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WAIVER OF LEGAL PROFESSIONAL PRIVILEGE IN LEGAL ADVICE

- ✚ **The basis of implied waiver:** *Mann v Carnell* (1999) 201 CLR 1 at [28-29] per Gleeson CJ, Gaudron, Gummow and Callinan JJ:

“...Legal professional privilege exists to protect the confidentiality of communications between lawyer and client. ... It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege. ...

... What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.”

- ✚ **Disclosure of the gist of legal advice:** *Bennett v CEO of the Australian Customs Service* (2004) 140 FCR 101.

- An everyday occurrence?: see per Tamberlin J at [10].
- An “everyday occurrence” amounts to a waiver: see per Tamberlin J at [6]; per Gyles J at [62, 65, 68]. And see per Emmett J at [34] (who dissented in the result on this point due to the limited nature of the right of appeal): at [36].
- The reasoning need not be disclosed to give rise to a waiver: per Tamberlin J at [13].
- It does not matter why the disclosure has occurred: per Emmett J at [35].
- The extent of the waiver: per Tamberlin J at [14].

- Waiver of privilege in related advice: *BAT v Cowell* (2002) 7 VR 524 at per Phillips, Batt and Buchanan JJA at [121].
- The consequences of such a waiver:
 - Negligence/breach of retainer – a solicitor has a duty to maintain the client’s privilege. See eg *Kang v Kwan* [2001] NSWSC 698 per Santow J at [30].
 - What if the waiver extends to the record of the client’s instructions? File notes?
 - Issues of causation? Public policy?
- See also *Gray v Associated Book Publishers (Aust) Pty Ltd* [2002] FCA 1045; *Ashfield Municipal Council v RTA* [2004] NSWSC 917; *Switchcorp Pty Ltd v Multimedia Ltd* [2005] VSC 425.



Lesser disclosure

- The mere reference to the existence of legal advice is not a waiver: *Hoad v Nationwide News Pty Ltd* (1998) 19 WAR 468 at 475; *Temwood Holdings Pty Ltd v WAPC* [2003] WASCA 112 per Wheeler J at [20]; *Minister for Education v Lovegrove Turf Services Pty Ltd* [2004] WASCA 305 per Pullin J at [24].
- Assertion of rights is OK: *Bennett* per Emmett J at [34].
- Grey areas: eg *Bennett* per Tamberlin J at [6]; *Nine Films & Television Pty Ltd v Ninox Television Ltd* [2005] FCA 356; *Switchcorp* at [12].