>23</sup> *Supra* n. 17.

<sup>24</sup> *Limitation Act*, NSW, 1969.

<sup>25</sup> *Supra* n. 17, at p. 449.

<sup>26</sup> *Supra* n. 17, at p. 459.

<sup>27</sup> *Supra* n. 19, at p. 327.

<sup>28</sup> *Spencer Bower & Turner, the Law Relating to Estoppel by Representation*, 3<sup>rd</sup> Edition, (1977), pp. 318-319.

<sup>29</sup> *Supra* n. 17, at p. 481.

<sup>30</sup> *Supra* n. 19.

<sup>31</sup> *Supra* n. 17.

### III. Express Waiver

15. Express waiver is constituted by any intentional or deliberate conduct on the part of the holder of the privilege or his agent whereby the confidential contents of a communication are disclosed to a third party or put into the public domain<sup>32</sup>. There is no formula apposite to more precisely define the nature of such conduct. It will depend upon the facts and circumstances of each particular case and ignorance of the existence of a right to claim LPP is of no assistance to the taxpayer or recipient of a visit pursuant to section 263 or a section 264 (1) (b) notice to produce documents.
16. Generally speaking the identification of acts constituting express waiver such as reading out a communication or tendering a document in curial proceedings has not proved elusive. For present purposes it is more likely that the opportunity for validly claiming LPP will be lost by inadvertence rather than by the deliberate action of the taxpayer or a custodian of records or information. This is discussed further infra.

### IV. Implied or Imputed Waiver

17. The High Court has considered the circumstances in which LPP may be lost other than by reason of express waiver on three occasions. On the last occasion in *Mann v Carnell*<sup>33</sup> the majority judges, Gleeson CJ and Gaudron, Gummow and Callinan JJ, held that disputes as to implied waiver (also referred as imputed waiver) usually arise from the need to determine whether particular conduct is **inconsistent** with the maintenance of the confidentiality which the privilege is intended to protect and where such conduct is inconsistent the waiver is "*imputed by operation of law*"<sup>34</sup>. In coming to that conclusion the majority judges adopted the aphoristic statement of Deane, Dawson and Gaudron JJ in *Goldberg v Ng* namely that in the potential circumstances it was a waiver by operation of law<sup>35</sup>.
18. There may be more than a semantic difference between waiver which is "*implied*" and that which is "*imputed*". In contract law the Courts imply terms inter alia to give business efficacy; to accord with custom or usage; or which arise from the nature of the contract itself. In this sense "*implied*" is used in contrast to "*express*" provisions of a bargain. This was discussed by Toohey J in *Goldberg v Ng*<sup>36</sup>. Literally, to impute a concept or notion is to "*put in*" and it is commonly used synonymously with attributing or ascribing one matter to something else as for example, with respect to an imputation in

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<sup>32</sup> Attorney General for the Northern Territory v Maurice (1986) 161 CLR 475, ("Maurice") per Mason and Brennan JJ at p. 487.

<sup>33</sup> Mann v Carnell (1999) 201 CLR 1.

<sup>34</sup> Supra n. 33, at para [29].

<sup>35</sup> Goldberg v Ng (1995) 185 CLR 83, at p. 95.

<sup>36</sup> Supra n. 35 at p.109.

the field of defamation. It is not clear why in most cases judges have used the terms as truly alternative formulations of the concept. It seems to me that it is preferable to use the term implied particularly as, if there is one idea that is tolerably clear in this area of the law, it is juxtaposed with the concept of express waiver as in the law of contract.

19. In *Mann v Carnell* the majority judges emphasised that what brings about waiver is the **inconsistency** which the courts when necessary informed by considerations of fairness perceive between the conduct of the client and the maintenance of the confidentiality and not some overriding principle of fairness operating at large<sup>37</sup>. In my view there can be little doubt that *Mann v Carnell*<sup>38</sup> has overruled the principles enunciated in the two earlier cases namely *Maurice*<sup>39</sup> and *Goldberg v Ng*<sup>40</sup>.
20. It will be necessary to return to the facts of *Mann v Carnell* however it is notable that in the majority judgment their Honours stated<sup>41</sup> that no application appears to have been made prior to or during the hearing of the appeal to reopen *Goldberg v Ng*<sup>42</sup> or any of the authorities on the subject. This is curious indeed. It seems to me with great respect that leave to reargue *Maurice*<sup>43</sup> and *Goldberg v Ng*<sup>44</sup> should have been granted to the parties irrespective as to whether leave was formally sought to do so. This could have been done *nunc pro tunc* or the Court could have had the matter re-listed so as to entertain full argument on the subject. A perusal of the transcript of the hearing of the appeal on 31 August 1999 makes it tolerably clear that senior counsel for the appellant was propounding a different formula to that enunciated in the two earlier discussions. Those earlier authorities established clearly that the overriding consideration in determining whether particular conduct amounts to implied waiver depended upon a general concept of fairness and not inconsistency. Whether in a particular case the result would be different is a matter of conjecture.
21. In order to make good that submission it is necessary to consider those two earlier decisions in detail. *Maurice*<sup>45</sup> concerned the status of a 1982 Claim Book, which was a document prepared in accordance with the practice and procedure adopted by the Aboriginal Land Commissioner pursuant to the *Aboriginal Land Rights (Northern Territory) Act* ("the Act")<sup>46</sup>, which was lodged with the Commissioner (then Kearney J). Copies of the document were distributed to the lawyers representing other parties including the Attorney-General. When the inquiry commenced before Kearney J counsel for the claimants tendered the Claim Book however that tender was not formally accepted; counsel did make reference to the Claim Book in the opening address. The proceedings before Kearney J were

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<sup>37</sup> Supra n. 33, at para [29].

<sup>38</sup> Supra n. 33.

<sup>39</sup> Supra n. 32.

<sup>40</sup> Supra n. 35.

<sup>41</sup> Supra n. 33, at para [30].

<sup>42</sup> Supra n. 35.

<sup>43</sup> Supra n. 32.

<sup>44</sup> Supra n. 35.

<sup>45</sup> Supra n. 32.

<sup>46</sup> Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) ("the Act").

adjourned during which time a question of jurisdiction was determined by the High Court in favour of the claimants. The proceedings resumed before Maurice J approximately three years later and at that hearing the claimants did not seek to tender the Claim Book but used it as a guide or aide memoire; and the claimants referred to it during the course of the examination of two witnesses in the claimants' case. In the proceedings the claimants had to establish traditional ownership of nominated lands by means inter alia of describing certain traditions, observances, customs and beliefs of Aboriginal people in accordance with their ancestry and common spiritual affiliations giving rise to a right to forage over the subject land. The Claim Book was not comparable to a pleading because it contained a substantial amount of historical and anthropological information which traced the history of the Warumungu tribe over a period of about 100 years. It should be accepted that the essential purpose of the Claim Book was to provide particulars of and an evidentiary basis for the claim to rights which could be established pursuant to the *Act*.

22. In *Maurice*<sup>47</sup> the Attorney-General sought disclosure of certain documents that provided source material for the Claim Book. At first instance Maurice J upheld an objection that the documents were protected by LPP and found that the privilege had not been waived by the lodging, distribution or use of the Claim Book. That decision was upheld by the Full Court of the Federal Court of Australia (Bowen CJ, Woodward and Toohey JJ) and an appeal against the Full Court decision was brought by the Attorney-General to the High Court.
23. Separate judgments were delivered in *Maurice*<sup>48</sup> by Gibbs CJ, by Mason and Brennan JJ, by Deane J and by Dawson J. Having reviewed a number of authorities on the topic and after citing a passage from *Wigmore on Evidence*<sup>49</sup>, Gibbs CJ stated that in 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. His Honour went on to say<sup>50</sup> that where a document deals with a single subject matter it would be unfair to allow a party to use part of the document and claim privilege as to the remainder and cited with approval a passage from the judgment of Templeman LJ in *Great Atlantic Insurance Co. v Home Insurance Co.*<sup>51</sup> dealing with whether a partial disclosure of the contents of a communication may be unfair or misleading. His Honour also approved two US decisions which suggested that the underlying principle in the conduct of a trial is one of **fairness** with particular reference to the use of associated materials.<sup>52</sup> Gibbs CJ agreed with the Commissioner that the contents of the source materials were not revealed and the Claim Book did not show how any

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<sup>47</sup> Supra n. 32.

<sup>48</sup> Supra n. 32.

<sup>49</sup> Wigmore on Evidence, McNaughton, Rev. 1961, Vol.VIII, para, [2327].

<sup>50</sup> Supra n. 32, at pp. 481 and 482

<sup>51</sup> *Great Atlantic Insurance Co. v Home Insurance Co.* (1982) 2 All ER 485, at p. 492.

<sup>52</sup> *Duplan Corporation v Deering Milliken Inc* (1975) 397 F.Supp. 1146, at pp.1161-1162; and *Weil v. Investment/Indicators Research and Management Inc.* (1982) 647 F (2d) 181 at 184.

particular source document was used. Accordingly there had been no intention to waive privilege nor could any waiver be implied.

24. In the joint judgment of Mason and Brennan JJ their Honours stated<sup>53</sup> that an implied waiver occurs when by reason of some conduct on the privilege holder's part it becomes **unfair to** maintain the privilege. That passage was cited with approval by Deane, Dawson and Gaudron JJ in *Goldberg v Ng*<sup>54</sup>. Their Honours endorsed the passage from *Wigmore on Evidence*<sup>55</sup> to which Gibbs CJ had referred and went on to say that the implied waiver inquiry is at bottom focused on the fairness of imputing such a waiver.

25. In the course of his judgment Deane J referred to *Craine*<sup>56</sup> which in my view has a substantial bearing upon the correct juristic analysis of this area of the law. His Honour said<sup>57</sup> that waiver of LPP by imputation or implication of law is based on notions of **fairness** and that it occurs in circumstances where a person has used privileged material in such a way that it would be unfair for him to assert the privilege rendering him immune from procedures pursuant to which he would otherwise be compellable to produce or allow access to material which he has elected to use to his own advantage. Deane J said:

*“Ordinary notions of **fairness** require an assertion of the effect of privileged material or disclosure of part of its contents in the course of proceedings before a court or quasi-judicial tribunal be treated as a waiver of any right to resist scrutiny of the propriety of the use as made of the material by reliance upon LPP. There are, however, no considerations of fairness which require the compliance by a party with the procedural requirement that he prepare and make available a document setting forth the case which he proposes to make before a court should be treated as a waiver”*<sup>58</sup>.

26. Dawson J stated<sup>59</sup> that it is clear enough that an implied waiver may be required by **fairness** notwithstanding that it was not intended and that it would not be fair to allow privilege to be waived with respect to a portion of a document or a conversation without requiring disclosure of the rest of it, at least if the document or conversation dealt with one subject matter. That passage was cited with approval by Deane, Dawson and Gaudron JJ in *Goldberg v Ng*<sup>60</sup>.

27. In *Goldberg v Ng*<sup>61</sup> the appellant, a practising solicitor, provided statements to the Law Society of NSW in relation to a complaint made by former clients for whom he had acted for many years. The Law Society possessed compulsory powers requiring solicitors to provide information to it in relation to

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<sup>53</sup> Supra n. 32, at p. 487.

<sup>54</sup> Supra n. 35 at p. 96.

<sup>55</sup> Supra n. 49.

<sup>56</sup> Supra n. 19.

<sup>57</sup> Supra n. 32, at pp. 492 and 493.

<sup>58</sup> Supra n. 32, at p. 493.

<sup>59</sup> Supra n. 32, at p. 497.

<sup>60</sup> Supra n. 35, at p. 97.

such complaints and the sanction for failure to do so included a finding of unsatisfactory professional conduct. Mr Goldberg was totally compliant with the statutory requirements of the complaints regime. A professional negligence claim was instituted against Mr Goldberg in the Equity Division of the Supreme Court of NSW by his former clients and the question which arose for determination was whether by providing to the Law Society the statements, which were in effect proofs of evidence, Mr Goldberg had waived what was found to be the privilege that reposed in those statements.

28. Upon these uncontroversial facts a majority of the High Court held that there had been an implied or imputed waiver because the disciplinary complaint procedure of the Law Society and the professional negligence claim related to the same subject matter. I respectfully agree with those who have stated judicially and otherwise commented that *Goldberg v Ng*<sup>62</sup> was wrongly decided. It seems to me that the conclusion reached by the three majority judges was grossly unfair to Mr Goldberg; he made an involuntary disclosure pursuant to a compulsory statutory process not directly related to the professional negligence claim.
29. In *Goldberg v Ng*<sup>63</sup> Deane, Dawson and Gaudron JJ wrote the majority judgment and Toohey J and Gummow J each wrote dissenting judgments. In the joint judgment their Honours stated<sup>64</sup> that if there was a waiver of the privilege it was imputed by operation of law in the particular circumstances. That passage was cited with approval in *Mann v Carnell*<sup>65</sup>. The majority judges approved a number of passages in the judgments of Mason and Brennan JJ, of Deane J and of Dawson J in *Maurice*<sup>66</sup>. Those passages from the judgments in *Maurice*<sup>67</sup> make it abundantly clear that an overriding principle of **fairness** dictated whether there had been an implied or imputed waiver.
30. In *Goldberg v Ng*<sup>68</sup> the majority judges stated that where two or more distinct proceedings or procedures are related in the sense that there is a general correspondence between the parties and they arise out of either the same dispute or closely connected disputes, conduct in relation to one proceeding or procedure, where anticipated or already commenced, can found an imputed waiver for the purposes of all proceedings and procedures. Thus the critical question in that case was whether the disclosure by Mr Goldberg 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 and inspection in the Equity proceedings. The majority judges held that the Equity proceedings and the complaint procedure were but different emanations of the one

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<sup>61</sup> Supra n. 35.

<sup>62</sup> Supra n. 35.

<sup>63</sup> Supra n. 35.

<sup>64</sup> Supra n. 35, at p. 95.

<sup>65</sup> Supra n. 33, at para [13].

<sup>66</sup> Supra n. 32, at pp. 96 and 97.

<sup>67</sup> Supra n. 32.

<sup>68</sup> Supra n. 35, at p. 98.

dispute<sup>69</sup>. They found that it was unfair for Mr Goldberg to continue to rely on the privilege because in the absence of access to the material before the Law Society one could only speculate as to why the Complaints Committee had concluded that the particular complaint did not involve a question of professional misconduct or unsatisfactory professional conduct; and thus there was an imputed waiver by Mr Goldberg constituted by forwarding the documents to the Law Society.

31. Toohey J, in dissent<sup>70</sup>, pointed out that none of the judges below had asserted that production of the material to the Law Society *per se* constituted a waiver of LPP otherwise attaching to the documents; but rather that there had been waiver on the basis of what they regarded as **fair** in the circumstances. Consistent with that observation his Honour focused his attention on what had been said by Mason and Brennan JJ in *Maurice*<sup>71</sup> and cited with approval the passage from that joint judgment which was endorsed by the majority in that case.. His Honour, correctly in my view, found<sup>72</sup> that the Equity proceedings and the complaint to the Law Society were not the same proceedings nor in any way did one depend on the other.
32. The other dissenting judge, Gummow J, stated<sup>73</sup> that limited waiver is an exception or qualification to express waiver and that general considerations of fairness do not arise on an aspect of express waiver; and he thought that the appeal turned upon the doctrine of implied or imputed waiver as an imposition of law. His Honour said that the issue is whether in **fairness** the facts supply sufficient reason for depriving the client of the benefit of a substantive rule of law and whether the facts said to call for an implied waiver occurred in anticipation of or otherwise in relation to the very same legal proceedings in the course of which the privilege is later claimed.
33. According to Gummow J, the critical question was whether Mr Goldberg "*chose*" to make the disclosures he did or whether the disclosure occurred in a particular legal setting whereby the Law Society was exercising compulsory powers<sup>74</sup>. His Honour stated that objectively he viewed the occasion in which the disclosure was made by Mr Goldberg as not being one in which he was an entirely free actor. Gummow J concluded that even allowing for the advantage Mr Goldberg sought to gain by making the disclosure (in seeking to have the complaint dismissed) the circumstances of the case supplied no sufficient reason for depriving him of a form of protection which the law had deemed it especially necessary to throw around communications between solicitor and client. Thus Gummow J reached the same conclusion as Toohey J and for substantially the same reasons.

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<sup>69</sup> Supra n. 35, at p. 101.

<sup>70</sup> Supra n. 35, at p. 107.

<sup>71</sup> Supra n. 32.

<sup>72</sup> Supra n. 35, at, p. 111.

<sup>73</sup> Supra n. 35 at, p. 116.

<sup>74</sup> Supra n. 35, at p. 122.

34. Pausing there it is submitted that it is crystal clear from *Maurice*<sup>75</sup> and *Goldberg v Ng*<sup>76</sup> that the High Court viewed the operation of implied or imputed waiver of LPP as depending upon a general concept of **fairness**. What *Mann v Carnell*<sup>77</sup> did was to formulate a new test albeit one that was informed by general considerations of fairness.
35. The material facts of *Mann v Carnell* are as follows. In 1997 the ACT Government settled an action brought against it by a member of the public without admission of liability and a complaint was made to a Member of the Legislative Assembly (" MLA") of the ACT about the Government's conduct of the litigation. That complaint was passed on to the Chief Minister who sent to the MLA in confidence copies of documents containing legal advice about the subject litigation and which in the ordinary course were the subject of a valid claim for LPP. The MLA returned the copies to the Chief Minister however he retained the covering letter a copy of which he forwarded to the litigant who sought production of copies of the documents containing legal advice referred to in the letter by way of preliminary discovery to ascertain whether they were defamatory contending that LPP had been lost by their having been shown to the MLA. The appellant sought pre-trial discovery and inspection of copies of the legal advice.
36. In *Mann v Carnell*<sup>78</sup> the majority judges (Gleeson CJ and Gaudron, Gummow and Callinan JJ) held that the operation of sections 118 and 122 of the *Evidence Act Commonwealth*<sup>79</sup> was confined to the adducing of evidence in the course of a hearing in a Court and that the appropriate law was not to be found by derivation in those statutory provisions. In addition the majority held that what brings about a waiver of LPP is **inconsistency** between the conduct of the person entitled to the benefit of the confidentiality of the communication between lawyer and client and maintenance of the confidentiality; and they found that the privilege had not been waived. The majority judges stated<sup>80</sup> that the ambit of the common law doctrine of LPP exceeds that of sections 118 and 122 of the *Evidence Act* and that it was the common law principles that were decisive in this particular case. As already observed according to the majority what brings about a waiver of LPP is the inconsistency, which the courts, when 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<sup>81</sup>.
37. McHugh J gave a powerful dissenting judgment in the course of which he stated that in his opinion *Goldberg v Ng*<sup>82</sup> had been wrongly decided<sup>83</sup>; as did Kirby J<sup>84</sup>. It should be borne in mind that when

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<sup>75</sup> Supra n. 32.

<sup>76</sup> Supra n. 35.

<sup>77</sup> Supra n. 33, at para [20].

<sup>78</sup> Supra n. 33.

<sup>79</sup> Supra n. 11.

<sup>80</sup> Supra n 33, at para, [20].

<sup>81</sup> Supra n. 33, at para, [28] to [30].

<sup>82</sup> Supra n. 35.

<sup>83</sup> Supra n. 33 at, para [134].

<sup>84</sup> Supra n. 33 at, para [147].

Kirby J was the President of the Court of Appeal in *Goldberg v Ng* his Honour was in the minority from which decision the High Court dismissed an appeal from that Court<sup>85</sup>.

## V. Limited or Partial Waiver

38. Some of the cases suggest that there is hybrid category of waiver called limited waiver which was discussed by Mason and Brennan JJ in *Maurice*<sup>86</sup>. Much of the authority turns upon whether or not the communication (almost inevitably in a hard copy form of record) can be severed so that part only of the true substance of the communication is lost or waived. This is not a particularly novel or difficult concept to comprehend however there will be many cases at the margin which are not susceptible of a clear determination either way. This category is not likely to arrive frequently in the context of an unannounced visit pursuant to section 263 and would lead to further consideration of the fine print contained in the document after the raid once the issue had been identified.

## VI. Issue Waiver

39. There is another category known as issue waiver but sometimes described as *state of mind* cases where a party to litigation reveals the subject matter of the privileged communication in the context of an issue in the proceedings that relates to or affects that party's state of mind. It seems to be me with respect that those cases should be treated entirely separately from any general principle relating to express or implied waiver. Put simply it should be readily understood that if a legal or factual issue in any legal proceeding concerning a party's state of mind in turn depends upon the receipt of and reliance upon advice it follows that in order to achieve a forensically fair and just result confidentiality can no longer attach to that communication. It is not and can not be solely a question of consistency. Here the emphasis is upon the general principles relating to the conduct of a fair trial and these cases should not be viewed as an example of the inconsistency test articulated by various members of the High Court in *Mann v Carnell*<sup>87</sup>. In other words the Courts have to determine how to resolve the tension between maintaining the confidence and revealing the true nature of the advice so as to decide the case in a way that dispenses justice to the parties.

40. In the so called *state of mind* cases almost invariably it will not be possible for a Court to come to reach a clear and reliable decision without knowing what was the nature and content of the advice.

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<sup>85</sup> *Goldberg v Ng* (1994) 33 NSWLR 639.

<sup>86</sup> *Supra* n. 32, at p. 488.

<sup>87</sup> *Supra* n. 33.

Accordingly those cases are inherently insusceptible of the maintenance of LPP and are in a special category.

41. In *Commissioner of Taxation v. Rio Tinto Ltd*<sup>88</sup> the question dealt with by the Full Court of the Federal Court was whether the Commissioner's response to the taxpayer's request for particulars constituted waiver by answering that his state of satisfaction to support the assessment under section 46A of the ITAA 1936 and the exercise of the relevant discretions were "those evidenced" by certain documents identified in lists which included eight privileged documents. The Court held that the Commissioner made an assertion that put the contents of those documents in issue which lay them open to scrutiny<sup>89</sup>.
42. The Full Court observed that such pre-trial conduct was inconsistent with the maintenance of the privilege consonant with the test formulated in *Mann v Carnell*. Accordingly the confidentiality reposed in those advices had been lost. Clearly this category of waiver of LPP can have no application for the purposes of the exercise of the ATO's access and information gathering powers.

## VII. Making a Claim for LPP

43. From the perspective of both legal practitioners and accountants it is important to know not only what constitutes a valid claim for LPP but how such a claim may be made in a timely way so as to prevent irretrievable harm to the client by the unlawful or unwitting disclosure of confidential information. On the one hand the power to compel production of documents is not conditioned by the Commissioner having any prior knowledge of the contents of the documents that relate to the income or assessment of a taxpayer. On the other hand the recipient of a section 263 visit or a section 264 notice may have little or no knowledge of the contents of the documents sought let alone whether a communication (whether electronically stored or a hard copy) contains confidential information which could be the subject of a valid claim for LPP. Many notices issued by the ATO pursuant to section 264 are directed to third parties and not to the taxpayer whose affairs are being investigated. Very often those third party recipients will be insouciant as to whether such a claim should be made.
44. This void can be easily exploited by an overzealous exercise of power by ATO field officers as occurred in *Citibank Ltd v Commissioner of Taxation*<sup>90</sup>; and on appeal in *Commissioner of Taxation v. Citibank Ltd*<sup>91</sup>. In the Full Court Bowen CJ and Fisher J said that the ATO officer in charge of the raid was obliged to ensure that Citibank and in particular its staff had in the circumstances an adequate

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<sup>88</sup> *Commissioner of Taxation v Rio Tinto Ltd* (2006) 151 FCR 341.

<sup>89</sup> *Supra* n. 88, at p. 362.

<sup>90</sup> *Citibank Ltd v Commissioner of Taxation* (1988) 19 ATR 1479.

opportunity or a practical or realistic opportunity to make claims of privilege and not merely to inform the ATO field officers of the possibility of such claims being made<sup>92</sup>.

45. The ATO has issued a document called the *Access and Information Gathering Manual* ("Access Manual")<sup>93</sup>. That document and the annexures and schedules thereto contain a detailed synopsis of the applicable principles and purports to state how and when taxpayers and/or their advisers are able to assert and maintain a claim for LPP. This regime, which is intended primarily as a guide for ATO field officers, is adequate however it contains certain imperfections some of which are discussed herein.
46. The principles to be applied in determining the reasonableness of action taken by ATO officers exercising their powers under section 263 are not illuminated by the absence of any code or procedure laid down in the statutory language. In the usual situation the ATO obtains cooperation from taxpayers or the custodian of information belonging to a taxpayer and the coercive powers are utilised fairly rarely. However, where the Commissioner does choose to act pre-emptively important practical issues arise both as to the potential relevance of the information to the subject matter of the investigation (this is an important issue but extraneous to the focus of this Paper) and pertinently for present purposes the ability of the taxpayer or the custodian to assert a claim for LPP. As has been pointed out a combination of ignorance, timidity or lack of concern on the part of those the subject of a raid can lead to the opportunity for claiming LPP being lost.
47. The taxpayer or the custodian of privileged documents or information bears the onus of establishing that the dominant purpose of the communication was to give or receive legal advice that being the ruling, prevailing, paramount or most influential purpose: *Federal Commissioner of Taxation v. Spotless Services Ltd*<sup>94</sup>. Such purpose is to be determined objectively and the evidence of the maker of the communication is not conclusive. The fact that a document is handed to solicitors for advice does not determine the purpose for which it was created. [Access Manual: para. 6.2.12]. In *Commissioner of Taxation v. Pratt Holdings Pty Ltd*<sup>95</sup> Kenny J at first instance provided a useful overview of the burden to be discharged in establishing a valid claim for LPP.
48. In *Kennedy v. Wallace*<sup>96</sup> Gyles J held that the taxpayer had failed to establish that notes made by him in the Savoy Hotel, London (and subsequently seized by the AFP at his home when executing a search warrant) was for the dominant purpose of obtaining legal advice from a Swiss lawyer. An

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<sup>91</sup> Supra n. 5.

<sup>92</sup> Supra n. 5, at p. 417.

<sup>93</sup> Access and Information Gathering Manual, Australian Taxation Office, Issued 18 December 2006, ("*Access Manual*").

<sup>94</sup> *Federal Commissioner of Taxation v. Spotless Services Pty Ltd* (1996) 186 CLR 404, at p. 416.

<sup>95</sup> *Commissioner of Taxation v. Pratt Holdings Pty Ltd* (2005) FCA 1247.

<sup>96</sup> *Kennedy v. Wallace* (2004) 208 ALR 424.

appeal to the Full Court was dismissed. Gyles J assumed *arguendo* that LPP could apply to communications with a foreign lawyer.

### VIII. Electronically Stored Information

49. Chapter 5 of the Access Manual deals somewhat aphoristically with the ATO's policy on obtaining electronically stored information ("ESI") particularly in light of the decision of the Full Court of the Federal Court in *JMA Accounting Pty Ltd v Carmody* (2004).<sup>97</sup>

50. *JMA Accounting*<sup>98</sup> considered at some length the Commissioner's powers pursuant to section 263 in relation to the search for and seizure of information stored and recorded on computers at an accounting firm. That firm was suspected of promoting a number of schemes involving false invoicing for services purportedly rendered overseas (Malaysia) and the subsequent return from a known tax haven (Labuan) of the full value of the invoiced amount less a commission fee. Those transactions *ex facie* were shams and indeed are substantially similar to a number of transactions which are the subject of an ATO investigation known as *Operation Wickenby*<sup>99</sup>. Thus the impetus for the section 263 raid appears to have been both necessary and appropriate.

51. Without descending into technical detail it should be emphasised that a number of possibilities exist with respect to obtaining ESI including but not limited to the following:

- Connecting the custodian's computers and/or servers to those belonging to the ATO and undertaking electronic photographing or imaging of the hard drives and servers at the premises, this being done without any scrutiny of the material stored;
- Copying directories located on the computers and/or servers;
- Copying files by reference to key words or selected categories of enquiry.

52. Complications may arise when computers or servers are removed from the premises of the custodian (almost invariably only consensually) and the ATO undertakes electronic photography or imaging which restores files and information that have been deleted. In this situation is there any obligation upon the ATO to provide to the taxpayer or the custodian details of the information which has been restored or retrieved?<sup>100</sup>

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<sup>97</sup> *JMA Accounting Pty Ltd v Carmody* (2004) 139 FCR 537 ("*JMA Accounting*").

<sup>98</sup> *Supra* n.33.

<sup>99</sup> Australian Crime Commission Special Investigation Authorisation and Determination (Wickenby Matters) 2006 being an instrument made under section 7C of the *Australian Crime Commission Act 2002*.

<sup>100</sup> There is an analysis of this area in a Paper presented by Frank D.O'Loughlin to the Law Council of Australia Workshop, October 2005.

53. The *Citibank* case is the touchstone for the lawful exercise of the ATO's powers pursuant to section 263 where ATO officers and others arrive at premises unannounced. An important matter that the majority judges in the Full Court in *Citibank*, Bowen CJ and Fisher J, make clear is that a search for hard copy documents should be conducted in a way which enables the taxpayer or the custodian to have an adequate opportunity to protect (in the case of a bank) documents belonging to its clients and to make claims for LPP on their behalf. It was held that Mr Booth, the ATO officer in charge of the raid, had failed to afford such an opportunity to Citibank's staff<sup>101</sup>. French J in the Full Court stressed that there had to be a practical and realistic opportunity to assert and test claims for LPP<sup>102</sup>. The question arises as to the extent to which if at all ATO officers should be entitled to peruse documents in order to determine on a provisional basis whether a claim for LPP is valid.
54. A further practical matter is the method by which a valid claim for LPP should be determined during a raid when the privileged communication is contained within an apparently neutral business record for instance, where the minutes of a board meeting contain legal advice with respect to one of the items on the agenda. Questions of this nature are not likely to be dealt with in a sufficiently clear and meaningful fashion during the pressure cooker situation which invariably exists during such an exercise.
55. The Full Court in *Citibank* appears to have decided that there is a condition imposed on a person exercising the statutory power pursuant to section 263 to take all reasonable steps to enable LPP to be claimed when the search and seizure is being conducted. What is reasonable is an open question and not a particularly helpful expression.
56. In *JMA Accounting*<sup>103</sup> there was discussion in the Full Court judgments of the decision of Brooking J in *Allitt v Sullivan*,<sup>104</sup> in particular where his Honour referred to what he described as a "lawful violation" of LPP in dealing with the execution of a search warrant. According to His Honour this involved an examination of the circumstances in which an officer is entitled to undertake a bona fide examination of documents for the limited purpose of determining a claim for LPP during a raid which may include cases where no-one is present to claim a privilege or where a blanket claim for privilege has been made and it appears reasonably apparent that such a claim is not sustainable.
57. The Full Court in *JMA Accounting*<sup>105</sup> advanced three broad and uncontroversial propositions as follows:

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<sup>101</sup> Supra n. 5, at p. 417.

<sup>102</sup> Supra n. 5, at p. 438.

<sup>103</sup> Supra n.96, at p. 542.

<sup>104</sup> *Allitt v Sullivan* (1988) VR 621.

<sup>105</sup> Supra n.96, at pp. 542-3.

- A person exercising a power to search and seize is entitled only to seize those documents which he is authorised to seize by the relevant power;
  - Both the search and seizure must be carried out reasonably;
  - The repository of the power must do no more than is reasonably necessary to satisfy himself that he has the documents which he is entitled to seize.
58. The Full Court went on to state that the ATO officers were not obliged to reach an accommodation with *JMA Accounting*<sup>106</sup> provided that their proposal for protecting any claims for LPP was reasonable and, if it was, their obligation was to then ensure that the proposal was implemented.
59. The notion of a *lawful violation* of LPP has a number of difficulties quite apart from being contradictory. First of all how is one to measure what is reasonable in the heat of the battle? Secondly why should the Commissioner be entitled to dictate the regime whereby claims for LPP are to be tested on the premises? Lastly who is to be the arbiter of the response by the taxpayer or the custodian when a regime different to that proposed by the ATO officers is suggested. The Access Manual purports to rely upon *National Crime Authority v S* (1991) 29 FCR 203<sup>107</sup> to support its role as arbiter of the regime to be implemented however that case is clearly distinguishable because the *National Crime Authority Act*<sup>108</sup> establishes the NCA as having the power to control hearings conducted by it. That is a vastly different scenario to a raid of private premises by ATO officers.
60. It is axiomatic that government agencies have at their disposal vast resources which enable them to scrutinise ESI and they can easily manipulate and retrieve data from computers especially by restoring deleted files. Thus if a claim for LPP is not made at the time of an unannounced visit to premises irretrievable harm may be sustained.
61. As noted the Access Manual provides a regime for the testing of claims for LPP but this is not particularly apposite to raids where widespread photographing and imaging of hard discs and servers is undertaken at the premises; nor when computers or hard drives are physically removed from the premises for such purpose.
62. As a result of the decision in *JMA Accounting*<sup>109</sup> there exists controversy as to exactly how the imaging of computer hard drives and discs should occur when premises are raided utilising section 263. The provisions in Chapters 6 and 7 of the Access Manual do not sufficiently protect the confidence in privileged communications that have been electronically stored. With respect to both

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<sup>106</sup> Supra n.96, at p. 544.

<sup>107</sup> *National Crime Authority v S* (1991) 29 FCR 203.

<sup>108</sup> *National Crime Authority Act, Commonwealth*.

<sup>109</sup> Supra n.96.

hard copy documents and material stored on hard drive or disc there is authority which establishes that ATO officers may examine or image the source material for the purpose of establishing at least on a provisional basis whether they could be subject to a valid claim for LPP: see Mason J in *Baker v Campbell*<sup>110</sup>; and *Waugh v British Railways Board*<sup>111</sup>.

## IX. Conclusions

63. There will be many situations where in the heat of battle clients, third party custodians and/or their advisers and consultants do not act in a sufficiently timely fashion to assert a claim for LPP. Anecdotal evidence suggests that notwithstanding the Taxpayer's Charter and the Access Manual some ATO field officers act in a heavy handed fashion and do not permit persons, who are usually in junior positions, to seek any advice as to how to respond to an "access" visit.
64. Except where access is exercised at a solicitor's premises (Appendix A of Chapter 6 deals specifically with this matter) persons present at the time generally speaking are likely to be entirely ignorant of what is LPP and thus unable to articulate a meaningful claim in a timely fashion.
65. The use by the ATO of the pro forma LPP claim form, which is an annexure to Chapter 6 of the Access Manual, is an interesting phenomenon but does not contain sufficient safeguards for the reasons discussed above where information is electronically stored.
66. As stated by the Full Court in *JMA Accounting*<sup>112</sup> the problem with section 263 is that it contains no procedure to test or ascertain whether a document is privileged during a raid. This is a serious deficiency because there are cases which hold that when privileged material is read by a third party, even as a result of accident, trickery or theft, the privilege is lost: *Waugh v British Railways Board*<sup>113</sup>. This is not a universally accepted view and regard should be had to what was said by Mason J in *Baker v Campbell*<sup>114</sup> namely that a party might not lose the privilege if documents have been obtained by illegal means or by deception.

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<sup>110</sup> Supra n. 4, at p. 80.

<sup>111</sup> *Waugh v British Railways Board* (1980) AC 521.

<sup>112</sup> Supra n. 96.

<sup>113</sup> Supra n. 34, at p. 536.

<sup>114</sup> Supra n. 4, at p.80.

67. In this area of the law there has been much unnecessary complexity and an absence of conceptual analysis that has failed to achieve a clear legal framework within which to solve practical problems. Moreover the High Court has left the issue of implied (or imputed) waiver in an unsatisfactory state. In both *Maurice*<sup>115</sup> and *Goldberg v Ng*<sup>116</sup> it was held that a general principle of fairness was apposite yet *Mann v Carnell*<sup>117</sup> effectively overruled those decisions without leave being granted to reargue their correctness. Whether the reformulation makes any practical difference is a moot point.
68. The juristic concept of waiver as it relates to LPP may be inapposite. There are examples of waiver in the application of various equitable principles and in my view the seminal statement about waiver at common law is contained in the judgment of Isaacs J in *Craine*<sup>118</sup> where an insurer purported to rely on an exclusionary condition which was based upon the failure of the insured to make a claim within a stipulated time. Thereafter the insurer entered into correspondence with the insured and his representatives relating to assessing the loss purportedly on a “*without prejudice*” basis. What *Craine*<sup>119</sup> makes patently clear is that a party to a dispute may not both approbate and reprobate. The same basic principle should regulate the waiver of LPP.
69. Inconsistency should be the keynote of the doctrine of waiver. Absent intentional conduct from which it can be easily inferred that LPP has been destroyed the Courts should undertake an objective factual analysis to determine whether the privilege holder has acted inconsistently with maintaining the confidentiality of the communication.

Christopher Charles Branson QC

May 2008

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<sup>115</sup> Supra n. 32.

<sup>116</sup> Supra n. 35.

<sup>117</sup> Supra n. 33.

<sup>118</sup> Supra n. 19.

<sup>119</sup> Supra n. 19.