SUPREME COURT OF QUEENSLAND

CITATION:	*McEwan v The Commissioner of Taxation* [2026] QSC 175
PARTIES:	**JULIE MCEWAN** (plaintiff/applicant) **v** **THE COMMISSIONER OF TAXATION** (first defendant/respondent) **ANTHONY RAINS** (second defendant/respondent) **COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS** (third defendant/respondent) **ROMAN MICAIRAN** (fourth defendant/respondent) **KATIE LUKIN** (fifth defendant/respondent) **JESSICA WILLIAMS** (sixth defendant/respondent) **ROBERTA DEVEREAUX** (seventh defendant/respondent)
FILE NO/S:	BS 971/22
DIVISION:	Trial
PROCEEDING:	Interlocutory Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	14 August 2026
DELIVERED AT:	Brisbane
HEARING DATE:	1 May 2026
JUDGE:	Freeburn J
ORDERS:	**1. Pursuant to rule 223(1) of the *Uniform Civil Procedure Rules 1999* (Qld) the first to seventh defendants (the Commonwealth Defendants) shall disclose to the plaintiff the documents comprising the brief to counsel (including any instructions or observations to counsel and documents forming part of the brief) leading to the advices of counsel dated 15 May 2020, 21 May 2020 and 8 September 2020;** **2. The plaintiff's application for disclosure of the Category C documents is dismissed.** **3. I will hear the parties on costs.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION OF DOCUMENTS – PRODUCTION AND INSPECTION OF DOCUMENTS – GROUNDS FOR RESISTING PRODUCTION – PRIVILEGE – CLIENT LEGAL PRIVILEGE – WAIVER OF PRIVILEGE – where the plaintiff commenced a malicious prosecution claim against the defendants – where the defence pleads the third defendant had reasonable and probable cause for prosecuting the plaintiff based on legal advice – where the defendants plead three advices received from counsel – where those advices were disclosed to the plaintiff – where the plaintiff now seeks disclosure of the underlying briefs of instructions and documents produced to counsel – where the defendants claim legal professional privilege over those documents – where the plaintiff submits that the defendants' previous disclosure of and reliance on those documents has the effect of waiving privilege over the underlying documents – whether the defendants' conduct in disclosing the advices is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect – whether the documents should be disclosed under rule 211 of the *Uniform Civil Procedure Rules 1999* (Qld)

Uniform Civil Procedure Rules 1999 (Qld), r 211, r 223, r 367

Attorney-General for the Northern Territory v Maurice (1986) 161 CLR 475; [1986] HCA 80, considered
Enkelmann v Stewart (2023) 15 QR 435; [2023] QCA 155, considered
G & S Engineering v Lampson Australia Pty Ltd [2009] QSC 361, followed
Goldberg v Ng (1995) 185 CLR 83; [1995] HCA 39, considered
Interchase Corporation Limited (in liq.) v Grosvenor Hill (Queensland) Pty Ltd (No. 1) [1999] 1 Qd R 141, considered
Mann v Carnell (1999) 201 CLR 1; [1999] HCA 66, considered
Osland v Secretary, Department of Justice (2008) 234 CLR 275; [2008] HCA 37, applied
Poland v Hedley [2023] WASCA 69, considered
R v Bunting (2002) 84 SASR 378; [2002] SASC 412, considered
Watkins v State of Queensland [2008] 1 Qd R 564; [2007] QCA 430, cited

COUNSEL: Ms McEwan was self-represented
F Lubett for the First to Seventh Defendants/Respondents

SOLICITORS: Australian Government Solicitor for the First to Seventh Defendants/Respondents

[1] The plaintiff, Ms McEwan, applies for an order pursuant to rule 223 or rule 367 of the *Uniform Civil Procedure Rules 1999* (**UCPR**) that the first to seventh defendants (**the Commonwealth Defendants**) produce certain documents to her.

[2] In summary, Ms McEwan seeks disclosure of the following documents:

(a) documents that are specifically referred to in the Commonwealth Defendants' defence (paragraphs (f)-(k) of the application, referred to in the Commonwealth Defendants' submissions as "**Category A**" documents);

(b) any and all documents that comprise "*the entire brief of instructions and materials"*, the *"facts and information*", the "*instructions*", and the "*observations to counsel*" given to Mr Copley KC and Ms Cartledge of counsel in respect of advice that they gave in 2020 (that advice, which is referred to as "**Counsel's Advice**", has already been disclosed to the plaintiff) (paragraphs (a)-(d) of the application, referred to as "**Category B**"); and

(c) any and all documents containing, recording or evidencing (in whole or in part) discussions between any of the Commonwealth Defendants and/or officers of the Commonwealth Director of Public Prosecutions (**CDPP**) in respect of Counsel's Advice, or in respect of certain Category A documents (paragraphs (e) & (l) of the application, referred to as "**Category C**").[1]

[3] There is no controversy about the Category A documents. Those documents have either been disclosed or are agreed to be disclosed.

Category B

[4] In their defence, the Commonwealth Defendants plead that the CDPP obtained legal advice as follows:

(a) "*advice dated 15 May 2020 from Michael Copley KC and Ms Sarah Cartledge of counsel*";

(b) "*advice dated 21 May 2020 from Michael Copley KC and Ms Sarah Cartledge of counsel*"; and

(c) "*email advice dated 8 September 2020 from Mr Copley KC about the Jasper Fogerty No-Case Submission*".

[5] Those three advices, together, are referred to in the parties' submissions, and in these reasons, as 'Counsel's Advice' and were produced to Ms McEwan. Ms McEwan has produced Counsel's Advice herself as exhibits to her affidavit affirmed on 7 April 2026.

[6] Ms McEwan argues that, because the Commonwealth Defendants have pleaded and disclosed Counsel's Advice, they should also disclose the background to Counsel's Advice, namely the "*entire brief of instructions and materials*", any "*facts and information*", any "*instructions*", and any "*observations to counsel*" given to Mr Copley KC and Ms Cartledge of counsel in respect of Counsel's Advice.[2] In essence,

---

1 This is counsel for the Commonwealth Defendants' summary. Ms McEwan's submissions did not quarrel with the summary.

2 See the submissions of the Commonwealth Defendants at [8].

Ms McEwan submits that the Commonwealth Defendants' disclosure of and reliance on Counsel's Advice has had the effect of waiving privilege over the related Category B documents.

[7] Ms McEwan submits that these documents:

(a) comprise the documents that are the foundation for and give meaning to Counsel's Advice;

(b) give meaning and veracity to Counsel's Advice and the Thompson Indictment Minute (discussed below) so that they can be accepted and relied on by the court; and

(c) are required to be disclosed because they comprise the brief and instructions to counsel and are likely to have influenced the content of Counsel's Advice.

[8] The Commonwealth Defendants submit that any such Category B documents are privileged, and that privilege has not been waived by the CDPP. In particular, the Commonwealth Defendants submit that the disclosure of Counsel's Advice did not create an inaccurate or misleading perception as to whether the relevant defendant had reasonable and probable cause to prosecute Ms McEwan, such that that perception could only be corrected by producing those underlying instructions and documents sought.[3]

[9] It is clear that Counsel's Advice was subject to legal professional privilege and that the Commonwealth Defendants' decision to rely on and to expressly plead Counsel's Advice as a justification for the decision to prosecute Ms McEwan had the effect of waiving that privilege. The real issue here is whether the pleading of Counsel's Advice also had the effect of impliedly waiving the privilege over the Category B documents.

The Authorities

[10] The authorities on implied waiver are rather mixed. There is no shortage of cases on implied waiver. For present purposes it is worth looking at the three High Court cases which considered the topic.

Maurice's Case

[11] A starting point is the High Court's decision in *Attorney-General for the Northern Territory v Maurice*,[4] a case relied on by counsel for the Commonwealth Defendants here. *Maurice's Case* concerned an application for the production of documents that formed the source material for a 'claim book' lodged with the Aboriginal Land Commissioner.[5] The source material was not specifically mentioned, and their actual contents were not revealed in the 'claim book'. The 'claim book' was distributed to other parties in the proceedings, but it was not admitted into evidence. The parties

---

3 This submission, seemingly requiring an inaccurate or misleading perception based on the reasons of Keane JA in *Watkins v State of Queensland* [2008] 1 Qd R 564; [2007] QCA 430 is discussed below. Suffice it to say that that is not the test.

4 (1986) 161 CLR 475; [1986] HCA 80.

5 In the report the claim book is described as the '1982 Claim Book'. It seems to have been designed to serve the purposes of a pleading.

and the court accepted that the documents attracted legal professional privilege. The issue was whether the privilege had been impliedly waived.[6]

[12] The High Court decided that the privilege had not been waived. However, the reasons for coming to that conclusion were different. Gibbs CJ cited Wigmore's reasoning that a party cannot be allowed, after disclosing as much as he pleases, to withhold the remainder; he may elect to withhold or to disclose, but after a certain point his election must remain final.[7] His Honour expressed this view:

> The decisions in which this question has been considered seem to me to be particular applications of the rule 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.[8]

[13] Gibbs CJ also quoted from *Nea Karteria Maritime Co. Ltd. v. Atlantic & Great Lakes Steamship Corporation [No. 2]*[9] where Mustill J suggested the following test:

> "…where a party is deploying in court material which would otherwise be privileged, the opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood."

[14] Ultimately, Gibbs CJ decided that the question was whether the disclosure or use of material that has been made renders it *unfair* to uphold the privilege in the associated material, and although the question whether the material that has been disclosed has been used in evidence is relevant, it is not decisive. So long as the 'claim book' was not used in any other way, His Honour said it was impossible to say that it was in any respect unfair or misleading to lodge it with the Commissioner and to distribute it to the parties without making available the sources from which it was derived.

[15] His Honour would have come to the opposite conclusion if the 'claim book' had been admitted into evidence. In that event, the opposite party would have been entitled to test its accuracy and weight, and since that could hardly be done unless it was known on what sources it was based, considerations of fairness might have required those sources to have been produced.[10]

[16] Mason and Brennan JJ, in a joint judgment, also quoted from that same passage in Wigmore and considered that an implied waiver occurs when, by reason of some conduct on the privilege holder's part, it becomes *unfair* to maintain the privilege.[11] They contrasted the disclosure of the 'claim book' and the nondisclosure of its source

---

6 This summary is based on the helpful work of Dr Ronald J Desiatnik in *Legal Professional Privilege in Australia* 4th ed 2025, LexisNexis, at Chapter 9.
7 *Wigmore on Evidence* (McNaughton rev. 1961), vol. VIII, par. 2327).
8 (1986) 161 CLR 475; [1986] HCA 80 at 481.
9 [1981] Com LR 138 at 139.
10 (1986) 161 CLR 475; [1986] HCA 80 at 483.
11 Ibid at 487.

material, but found no unfairness, and thus no implied waiver, because no attempt was made to "*reveal beneficial parts while keeping injurious parts hidden*".[12]

[17] Of course, it would be rare that a litigant, who has not seen the source material, could demonstrate that the opposite party has sought to reveal 'beneficial' parts while keeping 'injurious' parts hidden.

[18] Deane J emphasized the fundamental and substantive nature of the privilege and that the 'claim book' had not actually made it into evidence.[13] His Honour said:

> Waiver of legal professional privilege by imputation or implication of law is based on notions of *fairness*. It occurs in circumstances where a person has used privileged material in such a way that it would be *unfair* for him to assert that legal professional privilege rendered him immune from procedures pursuant to which he would otherwise be compellable to produce or allow access to the material which he has elected to use to his own advantage. Thus, ordinary notions of *fairness* require that 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 he has made of the material by reliance upon legal professional privilege. There are, however, no considerations of *fairness* which require that compliance by a party with a procedural requirement that he prepare and make available a document setting forth the case which he proposes to make before a court or quasi-judicial tribunal should be treated as a waiver of his right to claim legal professional privilege in respect of all the material upon which he has relied in the preparation of that document.[14]

[19] Deane J concluded that it would be an affront to ordinary notions of fairness to hold that the effect of compliance with that litigant's compulsory compliance with a procedural requirement was that the litigant has waived legal professional privilege in relation to that material.

[20] Dawson J also relied on the concept of fairness:

> This is a difficult area of the law, but it is clear enough that an implied waiver may be required by fairness notwithstanding that it was not intended. 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 the one subject-matter…[15]

[21] What was important, in His Honour's view, was that the 'claim book' did not disclose the content of any privileged communication and so did not abandon the element of confidentiality which the privilege protected. There was, therefore, no waiver of privilege.

---

12 Ibid at 489.
13 Ibid at 491, 492.
14 Ibid at 493.
15 Ibid at 497.

[22] Thus, the reasoning differs. As Dr Desiatnik colourfully explained, *Maurice's case* presented, unfortunately, a jurisprudential buffet.[16] However, at least a theme running through the judgments is that a person cannot retain a claim to the privilege where it would be *unfair* for that person to assert that legal professional privilege. As will be explained, the usefulness of that broad concept of fairness has been criticised.

Goldberg v Ng

[23] In *Goldberg v Ng*[17] a solicitor, the appellant, who was being sued by his former clients, the respondents, claimed privilege over documents, produced by him under subpoena, which he had sent to the New South Wales Law Society to answer a complaint of professional misconduct made by one of those clients over the same conduct for which they had brought the court proceedings against him. The Law Society had given the solicitor its assurance that the documents would not be given to anyone. The complaint was subsequently dismissed.[18]

[24] By a 3 to 2 majority, the High Court found legal professional privilege had been impliedly waived.[19] According to the majority, the proper approach to the question of fairness was on the basis that although the Law Society possessed powers to compel production of the documents, the solicitor's disclosure was voluntary and was made in the absence of any other written statement in answer to the complaint. The disclosure was for the calculated purpose of demonstrating the reliability of his denial of the allegation of failure to account. Accordingly, there was an imputed waiver of legal professional privilege.[20]

[25] As Dr Desiatnik has explained in his text, *Legal Professional Privilege in Australia*, the notion of fairness as a touchstone had its critics, principally because it is prone to producing unpredictability.[21] As Fitzgerald AJA observed in *Sevic v Roarty*, "*fairness is a concept with a subjective component on which reasonable minds can differ*".[22] The concept was criticised as a tool to identify implied waiver of legal professional privilege by McHugh J in *Mann v Carnell*.[23]

Mann v Carnell

[26] The issue of implied waiver was next raised in the High Court in *Mann v Carnell*.[24] In *Mann v Carnell*, the High Court took a different tack, without expressly overruling *Goldberg v Ng* or *Maurice's Case*.[25]

[27] The facts of *Mann v Carnell* were described by the plurality in this way. Dr Mann was for many years a surgeon practising in the Australian Capital Territory. In 1990

---

16 Desiatnik (supra) at 275.

17 (1995) 185 CLR 83; [1995] HCA 39.

18 Desiatnik (supra) at 275.

19 The majority comprised Deane, Dawson and Gaudron JJ. The minority comprised Toohey and Gummow JJ.

20 This summary is taken from the case headnote.

21 Desiatnik (supra) at 280. Fairness is often in the eye of the beholder: *Conroy's Smallgoods v Australasian Meat Industry Employees Union* (2023) 408 ALR 316; [2023] FCAFC 59 at [117].

22 (1998) 44 NSWLR 287 at 310.

23 (1999) 201 CLR 1; [1999] HCA 66 at [110], [127], [128];

24 (1999) 201 CLR 1; [1999] HCA 66.

25 The plurality referred to *Goldberg v Ng*; Kirby J (at 46) and McHugh J (at 35) considered that *Goldberg v Ng* had been wrongly decided: Desiatnik (supra) at 277 (fn 43).

and 1991, he commenced legal proceedings against the Australian Capital Territory Board of Health, certain public officials and various medical practitioners. The causes of action included breach of contract and defamation. By legislation enacted in 1993, the Board of Health was abolished, and the Australian Capital Territory, a body politic, was designated to stand in the place of the Board in any unresolved litigation to which the Board was a party.

[28] The litigation finally came on for hearing in September 1997. It was brought to an end on the second day of the hearing when Dr Mann accepted the sum of $400,000 paid into court on behalf of all defendants. That payment was made without any admission of liability.

[29] During the progress of the litigation, Dr Mann had been in contact with Mr Moore, who was an independent member of the Legislative Assembly of the Territory. On 24 October 1997, he wrote a letter to Mr Moore describing what had occurred as a "*monumental waste of public funds*". Mr Moore then wrote to Ms Carnell, in her capacity as Chief Minister, repeating the assertion that there appeared to have been a monumental waste of public funds, and seeking from her some assurance that this sort of situation would not occur again. He sent a copy of the letter to Dr Mann.

[30] In December 1997, Ms Carnell replied to Mr Moore in the following terms:

> "I enclose for your information, a letter from the ACT Government Solicitor to the Department of Health and Community Care setting down the particulars of the litigation over the past six years. I also attach copies of briefs received from senior counsel engaged to represent the Territory in the matter.
>
> The settlement of $400,000 was arranged to protect the Territory's interests by avoiding the costs of a four week hearing and took into account Dr Mann's ability to pay costs had the Territory been successful in defending the matter.
>
> Please do not hesitate to contact me if you have any further concerns in relation to this matter."

[31] At the hearing before Miles CJ, there was evidence, which was accepted, to the effect that it was established practice in the legislature of the Australian Capital Territory, and in other Australian legislatures, for Ministers, in appropriate cases, to provide members, confidentially, with background information concerning matters of Government administration.

[32] Dr Mann sought pre-trial discovery and inspection of copies of the letter and briefs involving senior counsel engaged to represent the Territory. It was acknowledged that the legal material was properly the subject of legal professional privilege. Dr Mann submitted the privilege had been waived.

[33] The High Court held that the privilege had *not* been waived because the disclosure by Ms Carnell, the Chief Minister, was a disclosure on a confidential basis to a member of the Territory's parliament who was performing his functions as a member of parliament. The High Court held that the disclosure was not conduct that was

inconsistent with the maintenance of the confidentiality which the privilege is intended to protect.[26]

[34] In *Mann v Carnell* Gleeson CJ, Gaudron, Gummow and Callinan JJ explained the relative importance of the concept of inconsistency as against the broader concept of unfairness:

> 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.[27]

[35] McHugh J was more strident in his rejection of the concept of unfairness. His Honour observed that one of the main difficulties with the concept of "*unfairness*" as a criterion for determining whether privilege has been waived was, as Dr Desiatnik had recently pointed out, that: "[i]*t is a peerless example of a 'legal category of indeterminate reference*'."[28]

[36] And so, since *Mann v Carnell*, the test of implied waiver is one of inconsistency and is not a broader enquiry as to "*fairness*".[29] Notions of fairness were demoted so that they are regarded as an influence on the principle of inconsistency.

[37] Thus, in *Mann v Carnell* the High Court took the view that the purpose of the privilege was to protect the Territory from subsequent disclosure of the legal advice it received concerning the litigation instituted by Dr Mann. For that reason, there was nothing inconsistent with that purpose in the Chief Minister conveying the terms of that advice, on a confidential basis, to the member of parliament who wished to consider the reasonableness of the conduct of the Territory in relation to the litigation.[30]

[38] The High Court returned to the topic of implied waiver in *Osland v Secretary, Department of Justice*.[31] Applying *Mann v Carnell*, in *Osland v Secretary, Department of Justice* the High Court explained implied waiver in this way:

> Waiver of the kind presently in question is sometimes described as implied waiver, and sometimes as waiver "imputed by operation of law". It reflects a judgment that the conduct of the party entitled to the privilege is **inconsistent** with the maintenance of the confidentiality which the privilege is intended to protect. Such a judgment is to be made in the context and circumstances of the case, and in the light of any considerations of fairness arising from that context or those circumstances.[32] [emphasis added]

---

26 (1999) 201 CLR 1; [1999] HCA 66 at [29] per Gleeson CJ, Gaudron, Gummow and Callinan JJ; Desiatnik (supra) at 276-277.
27 (1999) 201 CLR 1; [1999] HCA 66 at [29].
28 Ibid at [129]. His Honour's reference was to the 1999 edition of Desiatnik, *Legal Professional Privilege in* Australia (1999) at 122.
29 (1999) 201 CLR 1; [1999] HCA 66 at [29], [34]; see also *Poland v Hedley* [2023] WASCA 69 at [72].
30 (1999) 201 CLR 1 at [35].
31 (2008) 234 CLR 275; [2008] HCA 37.
32 Ibid at [45]. As discussed below, this passage was relied on by the Queensland Court of Appeal in *Enkelmann v Stewart* (2023) 15 QR 435; [2023] QCA 155 at [35].

[39] And so, whilst the law in this area could hardly be described as settled, there is now a stable and coherent reliance on the concept of inconsistency.

[40] Obviously enough, the focus on inconsistency involves a comparison of the purpose of the legal professional privilege against the conduct of the privilege holder. The conduct of the privilege holder may involve a limited confidential disclosure or a broad disclosure, and the disclosure may be voluntary or compelled, and the disclosure conduct may even be an omission to claim the privilege.[33] In each case the task is to assess whether the nature of the conduct is inconsistent with the retention of the privilege.

Two Further Cases

[41] Before considering the approach of Queensland courts, it is worth mentioning two further cases because they have features in common with this case.

[42] The *first* case is *Poland v Hedley,*[34] a decision of the Western Australian Court of Appeal. In this case, the court disagreed with the primary judge that the guiding principle was focused primarily on avoiding unfairness in the trial process.[35] The court preferred the *Mann v Carnell* approach, namely that the test for waiver has, as its focus, whether there is inconsistency between the conduct of the client and the maintenance of confidentiality in the communication which is the subject of the claim for privilege.[36]

[43] The reasoning of the court is evident from the following passage:

> In this case, **the media parties deliberately pleaded, by way of a defence of qualified privilege, that (1) they had sought and obtained legal advice in advance of publishing the articles, and (2) they had acted in accordance with that advice**. It was no mere plea as to the fact of having obtained advice. The formal plea disclosing their conduct in acting in accordance with the advice necessarily put the contents of the legal advice in issue, or necessarily opened it to scrutiny. Their conduct in pleading these matters in their defence was inconsistent with the maintenance of the confidentiality which the privilege was designed to protect. The disclosure could not be undone merely by deleting the plea. The effect of deletion was that the media parties could not lead evidence of the legal advice in accordance with which they allegedly acted in order to establish the pleaded defence of qualified privilege. It does not, however, preclude Mr Poland exploring at trial the issue of the reasonableness of the conduct of the media parties by reference to the legal advice the subject of the disclosure.[37] [emphasis added]

[44] The court continued:

---

33 See, for example, *Lombe v Pollak* [2004] FCA 264.
34 [2023] WASCA 69.
35 Ibid at [76].
36 Ibid.
37 [2023] WASCA 69 at [78].

> This is not a case where a document has been disclosed to a third party in circumstances and on terms that were consistent with the retention of confidentiality. In this case, **the plea concerning obtaining and acting in accordance with legal advice was voluntary, deliberate and directed, in the context of adversarial litigation, at Mr Poland** “perhaps [the person] above all” against disclosure to whom the privilege was designed to protect. The plea was, objectively, intended to be relied on as a material part of the media parties' answer to Mr Poland’s action. The deliberateness of the conduct in raising the plea is confirmed by, but not dependent upon, the further consideration that the plea remained as part of the defence for over two years, including at a time when the parties went to mediation with a view to attempting a settlement of the proceedings.[38] [emphasis added]

[45] Therefore, the court found that the media companies’ deliberate pleading of their legal advice, in the context of a defence of defamation proceedings brought by Mr Poland, was conduct that was inconsistent with the retention of the privilege.[39]

[46] The *second* additional case is *R v Bunting*.[40] In that case, a claim for privilege was made by the Director of Public Prosecutions (**DPP**) in response to a subpoena issued by an accused charged with murder. The accused sought the production of certain documents by the DPP. The DPP claimed legal professional privilege over some of the documents. Martin J explained his approach to the clash of these two principles:

> In my opinion, consistently with the principle identified in *Mann v Carnell*, at the point when the duty of disclosure requires disclosure of relevant information, if disclosure of the relevant information requires disclosure of a privileged communication, the conduct of the Director in instituting or maintaining a prosecution becomes inconsistent with the maintenance of the confidentiality of the communication by reason of legal professional privilege. In those circumstances, in my view it would be unfair for the Director to maintain the privilege in respect of the communication. Waiver of privilege is, therefore, imputed. In that sense the duty of disclosure “*prevails*” over legal professional privilege.[41]

[47] That case, it can be seen, involved a collision between the prosecution’s duty of disclosure and the maintenance of legal professional privilege. The latter gave way.

The Queensland Cases

[48] Here, the Commonwealth Defendants relied on *Maurice’s Case* as well as two Queensland cases: *Interchase Corporation Limited (in liq.) v Grosvenor Hill (Queensland) Pty Ltd (No. 1)*[42] and *Watkins v State of Queensland.*[43]

---

38 Ibid at [80].

39 For reasons discussed below the concept of deliberateness may well be something of a distraction in this context.

40 (2002) 84 SASR 378; [2002] SASC 412.

41 (2002) 84 SASR 378; [2002] SASC 412 at [74].

42 [1999] 1 Qd R 141.

43 [2008] 1 Qd R 564; [2007] QCA 430.

[49] *Interchase* was decided two years before *Mann v Carnell* and explicitly relied on *Maurice's Case* and the 'fairness test'. For example, in a passage quoted by counsel for the Commonwealth Defendants, Pincus JA said this:

> There remains the submission that there has been a relevant waiver of privilege; it was argued for the appellant that such a waiver may take place as a result of disclosure, even compulsorily, of a document. The principal authority relied on was *Attorney-General (N.T.) v. Maurice*, and that is authority for the view that a waiver may be imputed where 'disclosure or use of material that has been made renders it **unfair** to uphold the privilege in the associated material', per Gibbs C.J. at 483; see also per Mason and Brennan JJ. at 487. It may reasonably be argued to be odd and perhaps inconvenient to uphold the claim of privilege in respect of documents in category A, the valuation report to which they relate having been disclosed; but I fail to see how the respondent's insistence upon privilege for the category A documents can reasonably be described as **unfair**.[44] [emphasis added]

[50] Counsel for the Commonwealth Defendants relied on the following obiter passage from the reasons of Keane JA in *Watkins v State of Queensland*:

> It must be said, however, that the broad proposition that waiver will be imputed to ensure equality of advantage would mean that, in every case where an expert report is based on instructions as to the factual basis on which expert opinion is sought and the report is relied upon by the party that commissioned it in relation to the negotiation of a legal claim, the other party would have "a right" to see those instructions. There are reasons of principle and authority why I am unable to accept that broad proposition. In terms of principle, it seems to be inconsistent with the High Court's insistence upon the substantive nature of the right to confidentiality involved in legal professional privilege, that the right can be treated as so fragile as to be susceptible of abrogation in consequence of a judicial impression that the other party would be better informed than he or she might be if the confidential information were not provided. It is in the nature of things that a party who enjoys a right to keep information relevant to a forensic contest confidential will also enjoy an advantage over that party's opponent: the mere existence of that advantage cannot be a reason for the abrogation of the right. It is the abuse of the right by conduct apt to confuse or deceive the opponent which is the basis for an imputed waiver of privilege.[45]

[51] *First*, these observations were obiter because, as counsel for the Commonwealth Defendants points out, the court concluded that documents referred to were not privileged, so no question of waiver arose. *Second*, it is apparent that what his Honour was addressing in that passage was the broad proposition that waiver will be imputed to ensure equality of advantage or so that the other litigant is better informed. His Honour said that, in effect, waiver will not be so lightly inferred. That rejection of the broad proposition does not assist here. *Third*, his Honour's reference to an abuse of

44 [1999] 1 Qd R 141 at [20] (Thomas and de Jersey JJ agreed).
45 [2008] 1 Qd R 564 at [55] (Jerrard JA and McKenzie J agreed).

the privilege which is apt to confuse or deceive the opponent broadly aligns with the requirement that the court assess whether the nature of the conduct is inconsistent with the retention of the privilege. The focus was on the consequences of the inconsistency rather than the defining the principle that was to be applied.

[52] *Fourth*, the submissions of the Commonwealth Defendants rely on his Honour's reference to confusion or deception and submit that it was necessary for Ms McEwan to demonstrate an inaccurate or misleading perception. However, his Honour's reference to confusion or deception was plainly not intended to create a new and narrower principle to be applied in substitution for the inconsistency principles stated in *Mann v Carnell* and *Osland v Secretary, Department of Justice*,[46] but was merely an illustration of the principle.

[53] That passage from the reasons of Keane JA was expressly approved by the Queensland Court of Appeal in *Enkelmann v Stewart*.[47] However, again, the facts were some distance from the present facts.[48] Importantly, in *Enkelmann v Stewart*, the Court of Appeal quoted and relied on the principle of inconsistency as it was explained in the last of the quartet of High Court cases, *Osland v Secretary, Department of Justice* (quoted above).[49]

[54] A case decided after *Watkins v State of Queensland* is *G & S Engineering v Lampson Australia Pty Ltd*.[50] In that case, Applegarth J acknowledged the reasons of Keane JA in *Watkins v State of Queensland* but proceeded to apply the inconsistency principle:

> Ultimately, the resolution of the issue of waiver does not depend upon points of similarity and difference between the facts of *Goldberg v Ng* and the facts of the present case. It depends upon the application of the principles that have been more recently stated and restated by the High Court in *Mann v Carnell* and *Osland v Secretary, Department of Justice* to the circumstances of the present case. The issue is whether the conduct of Lampson in providing the report to the DME is inconsistent with the maintenance of the confidentiality that the privilege is intended to protect. The judgment about inconsistency "*is to be made in the context and circumstances of the case, and in the light of any considerations of fairness arising from that context or those circumstances*". Questions of waiver are matters of fact and degree. An important circumstance is the evident purpose in making the disclosure and the practical consequences of limited rather than complete disclosure.[51]

---

46 The inconsistency principle being that the conduct of the party entitled to the privilege is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect.

47 (2023) 15 QR 435; [2023] QCA 155 at [31].

48 The case concerned whether legal professional privilege applied to the file notes by a solicitor of oral comments by a registered professional engineer, Mr Giles, made in a conference with the appellants' solicitors and counsel. The issue was whether the appellants' privilege had been abrogated by r 212(2) of the UCPR and then whether, if there was privilege, it had been waived.

49 The High Court briefly considered implied waiver in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* (2013) 250 CLR 303; [2013] HCA 46 at [30]. There, the court simply referred to *Mann v Carnell* and explained that the court will impute an intention [to waive privilege] where the actions of a party are plainly inconsistent with the maintenance of the confidentiality which the privilege is intended to protect.

50 [2009] QSC 361.

51 [2009] QSC 361 at [32].

[55] In my view that is the correct approach.

[56] Finally, it should be acknowledged that some judges have doubted that *Mann v Carnell* effected a real change in the governing principles.[52] It is unnecessary to resolve that issue because, at the least, *Mann v Carnell* and *Osland v Secretary, Department of Justice* comprised, at least, a reformulation of the principles.[53]

[57] And, there is something of a semantics problem because lawyers and judges sometimes speak of the inconsistency of the privilege holder's conduct with the maintenance of the privilege as being unfair.[54] That general description does not alter the nature of the inquiry which is whether there is an inconsistency between the conduct of the privilege holder and the maintenance of the confidentiality. As the High Court explained in *Mann v Carnell*, the court is not concerned with some overriding principle of fairness operating at large.[55]

Application of the Principles

[58] Thus, it is necessary to assess whether the Commonwealth Defendants' pleading and reliance on Counsel's Advice is inconsistent with maintaining confidentiality over associated. For that purpose, it is necessary to look at the conduct of the Commonwealth Defendants in pleading Counsel's Advice.

The Pleaded Issues

[59] Ms McEwan's proceeding against the Commonwealth Defendants seeks damages for malicious prosecution. *One* part of the case Ms McEwan pleads is that the Commonwealth Defendants:

(a) ignored reasonable no-case submissions;

(b) gave no or insufficient consideration to exculpatory evidence;

(c) failed to disclose relevant documents, including exculpatory documents;

(d) misled judicial officers concerning the relevant facts of the case and disclosure; and

(e) withheld crucial exculpatory documents.[56]

[60] In their defence to those allegations, the Commonwealth Defendants:

(a) deny that they ignored reasonable no-case submissions on the grounds that they did not ignore them and rely on paragraphs 35.2, 39 43, 47 and 51 of their defence; and

---

52 See, for example, *Commissioner of Taxation v Rio Tinto Ltd* (2006) 151 FCR 341; [2006] FCAFC 86 at [44].

53 Ibid. Dr Desiatnik describes the change as not just a change in emphasis but as a sea-change: see Desiatnik (supra) at 279.

54 See, for example, *Watkins v State of Queensland* [2008] 1 Qd R 564; [2007] QCA 430 at [56].

55 *Mann v Carnell* (1999) 201 CLR 1; [1999] HCA 66 at [29].

56 Paragraph 22.5 of the Statement of Claim filed 18 November 2025 (CFI 333) ('**Statement of Claim**').

(b) say further that the CDPP had obtained legal advice, namely Counsel's Advice, which advised that there was reasonable and probable cause for the prosecution.[57]

[61] A *second* part of Ms McEwan's malicious prosecution case is her allegation that Mr Micairan, one of the Commonwealth Defendants, was in possession of information and documents that should have caused him, acting reasonably, and with bona fide intent, to immediately discontinue the prosecution. The documents in Mr Micairan's possession are alleged to include a barrister's advice, no-case submissions, multiple emails and other evidence.[58]

[62] Those allegations are denied and are said to lack certain particulars. The Commonwealth Defendants go further and plead that:

> in forming the view that there was reasonable and probable cause, in addition to reviewing the brief of evidence, the fourth defendant also reviewed [Counsel's Advice] which supported the decision to prosecute the State Charge…[59]

[63] A *third* part of the Commonwealth Defendants' defence of Ms McEwan's malicious prosecution case, relevantly the part of her case directed at the seventh defendant, Ms Devereaux, repeats the allegation that there was reasonable and probable cause. The paragraph again relies on two of the three components of Counsel's Advice.[60]

[64] Here, the defence goes further than relying on Counsel's Advice. The defence also relies on some other internal CDPP/DPP documents such as:

(a) a trial indictment minute dated 18 May 2020 prepared by Matthew Thompson (referred to as the '**Thompson Indictment Minute**');

(b) a draft indictment which was attachment A to the Thompson Indictment Minute;

(c) a draft letter addressed to Mr Heaton KC dated 1 June 2020, attachment B to the Thompson Indictment Minute;

(d) a draft statement of facts prepared by Mr Copley KC and Ms Cartledge;

(e) the Holt no-case submission;

(f) a further memorandum prepared by Mr Thompson dated 20 May 2020;

(g) comments provided by Mr Cooper in Case HQ (the CDPP's practice management software); and

(h) the prosecution policy of the Commonwealth.

---

57 Paragraph 22.5 of the Defence filed 23 February 2026 (CFI 339) ('**Defence**').

58 Paragraph 39.1(d) of the Statement of Claim.

59 Paragraph 39.1(d) of the Defence.

60 Paragraph 51.1(d) of the Defence.

[65] At least some of those documents are likely to be the subject of legal professional privilege.[61]

Inconsistency?

[66] It can be seen that Counsel's Advice comprises one of a range of documents that are positively pleaded by the Commonwealth Defendants as a basis for the decision to prosecute. The Commonwealth Defendants have evidently chosen Counsel's Advice, the draft statement of facts prepared by Counsel, and the other documents, because they provide a foundation for the plea of just and probable cause and a justification for the decision to prosecute. In a sense, the selection of those documents was a deliberate choice although it must be conceded that there is an element of artificiality and rigidity in characterising a parties' choices made in defending a proceeding as deliberate or voluntary.[62] The correct focus is not the character of the conduct but rather the relationship between that conduct and the maintenance of the privilege. Thus, the High Court has accepted that privilege can be waived by an *intentional* act done with knowledge whereby a person abandons the privilege by acting in a manner *inconsistent* with the maintenance of that privilege.[63]

[67] Here, the Commonwealth Defendants have selected certain documents from a range of documents that would otherwise have been subject to legal professional privilege. Privilege has been waived for those selected documents because, evidently, the Commonwealth Defendants intend to rely on those documents as supporting their defence of the proceeding. The range of documents are not disparate in the sense that they came into existence at roughly the same time and appear to have been focused on informing or assisting the decision to prosecute or not. The selection of only some of the documents in that range produces an incongruity.

[68] The related and perhaps more significant problem for the Commonwealth Defendants is that they are content for the advice of counsel to be produced, but they seek to retain privilege and confidentiality over the brief to counsel. It is a reasonably accurate analogy to say that by its nature, a brief to counsel asks a question, or a series of questions. The advice of counsel is the answer. The advice of counsel is necessarily dependent on the question asked and the documents provided as part of the brief. Put another way, the brief to counsel is a communication, and the advice of counsel is a response to that communication. The Commonwealth Defendants seek to divorce a communication that would otherwise be married.

[69] In any event, Counsel's Advice here is not self-contained. A reading of the three separate documents comprising Counsel's Advice makes clear that counsel's opinions are necessarily based on the question asked and the documents included in the brief to counsel.

[70] For those three related reasons, in my view, there is a plain inconsistency in the Commonwealth Defendants' conduct in exposing Counsel's Advice and their

---

61 Category (d) at least appears likely to be privileged. Some of the others may be. These documents have been disclosed or are proposed to be disclosed so that they are documents in respect of which any privilege has been waived.

62 A party embroiled in litigation and defending themselves can rarely be properly characterised as making deliberate choices as to the facts necessary for that party's defence of the allegations.

63 *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303; [2013] HCA 46 at [30].

continued maintenance of the privilege over other similar documents produced at the same time, seemingly for the same or similar purposes.

[71] The brief to counsel, or the communications to counsel constituting the brief to counsel, are therefore comprehended by the duty to disclose pursuant to rule 211(1) of the UCPR and any legal professional privilege over these documents has been implicitly waived.

[72] There remains, however, an argument by the Commonwealth Defendants regarding the test to be applied.

Rule 223 of the UCPR

[73] The submissions of counsel for the Commonwealth Defendants state the test in this way:

> Under rule 223(1), the Court may order a party to a proceeding to disclose to another party a document or class of documents but it may only make an order under that subrule if "*there are special circumstances* <u>*and*</u> *the interests of justice require it*" (rule 223(4)(a)) or "*it appears there is an objective likelihood the duty to disclose has not been complied with*" (rule 223(4)(b)(i)).

[74] Rule 223(4) is the focus here. That rule is as follows:

> (4) An order mentioned in subrule (1) or (2)[64] may be made only if—
>
> (a) there are special circumstances and the interests of justice require it; or
>
> (b) it appears there is an objective likelihood—
>
> (i) the duty to disclose has not been complied with; or
>
> (ii) a specified document or class of documents exists or existed and has passed out of the possession or control of a party.

[75] Subrules 223(4)(a) and (b) are alternatives. For present purposes, it is only necessary to consider subrule 223(4)(b). Here, the parties have argued whether the privilege claimed by the Commonwealth Defendants has been waived or not. The Commonwealth Defendants argued that the privilege had not been waived. For the reasons stated above, the Commonwealth Defendants have waived the privilege. The brief to counsel should have been disclosed. It follows that the duty of disclosure set out in rule 211(1) has not been complied with. The documents comprising the brief to counsel (including any instructions or observations to counsel) are in the possession or control of the Commonwealth Defendants and are directly relevant to the issues in the proceeding and are not excused from the duty of disclosure by reason of a valid claim to privilege from disclosure.[65]

---

64 Subrules (1) and (2) provide for orders to disclose [subrule (1)] and orders for special affidavits [subrule (2)].

65 See rule 212(1)(a) of the UCPR.

[76] The Commonwealth Defendants submit that there is no suggestion that the duty to disclose under rule 211 has not been complied with. However, I do not accept that submission. In the absence of a valid claim of privilege, the brief to counsel is just as directly relevant as Counsel's Advice – which has been explicitly pleaded and subsequently produced to Ms McEwan by the Commonwealth Defendants.

Conclusion on Category B

[77] The documents comprising the brief to counsel in about May and September 2020 are directly relevant and are not the subject of a valid claim to privilege and therefore should be disclosed.

[78] The description of the Category B documents sought is a little too enthusiastic. What is sought, for example, is the "*entire brief of instructions and materials*". What the word "*entire*" adds to that class is unclear. Similarly, the descriptions "*facts and information*", any "*instructions*", and any "*observations to counsel*" appear to overlap. What is required to be produced is the brief which will normally include instructions/observations and documents.

Category C

[79] Ms McEwan seeks disclosure of further categories of documents labelled as "Category C". They are:

(a) all documents containing, recording or evidencing (in whole or in part) discussions between any of the Commonwealth Defendants and/or officers of the CDPP with respect to Counsel's Advice; and

(b) all documents containing, recording or evidencing (in whole or in part) discussions between any of the Commonwealth Defendants and/or officers of the CDPP with respect to:

(i) those documents numbered #1, #3, #5 and #6 in the Category A annexure; and

(ii) "*any other drafts of the draft letter addressed to Mr Heaton KC or any other director of the Queensland Director of Public Prosecutions* (QDPP)" (the draft letter is document number #3 in the Category A annexure).

[80] The Commonwealth Defendants contend that Ms McEwan's pursuit of the documents comprising Category C involves an element of speculation that those documents exist and that those documents might contain probative information. The Commonwealth Defendants also argue that, using the language of rule 223, Ms McEwan does not articulate why there are both "*special circumstances*" that warrant such an order, and why "*the interests of justice require it*".[66]

[81] Counsel for the Commonwealth Defendants argued that:

---

66 Counsel for the Commonwealth Defendants referred to *Lampson (Australia) Pty Ltd v Ahden Engineering (Aust) Pty Lt*d [1999] 2 Qd R 252 where the test under rule 223(4)(a) was described as a rigorous one. Moynihan J described the "*special circumstances*" as needing to be "*exceptional or of a particular kind*".

> In circumstances where the plaintiff cannot demonstrate that the documents sought are disclosable under the various disclosure provisions in Chapter 7 of the UCPR, the Court would not exercise its discretion under rule 367 of the UCPR requiring the Commonwealth Defendants to disclose the documents.

[82] There are therefore two arguments put by the Commonwealth Defendants. The *first* is that Ms McEwan has not demonstrated that the further documents exist and are disclosable. The *second* is that the requirements of rule 223(4) have not been satisfied.

[83] I accept the first of those arguments, and so it is unnecessary to decide the second.

[84] In each case what Ms McEwan seeks is: "*All documents containing, recording or evidencing (in whole or in part) discussions between any of the Commonwealth Defendants and/or officers of the CDPP with respect to* [Counsel's Advice and other documents]". That is a request for documents that, it is assumed, may exist and are directly relevant. No evidence establishes that.

[85] In some cases, it can be assumed that a document must exist and be directly relevant. But here there is little more than speculation that:

(a) there are documents which contain/record/evidence discussions between the officers of the Commonwealth Defendants and the CDPP; and

(b) those discussions were with respect to Counsel's Advice (to use that as an example); and

(c) those documents satisfy the test of direct relevance.

[86] It follows that the application for Category C documents should be dismissed.

[87] The orders will be that the application concerning Category B documents will be allowed. The application concerning Category C documents will be dismissed. I will hear the parties on costs.