

Legal Professional Privilege - Waiver Principles

Commissioner of Taxation v Rio Tinto [2006] FCAFC 86 (2 June, 2006)

A recent Full Federal Court case has held that there has been an implied waiver of legal professional privilege (“LPP”).

21 July 2006

BACKGROUND

This decision relates to tax appeals instigated by CRA Limited (now Rio Tinto Limited (“Rio”) against a number of assessments made by the Commissioner for Taxation.

At issue was a dividend that CRA received while it was the owner of shares in Bankers Trust Australia Pty Ltd. The Commissioner assessed that the dividend (of \$100,000,007.58) was assessable income under the *Income Tax Assessment Act* (“the Act”). The Commissioner further determined that ‘if included as assessable income as a dividend, the payment was a dividend that arose out of a transaction that was by way of dividend stripping for the purposes [of the Act]’ [at 4].

As a result of this determination the Commissioner found that CRA had a deficit balance in its franking account for the 1997 year and was therefore subject to a penalty for over franking. The Commissioner refused to exercise his discretion to remit the additional tax imposed by way of penalty.

The Commissioner filed a Statement of Facts, Issues and Contentions (“the Statement”) in response to Rio’s Objection to the Commissioner’s taxation assessments. Rio contested the adequacy of the Commissioner’s Statement before a judge. The judge ordered the Commissioner to file a new Statement.

Further particulars

Rio wrote to the Commissioner, on a without prejudice basis, requesting further particulars of the

new Statement. Rio’s request contended that the Commissioner’s analysis did not: “state who the decision maker was, what he or she considered was the relevant scheme, transaction etc by way of dividend stripping, what facts were found, what documents were taken into consideration, and how that decision maker applied the matters required. [at 12]”

Rio specifically requested the name of the person who had made the relevant decision, on behalf of the Commissioner, as well as “**the usual particulars of all the matters, things, circumstances or events taken into consideration by that person in reaching the said state of satisfaction.** [at 15]”

The Commissioner provided some further information to Rio in a without prejudice letter from its solicitor dated 22 October, 2004. The further information was referenced to documents listed in a number of schedules (the “Schedules”) eg the Commissioner said ‘in relation to the state of satisfaction referred to in sub paragraph [x] – Schedule A attached’ and ‘...the facts, circumstances and matters taken into account by the decision maker in exercising the respondent’s discretion are to the best of his recollection those evidenced by the documents listed in: (a) in relation to the discretion under s227 of the 1936 Act – Schedule C Attached. [at 20]’

The Schedules contained over 500 documents. Each Schedule included a note that the documents contained in them may be protected from production on the grounds of LPP.



The commissioner's claim to privilege

Rio served a notice of production on the Commissioner in relation to some of the documents contained in the Schedules. The Commissioner refused to produce 17 documents on the grounds that they were protected by LPP.

At first instance

At first instance, Justice Sundberg ordered the production of all the contested documents. His Honour found that the Commissioner had acted in a manner that was inconsistent with the maintenance of LPP. Two of the key reasons His Honour identified were [at 27]:

1. The Commissioner, by his Statement, raised as an issue in the proceedings his state of mind; and
2. The Commissioner's response disclosed that the privileged scheduled documents had a bearing on his states of mind.

APPEAL

The Full Federal Court (Kenny, Stone and Edmonds JJ)

Principles identified by the Full Federal Court

- The Full Court confirmed the application of the inconsistency principle, as set out in *Mann v Carnell* (1999) 201 CLR 1, in determining whether there had been a waiver of privilege [at 43] that is, 'whether the particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect' (at 13 [29]).
- The Full Court examined the authorities dealing with implied waiver and noted that "both before and after *Mann* the governing principle requires a fact-based inquiry as to whether in effect the privilege holder had directly or indirectly put the contents of an otherwise privileged communication in issue in litigation, either in making a claim or by way of a defence" [at 61]. It is essential to analyse the acts or omissions of the privilege holder that are said to be inconsistent with the maintenance of the privilege [at 45].

- It does not matter that the privilege holder did not subjectively intend to lose the benefit of the privilege [at 43].
- The focus must be on the facts of the particular case. The Full Court noted that other cases dealing with implied waiver were of limited assistance [at 45–47].

On the facts

- The Full Court found that the ruling that the Commissioner had raised his state of mind as an issue in the proceedings through his Statement, was an error. The Commissioner's state of satisfaction was in issue in the proceedings because Rio had objected to the assessments and initiated proceedings [at 62 & 64].
- The key question is not whether the Commissioner put his state of mind in issue but whether he directly or indirectly put the contents of an otherwise privileged communication in issue in the litigation, either in making a claim or by way of defence [at 65].
- The Commissioner's Statement necessarily had to assert the existence of a satisfaction in order to maintain the assessments [at 63]. The Commissioner in exploring his state of mind and the basis for it would not ordinarily act in a manner that was inconsistent with the maintenance of privilege over legal advice relevant to his attaining a state of satisfaction or exercising his discretion in a particular way [at 67].
- The mere acknowledgment of the relevance of privileged documents to the key issues does not amount to an act inconsistent with the maintenance of privilege [at 71].
- The Commissioner could have identified his bases for satisfaction and exercises of discretion by listing the matters he took into account in each case. He did not [at 72].
- The Commissioner went further than merely stating that the privileged documents were relevant to reaching his state of satisfaction or that he took them into account.





Instead, he identified that the “matters, things, circumstances and events taken into consideration” in reaching the relevant state of satisfaction and exercising the relevant discretion were “those evidenced” by the documents listed in the Schedules. In doing so he put the documents in issue or laid them open to scrutiny. The consequence was that there was an inconsistency between the making of the assertion and the maintenance of privilege [at 72].

- The Commissioner had waived LPP notwithstanding that his further information was provided on a without prejudice basis or the inclusion of the note in the Schedules that stated that LPP may apply [at 75].

IMPLICATIONS

Although the Federal Court has stressed that the focus must be on the particular facts of the case, the decision highlights that it is important not to put the contents of a privileged communication in issue for the purpose of making a claim or a defence.

It is also important to be aware of the danger of waiver of privilege when negotiating or making submissions or announcements. For In-House Counsel it remains important to educate staff on the need to avoid declarations that you have legal advice and what that advice may be.

AUTHOR

Emma Cashen , Solicitor

FURTHER INFORMATION

For further information or advice on the topics covered in this article or other intellectual property law matters please contact:

Chris Jordan, Partner
+ 61 3 9254 2888 or cjordan@davies.com.au

If you would like to be removed from our mailing list, please send an email to mail@davies.com.au or telephone Melissa McLennan on + 61 3 9254 2777.

The contents of this information sheet are not intended to be, nor are they, a complete statement of the law on the particular subject matter and are for information purposes only. This update is not a substitute for legal advice.

Melbourne

1 Nicholson Street,
Melbourne VIC 3000
Telephone +61 3 9254 2777
Facsimile +61 3 9254 2770

Sydney

255 Elizabeth Street,
Sydney NSW 2000
Telephone +61 2 9293 1000
Facsimile +61 2 9262 1080

Brisbane

Level 3, 303 Coronation Drive,
Milton QLD 4064
Telephone +61 7 3368 2255
Facsimile +61 7 3368 2262

Canberra

Level 11, 60 Marcus Clarke St,
Canberra ACT 2601
Telephone +61 2 6248 8063
Facsimile +61 2 6248 6591

Newcastle

130 University Drive
Callaghan NSW 2308
Telephone +61 2 4960 8366
Facsimile +61 2 9262 1080