

## Legal professional privilege (revisited)

Case note : [AWB Limited v Cole \(No. 5\)](#)  
(2006) 155 FCR 30

This decision also arose out of the Commonwealth Government's Inquiry into Certain Australian Companies in relation to the United Nations Oil for Food Programme (Oil for Food Inquiry), conducted by former Supreme Court judge, Terence Cole, from late 2005 through until November 2006.

In particular, these proceedings arose from a dispute concerning notices to produce documents that Commissioner Cole had directed to AWB Limited (AWB) and its employees in the course of the Inquiry. AWB claimed that some 900 documents occupying 28 lever arch files caught by these notices were or recorded confidential communications that were protected from production to the Commissioner by legal professional privilege. Accordingly AWB commenced proceedings in the Federal Court seeking inter alia a declaration that these documents were privileged and orders resisting their production to the Inquiry. AWB's application was opposed by the Commonwealth, Commissioner Cole having filed a submitting appearance and advised the Court that he would take no part in the proceedings and would abide any order made by the Court. The proceedings were heard by Justice Young (who had some months earlier decided [AWB Limited v Cole \(No. 1\)](#) (2006) 152 FCR 382).

The only basis on which AWB advanced its claim for privilege in these proceedings was advice privilege, that is legal professional privilege that attaches to documents brought into existence for the dominant purpose of obtaining or giving legal advice. There was no challenge by either AWB or the Commonwealth to Justice Young's earlier conclusion in *AWB Limited v Cole (No. 1)* that litigation privilege was not available to protect documents brought into existence in contemplation of the Inquiry.

### *Principles for determining claim for privilege*

In determining whether AWB had made out its claims for legal professional privilege,

Justice Young looked at the substance of the matter, having regard to the context, the nature of the documents, the evidence that was lead in support of the claim of privilege and the content of the documents as revealed by his inspection of them. At paragraph [44] of his reasons for judgment, Justice Young also usefully set out the following summary of the general principles which govern advice privilege and which his Honour considered to be relevant to the disposition of the claim before him (the authorities to which his Honour referred in his summary have not been reproduced in the summary below) :

- (1) The party claiming privilege carries the onus of proving that the communication was undertaken, or the document was brought into existence, for the dominant purpose of giving or obtaining legal advice. The onus might be discharged by evidence as to the circumstances and context in which the communications occurred or the documents were brought into existence, or by evidence as to the purposes of the person who made the communication, or authored the document, or procured its creation. It might also be discharged by reference to the nature of the documents, supported by argument or submissions.
- (2) The purpose for which a document is brought into existence is a question of fact that must be determined objectively. Evidence of the intention of the document's maker, or of the person who authorised or procured it, is not necessarily conclusive. It may be necessary to examine the evidence concerning the purpose of other persons involved in the hierarchy of decision-making or consultation that led to the creation of the document and its subsequent communication.
- (3) The existence of legal professional privilege is not established merely by the use of verbal formula. Nor is a claim of privilege established by mere assertion that privilege applies to particular communications or that communications are undertaken for the purpose of obtaining or giving 'legal advice'. If assertions of that kind are received in evidence in support of the privilege claim, their conclusionary nature can leave unclear what advice was really being sought. There will be cases in which a claim of privilege will not be sustainable in the absence of evidence identifying the circumstances in which the relevant communication took place and the topics to which the instructions or advice were directed.
- (4) Where communications take place between a client and his or her independent legal advisers, or between a client's in-house lawyers and those legal advisers, it may be appropriate to assume that legitimate legal advice was being sought, absent any contrary indications. In the ordinary case of a client consulting a lawyer about a legal problem in uncontroversial circumstances, proof of those facts alone may provide a sufficient basis for a conclusion that legitimate legal advice is being sought or given.
- (5) A 'dominant purpose' is one that predominates over other purposes; it is the prevailing or paramount purpose.

- (6) An appropriate starting point when applying the dominant purpose test is to ask what was the intended use or uses of the document which accounted for it being brought into existence.
- (7) The concept of legal advice is fairly wide. It extends to professional advice as to what a party should prudently or sensibly do in the relevant legal context; but it does not extend to advice that is purely commercial or of a public relations character.
- (8) Legal professional privilege protects the disclosure of documents that record legal work carried out by the lawyer for the benefit of the client, such as research memoranda, collations and summaries of documents, chronologies and the like, whether or not they are actually provided to the client.
- (9) Subject to meeting the dominant purpose test, legal professional privilege extends to notes, memoranda or other documents made by officers or employees of the client that relate to information sought by the client's legal adviser to enable him or her to advise. The privilege extends to drafts, notes and other material brought into existence by the client for the purpose of communication to the lawyer, whether or not they are themselves actually communicated to the lawyer.
- (10) Legal professional privilege is capable of attaching to communications between a salaried legal adviser and his or her employer, provided that the legal adviser is consulted in a professional capacity in relation to a professional matter and the communications are made in confidence and arise from the relationship of lawyer and client. Some cases have added a requirement that the lawyer who provided the advice must be admitted to practice. Others have not regarded the possession of a current practising certificate as an essential precondition to the availability of legal professional privilege.
- (11) Legal professional privilege protects communications rather than documents, as the test for privilege is anchored to the purpose for which the document was brought into existence. Consequently, legal professional privilege can attach to copies of non-privileged documents if the purpose of bringing the copy into existence satisfies the dominant purpose test. In *Propend* Brennan CJ added a qualification to this principle: if an original unprivileged document is not in existence or its location is not disclosed or is not accessible to the persons seeking to execute the warrant, and if no unprivileged copy or other admissible evidence is made available to prove the contents of the original, the otherwise privileged copy loses its protection.
- (12) The Court has power to examine documents over which legal professional privilege is claimed. Where there is a disputed claim, the High Court has said that the court should not be hesitant to exercise such a power. If the power is exercised, the court will need to recognise that it does not have the benefit of submissions or evidence that might place the document in its proper context. The essential purpose of such an inspection is to determine whether, on its face, the nature and content of the document supports the claim for legal professional privilege.

*Two further issues*

Although Justice Young found that AWB had made out its claim for privilege in all but 25 of the documents in respect of which it was claimed, AWB's claim in these proceedings also raised two further issues requiring the Court's determination and relevant to whether these documents did not have to be produced to the Inquiry.

(i) *waiver*

The first was whether any privilege that attached to any of these documents had been impliedly waived by virtue of AWB's disclosures in the course of the Cole Inquiry, to the Australian Government prior to that Inquiry and in the course of earlier inquiries into AWB's participation in the Oil for Food Programme (in particular the inquiry undertaken by the Independent Inquiry Committee (IIC) appointed by the United Nations to investigate the Oil for Food Programme, as well as AWB's own inquiries (Project Rose and Project Water)) of the gist or substance of certain legal advices which it had obtained.

In his judgment at paragraphs [128] – [176], Justice Young identified and discussed the principles associated with establishing implied waiver and the authorities (including those from America and Canada) from which those principles are derived. This includes at paragraphs [164] – [176] the principles by which the disclosure of privileged documents may also result in the implied waiver of the privilege that otherwise attaches to associated material. Again, this part of his Honour's judgment is a very useful resource for any one wishing either to assert that legal professional privilege has been impliedly waived through disclosure of the substance of legal advice or to challenge such a claim, as well as for determining the extent of any such waiver.

On the facts before him, Justice Young found that the cumulative effect of AWB's various disclosures was that right up until the time that the then Managing Director of AWB was giving evidence to the Cole Inquiry, AWB was "*openly claiming that its legal advice showed that there was no evidence that it had engaged in any wrongdoing in connection with its supply of wheat to Iraq under the OFF [Oil for Food] Programme*". Specifically his Honour found that AWB had claimed that there was no evidence (i) of any corruption by AWB or (ii) of any side payments having been made by AWB to the former Iraqi regime or (iii) of any conduct by AWB that resulted in breaches of the UN

sanctions or (iv) that AWB had any knowledge of any connection between the 'trucking fees' it was paying to the Jordanian trucking company (Alia) and the former Iraqi regime.

His Honour stated :

I infer that AWB made the assessment that it would advance its commercial interests if it were to be known publicly that it had undertaken extensive legal reviews and that, as a result, it had obtained legal advice that there was no evidence that it had engaged in any improper or unlawful conduct in breach of the United Nations' Sanctions. AWB was content for information of this character to be disclosed publicly in relation to both Project Rose and Project Water.

and later concluded :

I am satisfied that AWB made a conscious and voluntary decision to deploy the gist or substance of this legal advice in its dealings with the Australian Government, IIC and the Commission because it considered that it was in its commercial interests to do so. These actions are inconsistent with the maintenance of confidentiality in the legal advice.

Accordingly, Justice Young held that AWB had thereby impliedly waived the legal professional privilege that would have (but for these disclosures) attached to over 300 (or approximately one third) of the documents the subject of the proceedings. These were not just confined to the particular advices that had been disclosed or whose substance or gist had been disclosed as outlined above. They also included any other legal advices that AWB had obtained in relation to the same subject matter or on the same issue as well as any documents and information which were taken into account in formulating or which otherwise underpinned or influenced the legal advice that AWB had chosen to disclose. This included documents which defined the scope of AWB's internal reviews or which identified what investigations were carried out; summaries, chronologies and other documents which recorded or analysed the results of those investigations; witness statements and other notes or records of interviews of AWB personnel; records of meetings and periodical reports concerning the findings of these reviews; and documents seeking advice or comprising or recording advice provided to AWB, as to whether AWB or any of its employees engaged in any wrongdoing in connection with wheat sales to Iraq under the Oil for Food Programme, including any wrongdoing in connection with the Tigris transaction.

There are three lessons may be derived from this part of Justice Young's decision.

- (a) The first is as to the test to be applied in determining whether there has been a waiver of privilege, namely that identified in *Mann v Carnell* (1999) 201 CLR 1, under which it is the inconsistency between on the one hand the conduct of the client (in disclosing the gist and substance of the advice and the circumstances in which and the reasons why that occurred) and on the other hand the maintenance of the confidentiality that the privilege is intended to protect, which effects the implied waiver of the privilege. Although the earlier authorities had referred to fairness, this has become a subsidiary consideration; it may be relevant to the Court's assessment of inconsistency in some contexts but not others. It may also be observed that amongst the amendments to the *Evidence Act* proposed by the Australian, New South Wales and Victorian Law Reform Commissions in their collaborative report *Uniform Evidence Law: Report (2005)* and contained within the *Evidence Amendment Bill 2007 (NSW)* is the repeal of the existing section 122 of the *Evidence Act* and its replacement with a new section that is aligned more closely with the common law test for the loss of privilege set out in *Mann v Carnell* (implementing recommendation 14-5 of the 2005 Report).
  - (b) The second lesson is that it is not only the privilege in the advice itself that may be lost through the disclosure of the substance or gist of that advice. The disclosure of that advice may also amount to the waiver of the privilege otherwise attaching to material associated with that advice.
  - (c) The third lesson is as to the potential scope of the associated material that may be caught by the implied waiver associated with the disclosure of legal advice.
- (ii) *fraud and the Cox and Railton exception*

The second of the further issues raised by these proceedings was whether legal professional privilege attached to documents that had come into existence in connection with the price at which AWB had sold wheat to the Iraqi Grain Board (IGB) under two contracts during the OFF Programme, and more particularly the inflation of that price to cover both (a) AWB's settlement of a claim which the IGB had made on AWB for a rebate of approximately US\$ 2 million on account of the fact that earlier shipments of

wheat by AWB to Iraq had been allegedly contaminated by iron filings (the “iron filings claim”) and (b) the repayment by the IGB of a debt said to have been owing to Tigris Petroleum in respect of an earlier shipment of wheat, which debt the UN sanctions at the time prevented from being repaid, in particular from funds generated from the Oil for Food Programme (the “Tigris transaction”).

This raised for determination the scope and application of the so-called “*fraud*” or “*Cox and Railton*” exception to legal professional privilege, namely the principle that communications between a lawyer and client which facilitate a crime or fraud are not protected by legal professional privilege.

The principles associated with the application of this exception are set out (and the authorities identified) at paragraphs [210] – [219] of his Honour’s reasons for judgment. These principles include the following :

- (1) This exception encompasses a wide species of fraud, criminal activity or actions taken for illegal or improper purposes, extending (relevantly for the purposes of the AWB proceedings) to “trickery” and “shams”.
- (2) Where a client is engaged in fraudulent or improper conduct sufficient to give rise to the application of the exception, communications with his or her lawyer in furtherance of that conduct are not privileged regardless of whether the lawyer is a party to the fraud or not.
- (3) The exception still applies even where the lawyer is innocent or unaware of the fraud or improper conduct.
- (4) Further, the fraud need not be that of the client or lawyer; it may be of a third party.
- (5) It is important to bear in mind that this exception is based on public policy grounds and is sufficiently flexible to capture a range of situations where the protection of confidential communications between lawyer and client would be contrary to the public interest.
- (6) For the exception to apply, there must be more than a mere assertion or allegation of fraud or impropriety.
- (7) The appropriate test has been expressed as being one of “reasonable grounds for believing” that the relevant communication was for an improper purpose or there is a “prima facie case” to that effect. It has also been said that “there must be something to give colour to the charge” and that “the statement must be made in clear and definite terms, and there must further be some prima facie evidence that it has some foundation in fact”.

- (8) It is not however necessary to prove an improper purpose on the balance of probabilities. This is so even where the issue is being determined on a final (rather than interlocutory) basis.

On the evidence before him, Justice Young found that a small number of documents (10) were brought into existence in furtherance of an improper and dishonest purpose – namely inflating the price of contracts A1670 and A1680 so as to extract payments from the UN escrow account that would be utilised in part to satisfy the iron filings claim. His Honour also found that the evidence before him established to the requisite standard that this transaction was deliberately and dishonestly structured by AWB and the IGB to misrepresent the true nature and purpose of the “trucking fees” being paid by AWB and “*to work a trickery on the United Nations*”. In those circumstances, Justice Young concluded that it would be contrary to public policy for the legal professional privilege that would have otherwise attached to those 10 documents to enure to communications of this kind and AWB’s claim in respect of those documents was rejected.

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(26 October 2007)

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<sup>1</sup> Note : although the author was one of the Counsel Assisting in the Oil for Food Inquiry, he did not participate in the hearing of these proceedings