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ARTICLES

LEGAL PROFESSIONAL PRIVILEGE: A PAROCHIAL DOCTRINE?

Dr R J Desiatnik

It has been noted that a “glance at the numerous cases in Australia and the United Kingdom which have concerned legal professional privilege in the last 20 years or so indicates twists and turns in the application of the general principles within single jurisdictions”: *Arrow Pharmaceuticals Ltd v Merck & Co Inc* (2010) 210 ALR 593 at [13]. The perfect illustration of this, unfortunately, is the litigation in *Kennedy v Wallace* (2004) 208 ALR 424 and *Kennedy v Wallace* (2004) 142 FCR 185, where contrary views were expressed at first instance and on appeal on the question of whether the privilege will apply to legal advice given by a foreign lawyer in the same way that it applies to legal advice given by an Australia lawyer. Not only, in the modern world, is this a question of considerable importance, but the approaches taken in that litigation encapsulate the differing judicial reactions to the issue of the scope of the doctrine. While these views are analysed in this article, and one view is held out as being demonstrably correct, Australian law still awaits an authoritative answer to the question. 536

DO YOU WAIVE PRIVILEGE BY PLEADING RELIANCE?

Andrew Eastwood

Some cases have held that a pleading of reliance in a misleading or deceptive conduct claim will give rise to a waiver of legal professional privilege. The argument accepted in those cases is that, because the party has put its “state of mind” in issue, and it is likely that the privileged communications are relevant to that “state of mind”, an issue waiver has occurred. This article considers those authorities, in light of the general principles concerning waiver of privilege laid down by the High Court, and more recent authorities. The author argues that, ordinarily, a pleading of reliance should not give rise to an issue waiver. 545

INTERVENTION IN CONSTITUTIONAL CASES

Angel Aleksov

The Attorneys-General of Australia are conferred with a right to intervene in proceedings that relate to a matter arising under the Constitution or involving its interpretation in any federal or State court (including the High Court) by s 78A of the Judiciary Act 1903 (Cth). As the Constitution defines the powers of each Australian polity, each polity has a “special interest” in constitutional questions arising in litigation, justifying this right of intervention. However, this right is limited by the concept of “intervention” and the role of an “intervener” in litigation, which allows participation to no further extent than the “interest” in the subject matter of the litigation. Therefore, an intervener under s 78A may only put submissions on constitutional questions, although a constitutional question can involve a broad category of issues. 555

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