FOREWORD

There will always be a tension between the wish of a person to avail himself of legal professional privilege and the need of society for disclosure of relevant material if disputes are to be fairly resolved. In 1846 Lord Langdale, then Master of the Rolls, said that he had anxiously examined the subject and arrived at a conclusion which had seemed to him to be right. But his view had not been approved by higher authority and, through somewhat gritted teeth, he enunciated the doctrine as it has come to be understood:

> The unrestricted communication between the parties and their professional advisers, has been considered to be of such importance as to make it advisable to protect it even by the concealment of matter without the discovery of which the truth of the case cannot be ascertained.[1]

The problems and ramifications of legal professional privilege are with us still.

It is a pleasure to be asked to contribute a Foreword to this remarkably learned and unfailingly absorbing book on Legal Professional Privilege for Corporations. Mr Andrew Higgins has addressed many important and difficult questions which both academics and practitioners will want answered. They will find clear statements of what the current law is in the four jurisdictions he considers (England, Australia, Canada, and the United States); they will also find critiques of that law, sensible proposals for its amendment and stimulating predictions about the direction the law may take in the future.

No one can deny that legal professional privilege is of immense importance to the rule of law but neither can any one deny that it must be kept within proper bounds if the legal system is to perform its function of justly deciding disputes between citizens and citizens and between citizens and the state. It is unfortunate (but not particularly surprising) that the ambit of the privilege is often less clear than one would expect it to be. But any lack of clarity in the law will be much ameliorated by this book.

After an introduction explaining why the topic is important, the author examines the rationale for legal professional privilege and points out that it is an evolving concept. In the next four seminal chapters, corporations assume centre stage and the author discusses the concept of the corporation as client, the identity of the corporation's legal advisers, how the dominant purpose test applies to corporations and how corporations exercise control over the privilege that they have. Many of the older cases about the privilege concern individual litigants, but the principles contained in them have more often to be applied today in a corporate concept. These chapters bring fresh thinking to what are difficult areas of the law. The book continues by discussing how corporate privilege can be lost and the scope of the 'iniquity exception' to privilege. All these matters are then brought together in a final chapter which re-examines the rationale of the privilege and suggests a possible way forward in the form of the privilege being qualified in a way which has not yet been considered by English courts.

I have an uneasy feeling that my invitation to write this Foreword may possibly be due to my participation in *Three Rivers (No. 5)* of 2003 a decision which (it is safe to say) has not been

[1] *Reece v Trye* (1846) 9 Beav 316 at 318–9.

received with universal enthusiasm by the legal profession. Mr Higgins says (para 3.59) that one day there will be a concerted push to overturn it. All one can say is that that has not so far happened and that such dissatisfaction (as exists) does not yet appear to have manifested itself in any decided case. That may, of course, change by the time a second edition of this excellent work is called for, as it surely will be.

Lord Justice Longmore
Court of Appeal, Royal Courts of Justice
February 2014

PREFACE

Bainton J of the Supreme Court of New South Wales has observed that it is 'rare in any but a simple commercial case not to have at least one argument over privilege'.[1] Disputes about privilege are frequently litigated in the courts and it is usually corporations doing the litigating.

There are a number of excellent treatises on the law of privilege in the common law world, but few focus on corporations specifically. This book examines the law of privilege as it applies to corporations in four major common law jurisdictions: England, Australia, Canada, and the United States.

This multi-jurisdictional approach reveals some common problems and regular inter-jurisdictional dialogue between courts when deciding privilege disputes. While legal professional privilege may go by different names in different jurisdictions, the right performs the same critical function. It allows clients to communicate in confidence with a lawyer for the purpose of obtaining legal advice and allows litigants and prospective litigants to prepare for litigation free from the fear that their preparation might be disclosed to their prejudice. While legal professional privilege helps promote the rule of law, allowing people to suppress relevant evidence makes it harder for courts to deliver correct judgments and harder for regulatory agencies to enforce the law.

Because of the practical importance of legal professional privilege it is crucial that its scope is clear, can be readily understood by lawyers and their clients, and can be easily applied by the courts. Yet large aspects of the law of privilege remain uncertain or are difficult to apply in practice. In some areas there is a mass of cases which are difficult to reconcile. In other areas there is a dearth of domestic authority. Sometimes the leading statements on the purpose of the rule and the case law are pulling in opposite directions.

The book focuses on the privilege issues that are unique to or commonly arise in corporate contexts. For example, it examines the meaning of the 'corporate client', including attempts in England and the United States to exclude some corporate employees from the client, and Australia's effective abolition of the client test. It looks at the definition of legal adviser in an increasingly competitive legal services market, including the differing treatment of in-house counsel and the UK Supreme Court's treatment of accountants in *Re Prudential*. It looks at key trends in the application of the purpose test to corporate investigations as well as the status of strategic advice from corporate counsel. It examines the battle for control of the corporation's privileged material in what may loosely be described as 'intra corporate' disputes: between the company and its former directors and employees, and between the company and its members. It examines the confusing and contestable distinctions between joint client, joint interest, and common interest privilege and their relationship to the doctrine of waiver. It looks at the many different ways waiver can occur, when companies can limit the extent of any waiver and the remedies available to a company in the event of inadvertent

[1] *Abigroup Ltd v Akins* (1997) 42 NSWLR 623, 627.

disclosure of privilege material. The High Court of Australia's recent decision in *Expense Reduction* has brought much needed clarity and common sense to this difficult area. It also looks at the expanding crime-fraud or iniquity exception to privilege and the procedures for claiming and reviewing privilege. Given the sheer number of privilege cases in each jurisdiction, instead of multiplying citations the book focuses on leading and representative cases.

There are some aspects of privilege that are not covered in the book because of the focus on corporations. For example, the book does not examine privilege as it specifically applies in criminal proceedings. While the book examines many privilege questions that are relevant to public bodies, it does not examine the interaction between the rules on privilege and other rules regulating the disclosure or power to withhold sensitive legal material held by public bodies such as freedom of information laws and public interest immunity.

I owe a great deal of thanks to many people for their help on this book. Daniel Khoo, Matt Sherman, Nikita Tuckett, Naomi Oreb, Gabor Fellner, and Joshua Oldfield—all former students at University College or on Oxford's BCL programme—conducted valuable research on the law of privilege and assisted me with referencing. I must also thank Rebecca Winninger and Tom O'Brien, who helped with research on privilege in Canada and Australia respectively and Elizabeth Houghton who helped me with proofing.

I am extremely grateful to Lord Justice Longmore for kindly agreeing to provide a foreword for the book especially given that he has delivered some of the most important judgments on privilege in England in the past decade including *Three Rivers No 5*. I am also grateful for the support and advice of my former supervisor and now colleague at Oxford, Adrian Zuckerman. Some of the text of this book is based on commentaries on privilege we have co-authored.

I want to thank the entire team at OUP who supported and steered the book from proposal through to publication: Vicky Pittman, Zoe Organ, and Rachel Holt who provided feedback on presentation and were successful in getting me to mostly keep to ambitious deadlines and Matthew Humphrys and Caroline Quinnell who saw the book safely through the editing and production phase with flexibility and patience.

Finally, a very personal thanks to Rathi for her support and forbearance. This book is dedicated to the McCabe and Laurie families, who know too much of what is written here, and in memory of Mike Higgins, who made it possible.

I have endeavoured to state the law as at 1 October 2013 in light of the materials available to me, although it was possible to add the November 2013 decision of the High Court of Australia in *Expense Reduction*.

Andrew Higgins
Faculty of Law, University of Oxford
February 2014

1

INTRODUCTION

A. The Importance of LPP for Corporations

Legal professional privilege ('LPP') is the protection given to confidential communications between lawyers and their clients in connection with legal advice or litigation, and preparatory materials thereto. The right has great practical significance for any legal system in which the controlling framework is the rule of law: by providing all persons, real and legal, with a private and secure sphere in which to consult a lawyer and/or prepare for litigation, it removes an obvious disincentive to consulting a lawyer or properly preparing for legal proceedings. Yet the privilege also has the capacity to undermine the administration of justice by shielding relevant evidence from legal investigations and legal proceedings, thereby making it harder for law enforcement agencies to enforce the law, and harder for courts to decide disputes correctly. **1.01**

Legal professional privilege is one of a small number of exceptions to, and limits on, the power of the State to compel the disclosure of evidence on threat of contempt or other sanction. Having access to documents and information, and the right to question witnesses or persons of interest, is crucial if law enforcement agencies are to detect and prove breaches of the law, if defendants in criminal proceedings are able to adequately defend the charges against them, and private litigants are able to successfully enforce their legal rights or defend their legal interests. Perhaps the most famous statement on the importance of ensuring the **1.02**

court has access to all relevant evidence, rather than decide the case on the material put before it, comes from Donaldson MR. He said:

> The litigation process is not a game. It is designed to do real justice between opposing parties and if the court does not have all the relevant information it cannot achieve this object.[1]

1.03 For these reasons all modern legal systems provide some compulsive powers to help law enforcement agencies and parties to legal proceedings obtain relevant evidence.

1. The purpose of legal professional privilege

1.04 All major common law jurisdictions recognize that powerful reasons exist for protecting lawyer–client communications and preparatory materials for litigation from compulsory disclosure.

1.05 The privilege allows clients to talk freely to a lawyer in the knowledge that their confidences will not be revealed without their consent. This promise of confidentiality encourages clients to seek legal assistance and speak candidly to their lawyer, or more accurately, it removes a disincentive against clients speaking candidly to lawyers. Once fully apprised of a client's circumstances, the lawyer is able to give accurate and relevant legal advice and provide the best possible representation. The result is that people obtain a better understanding of the law and their legal rights and obligations, and can properly prepare and present their claim or defence in litigation. These are important ends in themselves, and underpin much of the jurisprudence declaring LPP to be a 'human right'.[2]

1.06 The privilege also has social benefits. By encouraging consultation with lawyers and greater candour in lawyer–client communications, the privilege helps foster legal compliance and a more efficient litigation process. Modern society is complex and achieving compliance with many laws often requires detailed legal advice. As Baroness Hale stated in *Three Rivers*: 'It is in the interests of the whole community that lawyers give their clients sound advice, accurate as to the law and sensible as to their conduct.'[3] The litigation process can be complex too, and often the skills of trained lawyers are needed if it is to be conducted fairly and proportionately to the interests at stake.[4] This includes not only representation in court, but also advice for the purposes of early and fair dispute resolution. Where lawyers are not fully apprised of their client's case, there is the danger of discouraging settlement or reasonable settlements, because neither side's counsel is fully cognizant of the strengths and weaknesses of their own side's case, let alone the opponent's, until trial and therefore do not know whether to settle or on what terms.

2. The costs of legal professional privilege

1.07 While legal professional privilege promotes the rule of law, it is also widely recognized that allowing people to suppress evidence which is relevant to legal investigations and proceedings

---

[1] *Davies v Eli Lilly & Co* [1987] 1 WLR 858 (CA) 967.

[2] *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563 [7]; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 (HCA) [85].

[3] *Three Rivers DC v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48, [2005] 1 AC 610 [61].

[4] *Anderson v Bank of British Columbia* (1876) 2 Ch D 644 (CA) 649; R Assy, 'Can the Law Speak Directly to its Subjects? Law, Language and Access to Justice' (2011) 38 J L & Soc 376–404.

can undermine the administration of justice. This in turn can undermine public confidence in the correctness of court decisions and the rule of law. Thus, the dividing line between what is privileged and what is not matters a great deal.

1.08 It is too simplistic to state that where privilege is claimed over documents or communications the result is that the evidence in those documents or communications is lost. One needs to consider what such documents or communications would contain if there were no privilege. If the privilege were abolished, many clients who are concerned about the disclosure of their confidential information are likely to stop communicating this information to their lawyers. Hence the evidence supposedly suppressed by the privilege would not exist without it. Even the fiercest critics of the privilege, such as Bentham, accepted the logic of this argument.[5] Similarly, while lawyer–client communications and preparatory materials for litigation are protected from disclosure, a client or litigant's knowledge of the underlying facts remains compellable. In theory, therefore, the evidence suppressed by the privilege can always be obtained by other means even if it is more costly to do so.

1.09 However, few lawyers in common law countries would doubt that, in practice, the outcome of a privilege dispute is often a zero sum game: upholding a privilege claim often changes the course of investigations and legal proceedings, allowing the privilege holder to keep sensitive information under a cloak of secrecy and thereby avoid legal liability or assert claims to which they have no genuine entitlement.

1.10 The costs of LPP can arise whenever a privilege claim is made and regardless of the identity of the person claiming privilege. However there is particular concern about the potential for corporations and public bodies to make very broad, and sometimes unmeritorious, privilege claims. In the case of governments, there is also concern that privilege claims are used to avoid disclosure of sensitive information in which there is significant and legitimate public interest, and which the public would otherwise be entitled to access under freedom of information laws. For example, the UK Government claimed privilege over the full legal advice given to the Government by the Lord Chancellor regarding the legality of going to war with Iraq, having previously published only part of the advice, and resisting an Enforcement Notice by the Information Commissioner to release the advice under the Freedom of Information Act.[6] It was only in 2010, when the Chilcot Inquiry was examining the UK's involvement in the Iraq war, that the Government decided to waive privilege over the advice and the public was able to read it in full.[7] In Australia, a Royal Commission into another aspect of the Iraq tragedy—the corruption of the UN OIL for Food Programme by the Iraqi regime with the assistance of foreign companies—concluded that AWB, the single largest exporter of goods under the programme, had been asserting unmeritorious privilege claims in order to thwart the inquiry. As a result, the Commissioner called for a separate review of the laws of privilege.[8]

[5] J Bowring (ed), *The Works of Jeremy Bentham* (London, 1842) 473–9.

[6] The Information Commissioner, Freedom of Information Act 2000, Enforcement Notice, 22 May 2006. Available at <http://www.ico.org.uk/upload/documents/library/freedom_of_information/notices/full_transcript_of_enforcement_notice_220506>.

[7] Letter from Sir Gus O'Donnell, Cabinet Secretary to Sir John Chilcot, Chairman of the Iraq War Inquiry, 25 June 2010. Available at: <http://www.iraqinquiry.org.uk/media/46469/ODonnell-to-Chilcot-re-declassification-250610.pdf>.

[8] T Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (Commonwealth of Australia, Canberra 2006) [7.55] recommendation 4.

1.11 That there is special attention paid to corporations and governments in public debate about legal professional privilege is not surprising. Governments and large corporations wield extensive economic and social power. And most business and commercial activity is conducted through corporations, the overwhelming bulk of which are small private companies. Corporate privilege matters. It matters for those managing or representing these entities, those who hold office or work for them, and those who are affected by their activities, which is all of us.

3. The benefits and costs of corporate privilege

1.12 It is difficult to underestimate the value of lawyers giving wise counsel to their corporate clients which is 'accurate as to the law and sensible as to their conduct'.[9] Legal professional privilege can help promote compliance and good governance by encouraging companies to get advice and order their affairs in a lawful manner. Corporations are subject to an increasing array of laws and regulations, and in many heavily regulated areas the line between prohibited conduct and legitimate commercial behaviour is not always an 'instinctive matter'.[10] Compliance with these laws would be virtually impossible without taking legal advice, and guaranteeing corporations the right to communicate in confidence with counsel is one way of encouraging corporations to get that advice. The American Bar Association claims that:

> Extending the privilege to corporations fosters an open dialogue between a corporation's management and corporate counsel, which can help ensure that the corporation complies with laws that might otherwise have been broken.[11]

1.13 One should add that there also needs to be frank, if not open, dialogue between corporate counsel and ordinary corporate employees who have knowledge of the matters on which the company needs advice. A privilege will be far less effective in promoting voluntary compliance and sound management of a company's legal affairs, if it encourages senior management to request advice or direct their lawyers to carry out legal investigations, but the company's employees 'hold back half the truth' for fear that frank communications with corporate counsel could be disclosed or used to their prejudice.

1.14 The risk of compulsory disclosure of lawyer–corporate client communications will create hard choices for at least some corporate agents in some situations. Whilst it is always in the company's interests to get accurate advice on legal matters affecting the company, disclosure of that advice can prejudice the company's position in litigation, expose it and individual agents to civil claims or regulatory action, as well as undermine the company's commercial position. Faced with these risks, there are bound to be some corporate agents who decide not to consult lawyers, or to be selective or even mislead corporate counsel when communicating with them. In turn, this will make it harder for company management to achieve legal compliance.

1.15 This legal and commercial reality provides a strong case for protecting lawyer–corporate client communications, and requires that the boundaries of the privilege are set clearly so that corporate agents who are contemplating consulting legal advisers, and the corporate agents

[9] *Three Rivers No 6* [61] (Baroness Hale) (n 3).
[10] *Upjohn Co v United States* 449 US 383, 392–3, 101 S Ct 677 (1981).
[11] American Bar Association, 'Taskforce on Attorney Client Privilege Report' (2005) <http://www.abanet.org/buslaw/attorneyclient/home.shtml> accessed 19 January 2010.

who will be communicating with them, can have those consultations secure in the knowledge that they will be kept confidential.

a. Costs of corporate privilege

1.16 While the value of companies having uninhibited access to sound legal advice is clear, on the other side of the ledger the costs of corporate privilege are greater than those attributable to a privilege for individuals. This is partly a product of scale and, importantly for the purposes of this book, partly a product of the difficulties in applying a rule designed for individuals to legal entities who can only acquire information, take advice, and act through their agents.

1.17 Corporate activities normally involve larger amounts of money than individual affairs, a broader range of legal issues, and greater potential legal liability. As a consequence corporations have more need for legal services than individuals, and provide the bulk of the demand for the legal services market.[12] Corporations also increasingly dominate the civil justice system. A cursory glance of the court lists would reveal that many cases in the commercial and superior courts—the very same courts that have the power to compel the production of documents—involve corporations, specifically large private or publicly listed corporations, and often exclusively.

1.18 Large corporations tend to acquire much more information and generate many more records than an individual does in the course of their lifetime. Accordingly, the number of records corporations are required to disclose under compulsory processes, and the number that they can claim privilege over tends to dwarf the disclosure obligations and privilege claims of individuals. Corporations enjoy perpetual succession, can be registered in multiple jurisdictions at the same time, and can have thousands of agents in numerous locations. Most large corporations generate voluminous internal communications, and communications with third parties, as part of their day to day activities. It would not be over the top to describe large corporations as information processing bureaucracies.

1.19 The consequences of a privilege claim by a corporation potentially have a greater impact on law enforcement investigations and court proceedings than a claim by individuals. The capacity for individuals to suppress evidence is limited principally because the privilege applies only to what is *communicated* between lawyer and client. The client's *knowledge* of the underlying facts remains compellable. The individual client can only communicate what she knows, and such knowledge can be compelled directly from the individual, and with minimal cost. By contrast, restricting the privilege to communications is much less effective in preventing corporations from suppressing evidence. In the case of corporations the line between *compellable knowledge* and *privileged communications* can be almost impossible to draw. Corporations can act only through their agents and typically acquire information in a purposeful manner. The company's 'knowledge' is principally found in the records obtained or generated by its agents: normally in the form of communications from third parties, or communications to other agents in the corporation. It is not difficult to see the temptation for corporate managers to have company records generated by lawyers, or routed through them, for the purpose of creating a privilege claim over sensitive information held by the company.

[12] M Galanter, '"News from Nowhere": the Debased Debate on Civil Justice' (1993) 71 Denv U L Rev 77, 88.

1.20 One way for investigators or opponents in litigation to get around this problem is to compel the information from the corporate employee who communicated it to the company lawyer. However this strategy has two notable limitations. First, law enforcement agencies and opponents face the practical difficulty of identifying the employees who might hold such information. In some cases the employee may no longer work for the entity, or may no longer be available. This is often the situation where the events under investigation or in dispute occurred years or decades earlier. Trying to ascertain which employee or former employee in a large corporation holds the relevant information can be like finding the proverbial needle in the haystack. Finding that needle also normally depends on the full cooperation of the corporation in identifying the likely current or former employees. Secondly, in some instances it is possible for companies to funnel information directly through their legal advisers so that the only corporate 'knowledge' on a particular subject is to be found in the contents of privileged communications. While it is impossible to know how common the practice of information funnelling is, there is evidence that some corporations and some advisers are prepared to engage in this behaviour.[13]

b. Research on the effects of corporate privilege

1.21 The one empirical study to date on the effects of privilege on corporations, conducted by Vincent Alexander in New York in the 1980s, provides support for a corporate privilege, but also confirms its costs and suggests that the role of the privilege in promoting candour may be overstated. The survey comprised 182 interviews with corporate executives, in-house counsel, external corporate attorneys, and judges in Manhattan. Some of the key findings were:[14]

(i) Three quarters of corporate executives believed that the privilege encouraged candour on the part of corporate executives.

(ii) Executives' interaction with counsel relied more heavily on their trust and experience with that counsel, rather than knowledge of privilege laws. If rapport were established executives would continue to consult these counsel even if the privilege were abolished or curtailed.

(iii) If the privilege were abolished executives would put fewer things in writing and be more circumspect in written communication. Most oral consultations would continue to be as candid as in the past.

(iv) A small minority of clients would be completely deterred from consulting a lawyer if the privilege were abolished, and a significant minority would be dissuaded from being completely candid during the consultation.

(v) Employees at lower levels of the corporate hierarchy generally know little about the corporate privilege.

(vi) In their discussions of the privilege with corporate representatives, most lawyers indicate that claims of privilege may not be upheld for one reason or another.

[13] C Wright and K Graham (eds), *Federal Practice and Procedure* (vol 24, 2nd edn, West Publishing, St Paul, MN 1986) S 5476; V Alexander, 'The Corporate Attorney–Client Privilege: A Study of the Participants' (1989) 63 St John's L Rev 191; A Higgins, 'Corporate Abuse of Legal Professional Privilege' (2008) 27 CJQ 377.

[14] Alexander, 'The Corporate Attorney–Client Privilege' 202, 225, 246, 248, 261, 263, 264, 269–70, 273, 370–1, 374 (n 13).

(vii) Lawyers were virtually omnipresent at the larger corporations surveyed.
(viii) Privilege claims often lack merit.

4. The benefits and costs of privilege for public bodies

1.22 Although the focus of this book is the law of privilege as it applies to public and private corporations, much of the arguments about the scope of corporate privilege apply equally or with greater force to the State, public bodies, and officials. The value of legal advice to public bodies, in helping ensure they act lawfully, fairly, and in the public interest, is obvious. However the costs of governmental privilege are also equally obvious. Not only is there the loss of evidence to the law enforcement process, privilege claims reduce the levels of transparency in government. This in turn can reduce levels of accountability, and standards in public office, for it is a cornerstone of political science that the closer public officials are watched the better they behave (a truism that arguably applies to state, corporation, and individual alike). Of course some secrecy over government decision making is necessary and conducive to good government, and arguably decision-making processes relating to legal matters is one area that requires a degree of secrecy. However, where the case for governmental privilege is presented in this fashion, it is indistinguishable from other governmental privileges and immunities over confidential information (for example, rules on cabinet secrecy and national security). Commentators have noted that the traditional justification for the privilege—that it encourages people to obtain advice about the law, their rights, and obligations—seems ill suited or even archaic when applied to public officials discharging public duties.[15]

1.23 This concern may also have been at the back of the English Court of Appeal's mind in the *Three Rivers* litigation when it rejected the Bank of England's claim to privilege over 'raw material' relating to the Bingham Inquiry into the collapse of the Bank of Credit and Commerce International ('BCCI'). It is apparent from the court's judgment that it believed that a national institution like the Bank of England had a public duty to put all relevant information before an inquiry established by the Government into the collapse of an important financial institution.[16]

1.24 On the other hand there have been strong judicial pronouncements in favour of governmental privilege as a means of encouraging governments to act lawfully. For example, in the Australian High Court case of *Waterford v The Commonwealth* Justices Mason and Wilson observed that:

> The growing complexity of the legal framework within which government must be carried on renders the rationale of the privilege, as expressed in Grant v Downs, increasingly compelling when applied to decision-makers in the public sector. The wisdom of the centuries is that the

[15] Wright and Graham, *Federal Practice and Procedure* 126 (n 13); M Leslie, 'Government Officials as Attorneys and Clients: Why Privilege the Privileged?' (2002) 77 Ind LJ 469; In *Re Grand Jury Subpoena Duces Tecum* CA 8th (1977) 112 F3d, 910, 921 the Eight circuit stated: 'We believe that the strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognitions of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials'; C Tapper, 'Privilege, Policy and Principle' (2005) 121 LQR 181, 184; L Brown 'The Justification of Legal Professional Privilege when the Client is the State' (2010) 84 ALJ 624 (suggesting protection of legal advice should be dealt with on a case by case basis).

[16] *Three Rivers District Council v Governor and Company of the Bank of England (Disclosure) (No 5)* [2003] EWCA Civ 474, [2003] QB 1556 [35].

existence of the privilege encourages resort to those skilled in the law and that this makes for a better legal system.[17]

5. Legal professional privilege as a balancing exercise

1.25 Lawmakers and courts face a daunting challenge in setting the boundaries of the privilege given the competing interests at stake. On the one hand clients need a private and secure sphere in which they can obtain sound legal advice and adequately prepare for litigation, whilst on the other hand there is a need to ensure that information which is relevant to legal investigations and proceedings is not lost unnecessarily to an overly broad privilege. The law of privilege reflects the balance struck between these two objectives and the juristic pendulum has been ceaselessly swinging between them.[18] This is why privilege claims are so often contested and 'legal professional privilege has long been the subject of controversy'.[19]

B. Common Systems, Common Problems: The Four Jurisdictions Covered

1.26 All major common law systems have grappled with the same or related problems in working out the boundaries of corporate privilege. Whether it be legal involvement in internal investigations, dealings with regulators regarding legal compliance, legal advice on complex corporate restructures, leaks by disgruntled employees or disputes between corporations and their shareholders or former directors, corporations in all major common law jurisdictions face similar challenges in determining whether a communication is privileged or not, by whom and against whom privilege can be asserted, and when the privilege has been waived or otherwise lost.

1.27 At the judicial level, because there is often a dearth of domestic authority on questions of corporate privilege, courts regularly consider relevant case law from other common law countries for guidance as to how these issues have been dealt with in similar jurisdictions. It would be unwise for practitioners to ignore this inter-jurisdictional dialogue.

1.28 The jurisdictions which are covered in this book are England, Australia, Canada, and the United States. These jurisdictions have been chosen for several reasons. First, each of them has made a major contribution to common law jurisprudence generally; secondly, the decisions of their courts regularly feature in the inter-jurisdictional dialogue between judges on the scope of privilege, and because each jurisdiction has developed distinctive approaches to aspects of corporate privilege which highlight the competing interests in play and the different policy choices that might be taken in balancing the interests; of the company, its agents and members, third parties, and law enforcement agencies.

1. England

1.29 English law is the primary focus of this book, principally because much of the relevant English case law on privilege was influential in the development of the law in the other jurisdictions covered in this book, and in some cases it remains good law in those jurisdictions.

[17] *Waterford v The Commonwealth* (1987) 163 CLR 54, 64.
[18] R Desitanik, *Legal Professional Privilege in Australia* (2nd edn, Lexis 2005) 227.
[19] *Esso Australia Resources Ltd v Dawson* (1999) 87 FCR 588 [26] (Federal Court of Australia—Full Court).

While there are statutes codifying the law of privilege in England in some contexts,[20] case law provides the primary source of law on privilege. The following is a brief overview of the fundamental principles of legal professional privilege in English law.

Preconditions to a claim of privilege In English law legal professional privilege is considered a single integral privilege which consists of two limbs: legal advice privilege and litigation privilege.[21] Legal advice privilege protects communications between a lawyer and a client made for the purpose of obtaining legal advice and certain preparatory documents thereto. Litigation privilege protects any communication or document made for the dominant purpose of litigation.[22] Litigation privilege is broader than legal advice privilege in that it also covers third party communications. **1.30**

Legal advice privilege To qualify for legal advice privilege a communication must either be made for the dominant purpose of obtaining legal advice, or be part of the necessary exchange of information for the giving of legal advice.[23] Legal advice is not limited to telling the client the law and extends to advice on what should be prudently and sensibly done in a relevant legal context.[24] Documentary material need not be communicated to attract legal advice privilege but a client probably must intend to communicate the document or the information contained in it. [25] Only communications *between a lawyer and client* or material *produced by the lawyer or client* for the purposes of giving or obtaining legal advice are protected. Privilege will not attach to material generated by third parties—whether at the request of the lawyer or the client—to enable the lawyer to give better advice. However a principal is entitled to communicate with lawyers through agents provided the agent is acting strictly as an intermediary.[26] **1.31**

The legal adviser The person providing the legal advice must be a practising lawyer, or failing that, the client must have a genuine belief that the lawyer is qualified to practice.[27] While English law protects advice from 'in-house counsel',[28] under European law the lawyer must be formally independent from the client.[29] Communications with other professional advisers will not qualify for protection even if they are giving legal advice.[30] **1.32**

Litigation privilege For a document or communication to qualify for litigation privilege the proceedings must be adversarial in nature,[31] and have the power to determine the legal rights, obligations, or culpability of the parties before it (which means arbitrations probably qualify[32] but inquiries do not[33]). The proceedings must be pending or reasonably anticipated **1.33**

[20] See eg Police and Criminal Evidence Act 1984 s 10.
[21] *Three Rivers No 6* [105] (n 3).
[22] *Waugh v British Railways Board* [1980] AC 521 (HL).
[23] *Balabel v Air India* [1988] Ch 317 (CA).
[24] *Three Rivers No 6* (n 3).
[25] *Three Rivers No 5* (n 16).
[26] *Wheeler v Le Marchant* (1881) 17 Ch D 675.
[27] *Dadourian Group International Inc v Simms* [2008] EWHC 1784 (Ch).
[28] *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1972] 2 QB 102 (CA).
[29] Case T-125/03 *Akzo Nobel v Commission of the European Communities* [2010] 5 CMLR 1143.
[30] *R (on the application of Prudential plc) v Special Commissioner of Income Tax & Anor* [2013] UKSC 1, [2013] 2 WLR 325.
[31] *Re L (a minor) (Police Investigation: Privilege)* [1997] AC 16 (HL).
[32] *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1974] AC 405 (HL).
[33] *Three Rivers No 6* [10] (n 3).

at the time a document or communication is brought into existence.[34] Litigation privilege almost certainly applies to litigants in person.[35] Because third-party communications are directed towards the collection and presentation of evidence, and not the obtaining and giving of legal advice, a number of judges have criticized its rationale[36] and the protection for communications with experts has been significantly restricted. This includes procedural rules clarifying that experts must disclose all material instructions in their reports, and the use of case management powers to require litigants to waive privilege in expert reports as the price of using multiple experts in the same field in order to avoid the appearance of expert shopping.[37]

1.34 Privilege does not protect matters known by the lawyer which are not referable to the process of giving or receiving legal advice. Just as a client's knowledge of the underlying facts remains compellable, so too are facts known by the lawyer that are not learnt through lawyer–client communications for the purpose of giving advice. The precise boundaries of this exception are unclear and are based on a number of nineteenth-century (and earlier) cases which seek to draw a distinction between information known by a lawyer in his capacity as such, and information known to the lawyer as a witness.[38] This is sometimes referred to 'as the facts patent to the senses' exception.[39] There is no authoritative modern case which reviews the extent to which privilege can be claimed over matters learnt by lawyers in the course of acting for the client but which does not derive from the contents of lawyer–client communications.[40] However, in *United States of America v Philip Morris* the Court of Appeal held that a lawyer could not refuse to answer questions merely because he had learnt the relevant information in the course of acting for a client.[41]

1.35 **Copies and selections** Transmission of non-privileged documents to a lawyer will not make them privileged, but copies of non-privileged documents made for the purpose of litigation will qualify, and in rare cases non-privileged documents selected by a lawyer if their disclosure would betray the trend of legal advice given. These rules are technical and have been described as 'ripe for review'.[42]

1.36 **Iniquity exception** The privilege protects only legitimate communications. The privilege cloak cannot be used to further crimes, frauds, or conduct that is sufficiently iniquitous that public policy requires disclosure.[43]

[34] *USA v Philip Morris Inc* [2004] EWCA Civ 330, [2004] 1 CLC 811.

[35] Although no case has directly decided the issue, there are strong dicta to this effect. See *Ventouris v Mountain (The Italia Express)* [1991] 1 WLR 607 (CA) 611 (Bingham LJ), *Kelly v Warley Magistrates Court* [2007] EWHC 1836 (Admin), [2008] 1 WLR 2001 [18] (Laws LJ).

[36] *Three Rivers No 6* [29] (Lord Scott) (n 3).

[37] See para 7.106.

[38] See eg *Dwyer v Collins* (1852) 7 Ex 639, 648 where the court said: 'the privilege does not extend to matters of fact which the attorney knows by any other means than confidential communication with his client . . .'. One of the earliest cases is *Kelway v Kelway* (1579) Cary 89, 21 ER 48 in which the court ordered that the plaintiff's solicitor be examined but not on matters 'which he knoweth as solicitor only'.

[39] Based on dicta from the Court of Appeal in *Lyell v Kennedy* (1883) 23 Ch 387 at 401–2 per Baggallay LJ and at 404, 407 per Cotton LJ. The House of Lords upheld the Court of Appeal's decision but it is not possible to discern any clear support for the facts patent to the senses exception in the judgments of Lords Blackburn, Watson, and Bramwell: (1883) 9 App Cas 81.

[40] H Malek (ed), *Phipson on Evidence* (17th edn, Sweet & Maxwell, London 2009) 23–60. For a helpful list of the information, communications, and documents relating to the lawyer–client retainer, and facts discovered in the course of the lawyer–client relationship, that have been held not to be privileged see JD Heydon, *Cross on Evidence* (9th Australian edn, Lexis 2013) [25225] and [25295] respectively.

[41] *USA v Philip Morris Inc* (n 34).

[42] *Ventouris v Mountain (The Italia Express)* (n 35).

[43] *Eustice v Barclays Bank* [1995] 1 WLR 1238 (CA), [1995] 2 BCLC 630, 644–5.

Corporate privilege English law generally offers broad protection for a company's confidential legal material, with the notable and still controversial exception of the definition of the 'corporate client'. In *Three Rivers No 5* the Court of Appeal held that not all employees of a company (or public body) will necessarily be a member of the corporate client for the purpose of the privilege, but it did not lay down any guidelines for determining when communications of employees will be eligible for protection as privileged communications of the company. In the case of intra-corporate disputes English law does not permit a company to assert privilege against its members in relation to legal advice regarding the company's affairs, except where the advice relates to hostile litigation between them.[44] A director or employee may be able to assert joint privilege over a company's legal material, and thus prevent the company waiving the privilege without their consent, provided all parties concerned—the entity, the company lawyer, and the director—knew, or ought to have known, that the lawyer was advising the company and the individual agent jointly.[45] **1.37**

Extent and nature of the protection provided by privilege If the preconditions for a privilege claim are met, the protection offered by privilege is substantial. Privilege has been described as a fundamental substantive right,[46] which, in the context of litigation, is supported by the right to fair trial under Article 6 of the European Convention on Human Rights.[47] The confidentiality of lawyer–client communications is also protected by the right to privacy under Article 8 of the European Convention on Human Rights, although that right is expressly qualified. Legal professional privilege, where it applies, is absolute and cannot be subject to a balancing exercise in individual cases.[48] Nor can any adverse inference be drawn from a privilege claim.[49] **1.38**

The privilege belongs to the client, not the adviser.[50] The client's heirs and successors in title can also assert the privilege.[51] **1.39**

Abrogation of privilege The privilege can be abrogated by statute using clear words or by necessary implication,[52] and must not breach the rights to confidentiality of lawyer–client communications guaranteed under the ECHR.[53] The ECtHR has recognized that in appropriate circumstances, legislation that pursues a legitimate objective and is reasonably proportionate to that objective, may restrict LPP without infringing the ECHR.[54] Nonetheless, litigation privilege is a generally acknowledged principle in the Contracting States, and thus powerful reasons would be needed to restrict the privilege in connection with litigation as in principle it would amount to an interference with the right of access to court protected by Article 6(1).[55] **1.40**

Control and waiver of privilege There is significant overlap between the relevant concepts of *control, waiver and loss of privilege*. While all persons are entitled to a private and secure **1.41**

[44] *Arrow Trading Investments v Edwardian Group* [2005] 1 BCLC 696.
[45] *R (Stewart Ford) v The Financial Services Authority* [2011] EWHC 2583 (Admin), [2012] 1 All ER 1238.
[46] *R v Derby Magistrates' Court, ex p B* [1996] AC 487 (HL); *Morgan Grenfell & Co Ltd v Special Commissioner of Income Tax* (n 2).
[47] *Campbell and Fell v UK* (App No 7819/77; 7878/77) (1983) 5 EHRR 207 [158].
[48] *R v Derby Magistrates' Court, ex p B* (n 46).
[49] *Wentworth v Lloyd* (1864) 10 HLC 589.
[50] *Ventouris v Mountain (The Italia Express)* 611 (n 35).
[51] *Re Konigsberg* [1989] 1 WLR 1257 (Ch).
[52] *Morgan Grenfell & Co Ltd v Special Commissioner of Income Tax* (n 2).
[53] *McE, Re* [2009] 1 AC 908; *Morgan Grenfell & Co Ltd v Special Commissioner of Income Tax* (n 2); *Campbell and Fell v UK* (n 47).
[54] *Foxley v UK* (2001) 35 EHRR 637 at [44].
[55] *Campbell and Fell v UK* [158] (n 47).

sphere in which to obtain advice and prepare for litigation, a privilege holder cannot automatically exclude everyone else from that private and secure sphere: joint clients are joint privilege holders and have an equal entitlement to access the same confidential legal material, while a privilege holder cannot assert privilege against persons with whom they share a joint interest if the communication was made in furtherance of that interest. Examples include a company and its members,[56] a trust and its beneficiaries,[57] or partners.[58] In such a case, disclosure to these other parties does not constitute a waiver.[59]

1.42 It is an oft repeated mantra that only documents and communications that are confidential will qualify for legal professional privilege[60] but this concept is treated loosely in English law and equates to a requirement to take steps to avoid the material entering the public domain.[61] A person is free to waive privilege. This can be express or implied by conduct, based on an objective analysis of what a person has done with the privileged material.[62]

1.43 There is a growing body of cases suggesting that a privilege holder can limit their waiver to certain persons only and specify the purposes for which the material can be used.[63] Where a waiver occurs in litigation however—by deploying the material in the court—the extent of the waiver, including whether it extends to any related material, is determined by the court based on considerations of fairness.[64]

1.44 In proceedings between client and lawyer, a client will be deemed to have waived privilege over the contents of the communications with their lawyer, but English law has expressly rejected an 'imputed' or 'material fact' waiver where a client asserts claims in legal proceedings that puts the contents of his privileged material in issue.[65]

1.45 **Remedies available in the event of inadvertent disclosure** While strictly speaking legal professional privilege only confers a right to resist compulsory disclosure,[66] the courts recognize that a privilege holder's rights over their legal material do not cease merely because they no longer have custody or control of the material.[67] Historically the remedy available to the privilege holder took the form of an equitable injunction, based on action for breach of confidence, to prevent third parties from using or disseminating their legal material. There is still lingering debate as to whether the entitlement to relief is governed by the rules of confidence or privilege. Relief will ordinarily be granted to the privilege holder unless the material has

[56] *Arrow Trading Investments v Edwardian Group* [24] (n 44).
[57] *Talbot v Marshfield* (1865) 2 Dr & Sm 549; *Re Londonderry's Settlement* [1965] Ch 918 (CA), 938.
[58] *Pearse v Pearse* (1846) 1 De G & Sm 12; *Re Pickering* (1884) 25 Ch D 247; *BBGP Managing General Partner Limited & Ors v Babcock & Brown Global Partners* [2010] EWHC 2176 (Ch), [2011] 2 WLR 496.
[59] *Woodhouse & Co Ltd v Woodhouse* (1914) 30 TLR 559; *BBGP Managing General Partner Limited & Ors v Babcock & Brown Global Partners* (n 58).
[60] C Hollander, *Documentary Evidence* (11th edn, Sweet & Maxwell, London 2012); B Thanki (ed), *The Law of Privilege* (2nd edn, Oxford University Press, Oxford 2011).
[61] *Gotha City v Sotheby's* [1998] 1 WLR 114 (CA).
[62] *Digicel (St Lucia) Ltd v Cable & Wireless Plc* [2009] EWHC 1437 (Ch).
[63] *Berezovsky v Hine* [2011] EWCA Civ 1089. Failing this, the privilege holder may be able to limit the waiver to the third party where they shared a common interest at the time the material was disclosed: *Buttes Gas and Oil Co v Hammer (No 3)* [1981] QB 223 (CA); *Leif Hoegh & Co A/S v Petrolsea Inc (The World Era) (No 2)* [1993] 1 Lloyd's Rep 363.
[64] *Dunlop Slazenger International Ltd v Joe Bloggs Sports Ltd* [2003] EWCA Civ 901.
[65] *Paragon Finance Plc v Freshfields (a Firm)* [1999] 1 WLR 1183 (CA).
[66] *Calcraft v Guest* [1898] 1 QB 759 (CA).
[67] *Goddard v National Building Society* [1987] QB 640 (CA).

already been adduced in evidence, or a well-established equitable defence can be made out, such as delay.[68] There may also be some residual discretion to refuse relief where it would not be in the public interest to do so, such as where the material discloses an iniquity.[69] Privileged material that has been disclosed inadvertently during litigation cannot be used by an opponent without the court's permission. In exercising its discretion the court will be guided by the equitable principles laid down in earlier cases in which injunctions were typically limited to disclosures obtained by fraud or were an obvious mistake.[70]

Procedure The burden of establishing the right to privilege rests on the party asserting it.[71] Whether a communication was made for the requisite legal purpose is a question of fact that must be determined objectively.[72] However, the procedures for claiming privilege are loosely applied in practice (some would say with common sense),[73] and courts will only look beyond an assertion of privilege in an affidavit or list of document in limited circumstances, in camera inspection of allegedly privileged material is a last resort, and cross-examination of a deponent claiming privilege is reserved for extreme cases.[74] **1.46**

2. Australia

Common law and statutory codification Legal professional privilege in Australia is governed by both common law and statute. The privilege has largely, though not entirely been codified under Commonwealth and State Evidence Acts (also known as the 'uniform evidence legislation').[75] These acts generally term the privilege 'client legal privilege', in recognition that the privilege belongs to the client, and override the common law to the extent of any inconsistency. While the operation of the privilege under the common law and the uniform evidence law is substantially the same, there are some notable differences. The uniform evidence legislation originally only applied to the adducing of evidence, which meant the adducing of evidence at trial or interlocutory proceedings. The legislation has been amended to cover some pre-trial disclosures although the extent to which they do so varies between jurisdictions.[76] In relation to any other compulsory disclosure requirements, including those outside the legal process, the rules on privilege are governed by the common law. The uniform evidence legislation is directed to protecting confidential communications, and thus do not extend to communications with fact witnesses for the purposes of legal proceedings. This aspect of litigation privilege is therefore governed by the common law.[77] **1.47**

[68] *Goddard v National Building Society* (n 67).
[69] *Istil Group Inc v Zahoor* [2003] EWHC 165, [2003] All ER 252 (Ch).
[70] *Al-Fayed v Commissioner of Police of the Metropolis (No 1)* [2002] EWCA Civ 780.
[71] *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [435]–[436] (n 28) quoting Lord Strathclyde in *Whitehill v Glasgow Corporation* 1915 SC 1015.
[72] *West London Pipeline and Storage Ltd v Total Uk Ltd* [2008] EWHC 1729 (Comm), [2008] All ER (D) 294 (Jul).
[73] Malek, *Phipson on Evidence* [23.65] (n 40).
[74] *West London Pipeline and Storage Ltd v Total Uk Ltd* (n 72).
[75] Evidence Act 1995 (Cth) ss 118, 119; Evidence Act 1995 (NSW) ss 118, 119; Evidence Act 2008 (VIC), ss 118, 119. Both Tasmania, Evidence Act 2001 (Tas), and Norfolk Island Evidence Act 2004 (NI), have adopted the uniform evidence law but Queensland, South Australia, and Western Australia have not.
[76] J Gans and A Palmer, *Uniform Evidence* (Oxford University Press, Melbourne 2010) 14.1.4. In summary Victoria and New South Wales have extended the protection of client legal privilege to pre-trial disclosure requirements, including a subpoena to produce documents, whereas under the Commonwealth Evidence Act only journalists' privilege has been extended to pre-trial disclosures: see Evidence Act 1995 (Cth) s 131A; Evidence Act 1995 (NSW) s 131A; Evidence Act 2008 (Vic) s 131A.
[77] *Australian Securities and Investments Commission v Australian Lending Centre Pty Ltd (No 2)* [2011] FCA 1057.

1.48 In common with other Commonwealth countries, legal professional privilege is considered to be a fundamental human right available to all legal persons,[78] and can only be overridden by statute using clear words or by necessary implication.[79] Given that many statutes which confer a power on a regulator to compel information do not expressly address the question of whether and, if so, when a person can withhold information on grounds of privilege, much of the courts' focus is on whether privilege is abrogated by necessary implication. If privilege would make the legislation inoperative or would largely frustrate its objectives the legislation can be interpreted to override the privilege by necessary implication, but the mere fact that the legislation may be more effective and efficient in the absence of privilege is not sufficient to found a 'necessary implication'.[80]

1.49 **Expansion of legal advice privilege to third-party communications and documents** The most exceptional aspect of the law of privilege in Australia is the relatively recent extension of legal advice privilege to communications with third parties for the purpose of obtaining legal advice in *Pratt Holdings v Commissioner of Taxation*.[81] This was based on the rationale, squarely rejected in England over a century ago,[82] that the purpose of the privilege is to enable a person to get the best possible legal advice, and to that end clients should be entitled to communicate in confidence with third parties for the purpose of obtaining facts and opinions even if the information is not confidential to the client. The effect of the Federal Court's decision was to substantially reduce the gap between legal advice privilege and litigation privilege.[83] Legal advice privilege under the uniform evidence legislation was subsequently expanded to cover confidential documents prepared for third parties, but not confidential communications with third parties.[84] Legal advice is defined broadly, consistently with the decision of the House of Lords in *Three Rivers*.[85]

1.50 **The relationship between purpose and communication** Both at common law and under the uniform evidence legislation privilege will attach to confidential documents whether or not they were communicated to a lawyer, provided they were made for the dominant purpose of obtaining legal advice or preparing for litigation.[86] Conversely, even where a document was not prepared for a legal purpose, sending a copy of it to a lawyer will attract privilege if it was communicated to the lawyer for the purpose of obtaining advice.[87]

1.51 **Reliance on dominant purpose test** Given the expansive, and expanding, scope of the type of documents and communications that can qualify for privilege, it is clear that Australia places considerable reliance on the dominant purpose test as the means of ensuring that evidence that should be available in legal proceedings is not lost to the privilege. Until 1999

[78] *Daniels Corporation v Australian Competition and Consumer Commission* (n 2).
[79] *Corporate Affairs Commn (NSW) v Yuill* (1991) 172 CLR 319.
[80] *Daniels Corporation v Australian Competition and Consumer Commission* (n 2).
[81] *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357 (Federal Court of Australia—Full Court) [40].
[82] *Wheeler v Le Marchant* (n 26).
[83] Australian Law Reform Commission, 'Privilege In Perspective Client Legal Privilege in Federal Investigation' (Report 107, 2007), [2.23].
[84] Evidence Act 1995 (Cth) s 118(c); Evidence Act 1995 (NSW) s 118(c); Evidence Act 2008 (Vic) s 118(c).
[85] *AWB Ltd v Honourable Terence Rhoderic Hudson Cole (No 5)* [2006] FCA 571, (2006) 155 FCR 30 (Federal Court of Australia); *Betfair Pty Limited v Racing New South Wales* [2009] FCA 1140.
[86] Evidence Act 1995 (Cth) s 118(c), s 119(c); Evidence Act 1995 (NSW) s 118(c), s 119(c); Evidence Act 2008 (Vic) s 118(c), s 119(c); *Kennedy v Wallace* (2004) 213 ALR 108 (Federal Court of Australia).
[87] *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 (HCA).

Australia had relied on a sole purpose test for legal professional privilege but this test was abandoned in favour of the dominant purpose test by the High Court partly due to the adoption of the dominant purpose test under the uniform evidence legislation, and partly due to concerns that the sole purpose test was too narrow and unduly favoured the disclosure of evidence over the protection of confidential lawyer–client communications.[88]

Meaning of legal adviser The right to resist compulsory disclosure at common law is limited to lawyers admitted to practice.[89] 'Legal adviser' includes independent lawyers and in-house counsel provided they are providing independent advice.[90] The test for communications with in-house counsel is therefore a functional one. Privilege for non-lawyers providing legal advice has been left to the legislature. The Australian Government has been conducting a consultation on whether to create a statutory privilege for tax advice including advice given by accountants.[91] **1.52**

Crime-fraud exception In Australia, at common law, the crime-fraud exception extends to a broad range of legal wrongs that have deception, deliberate abuse or misuse of legal powers, or deliberate breach of legal duty at their heart.[92] The courts have made it clear that public policy considerations underpin both the rationale and scope for the rule such that the rule will apply whenever shielding the contents of a lawyer–client communication would be contrary to the public interest.[93] Under the uniform evidence legislation the exception applies in furtherance of the commission of a fraud, an offence, a deliberate abuse of statutory power, or the commission of an act that renders a person liable to a civil penalty.[94] **1.53**

Corporate privilege The rules on privilege provide broad protection for corporate communications in disputes with outsiders, and that protection is designed in part to afford the same degree of protection in practice for small as well as large and publicly listed companies.[95] As for the allocation of the benefits and burdens of the privilege in intra-corporate disputes, Australian case law is relatively limited and mixed. Whether shareholders can access the company's privileged material has not been decided at common law, although there are conflicting dicta both for and against the proposition.[96] Under the Corporations Act the court has a discretionary power to allow shareholders to inspect the company's books, although one case has suggested it will not exercise that power if the application is an attempt to circumvent a claim to legal professional privilege by the company.[97] Australian courts are willing to find that individual executives and the company were joint clients, thus preventing the company waiving privilege without the individual's consent.[98] **1.54**

[88] *Esso v Federal Commissioner of Taxation* (1999) 201 CLR 49 (HCA) [73].

[89] Evidence Act 1995 (Cth) s 117; Evidence Act 1995 (NSW) s 117; Evidence Act 2008 (Vic) s 117; *Commonwealth v Vance* [2005] ACTCA 35 [21].

[90] *Telstra Corporation Limited v Minister for Communications, Information Technology and the Arts (No 2)* [2007] FCA 1445; *Rich v Harrington* [2007] FCA 1987.

[91] Following the recommendation of the ALRC. ALRC *Privilege in Perspective Clients Legal Privilege in Federal Investigations,* Report 107 (2007), Recommendation 6-6.

[92] *Southern Equities Corporation Ltd (in liq) v Arthur Andersen & Co* (1997) 70 SASR 166, 174 (Doyle CJ).

[93] *AWB v Cole (No 5)* 706 (Young J) (n 85).

[94] Evidence Act 1995 (Cth) s 125(1); Evidence Act 1995 (NSW) s 125(1); Evidence Act 2008 (Vic) s 125(1).

[95] *Pratt Holdings Pty Ltd v Commissioner of Taxation* [40], [43] Finn J (n 81).

[96] *State of South Australia & Anor v Barrett & Ors* (1995) 64 SASR 73 (Full Court of the Supreme Court of South Australia) [78]; cf *The Shed People Ltd v Turner & Ors* (2000) 34 ACSR 609, 612–13.

[97] Corporations Act 2001 (Cth) s 247A(1); *Czerwinski v Syrena Royal Pty Ltd (No 1)* (2000) 34 ACSR 245 (Supreme Court of Victoria).

[98] See eg *Farrow Mortgage Services Pty Ltd (in Liquidation) v Webb & Ors* [1996] 39 NSWLR 601 (Court of Appeal for the Supreme Court of New South Wales).

On the other hand, companies have been allowed to assert privilege against former directors in disputes between them.[99]

1.55 **Waiver of privilege** The test as to what constitutes a waiver of privilege is the same whether the waiver occurs in the course of litigation or outside of litigation, and for determining the extent of any waiver. The test laid down by the High Court in *Mann v Carnell*[100] is whether there has been conduct inconsistent with the maintenance of the confidentiality which the privilege is intended to protect, bearing in mind considerations of fairness. This test may allow a privilege holder to disclose legal material on a limited basis, but the scope of the waiver remains in the court's control. The uniform evidence legislation largely codifies the rule in *Mann v Carnell* but its application can still produce different outcomes from the common law.[101] Applying the same inconsistency test, a court may hold that privilege has been waived if a litigant puts the contents of their privileged material in issue, and denying access to the material would cause unfairness to the other party.[101a]

1.56 Australian courts' approach to the waiver of privilege over expert communications lies somewhere between the English position of requiring disclosure of material instructions in the report and the US approach of requiring disclosure of all information and assumptions provided to the expert. Ordinarily, disclosing an expert report for the purpose of relying on it in litigation waives privilege over all instructions and information provided to the expert, at least if it influenced the content of the report.[102] Some jurisdictions have gone further and abrogated privilege for communications with experts altogether for certain types of proceedings,[103] or for experts who may be called to testify at trial.[104]

1.57 Despite having a clear test as to what constitutes waiver, historically the law on unintentional disclosure has been just as unsatisfactory as English law. However, a 2013 decision of the High Court in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited*[105] considerably simplifies and improves the law on inadvertent disclosure in litigation. The court held that unintentional disclosure of privileged material does not constitute a waiver of privilege, and where privileged material is disclosed by mistake during the discovery process, a court should use its case management powers to rectify the mistake; it is not necessary to resort to its equitable jurisdiction. Whether the High Court's decision will also influence the approach of lower courts to unintentional disclosure outside of litigation remains to be seen.

1.58 **Procedure** In its 2007 report on client legal privilege the Australian Law Reform Commission proposed a number of changes to the procedures for claiming privilege, to provide for greater transparency and confidence that the privilege is not being abused.[106]

---

[99] *State of South Australia v Barrett* (n 96).

[100] *Mann v Carnell* (1999) 201 CLR 1.

[101] *Osland v Secretary to the Department of Justice* [2008] HCA 37, (2008) 234 CLR 275, cf Evidence Act 1995 (Cth) s 122; Evidence Act 1995 (NSW) s 122; Evidence Act 2008 (Vic) s 122.

[101a] *Commissioner of Taxation v Rio Tinto Ltd* [2006] FCAFC 86, (2006) 151 FCR 341.

[102] *ASIC v Southcorp* (2003) 46 ACSR 438 (Federal Court of Australia) [21].

[103] Queensland in relation to personal injury claims: Rule 212(2) of the Uniform Civil Procedure Rules 1999 (Qld).

[104] South Australia: Rule 160 of the Supreme Court Civil Rules 2006 (SA).

[105] *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013] HCA 46.

[106] ALRC, *Privilege in Perspective Client Legal Privilege in Federal Investigations,* ch 8 Recommendations 8-1 to 8-22.

The Government has not adopted these recommendations to date. The current procedures for asserting a privilege claim are very similar to the rules in England, but unlike English courts, Australian courts are more willing to inspect allegedly privileged material to determine whether the claim is properly made.[107]

3. Canada

Distinction between 'solicitor/client' and 'litigation privilege' In contrast to English law, the Canadian courts define litigation privilege as covering all qualifying materials prepared for litigation which are not communications between lawyer and client. Communications between lawyer and client are covered by solicitor/client privilege. In *Blank v Canada* Fish J stated that the privileges were 'distinct conceptual animals' and not two branches of the same tree bearing in mind 'their different scope, purpose, and rationale'.[108] 1.59

Privilege is a fundamental right, but it does not always trump other fundamental rights Like other Commonwealth countries Canada has elevated the privilege to the status of a fundamental human right in recent decades.[109] What sets Canada apart however, is the Supreme Court's willingness to balance the right to privilege against other fundamental rights when they come into conflict. Qualifying the privilege is rare and is only justified where there is a compelling interest in favour of disclosure such as protecting the safety of others, to ensure persons who are accused of a serious criminal offence receive a fair trial, or to protect national security.[110] 1.60

The status of privilege as a fundamental right also provides limits as to when and the extent to which it can be restricted. In *Descoteaux v Mierzwinski*, the Supreme Court laid down rules regarding attempts to interfere with the privilege: 1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent. 2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality. 3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the means of exercising that authority should be made with a view to limiting the intrusion on confidentiality only to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.[111] 1.61

Privilege protects communications with external and in-house counsel[112] and may be extended to other relationships on a case by case basis Another notable and exceptional aspect of Canadian privilege law is the courts' willingness to extend privilege to other relationships on a case by case basis, or document by document basis, where the harm to the relationship by the disclosure of the communication would outweigh the harm to the administration of justice if the evidence were unavailable.[113] To date, attempts 1.62

[107] *Grant v Downs* (1976) 135 CLR 674 (HCA) 689.
[108] *Blank v Canada* [2006] 2 SCR 319, 2006 SCC 39 [7].
[109] *Descoteaux v Mierzwinski* [1982] 1 SCR 860.
[110] *Smith v Jones* [1999]1 SCR 455; *R v McClure* [2001] 1 SCR 445.
[111] *Descoteaux v Mierzwinski* (n 109).
[112] *R v Campbell* [1999] 1 SCR 565.
[113] *R v Gruenke* [1991] 3 SCR 263.

by clients of accountants and patent agents to assert a privilege have been rejected as unwarranted.[114]

1.63 **Litigation privilege** The Canadian Supreme Court has also moved to restrict the scope of litigation by limiting its lifespan. In the case of *Blank v Canada* the court held that as an aid to adversarial litigation, litigation privilege over third-party communications comes to an end at the conclusion of the litigation for which the communications were created.[115]

1.64 **The purpose test** The Canadian courts do not use the language of dominant purpose when assessing whether a communication between lawyer and client was made for the requisite legal purpose, instead focusing 'on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered'.[116] The dominant purpose test is applied to litigation privilege and while the application will always turn on the facts of each case, generally Canadian courts have been slow to grant protection for documents that were essentially factual investigations even if the results of the investigations were intended for use in possible litigation.[117]

1.65 **Iniquity exception** The crime-fraud or iniquity exception under Canadian law is broadly similar to that in England—it extends to communications in furtherance of a crime or fraud and at least one case has extended it to torts where the holder engages in conduct where they knew or ought to have known that it was unlawful.[118] There must be a causal connection between the wrongful conduct and the consultation with the lawyer in the sense that the consultation needs to be in furtherance of, or part of, the wrong.[119]

1.66 **Corporate privilege** So far as control of the corporate privilege is concerned, Canadian courts generally favour the interests of the entity over its officers and members. Shareholders have no rights of access to the company's privileged material,[120] no director has successfully argued they were a joint client with the company, and former directors do not have the power to waive the company's privilege.[121] One crucial exception to this entity-first approach is that a trustee in bankruptcy cannot waive the company's privilege, even if the company no longer has any officers.[122]

1.67 Canada offers broad protection to corporate communications as against outsiders, by adopting an agency theory of the corporate client which holds that any employee can represent the company.[123] However, privilege will not automatically attach to any legal communications

[114] *Tower v Minister of National Revenue*, 2003 FCA 307, [2004] 1 FCR 183 (accountants); *Lilly Icos LLC v Pfizer Ireland Pharmaceuticals* (2006) FC 1465, [2006] FCJ No 1853 (patent agents).

[115] *Blank v Canada* [2006] 2 SCR 319 (n 108).

[116] *R v Campbell* [50] (n 112). See also *Pritchard v Ontario (Human Rights Commission)*, [2004] 1 SCR 809 [20].

[117] *Discovery Enterprises Inc v Ebco Industries Ltd* [1999] 4 WWR 561, 114 BCAC 235, [1998] BCJ No 2674.

[118] *Dublin v Montessori Jewish Day School of Toronto* (2007), 85 OR (3d) 511, 281 DLR (4th) 366 (Ont SCJ).

[119] *R v Campbell* (n 112); *Descoteaux v Mierzwinski* [1982] 1 SCR 860.

[120] *Discovery Enterprises Inc v Ebco Industries Ltd* (n 117).

[121] *Ultra Information Systems Canada Inc v Pushor Mitchell LLP*, 2008 BCSC 974, [2008] BCJ No 1397.

[122] *Bre-X Minerals Ltd (Trustee of) v Verchere*, 2001 ABCA 255, 206 DLR (4th) 280, [2001] AJ No 1264.

[123] A Bryant et al, *The Law of Evidence in Canada* (3rd edn, Lexis 2009) [14.108]–[14.109]; *Copthorne Holdings Ltd v Canada*, 2005 TCC 491, [2005] 4 CTC 2085; *PSC Industrial Services Canada Inc v Thunder Bay (City)* [2006] OJ No 917 (Ontario SCJ).

disseminated freely within a company on the grounds that it may lack the necessary confidentiality.[124] Although there is limited authority on point, it has been held that the raw material collected by a company for the purpose of obtaining advice will receive protection even if the material is not sent to a lawyer.[125]

Waiver of privilege In Canada there is no general doctrine of 'limited waiver' but disclosure of privileged communications to others with a common interest will not constitute a waiver against the rest of the world.[126] The same is true of disclosure to regulators to enable them to fulfil their official duties.[127] As with every other jurisdiction, the extent of waiver in litigation is governed by notions of fairness.[128] Canada also employs fairness considerations to impute waivers of privilege to a person who has made the content of their legal material an issue in the litigation.[129] The protection for privilege holders whose legal material has escaped their confidential sphere through no fault of their own is, in common with the English authorities, limited and discretionary, although courts increasingly recognize that rights to privilege do not cease merely because the privilege holder has lost physical control of their legal material.[130] **1.68**

4. The value of US experience

The US is the world's second largest common law jurisdiction, and development of the law of privilege at a federal level has been left to the common law,[131] which means independent Federal Court judges and ultimately the US Supreme Court. Given Federal Courts are not bound to follow the decision of other circuits, and US states are free to develop their own laws on privilege, US case law on privilege provides a large and mixed bag of jurisprudence which other common law lawyers can look to for valuable insights. On almost every proposition about the scope of privilege one can find conflicting authorities and as such it is often necessary to look to the prevailing view. In the space available it would be impossible to provide a detailed account of all the case law on the attorney–client privilege in the United States that affects corporations. Instead, what this book seeks to do is engage with the key debates about the scope of the corporate privilege, as argued in different and Federal and State Courts, and guided by the occasional pronouncements of the US Supreme Court. **1.69**

In the United States courts tend to explain the purpose of the privilege by focusing on its social benefits, no doubt influenced by Wigmore's instrumental rationale for the privilege. As the US Supreme Court stated in *Upjohn v United States*: **1.70**

> [The privilege's] purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and

[124] *T-D Bank v Leigh Instruments Ltd* (1997) 32 OR (3d) 575 (Ont Gen Div).
[125] *Mitsui & Co (Point Aconi) Ltd v Jones Power Co* [2000] NSJ No 258, 2000 NSCA 96.
[126] *Maximum Ventures Inc v DeGmaf* [2007] BCJ No 2235 (BCCA); *General Accident Assurance Co v Chrusz* (1999), 45 OR (3d) 321, [1999] OJ No 1107 (Ont CA); *Barrick Gold Corp v Goldcorp Inc*, 2011 ONSC 1325, [2011] OJ No 3530.
[127] *Pritchard v Ontario (Human Rights Commission)* (n 116).
[128] *Bone v Person* (2000), 145 Man R (2d) 85, [2000] MJ No 107 (Man CA).
[129] *Lloyds Bank Canada v Canada Life Assurance Co* (1991), 47 CPC (2d) 157, [1991] OJ No 135 (Ont Gen Div).
[130] Most Canadian courts continue to apply the English authorities: see Bryant et al, *The Law of Evidence in Canada* [14.150] (n 123).
[131] United States Federal Rules of Civil Procedure, r 501.

> administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client.[132]

1.71 The attorney–client privilege is not directly guaranteed by the US Constitution, and therefore its violation does not give rise to a constitutional issue.[133]

1.72 Perhaps the shortest authoritative summary of the attorney–client privilege was provided by the Federal District Court in Massachusetts in *United States v United Shoe Machinery Corp*. In a frequently cited passage the court stated:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or is his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services (iii) assistance in some sort of legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.[134]

1.73 **Qualified protection for attorney work product** US jurisdictions do not recognize a 'litigation privilege', but instead have an attorney work product doctrine that provides qualified protection for a litigant's case preparation. Rule 26(b)(3) of the Federal Rules of Civil Procedure states that discovery of documents and tangible things 'prepared in anticipation of litigation or for trial' can be obtained only 'upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means'. There are specific rules governing communications with experts, and while the extent of disclosure has been wound back recently, the disclosure requirements over the information provided to an expert, and the circumstances of their retainer, are still more extensive than the rules in other common law jurisdictions.[135]

1.74 **Corporate privilege** US courts give broad protection to corporate communications, certainly at a federal level following the US Supreme Court's decision in *Upjohn v United States* that the corporate client is not limited to members of the control group.[136] On the other hand, the courts strongly favour the interests of the entity over individual officers in part because of policy concerns that the entity's power to waive privilege, including in administration, is an important means of fighting corporate wrongdoing.[137] For similar policy reasons, US courts recognize that shareholders have a legitimate interest in the management of the company's affairs and therefore the company's privileged material can be accessed by its shareholders upon a showing of good cause.[138]

---

[132] *Upjohn Co v US*, 389 (n 10).

[133] *Fisher v US*, 425 US 391, 401, 96 S Ct 1569 (1976) Though depending on how it is violated, and whether it impacts on the ability of counsel to represent his client, it may give rise to issues under the Fourth, Fifth, and Sixth Amendments: see P Rice, *Attorney-Client Privilege in the United States* (3rd edn, West Group, St Paul, MN 2009) S10.1.

[134] *United States v United Shoe Machinery Corp.*, 89 F Supp 357 (D Mass 1950).

[135] Rule 26(a)(2)(B)(ii), 26(b)(4)(B) and (C).

[136] *Upjohn Co v United States* (n 10).

[137] *Commodity Futures Trading Commission v Weintraub* 471 US 345, 195 s Ct 1989, (1985).

[138] *Garner v Wolfinbarger* (1990) 430 F2d 1093 (5th Cir).

US courts are very strict on the requirement of confidentiality; generally they do not permit limited waivers, or allow partial disclosure in litigation which confers the privilege holder with a tactical advantage.[139] Moreover, US courts employ robust procedures for asserting and reviewing privilege claims given the concerns—supported by a considerable amount of evidence—that the privilege cloak is prone to abuse and privilege claims often lack merit.[140] **1.75**

C. Major Rules Affecting the Scope of Corporate Privilege

There are some aspects of legal professional privilege that are particularly important in setting the boundaries of privilege for corporations and public bodies. They are the rules which are most often in issue in 'privilege disputes' and are the primary focus of this book. All of these rules or controlling devices are designed to keep the boundaries of the privilege within sensible limits in accordance with its rationale. **1.76**

The precise content of these rules can vary considerably in the jurisdictions covered in this book, and some jurisdictions do not apply some of the controlling devices at all. However, in considering the law of corporate privilege, it is important to assess their combined effects. For while specific aspects of the privilege may differ somewhat in each jurisdiction, in every jurisdiction the law of privilege is dedicated to the same overall objective: ensuring that the privilege is sufficiently broad to allow corporations to obtain confidential legal advice about their affairs and adequately prepare for litigation, whilst ensuring that corporate records constituting real evidence are available to legal investigations and proceedings. **1.77**

In keeping with these objectives, no jurisdiction adopts either an entirely lax or entirely strict approach to *all* of these controlling devices although there are considerable differences in which controlling devices are relied on to keep privilege claims within reasonable limits. For example, while the Americans have traditionally looked to the client test, the crime-fraud exception, the qualified attorney work product doctrine, and the procedures for reviewing privilege claims in order to avoid an overly broad privilege, they have placed less emphasis on the purpose of the communications or the status of the lawyer giving the advice. By contrast, in Australia the purpose test has been the key controlling device in limiting the scope of privilege, whilst the corporate client was defined broadly and recently abolished altogether. English law uses a narrow client test, and adopts a broad interpretation of the crime-fraud or iniquity exception, but on the other hand does not countenance any qualifying of the privilege and only in exceptional circumstances will a court look behind a privilege claim to review whether it is properly claimed. **1.78**

While the precise mix of rules that make up the privilege are rarely the same, in assessing the balance struck between protecting confidential legal communications and access to relevant evidence in each jurisdiction, one has to step back and consider the rules of privilege as a whole. With that rider in mind the main rules or controlling devices on the law of privilege are: **1.79**

[139] See Chapter 7, paras 7.49–7.50, 7.92.

[140] Wright and Graham, *Federal Practice and Procedure* S 5476 (n 13); Alexander, 'The Corporate Attorney—Client Privilege: A Study of the Participants' (n 13); E Thornburg, 'Sanctifying Secrecy: The Mythology of the Corporate Attorney Client Privilege' (1993) 69 Notre Dame L Rev 157.

1. The client test

1.80 Every jurisdiction except Australia confines legal advice privilege to communications between lawyer and client or documents authored by them for the purpose of obtaining or giving legal advice. The definition of the client also matters for litigation privilege in jurisdictions that afford lesser protection to third-party communications in preparation for litigation (Canada, US). In the case of corporations and public bodies, both England and the US have employed definitions of the client that do not automatically include all employees, although which employees will be considered part of the client is uncertain, especially in England. In Australia and Canada the corporate client includes all employees. A narrow client test is perhaps the most effective way of restricting the scope of corporate privilege simply because, absent litigation, the communications of those employees who fall outside the client group will not be protected. However, a narrow client test also carries the risk that a corporation's private and secure sphere is shrunk to a point where the privilege no longer performs its intended function: allowing companies to obtain confidential legal advice that is both accurate as to the law and sensible as to the company's conduct. The meaning of the corporate client is examined in Chapter 3.

2. The purpose test

1.81 A document or communication will only attract privilege if a client or litigant's purpose in making or procuring it was to obtain legal advice or prepare for pending or reasonably anticipated litigation. The legal purpose should be at least the dominant or predominant purpose, although English and Canadian courts use slightly different language when describing the requisite purpose of communications between lawyer and client.[141] The purpose test is an indispensable part of the law of privilege for without it clients could avoid the disclosure of sensitive information merely by transmitting it to their lawyer, or have lawyers present when the information is communicated. The dominant purpose test is designed to strike a balance between protecting material that has only an incidental legal purpose, or denying protection to material that is principally for a legal purpose but also incidental commercial purposes. The test is perfectly sound on paper but can be very difficult to apply in practice and has resulted in courts in the same jurisdiction reaching different outcomes in cases involving very similar fact scenarios. Australia places the greatest reliance on the purpose test as a controlling device given it does not use a client test in the case of legal advice privilege. The purpose test and its application are discussed in Chapter 5.

3. The company's advisers

1.82 At common law, legal professional privilege is confined to lawyers providing legal advice and is not available to the clients of any other professional adviser. There have been statutory reforms to create a privilege for legal advice provided by accountants (US) or professionals working under the supervision of a lawyer (England). On the other hand, some jurisdictions have restricted the category of lawyers who are eligible for privilege to those who are formally independent from the client (EU law) or acting independently from the client (Australia). Confining the privilege to lawyers, or independent lawyers, has the distinct downside of increasing the cost of legal services as lawyers can charge a premium for the privilege they can offer to their clients, but it has the advantage of providing a form of 'quality control'

[141] See para 5.06.

regarding the advice that clients receive under the protection of privilege. Thus the law can have greater confidence that communications with a legal adviser under the privilege shield were directed at achieving legal compliance rather than goals that may be contrary to the rule of law. As a bright line rule it also avoids creating uncertainty about the scope of the privilege outside of the lawyer–client relationship, or adding more uncertainty to a rule that is already uncertain in a number of areas. Which advisers qualify for the protection of privilege is examined in Chapter 4.

4. The crime-fraud or iniquity exception to legal professional privilege

1.83 All jurisdictions exclude communications made in furtherance of crimes and some civil wrongs. The principle that it is no part of a lawyer's role to assist in the commission of wrongdoing is universally accepted, but there are differences among jurisdictions as to which wrongs fall within the exception. In England it includes abuse of statutory power, and in Australia conduct amounting to 'a fraud on justice'.[142] There is disagreement in the United States as to whether fraud covers all legal wrongs such as torts or breach of contract.[143] A common feature of many Commonwealth authorities is that it applies to legal wrongs which involve dishonesty.[144] However, in England the Court of Appeal has arguably gone much further, and held that the exception can apply to wrongs where the client's conduct is sufficiently 'iniquitous' that the public interest requires its disclosure.[145] Thus the privilege may still take flight even if the client believed they were acting lawfully based on legal advice. This issue can be extremely important for corporations involved in any transaction or matter where the line between what is lawful and what is not is a fine one. The crime-fraud exception is examined in Chapter 8.

5. Qualifying the privilege

1.84 There may be specific materials and/or specific circumstances in which privilege can be overridden because the case for disclosure is deemed more important than the need to protect the client's confidential communications. This controlling device is perhaps the issue on which jurisdictions are most divided. Canada has qualified the privilege so that in exceptional cases it will give way where it clashes with, and would defeat, the exercise of other fundamental rights.[146] The United States also qualifies the privilege over work product in connection with litigation to ensure relevant evidence is not lost to legal proceedings.[147] Qualifying the privilege is one means of avoiding the injustices that may occur by upholding privilege in every circumstance no matter how prejudicial the effects of non-disclosure may be to the administration of justice and the rights of others, or how minor the impact of disclosure may be to the privilege holder. Both England and Australia have rejected a qualified privilege, although Australia's uniform evidence legislation does codify a number of general exceptions to the privilege where asserting a claim would have the effect of defeating a legal right or preventing the enforcement of a court order.[148] In *Re Derby Magistrates*, perhaps the most important

[142] *A-G for the Northern Territory v Kearney* (1985) 158 CLR 510 (HCA) [17].

[143] See E Imwinkelreid, *The New Wigmore: A Treatise on Evidence* (Aspen Law & Business, New York 2002) 966–70.

[144] *Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd* [1972] Ch 553; *Kang v Kuan* [2001] NSWSC 698.

[145] *Eustice v Barclays Bank* (n 43).

[146] See para 2.62.

[147] Federal Rules of Civil Procedure, r 26(b)(3).

[148] Evidence Act 1995 (Cth) s 121; Evidence Act 1995 (NSW) s 121; Evidence Act 2008 (Vic) s 121.

articulation of the rationale for privilege in England in modern times, the House of Lords held that the privilege cannot be the subject of a balancing exercise weighing up competing interests in individual cases; the rule itself is the product of this balancing exercise.[149] The possibility of adopting a qualified corporate privilege is considered in Chapter 9.

6. Control of the corporate privilege

1.85 Control of corporate privilege is critical in determining who can assert or waive privilege, and against whom the privilege can be asserted. Such rules are only partly directed towards keeping the privilege within sensible limits vis-à-vis outsiders. They are also designed to ensure that in collective contexts, the privilege does not unfairly prejudice those persons who have a legitimate interest in accessing legal material belonging to the corporate client, or preventing the corporate client from disclosing privileged material without their consent.

1.86 While legal professional privilege is not a proprietary right, many privilege disputes which can be loosely described as 'intra-corporate disputes' have proprietary characteristics as they are essentially disputes over control of information. In corporate contexts there is usually more than one person who has the authority to seek and obtain advice and holds the information on which that advice is sought. The individual agents who authorize the communications with corporate counsel, the agents who are party to communications and the entity may all have divergent interests as to whether the information should be disclosed and for what purposes it might be used.

1.87 The right to privilege belongs to the client, which is usually the entity. However individual officers or employees will sometimes claim that corporate counsel were also advising them personally, as a joint client. The issue becomes important where control of the entity vests in persons hostile to the interests of the individual officers who obtained the advice or communicated information to the company's lawyer. There are also difficulties as to whether directors should be entitled to rely on privileged materials produced or obtained by the company during their time in office, notwithstanding a claim to privilege by the company. The United States generally favours the entity's interests over individual on issues of control. The case law in Commonwealth countries is much more limited, but generally speaking they too favour the entity's interests over the individual officers, although English and Australian courts are more willing to find that corporate counsel are advising the entity and individual directors jointly, while Canadian courts do not permit a trustee of a company in bankruptcy to waive the company's privilege.

1.88 Another critical question is whether and, if so, when an entity's members are entitled to access the company's privileged material when those in control of the company, and perhaps other members of the company, wish to avoid disclosing the material. The full range of possible approaches is evident in the jurisdictions covered in this book: from always allowing the company to assert privilege against its shareholders (Canada), to never allowing the company to assert the privilege unless the material relates to hostile litigation between the company and its members (England), to overriding a claim to privilege where shareholders can show good cause for being able to access the company's legal advice (the United States). All of these questions about control of corporate privilege are examined in Chapter 6.

[149] *R v Derby Magistrates' Court, ex p B* (n 46).

7. Confidentiality and waiver of privileged communications

1.89 Confidentiality is said to lie at the heart of the rationale for privilege. Privilege is designed to allow a client to communicate in confidence with a legal adviser regarding their affairs and will not protect information that the client does not treat as confidential or which is already in the public domain.

1.90 Confidentiality raises a number of different policy and practical considerations in the case of a corporation's legal material. Corporate governance rules and the day to day management of a company's affairs means that a considerable number of people may have a right to access a company's privileged material, or have been given access to that material even if they are not strictly members of the corporate client, or even members or employees of the company. Some US courts have questioned the very notion of confidentiality in the case of corporations that may have hundreds or thousands of employees, while others have cited confidentiality considerations for restricting the definition of the corporate 'client' to the board and senior management.[150] However, in other jurisdictions, the main issues surrounding confidentiality of lawyer–corporate client communications are (a) what protection should corporations be afforded when they deliberately disclose privileged information to third parties including insurers, business partners, or regulatory agencies, or in the course of legal proceedings and (b) what protection should be afforded to privileged communications that have escaped the client's confidential sphere either by mistake, or through unauthorized acts such as leaks by disgruntled employees.

1.91 The degree of protection to companies deliberately using or disclosing parts of their privileged advice (ie waiving privilege) differs significantly in the jurisdictions covered in this book. English courts appear to be developing a general power of limited waiver which allows a person to limit the scope of any waiver to certain people or certain purposes only. A general power of this kind allows privilege holders to engage in tactical waivers for commercial or strategic advantage. One area where there is general uniformity of approach is in how jurisdictions deal with waivers in litigation, and the extent of such waivers. These issues are principally governed by considerations of fairness. The protection of documents that have escaped a company's confidential sphere, even through no fault of the company, is surprisingly weak in most jurisdictions. These issues are examined in Chapter 7.

8. Procedures for claiming and challenging privilege

1.92 Ensuring that the law of privilege, as written in the statutes and case law, is upheld in practice is a critical and formidable challenge. There is an inherent tension between protecting a person's private and secure sphere, and ensuring privilege claims are sound: namely, how much of the secret needs to be told in order to know that it should be kept? The two key questions are; first, what particulars must be provided by a party claiming privilege to substantiate the claim, and secondly, when will a court look beyond those particulars in order to satisfy itself that the claim is properly made. Here too, there are significant differences between the jurisdictions covered in this book. The US and Australian courts have called for a robust approach to reviewing privilege claims, including in camera inspections of privileged material, whereas the English courts have declared that such inspections should be a last resort. These issues are examined in Chapter 8.

[150] See eg *Radiant Burners Inc v American Gas Association* 207 F Supp 771 (ND Ill, 1963) (Illinois District Court).

D. Uncertainty in the Boundaries of Corporate Privilege

1.93 A recurring theme in the jurisprudence on legal professional privilege in common law countries is the need for certainty. If the privilege is to perform its function of facilitating candour in the lawyer–client relationship—and all the benefits that entails—clients must be secure in the knowledge that what they tell their lawyers will not be disclosed or used without their consent. Any doubt as to whether a communication is privileged at the time it is made—or that privilege may be later overridden to satisfy some other public interest—is bound to have a chilling effect on at least some people in some situations. It has been said by the US Supreme Court that an uncertain privilege is little better than no privilege at all.[151] This principle is also the primary basis for courts in England and Australia declaring the privilege to be absolute, and not subject to a balancing exercise.[152]

1.94 While the authorities recognize the importance of a privilege that is certain, difficulties arise when one moves from principle to practice. Several distinguished commentators have observed that the law of privilege does not provide the security for lawyer–client communications that the judicial rhetoric would suggest.[153] In many cases this is because the scope of the privilege is unclear on some very basic questions.

1.95 To take a few examples:

- In the 1998 English Court of Appeal case of *Gotha City v Sotheby's*[154] Staughton LJ observed that the doctrine of common interest privilege was 'not defined as well as one might hope'.
- In the 2004 Australian Federal Court case of *Pratt Holdings Pty Ltd v Commissioner of Taxation*[155] the court had to decide whether a client was entitled to claim advice privilege over a document prepared at its request by a third party for the dominant purpose of the client submitting the document to their lawyer to obtain legal advice. Finn J said that it was a surprise that this basic question could still be a matter of contest.
- In the 2002 English High Court case of *Three Rivers No 5*[156] the court considered whether a document must be communicated to the lawyer in order to qualify for advice privilege. Tomlinson J observed that the law on the issue 'is not as clear as one might have expected'. In the same case the Court of Appeal noted that there was a surprisingly wide divergence of opinion on the scope of legal advice privilege.[157]
- In the 2011 English High Court case of *R (Stewart Ford) v Financial Services Authority*[158] the court had to decide whether directors and senior executives might be able to assert joint or joint interest privilege with the company over legal advice they obtained on behalf the company. Burnett J noted: 'it was striking that neither counsel has cited any English authority which establishes the criteria against which this…aspect of joint interest

[151] *Upjohn Co v United States* 392–3 (n 10).
[152] *R v Derby Magistrates' Court, ex p B* (n 46); *Carter v Managing Partner, Northmoore Hale Davy & Leake* (1995) 183 CLR 121 (HCA).
[153] eg C Tapper, 'Prosecution and Privilege' (1997) 1 Int J of Evidence and Proof 5, 13.
[154] *Gotha City v Sotheby's* 122 (n 61).
[155] *Pratt Holdings Pty Ltd v Commissioner of Taxation* [41] (Finn J); [105] (Stone J) (n 81).
[156] *Three Rivers No 5* [6] (n 16).
[157] *Three Rivers No 5* [6] (n 16).
[158] *R (Stewart Ford) v The Financial Services Authority* [16] (n 45).

privilege should be considered.' The two counsel in that case were editors of leading textbooks on legal professional privilege.

- In submissions seeking leave to appeal to the High Court of Australia in the recent case of *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd*,[159] concerning inadvertent disclosure of privileged documents, counsel for the appellants submitted that the cases were 'somewhat all over the place as to the juridical basis of the analysis'.

1.96 There are also a number of areas where the law as stated is clear but in practice there is a fine borderline between what is privileged and what is not, especially in corporate contexts. The application of the purpose test is a notable example.

1.97 If one takes all the potential sources of uncertainty in the law of privilege, and combines them in scenarios that commonly arise in corporate contexts, including internal investigations or advice on prospective transactions, the gap between the promise of confidentiality, which is supposed to be the sine qua non of privilege, and the practical reality facing corporate clients, is stark. Instead of lawyers giving corporate agents assurances about the confidentiality of their communications, they would more likely have to warn employees that there was a real risk that their communications could be disclosed for one reason or another.

1.98 The following summary is based on English law but many of these qualifications would apply to other jurisdictions, and lawyers in those jurisdictions would need to add further qualifications specific to those jurisdictions.

1.99 In advice contexts an individual agent who holds relevant information might not be part of the corporate client. A court might find that the company's conduct amounted to iniquitous practice and that communications in furtherance of that conduct are compellable. The company may waive privilege over the communications without the employee's consent. Shareholders in the company may also be entitled to access the communication. If the communication is disclosed by mistake, or leaked, the company may not be able to recover it or prevent its use. There is also a risk that whatever an agent's own purpose, a court may find that the company had a predominantly business rather than a legal purpose in authorizing the communication, so the privilege does not apply. While this list is fairly comprehensive, it is not exhaustive.

1.100 If legal advisers are regularly required to warn corporate agents that their communications could be disclosed, the candour-promoting function of the privilege may be significantly diminished. Nor are these warnings merely of academic interest. They may be very necessary where there is a conflict of interest between the agent and the company. Equally, many corporate managers will want to know whether, by calling in lawyers to carry out internal investigations or seeking advice on the company's potential liability for past events or future transactions, there is a risk that they are creating briefs or road maps to help regulators or opponents in litigation to establish that very liability.

1.101 Finally, it would be remiss to overlook the fact that a significant source of uncertainty in the law of privilege is the courts' preparedness to change it. Sometimes courts seek to distinguish the existing limits on the privilege in order to expand its scope, yet in other cases they

[159] Transcript of Proceedings, *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCATrans 137 (7 June 2013) (N C Hutley SC).

introduce new controlling devices, hitherto unknown or only hinted at in dicta, to restrict the scope of the privilege. The boundaries of the privilege are not set in stone, and because the stakes are high, there is always a possibility that courts will look beyond the existing case law and seek to enunciate a new principle that a judge believes more accurately reflects the rationale for the privilege. Despite the House of Lords stating in *Re Derby Magistrates* that the balance between confidentiality and disclosure was set 300 years ago, in reality the boundaries of the privilege are regularly being extended, restricted, or in cases of uncertainty, simply filled in.

1.102 For example, just two years after its decision in *Re Derby Magistrates*[160] the House of Lords held that the public interest in favour of disclosure of relevant evidence outweighed the case for upholding privilege over communications with third parties in 'non-adversarial' proceedings. In Australia, for 23 years the courts applied a sole legal purpose test for determining whether a communication's purpose qualified for the protection of privilege following the High Court's decision in *Grant v Downs* that it was not enough for a communication to have a legal purpose, amongst other purposes, for the privilege to apply.[161] Then in 1999 the court abandoned the sole purpose test in favour of the dominant purpose test, suggesting that the pendulum had swung too far in favour of disclosure.[162] Five years later the Full Federal Court expanded the scope of LPP even further by declaring that third party communications could qualify for privilege, even in the absence of a reasonable prospect of litigation, provided the communication satisfies the dominant purpose test.[163]

1.103 In Canada there have been both significant expansions and contractions in the scope of privilege from time to time. For example, in addition to qualifying the privilege, the Supreme Court recently limited the lifespan of litigation privilege, declaring that as an aid to adversarial litigation, the privilege only prevents disclosure in the litigation for which the relevant communications were brought into existence.[164]

1.104 There may be little that practitioners can say about these occasional major changes in the law when advising their clients on the status of their communications, save for being aware of any trends and qualifying their advice accordingly. However, when privilege disputes do arise, practitioners should be alert to the possibility that while the existing case law may seemingly be against their client's position, if a sufficiently principled case can be made, preferably supported by dicta from distinguished judges or case law from other common law jurisdictions, it may be possible to persuade the court to adopt a different result. Equally, practitioners representing clients who seemingly have the law on their side would be well advised to be on top of the principles supporting their client's preferred outcome, and not just the relevant authorities.

1.105 **The problem of applying a privilege designed for individuals in corporate contexts** One reason for the uncertainty in the scope of the corporate privilege is that until relatively recently, the courts have paid insufficient attention to the challenges of applying a rule originally designed for individuals to complex corporate firms and government organizations. The

[160] *R v Derby Magistrates' Court, ex p B* (n 46).
[161] *Grant v Downs* (n 107).
[162] *Esso v Federal Commissioner of Taxation* (n 88).
[163] *Pratt Holdings Pty Ltd v Commissioner of Taxation* (n 81).
[164] *Blank v Canada* [2006] 2 SCR 319 (n 108).

Three Rivers litigation is symptomatic of the gap between the jurisprudence on privilege and the modern realities of corporate life. The case was decided at first instance on the basic but unresolved question of whether documents had to be communicated to the lawyer to qualify for advice. Yet on appeal the case turned upon the equally basic question of who was the 'client' for the purpose of privilege when a lawyer is advising a company. This issue had never been decided by an English Court. Accordingly, the Court of Appeal was thrown back to analysing a small number of nineteenth-century authorities which considered the scope of privilege in relation to communications between principal and agent, or between third parties and lawyers.[165] Those cases were decided when the law of privilege was still developing and the laws governing public bodies and corporations bore little resemblance to the duties these entities have now. The Court of Appeal did not provide any guidance as to the meaning of the client in corporate contexts, however the English courts are not alone in failing to define the corporate client. The US Supreme Court in *Upjohn* ruled that the corporate client was not confined to members of the control group of a company (as the Federal Courts had previously held) but it also expressly declined to lay down any clear guidelines as to which agent of the company was the client for the purpose of the privilege.[166]

1.106 Even in cases that exclusively involve corporations and public bodies the courts have tended to explain the rationale for privilege by reference to the behaviour and needs of individuals. When the *Three Rivers* litigation came before the House of Lords, most of their Lordships justified legal advice privilege by considering its value to the individual, for example, a witness at an inquest[167] or a testator making a will.[168] How these examples fit with the organization of a central bank, and the behaviour and duties of its officials, was not spelt out. Their Lordships gave a resounding endorsement of legal advice privilege and stressed that the privilege was a right of all legal persons including corporations. Lord Scott stated:

> [The authorities] recognize that in the complex world in which we live there are a multitude of reasons why individuals, whether humble or powerful, or corporations whether large or small, may need to seek the advice or assistance of lawyers in connection with their affairs; they recognize that the seeking and giving of this advice so that the clients may achieve an orderly arrangement of their affairs is strongly in the public interest.[169]

This is a strong statement of principle, but what is missing from the authorities is a detailed consideration of when the privilege is needed by each of the persons entitled to claim it, and how the privilege applies to those persons.

1.107 The tendency of courts to focus on individuals when explaining the purpose of the privilege has resulted in the courts giving only very broad brush explanations of the rationale for corporate and governmental privilege, and a privilege that is uncertain in scope in key areas. This book seeks to address this lacuna in the law by specifically focusing on corporate privilege. For the privilege to work as intended it has to take account of the nature and needs of those entities and adapt the rules of privilege accordingly.

[165] *Three Rivers No 5* (n 16).
[166] *Upjohn Co v United States* 396–7 (n 10).
[167] *Three Rivers No 6* [115] (Lord Carswell) (n 3).
[168] *Three Rivers No 6* [55] (Lord Rodger) (n 3).
[169] *Three Rivers No 6* [34] (n 3).

1.108 **Aims of the book** One of the book's principal aims is to provide a detailed consideration of the surprisingly large number of areas where there is uncertainty in the law of privilege as applied to corporate communications.

1.109 Where the law is uncertain, or there are judicial statements suggesting that the privilege may be out of alignment with its rationale, the book aims to provide a comprehensive account of the principles underlying the rule to guide practitioners as to the most likely result of a privilege challenge or, where appropriate, to contend for a different result. In so doing, the book seeks to provide lawyers with a practical guide to the law of corporate privilege.

principal driver of calls for change in the boundaries of privilege—whether it be to expand or contract them—is a belief that aspects of the rule which reflect historical practices or beliefs are no longer relevant to the ways in which people obtain legal advice or the manner in which litigation is now conducted.

2.03 This chapter identifies and analyses the different rationales put forward for legal professional privilege over its lengthy lifespan and links the history of the privilege to the current debates about its status and purpose. In *Adelaide Steamship Co Ltd v Spalvins*[3] Olney, Kiefel, and Finn JJ observed that 'there is not uniform agreement as to the policies informing, and the purposes of, the privilege'. Two areas where the rationale for privilege has been questioned in recent times are legal advice privilege unconnected with litigation and third-party communications in preparation for litigation.

B. Privilege as an Aid to Legal Representation and Advice

2.04 In his famous but relatively brief history of the privilege, Wigmore claimed that it was originally more concerned with protecting the honour of gentleman barristers, than the client's interests.[4] This theory, and Wigmore's account of the early history of the privilege, has been criticized as simplistic.[5]

2.05 **Honour theory rejected** Whatever the true history of the privilege it is clear that by the end of the eighteenth century loyalty or professional honour was rejected as a justification for the rule. In the *Duchess of Kingston's Case* (1776) 20 St Tr 355, 574 Lord Mansfield ruled that a surgeon had to testify against the Duchess on her trial for bigamy, because there was no public odium or moral delinquency in breaking a pledge of secrecy under force of law.[6]

2.06 While some of the legal argument in the case law from the 1700s refers to the need for secrecy in communications between lawyer and client in order to protect the client,[7] it was not until the 1833 case of *Greenough v Gaskell* that Lord Brougham set out what lawyers today would understand to be the foundations of the modern privilege: the need to secure access to legal advice and representation in order to prepare for litigation or avoid it altogether.[8] *Greenough* is a landmark case as it was the first time a claim to privilege over lawyer–client communications was upheld irrespective of whether legal proceedings were pending or contemplated. It therefore marks the birth of what is now known as legal advice privilege, and lends support

[3] *Adelaide Steamship Co Ltd v Spalvins* (1998) 81 FCR 360, 374.

[4] J Wigmore, *On Evidence* (vol 8, 4th edn McNaughton Revision, Little Brown & Co, Boston 1961) 543.

[5] C Wright and K Graham (eds), *Federal Practice and Procedure* (vol 24, 2nd edn, West Publishing, St Paul 1986) 75; J Auburn, *Legal Professional Privilege: Law and Theory* (Hart, Oxford 2000) 5–6 noting that barristers were still required to answer certain questions.

[6] J Wigmore, *On Evidence* 543 (n 4).

[7] The submission of counsel for the defendant in *Annesley v Anglesea* 17 How St Trials 1139 (1743) at 1237 deserves to be highlighted as a statement of the rationale for privilege that is as convincing as anything that has been said since: 'As to the client, the interest which he has in the privilege, is very obvious. No man can conduct any of his affairs which relate to matters of law, without employing and consulting with an attorney; even if he is capable of doing it in point of skill, the law will not let him; and if he does not fully and candidly disclose everything that is in his mind, which he apprehends may be in the least relative to the affair he consults his attorney upon, it will be impossible for the attorney properly to serve him: therefore to permit an attorney, whenever he thinks fit, to betray that confidence . . . would be of the most dangerous consequence, not only to the particular client concerned, but to every other man who is or may be a client.'

[8] *Greenough v Gaskell* (1833) 1 My & K 98, 39 ER 618.

to Lord Carswell's statement in *Three Rivers No 6* that legal professional privilege 'is a single integral privilege, whose sub-heads are legal advice privilege and litigation privilege'.[9]

2.07 The purpose of the privilege is not to protect secrets per se or promote loyalty, but to secure to all persons access to legal advice and representation free from the fear that what they tell their lawyer may be disclosed to their prejudice. And, in the words of Lord Brougham, if the privilege was confined to communications connected with contemplated or pending litigation, no one could safely obtain the legal advice that might 'render any proceedings successful, or all proceedings superfluous'.[10] In short, legal professional privilege provides a private and secure sphere in which people can safely obtain legal advice and representation. The same rationale for the privilege has been identified by the US Supreme Court,[11] the High Court of Australia,[12] and the Canadian Supreme Court.[13]

2.08 The need for a private and secure sphere seems self-evident in the context of litigation. Set against the prospect of a court determining a person's culpability, or their rights and liabilities, there is a real risk that a client will withhold information from their lawyers for fear of prejudicing their cause if the information could be disclosed and used against them. Sometimes those apprehensions are misguided and the information actually supports the client's case. Sometimes the apprehensions are well founded. In both cases the privilege provides a secure zone within which the client can 'make a clean breast of his affairs'[14] to the lawyer for the purposes of preparing for litigation. Even fierce critics of the privilege, such as Bentham, accepted the logic of this argument. Bentham argued that the chilling effect brought about by removal of the privilege would produce positive outcomes for the administration of justice. According to him the net result of abrogating the privilege would be that clients who had committed legal wrongs would not derive as much assistance from their lawyers as is presently the case. Bentham's objection to privilege therefore is not the loss of evidence to the law enforcement process, but the availability of legal assistance to the undeserving. Clients who complied with the law had nothing to fear from the abolition of the privilege and the disclosure of their communications with their lawyer, and thus could continue to consult them without inhibition.

2.09 Bentham's argument has several flaws, and highlighting them confirms the value of the privilege, both to the individual and to society. First, Bentham makes a bold assumption that a person can know their guilt or innocence without legal advice or the legal process set up to decide it. Whether this was true of Bentham's time, it certainly is not now given the complexities of the law. Secondly, it implies that persons who have committed crimes or civil wrongs should not receive the same legal assistance as those who have not. Yet it is a cornerstone of all advanced legal systems that everyone is entitled to legal assistance in the determination of their rights and duties, or in defending criminal proceedings.[15]

[9] *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48, [2005] 1 AC 610 [105].

[10] *Greenough v Gaskell* 103 (n 8).

[11] *Upjohn Company v United States* 449 US 383, 389, 101 S Ct 677 (1981).

[12] *Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49 [35].

[13] *R v McClure* [2001] 1 SCR 445, [36]–[39].

[14] *Anderson v Bank of British Columbia* (1876) 2 Ch D 644 (CA) 649.

[15] A state may have to provide legal assistance to parties to criminal or civil proceedings when the interests of justice so require: see eg Art 6(3)(b) ECHR; *Steel and Morris v UK* (App No 68416/01) (2005) 41 EHRR 22 [59], [62].

2.10 Legal professional privilege facilitates the basic right to legal assistance, by removing every obvious disincentive to consulting a lawyer: by speaking openly to a lawyer without the protection of privilege the client may be putting their own neck in the noose.[16]

1. Recent debate about the need for legal advice privilege

2.11 While there is unanimity amongst common law lawyers about the purpose of the privilege, and its value in connection with litigation, there is some disagreement about whether there is a need for a private and secure sphere in purely advice contexts. This disagreement surfaced in England in the *Three Rivers* litigation. In two separate judgments delivered by the Court of Appeal, the court cast doubt on whether, objectively, a client seeking purely legal advice would be deterred from doing so by the absence of a privilege.

2.12 Lord Justice Longmore and Lord Phillips MR noted that the client's self-interest in obtaining accurate advice provided sufficient incentives for the client to disclose all relevant facts to the lawyer. [17] The client seeking legal assistance for the purpose of litigation, and the client who seeks purely legal advice, have divergent interests when it comes to deciding whether to consult, and what information to disclose, to a lawyer. One wants to win their case, the other wants accurate legal advice so that they can protect their legal position.

2.13 Self-interest would tend to motivate the client seeking purely legal advice to provide full disclosure of all relevant facts, just as it would with a patient seeking treatment from a doctor, or a client seeking tax advice from an accountant. Provided the client is acting bona fide—ie he wants advice in order to arrange his affairs in a lawful manner—there is every incentive to tell the lawyer the full story in order to get the best possible advice. As Longmore LJ expressed it in *Three Rivers No 5*, for the client who is seeking purely legal advice 'the prospect of winning or losing a particular case will normally do nothing to cloud his judgment as to what facts he places before his legal adviser.'[18] If he fails to give accurate information to the lawyer he risks obtaining unreliable advice.

2.14 The fact that people frequently retain accountants to provide legal advice on tax matters, even without a privilege, was one of the reasons why the High Court declined to extend the privilege to the process of obtaining legal advice from accountants in *Prudential v Special Commissioners*.[19] Charles J also stated that the market for legal advice from accountants suggests 'that the conclusion underlying privilege that there is a need for absolute confidentiality in respect of legal advice may need revisiting'.[20]

2.15 Notwithstanding these doubts about the need for a privilege over advice unconnected with litigation, the House of Lords in *Three Rivers No 6*, and the Supreme Court in *Re Prudential*, strongly defended the need for a legal advice privilege. Both Lord Sumption in *Prudential* and Lord Scott in *Three Rivers* acknowledged that in many cases clients may have

[16] For a concise discussion of the various rationales put forward for legal professional privilege and an argument that protecting the integrity of legal representation is its raison d'être see H Ho, 'Legal Professional Privilege and the Integrity of Legal Representation' (2009) 9 Legal Ethics 163.

[17] *Three Rivers District Council v Governor and Company of the Bank of England (No 5)* [2003] EWCA Civ 474, [2003] QB 1556 [26] (Longmore LJ) and *Three Rivers v Bank of England (No 6)* [2004] EWCA Civ 218, [2004] QB 916 [39] (Lord Phillips MR).

[18] *Three Rivers No 5* (n 17).

[19] *R (Prudential Plc) v Special Commissioner of Income Tax* [2009] EWHC 2494 (Admin), [2010] All ER 1113 [80].

[20] *R (Prudential Plc) v Special Commissioner of Income Tax* [72] (n 19).

no inhibitions in providing their lawyers with all relevant information without an assurance of non-disclosure. However Lord Sumption said this did not matter for two reasons.

2.16 The first is that privilege has been the law for many years and no one was asking the court to depart from it. The second, principled reason, is that 'those clients who do wish to consult a lawyer on the basis of absolute confidence should be entitled to do so, notwithstanding that absolute confidence may be less important to others.'[21]

2.17 In *Three Rivers* Lord Scott claimed that legal advice privilege was necessary to protect the rule of law. In a society where the controlling framework was a belief in the rule of law, communications between clients and lawyers, whereby the client is seeking legal advice in the management of their affairs, should be secure against the possibility of scrutiny from others, whether the police, the executive, business competitors, inquisitive busybodies, or anyone else. Lord Scott endorsed Zuckerman's description of this principle as the 'rule of law rationale'.[22] However the rule of law rationale for privilege, at least as articulated by Zuckerman, is still based on empirical assumptions about the behavioural consequences of recognizing or failing to recognize a privilege. The fact that some clients 'wish' to consult a lawyer in absolute confidence, as Lord Sumption put it, is, with respect, no basis for maintaining a privilege that can change the outcome of cases, with all the adverse effects this has on the administration of justice.

2.18 The rule of law rationale for legal professional privilege is based on two propositions. First, everyone has a right to know the law and understand their legal rights and obligations. Given that the principal means by which people acquire knowledge of the law in modern society is by consulting trained legal advisers, access to legal advice must be protected. The rule of law rationale says something at a general level about the proper relationship between the State and individuals, and the State's authority to impose binding rules on those subject to its jurisdiction. However, the second part of the rule of law rationale is the empirical assumption that compulsory disclosure of lawyer–client communications would lead to fewer lawyer–client consultations and reduced candour in those consultations, which is bound to inhibit a person's capacity to gain an understanding of their rights and obligations. The point is that unless the legal advice privilege is framed as a right to protect the privacy of lawyer–client communications per se,[23] it is still necessary to explain why some people might be inhibited from obtaining legal advice in the absence of a privilege. The best answer is that while most people usually have a strong self-interest in obtaining accurate legal advice and disclosing all relevant facts to their lawyer, there are a number of situations where the self-interest analysis falls down, or is irrelevant.

2.19 The archetypal case for legal advice privilege is where a client seeks advice in relation to past events. If the client has done X, but has no knowledge whether X is lawful and if unlawful whether it can be rectified, they may wish to obtain advice as to whether X will give rise to legal liability. Without a privilege the client faces a dilemma between getting advice to clarify their legal position at the risk of having those communications disclosed to their prejudice, or to refrain from obtaining advice and living with the attendant uncertainty regarding their

[21] *R (Prudential) v Special Commissioner of Income Tax* [118] (n 1).

[22] *Three Rivers No 6* [2005] 1 AC 610 [34] (n 9). Lord Scott's articulation of the rationale was approved by Lord Neuberger in *R (Prudential) v Special Commissioner of Income Tax* [21] (n 21).

[23] The relationship between privilege and the right to privacy is discussed at para 2.49.

legal rights and obligations. The latter outcome would be particularly unfortunate for both the client and the goal of encouraging legal compliance if X could in fact be rectified so as to make it legal. Sometimes a person's involvement in past events can become the subject of quasi legal proceedings. An inquest is a case in point, as noted by Lord Carswell in *Three Rivers No 6*.[24] The case for advice privilege in such circumstances is the same as the case for litigation privilege. The client needs legal advice and/or assistance to protect their legal position, and a secure zone in which to take advice and prepare their response to any requests or summons to give evidence or produce documents about the matter.

2.20 The second category of cases where a privilege is needed is where the client's predominant concern is to protect personal relationships, sensitivities, and reputations, rather than their own self-interest. The classic example considered in *Three Rivers No 6* is the testator who wishes to instruct a solicitor to draw up his will. Lord Rodger noted that the instructions of a client may be motivated by 'jealousies, slights, animosities and affections, which the testator would not wish to be revealed but which he must nevertheless explain if the solicitor is to carry out his wishes'.[25] There may be doubt about whether such sentiments of the testator are relevant to the validity of his will. Lord Phillips MR made this point for the Court of Appeal in *Three Rivers No 6* when he stated that there is little reason to fear that communications between solicitor and client would be inhibited if the privilege were not available in those circumstances.[26] Nonetheless, Lord Rodger probably has the better of the argument so far as the value of the privilege is concerned because the correct question is not whether such matters are irrelevant, but whether the client knows it is irrelevant. Given the client is most likely to acquire such knowledge by obtaining advice from his lawyer, there is a risk that without a promise of confidentiality, the client may be so concerned about the disclosure of his motivations that he will materially alter his instructions.

2.21 A persuasive argument could also be made that there is an air of unreality about the 'self-interest motivates disclosure' analysis. It presumes that clients always know what is in their best interests, and how those interests can be furthered when making decisions about consulting a lawyer and what information to put before the lawyer. Human beings are not always rational, and because of the varied levels of education, intelligence, and experience with the legal system, it may be that many persons out of fear or misapprehension believe that in some situations they should avoid getting legal advice, or should tell their lawyers as little as possible about their affairs. A recurring theme in the Australian authorities on privilege is the need to protect the 'liberty' and 'dignity' of all persons, especially the 'ordinary citizen', the 'unintelligent', and the 'ill-informed', in their dealings with the State.[27] In this analysis one can find traces of the rule of law rationale endorsed by Lord Scott in *Three Rivers*. These decisions reinforce the status of the privilege as a fundamental right.

2.22 The soundness of the empirical assumption underlying advice privilege also has to be judged in light of the importance of the interests at stake. Given that the right to know the law and one's rights and obligations is integral to a system based on the rule of law, the case for privilege cannot be reduced to a mathematical equation, counting all the situations where

[24] *Three Rivers No 6* [2005] 1 AC 610 [115] (n 9).
[25] *Three Rivers No 6* [2004] EWCA Civ 218 [55] (n 17).
[26] *Three Rivers No 6* [2004] EWCA Civ 218, [2004] QB 916 [39] (n 17).
[27] *Baker v Campbell* (1983) 153 CLR 52 (HCA) 95, 120; *A-G for the Northern Territory v Maurice* (1986) 161 CLR 475 (HCA) 484.

privilege only attaches to what the client told the expert and what the expert communicated back to the client.[47] In the case of expert witnesses, their opinion of the case will always be partly based on information derived from privileged communications.

2.36 There is also no authority supporting the proposition that third-party communications must fall within the zone of privacy available to all persons preparing for litigation. While it is widely accepted that the ability to prepare for litigation in private is an integral component of the right to fair trial, there is no case law in any common law jurisdiction covered in this book suggesting that compulsory disclosure of third-party communications would result in an unfair trial. On the contrary, in a number of jurisdictions some third-party communications may be compellable in certain circumstances. For example, in the United States, where the phrase 'zone of privacy' is often used,[48] third-party communications in preparation for litigation only receive qualified protection.[49] Similarly, the Ontario Court of Appeal has endorsed the zone of privacy concept in cases where the protection for third-party communications was significantly cut back, and observed that the privacy concept does not define the outer reaches of protection for litigation preparation.[50]

2.37 **The economic case for privilege over third party communications** The case for protecting third-party communications from compulsory disclosure principally rests on economic considerations. There are fears that disclosure of such communications would promote free riding in litigation and/or 'chill' parties from collecting relevant evidence. These arguments carry some force, at least in the context of criminal litigation.

2.38 What the free riding argument overlooks is that if privilege did not apply to third-party communications both parties would be forced to disclose the fruits of their evidence-gathering process to their opponent. Thus the economic injustice rendered by the absence of privilege is that those with greater resources do not derive as much assistance from the disclosure process as those with fewer resources. But ensuring parties are on an equal footing in litigation, so far as practical, is one of the principal aims of the disclosure process in civil litigation. In *Dombo Beheer BV v Netherlands* the European Court of Human Rights said that a requirement of the right to a fair trial was that each party must be afforded a reasonable opportunity to present his case and evidence under conditions that do not place him at a substantial disadvantage against his opponent.[51] That implies equality of access to evidence.[52]

2.39 Removing litigation privilege over third-party communications may make litigants more circumspect about what evidence they collect, and the process by which they collect it. In Australia, for example, privilege over communications with experts has been abolished in several jurisdictions.[53] The practical effect of these changes may, however, simply be that

[47] *Harmony Shipping v Davies* (n 46); *R v King* [1983] 1 All ER 929, [1983] 1 WLR 411.

[48] See eg *Griswold v Connecticut* 381 US 479, 85 S Ct 1678 (1965) where the phrase was used in relation to the Fifth Amendment.

[49] Under the attorney work product doctrine as codified in Federal Rules of Procedure r 26(b)(3).

[50] *General Accident Assurance Co v Chrusz* (n 43) 330, citing R Sharpe 'Claiming Privilege in the Discovery Process' in LSUC Special Lectures, *Law in Transition: Evidence* (De Boo, Toronto 1984) 163.

[51] *Dombo Beheer BV v Netherlands* (App No 14448/88) (1993) 18 EHRR 213.

[52] C Hollander, *Documentary Evidence* (11th edn, Sweet & Maxwell, London 2012) [7]–[16].

[53] Notably Queensland, Uniform Civil Procedure Rules 1999 (Qld) r 212(2), and South Australia. Supreme Court Civil Rules 2006 (SA) r 160. In South Australia privilege will still apply to communications with shadow experts, who help the parties prepare for proceedings, provided they sign a certificate stating that they have not been retained to give evidence or previously express an opinion about the case: r 161.

experts are now routinely consulted by phone or in person, and only when a litigant is satisfied that the expert's opinion supports their case, do they then formally instruct them in writing. The argument has been influential in the United States which has moved away from requiring full disclosure of communications with testifying experts to only requiring disclosure about the facts and assumptions that the expert considered in forming their opinion, and the terms on which they are acting as an expert witness.[54]

2.40 While it cannot be doubted that removing litigation privilege might alter the way evidence is collected, the crucial factor for litigants in deciding what evidence to collect is that the burden and standard of proof effectively require each party to do what seems necessary and practicable in order to win the case, even if there is a risk that some of this private investigation may backfire.[55] Unless a claimant presents credible evidence in support of their claim, it will fail. Once they do so, the defendant has little choice but to respond by putting on their own credible evidence. There are many situations in which the trier of fact can more readily draw inferences from evidence that is uncontested. The point was neatly summarized by JD Heydon: 'a party against whom evidence on a particular issue has been given will often be well advised to adduce evidence on it in order to avoid defeat, or even be obliged to do so in consequence of a presumption of law.'[56]

2.41 A related argument in favour of litigation privilege over third-party communications is that it saves trial time and costs. Litigation privilege covering earlier (or later) reports or statements avoids lengthy cross-examinations on discrepancies between the statement or report that is relied on and drafts or reports that were not signed or used by the litigant.[57] This is not so much an argument in favour of litigation privilege, but an argument to restrict the extent of waiver of privilege when a litigant chooses to rely on an expert's report. Given that the purpose of the rule on selective waiver is to prevent a litigant from painting a misleading picture of the evidence, and causing unfairness to the other side, it is difficult to see how saving time and money could trump the need to conduct proceedings fairly. In any event, where previous communications are disclosed, and questions regarding them have limited or no probative weight, the court has a discretion to disallow them.[58]

b. Limiting the costs of privilege over third-party communications

2.42 **The balance between preparing for litigation without intrusion and ensuring the evidence that is presented to court is adequately tested** There needs to be an appropriate balance between, on the one hand, the need to provide litigants with a private and secure sphere for preparing for litigation, and on the other hand, the need to provide an opponent with adequate means of testing the evidence presented at the trial. The scope of litigation privilege has come under sustained judicial criticism, and has been subject to statutory and judicial reforms in recent years, based on the belief that the balance has erred too much on the side of

[54] See para 7.155.
[55] See A Ligertwood and G Edmond *Australian Evidence* (5th edn, Lexis, Sydney 2010) [5.46].
[56] JD Heydon *Cross on Evidence* (9th Australian edn, Lexis 2013) [7205]. See also *DPP v Morgan* [1976] AC 182 (HL) 200.
[57] Thanki, *The Law of Privilege* [3.138] (n 44).
[58] See eg CPR 32.1; Evidence Act 1995 (Cth) s 135; Evidence Act 1995 (NSW) s 135; Evidence Act 2008 (Vic) s 135.

or where a witness refuses to cooperate, or they cannot meet the witness's expenses in giving evidence and therefore cannot comply with the requirements of issuing a subpoena or witness summons.

c. Reforms

2.46 There have been a number of reforms designed to reduce the costs associated with privilege over third-party communications and experts in particular. Many of these reforms are not concerned with privilege, but changing the process by which experts are retained and the way expert evidence is adduced.[62] Specific reforms relating to privilege include abolishing privilege over expert communications for some types of proceedings, abolishing privilege for experts who are consulted for the purposes of testifying at trial (as opposed to acting as an adviser), or in Canada limiting the lifespan of privilege to the litigation for which the material was brought into existence.[63]

D. Privilege as a Human Right

1. Introduction

2.47 **Privilege is a fundamental human right** For most of the nineteenth and twentieth centuries privilege was treated as a rule of evidence. However, in recent decades the law of privilege has been influenced by the emergence and increasing importance of human rights law in shaping and reshaping the rights and obligations of people in their relationships with the State and each other. Superior courts in most common law jurisdictions have talked about privilege in the language of rights, describing that right as 'fundamental' and/or 'human'.[64] The debate as to the correct status of the privilege was described by Lord Scott in *Three Rivers* as sterile.[65] Obviously, some rules of evidence and procedure constitute fundamental rights, so it is possible to apply both labels to privilege. Nonetheless, the description of privilege as a rule of evidence fails to capture its true reach. The privilege extends to all forms of compulsory process including search warrants or notices to produce documents from regulators under powers conferred by statute.[66]

2.48 Classification of privilege as a fundamental human right raises a number of questions regarding the interests it is designed to protect, the extent to which it adequately protects those interests, and whether the rights to privilege may be curtailed or overridden to protect other fundamental rights.

[62] For a discussion of some of the techniques see eg H Genn, 'Getting to the Truth: Experts and judges in the "hot tub"' (2013) 32 CJQ 275; R Jacob, 'Court-Appointed Experts v Party Experts: Which is better?' (2004) 23 CJQ 400.

[63] *Blank v Canada* 2006 SCC 39, [2006] 2 SCR 319 (n 40).

[64] *R v Derby Magistrates' Court, ex p B* [1996] AC 487 (HL) 507; *R (on application of Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563 [7]; *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121, 161 'a practical guarantee of fundamental, constitutional, or human rights … and a corollary of the rule of law'; *Descoteaux v Mierzwinski* [1982] 1 SCR 860.

[65] *Three Rivers No 6* [26] (Lord Scott) (n 9).

[66] *R (on application of Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [7] (n 64); *Baker v Campbell* (n 27); *Descoteaux v Mierzwinski* [1982] 1 SCR 860 (n 64).

2. Privilege and the right to privacy

2.49 In her 1992 book on privilege McNicol argues that the human rights rationale for privilege is based on a 'libertarian philosophy that individual rights and interests should be protected against undue interference from the law'.[67] This philosophy is certainly discernible in Lord Scott's description of the rationale of privilege in *Three Rivers*, that whatever the precise behavioural effects of having or not having a privilege, in a society based on the rule of law, lawyer–client communications should be immune from scrutiny by others.[68]

2.50 A rights based rationale for privilege that has recently emerged, and which is a product of this philosophy, is the idea that the private and secure sphere between lawyer and client is intrinsically valuable as part of a person's right to privacy. To intrude on this sphere would breach a person's right to privacy, and indeed, their dignity. The European Court of Human Rights and some English cases have endorsed this rationale holding that the right to confidential and inviolable communications with a lawyer is embedded in the protection of privacy under Art 8 of the ECHR.[69]

2.51 Jurisprudence on the relationship between legal professional privilege and the right to privacy should be treated with caution by common law lawyers. The right to privacy under Art 8 of the ECHR is not absolute. The right can be curtailed to the extent that it is 'necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'. Contracting states have a margin of appreciation in the degree to which they entrench, or limit, a right to privacy in their domestic law. The disclosure process in civil litigation, where privilege is of great practical significance, is a case in point. The assistance the State provides to private litigants in gathering evidence, whether by way of disclosure or by subpoena processes, is usually more restricted in civilian systems than in common law countries. In most civilian systems there is no general obligation on a party to produce to his opponent documents in his possession which are adverse to his case or helpful to his opponent.[70] Disclosure obligations are also limited in the ECJ and the European Court of First Instance. Article 24 of the Statute of the Court of Justice of the European Economic Community 1957 confers power on either court to require the parties, Member States, and institutions which are not parties, 'to produce all documents and to supply all information which the court considers desirable'. However the only sanction for a breach of an order is that 'formal note' is taken and adverse inferences may be drawn. Hence it is not surprising that the rules on privilege in the ECJ and European Court of First Instance are less developed than English rules of privilege, where disclosure obligations are substantial and privilege is a critical exception.[71]

2.52 Most common law superior courts possess sweeping powers to order the disclosure of relevant evidence, both written and oral. While the right to privacy places restrictions on how

[67] S McNicol, *Law of Privilege* (Law Book Co, Sydney 1992) 1.
[68] *Three Rivers No 6* [34] (Lord Scott) (n 9).
[69] *Golder v UK* (App No 4451/70)(1979–80) 1 EHRR 524; *Campbell v UK* (App No 13590/88) (1992) 15 EHRR 137; *Foxley v UK* (App No 33274/96) (2000) 31 EHRR 637.
[70] P Matthews and H Malek (eds), *Disclosure* (2nd edn, Sweet & Maxwell, London 2004) [1.24].
[71] Matthews and Malek, *Disclosure* [17.36] (n 70).

the disclosure process is conducted,[72] and what can be subsequently done with information that is disclosed,[73] the right to privacy does not shape the scope or content of a litigant's disclosure obligations. Litigants can be required to reveal discussions between family members, or confessions to religious advisers, where the information is relevant and necessary for the just disposal of the litigation.[74] This intrusion into a litigant's private life is compatible with Art 8 because it is deemed necessary to protect the rights of others: namely the opposing litigant.

2.53 In civil law systems it may be reasonable to argue that privilege is a manifestation of a person's general right to privacy.[75] However, in common law jurisdictions, protecting the privacy of lawyer–client communications on the grounds that they are confidential only provides a justification for the statutory, contractual and equitable laws, and professional duties, that prevent legal advisers from disclosing confidential information of their clients *except as required by law*. Similar laws exist to protect the privacy of other professional and personal relationships. However the immunity from compulsory disclosure of lawyer–client communications is not based on a belief that those communications are more private than those of other relationships, or involve a special kind of privacy that requires special protection. Rather the common law gives additional protection to the private nature of lawyer–client communications because it helps protect other important interests. The interests normally cited are the administration of justice and the rule of law.

2.54 **Should lawyer–client communications be off-limits to the State or third parties?** It is reasonably clear that privacy alone does not provide an independent justification for the privilege based on the existing law in common law countries. However, it might be argued that in principle the nature of the lawyer–client relationship is sufficiently private, and sufficiently important, that to breach the client's secure sphere would be an unacceptable assault on the dignity of the individual. As previously mentioned, there are statements from the High Court of Australia invoking the need to protect the dignity of individuals in their dealings with the State as a justification for the privilege.[76] Protecting a person's dignity is certainly a relevant consideration in setting limits on the State's power to compel evidence.[77]

2.55 However the problems with designating lawyer–client communications as off-limits because they are private go beyond incompatibility with existing law. Where the case for protecting lawyer–client communications is detached from the actual consequences of disclosing those communications, it becomes indistinguishable from the case for protecting a person's private communications in other professional or personal relationships where confidentiality is expected and generally believed to be necessary to protect trust in those relationships and the

[72] For example, the safeguards attached to the execution of civil search warrants, also known as Anton Piller Orders.

[73] In England permission or consent of the disclosing party is required to use information obtained on disclosure, CPR 31.22, and this rule has been followed in most other jurisdictions, except the US.

[74] Protection for communications of other private relationships is the exception rather than the norm: see Chapter 4 section A.

[75] Although the ECtHR has recognized that in appropriate cases interference with privileged communications may be justified: *Foxley v UK* [44] (n 69).

[76] *Baker v Campbell* (Deane J) (n 27).

[77] See eg A Ashworth and M Redmayne, *The Criminal Process* (4th edn, Oxford University Press, Oxford 2010) 23.

dignity of the persons in them. The confidentiality of communications in these relationships is protected by law, but those protections are qualified and may give way to other legitimate interests. The courts have also recognized that limited intrusion on the privacy of lawyer–client communications may be justified to protect other fundamental rights such as the right to safety.[78] The Supreme Court in Canada, the House of Lords, and the European Court of Human Rights have all recognized that there is nothing intrinsically objectionable with interference with lawyer–client communication provided it is for a legitimate objective, the interference is proportionate to that objective, and there are appropriate safeguards.[79]

2.56 The likelihood of the courts reframing the rationale for privilege—and in turn its scope—as a 'dignity protecting' rule that holds that certain communications should be free from scrutiny from anyone *because they are private* appears remote at least in the near future.[80]

3. Legal professional privilege and the privilege against self-incrimination

2.57 Another rationale for privilege which centres on protecting the dignity of the individual, and which does not depend on behavioural assumptions about the effects of the privilege, is the idea that it helps protect the constitutional guarantee against self-incrimination. For example, In *Maranda v Richer*, LeBel J of the Canadian Supreme Court stated that an aim of the privilege 'was to avoid lawyers becoming, even involuntarily, a source to be used in the criminal prosecution of their clients, thus jeopardizing the constitutional protection against self-incrimination enjoyed by the clients'.[81]

2.58 **A rule about legitimate sources of evidence** If the purpose of the privilege is to prevent clients from incriminating themselves, there must be some doubt about whether it does any work that is not already performed by the privilege against self-incrimination, which also provides an immunity from compulsory disclosure or adverse use. However, the principle can be stated more broadly, to prevent adverse use of lawyer–client communications in criminal or civil proceedings whether or not the material is likely to incriminate the holder.

2.59 The underlying principle is that lawyer–client communications are not a legitimate source of evidence for the State or the accused to make a case against the privilege holder. Defined in this way, the privilege ensures that a person's efforts to protect or promote their legal interests cannot be used to undermine those legal interests. The lawyer's office constitutes a safe harbour, in which a client can communicate with their lawyer for a legitimate purpose secure in the knowledge that they are not cooperating in their own prosecution or in building their opponent's case against them. This is the most convincing of the non-instrumental rationales in favour of privilege, because the entitlement to privilege does not depend solely on the choices of the client, but also the uses, if any, to which the material may be put. This issue is further explored at para 2.70.

[78] *Solosky v Canada* [1980] 1 SCR 821; *McE, Re* [2009] UKHL 15, [2009] 1 AC 908; *Foxley v UK* (n 69). In *Foxley* and *Re McE* it was found that the safeguards to protect a person's privacy were not sufficient hence the interference with the privileged communications were not sufficient. The US Supreme Court and the Australian High Court have also expressed a willingness to review material subject to a privilege claim in camera in ought to be satisfied that the claim is properly made: *United States v Zolin* 491 US 544, 109 S Ct 2619 (1989); *Grant v Downs* (1976) 135 CLR 674 (HCA).

[79] *Solosky v Canada* (n 78); *McE, Re* (n 78).

[80] Especially when applied to corporations given that corporate privacy rights are not necessarily identical to the privacy rights of individuals: see *Société Colas Est v France* (2004) 39 EHRR 17 [41].

[81] *Maranda v Richer* 2003 SCC 67, [2003] 3 SCR 209 [12].

individual case.[96] The House of Lords stated that the privilege was an absolute right, which was itself the product of a balancing exercise between the competing interests of protecting the confidentiality of lawyer–client communications and ensuring all relevant material is before the court. There can be no further balancing exercise in individual cases because if the privilege is to have its intended effect of encouraging candour in lawyer–client communications it must be operative at the time the communication is made, ie the client must have a guarantee *before* they talk to their lawyer that what they tell the lawyer will not be disclosed without their consent.[97] The consequence of this reasoning is that the privilege ends up trumping and thus defeating other fundamental rights when they clash.

2.67 *Derby Magistrates* was decided before the European Convention of Human Rights was incorporated into English domestic law.[98] Some English judges have suggested that privilege might need to be subject to a balancing exercise, in the same way that other fundamental human rights are qualified including the right to privacy or the right to free speech. A blanket rule that precludes any incursion on the privilege no matter how compelling the case, or without any consideration as to what, if any, adverse impacts disclosure would have on the privilege holder, might be incompatible with the principles of proportionality that underpin much of the jurisprudence on human rights in Europe.[99] In *Medcalf v Mardell* Lord Hobhouse stated in a dissenting opinion, 'that, it may be that the privilege may not always be absolute and a balancing exercise may sometimes be necessary'.[100] No court has directly considered whether the ECHR might require privilege to be subject to a balancing exercise when it conflicts with other fundamental human rights. However, there have been statements from the Privy Council[101] and the House of Lords[102] affirming *Re Derby Magistrates* and the absolute nature of privilege, notwithstanding that the Canadian Supreme Court has taken a different approach.

2.68 In a forceful speech in *Re Derby* Lord Nicholls thought that the inherent and insurmountable difficulty with the Canadian approach is that it would impossible for the court to conduct the balancing exercise because it would be impossible to weigh up the accused's need for the evidence with the privilege holder's interest in maintaining the confidentiality of their privileged communications. He stated:

> Inherent in the suggested balancing exercise is the notion of weighing one interest against another. On this argument, a client may have a legitimate, continuing interest in non-disclosure but this is liable to be outweighed by another interest. In its discretion the court may override the privilege against non-disclosure. In *Reg v Ataou* the Court of Appeal expressed the matter thus, at p. 807: 'The judge must … balance whether the legitimate interest of the defendant in seeking to breach the privilege outweighs that of the client in seeking to maintain it.'
>
> There are real difficulties here. In exercising this discretion the court would be faced with an essentially impossible task. One man's meat is another man's poison. How does one equate

[96] *R v Derby Magistrates' Court, ex p B* (n 64).
[97] *R v Derby Magistrates' Court, ex p B* 507 (n 64).
[98] By virtue of the Human Rights Act 1998.
[99] The editors of *Phipson on Evidence* have provided some support for this view: *Phipson on Evidence* [23-12] (n 92).
[100] *Medcalf v Mardell* [60] (n 90).
[101] *B v Auckland District Law Society* [2003] UKPC 38, [2003] AC 736 [50–56].
[102] *Three Rivers No 6* [25] (n 9).

> exposure to a comparatively minor civil claim or criminal charge against prejudicing a defence to a serious criminal charge? How does one balance a client's risk of loss of reputation, or exposure to public opprobrium, against prejudicing another person's possible defence to a murder charge? But the difficulties go much further. Could disclosure also be sought by the prosecution, on the ground that there is a public interest in the guilty being convicted? If not, why not? If so, what about disclosure in support of serious claims in civil proceedings, say, where a defendant is alleged to have defrauded hundreds of people of their pensions or life savings? Or in aid of family proceedings, where the shape of the whole of a child's future may be under consideration? There is no evident stopping place short of the balancing exercise being potentially available in support of all parties in all forms of court proceedings. This highlights the impossibility of the exercise. What is the measure by which judges are to ascribe an appropriate weight, on each side of the scale, to the diverse multitude of different claims, civil and criminal, and other interests of the client on the one hand and the person seeking disclosure on the other hand?[103]
>
> In the absence of principled answers to these and similar questions, and I can see none, there is no escaping the conclusion that the prospect of a judicial balancing exercise in this field is illusory, a veritable will-o'-the-wisp.

2.69 With respect, the difficulty with Lord Nicholls' argument is that it overlooks the fact that balancing competing and incommensurable rights is something that courts do regularly, whether it is assessing where the balance of justice lies in an application for an interim injunction,[104] or in setting the balance between competing convention rights such as the right to privacy and the freedom of expression.[105] The chief argument against the Canadian approach is not whether the courts can satisfactorily carry out a balancing exercise, but whether doing so would inhibit a person's ability to obtain legal assistance if the facts they communicate to their lawyer could be disclosed without their consent and potentially to their prejudice. One can only speculate as to whether a person accused of serious wrongdoing would be deterred from communicating information to a lawyer if it could be disclosed but not used in evidence against them. Interestingly, Lord Nicholls expressly left open the possibility that where the privilege holder no longer has any legitimate interest in maintaining the confidentiality of their lawyer–client communications, the privilege could give way if there was a compelling reason.[106] However no subsequent decision has entertained this possibility, and Lord Nicholls himself acknowledged the difficulties of ascertaining whether the privilege holder still had a legitimate interest in maintaining confidentiality in their privileged material. In *Nationwide Building Society v Various Solicitors*[106b] Blackburne J held that the reasons given by the majority in *Re Derby* were inconsistent with the 'no interest' point raised by Lord Nicholls. Accordingly, the privilege was absolute in the sense that unless it could not be claimed or was otherwise lost, the basic principle is 'once privileged, always privileged'.

[103] *R v Derby Magistrates' Court, ex p B* 511, 512 (n 64).

[104] See eg *American Cyanamid Co v Ethicon Ltd* [1975] AC 396; [1975] 2 WLR 316; *Cream Holdings Ltd and Others v Banerjee and Anor* [2004] UKHL 44; *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46 [2006] 227 CLR 57.

[105] See eg *Moseley v UK* (App No 48009/08) [2011] 53 EHRR 30; *JIH v News Group Newspapers* [2011] EWCA Civ 42, [2011] 1 WLR 1645 (CA).

[106] *R v Derby Magistrates' Court, ex p B* 512 (n 64).

[106b] *Nationwide Building Society v Various Solicitors* [1999] PNLR 52.

malfeasance in public office, and relied explicitly on the contents of the Bingham report. During the course of the litigation the liquidators sought disclosure of internal documents created by employees of the bank in connection with the Inquiry. The Bank of England claimed legal professional privilege over a number of these documents. The Bank did not claim litigation privilege, which would have made the client question redundant,[8] on the basis that while litigation was a reasonable prospect at the time, the dominant purpose of the communications was to respond to the Bingham Inquiry. The Bingham Inquiry did not constitute adversarial litigation. Thus documents made in connection with the Inquiry did not qualify for litigation privilege.[9] Instead the Bank claimed legal advice privilege.[10]

3.12 The claimants challenged some of the privilege claims. Initially the challenge was confined to documents that were prepared by Bank employees and passed to the Bingham Inquiry Unit but were not themselves communicated to the Bank's lawyers, although the contents of them may have informed material that was provided to the lawyers. The claimants argued that no privilege attached to this 'raw material' produced by ordinary bank employees which was not intended to be communicated to the lawyer.

3.13 **High Court decision** The claimants' challenge to privilege was heard by Tomlinson J at first instance. Tomlinson J described the question he had to decide as:

> whether the subject matter of legal advice privilege is restricted to *communications between solicitor and client*, . . . or whether it embraces also material brought into existence for the dominant purpose of obtaining legal advice, even though that material is not in itself a *communication between solicitor and client*.[11]

What leaps out from this formulation, and even the phrase 'communication between solicitor and client', is that it actually raises two different issues. First, must the material be communicated to the lawyer to attract privilege, and secondly who is the client?

3.14 Tomlinson J focused on the nature of the 'communication', not the definition of the client. He observed that the law on the communication is not as clear as one might have expected.[12] Upholding the Bank's claims to privilege over 'raw material' which was not sent to the lawyers, he stated:

> I would suggest that it is the confidentiality of the process of communication which is preserved [by LPP], rather than simply the confidentiality of distinct communications within that process . . . Once that wider principle is borne in mind . . . it becomes clear that actual communication of the relevant document or information—and I prefer the broader description 'material'—is not in fact the touchstone. Rather the touchstone is the purpose for which the document was brought into existence.[13]

3.15 The fact that the judge did not deal with the client question is not surprising. There is a dearth of authority on the topic, and it is not even clear the issue was argued before him. Given that identifying the client is a precondition of establishing a claim to privilege—to

[8] As litigation privilege protects confidential communications with third parties in connection with litigation.

[9] *Re L (a minor) (Police Investigation: Privilege)* [1997] AC 16 (HL).

[10] *Three Rivers No 5* [2] (n 2).

[11] *Three Rivers District Council v Governor and Company of the Bank of England (No 5)* [2002] EWHC 2730 [3].

[12] *Three Rivers No 5* [6] (n 11).

[13] *Three Rivers No 5* [4] (n 11).

know who can assert it and to know whether the material was confidential to the client—the only explanation for the lack of authority on the issue is that courts and practitioners have operated on two assumptions about the client in corporate contexts. First, the entity formally obtaining (and paying for) the advice is the client, and secondly, all of the entity's employees are part of, or capable of being part of, the 'client' for the purposes of the privilege. The Court of Appeal's decision in *Three Rivers No 5* effectively ended this second assumption.

2. The Court of Appeal's decision in *Three Rivers No 5*

3.16 The Court of Appeal rejected the Bank's claims to legal advice privilege, thus overruling the High Court, but it did so based on grounds that were not considered by Tomlinson J. The Court of Appeal did not take issue with the principle underpinning Tomlinson J's decision; that the client did not have to physically send documents to a lawyer in order for them to qualify for privilege. Some commentators have argued that the Court of Appeal overturned Tomlinson J on this point as well because the privilege did not extend to internal preparatory documents.[14] However the court acknowledged that the client's preparatory documents could attract the protection of privilege if they were intended to be communicated to the lawyer. It stated: 'there would be no difficulty in saying that a document which was intended to be a communication between client and solicitor was still privileged even if not in fact communicated.'[15]

3.17 Rather, the Court of Appeal overturned Tomlinson J on the grounds that the documents in question were not the client's documents. The documents were prepared by ordinary employees of the Bank and they were not the 'client'. In making this finding, the Court of Appeal ventured into the corporate client question for the first time in at least a hundred years. The decision sent shockwaves through the legal profession.[16]

3.18 In its judgment the Court of Appeal noted that there was a surprisingly wide divergence of opinion about the scope of legal advice privilege. Both parties asserted that the law had been settled since the nineteenth century and favoured their respective positions. According to the claimant, privilege attached only to communications between solicitor and client, and material disclosing the substance of those communications. According to the Bank, the principle was that any document made by the client for the dominant purpose of obtaining advice qualified for protection whether or not it was intended to be communicated to the lawyer or was in fact communicated to the lawyer.[17] Therefore the Court of Appeal resorted to analysing a small number of cases from the nineteenth century in which the boundaries between legal advice privilege and litigation privilege first emerged. These cases were *Anderson v Bank of British Columbia* (1876) 2 Ch D 644 (CA); *Southwark and Vauxhall Water Co v Quick* (1878) 3 QBD 315 (CA); and *Wheeler v Le Marchant* (1881) 17 Ch D 675 (CA).

3.19 The Court of Appeal's approach to these cases is discussed at paras 3.62 and 3.67. For the purpose of identifying what the court decided it suffices to say that the court concluded two things: first, by the end of the nineteenth century it was clear that legal advice privilege

[14] B Thanki (ed), *The Law of Privilege* (2nd edn, Oxford University Press, Oxford 2011) [2.141].
[15] *Three Rivers No 5* [21] (n 2).
[16] Thanki, *The Law of Privilege* 33 (n 14).
[17] *Three Rivers No 5* [6] (n 2).

did not apply to documents communicated to a client or his solicitor for advice to be taken upon them by independent agents, but only to communications passing between that client and his solicitor (whether or not through any intermediary) and documents evidencing such communications. Secondly, in the case of a company, information from an employee stands in the same position as information from an independent agent.[18] The court went on to analyse more recent twentieth-century cases about the purpose for which documents were created and the significance of actual communication to the lawyer but found most of them unhelpful as they concerned litigation privilege or did not concern communications by employees of the client.[19]

3.20 At some point during the argument, the Court of Appeal appears to have shifted focus from considering whether the documents needed to be sent to the lawyer—the question decided by Tomlinson J—to considering the identity of the employees who had authored them. It accepted Lord Taylor's formulation in *Air India v Balabel* that 'whether documents are privileged or not must depend on whether they are part of that necessary exchange of information of which the object is the giving of legal advice'[20] as an appropriate test to apply to communications between the client and his solicitor. However, it said authority does not support its wider application to memoranda supplied by employees for the purpose of being sent to the client's solicitor.[21] Counsel for the Bank put to the court the hypothetical example of the Governor making a note of what he remembered in relation to the supervision of BCCI with the intention of being sent to Freshfields. In response, the court endorsed counsel for the plaintiff's submission that on the evidence before the court, the Bingham Inquiry Unit was the client for the purposes of the application. Accordingly, documents prepared by ordinary Bank employees were not privileged whether or not they were sent to the Bank's lawyers. The same would be true of documents prepared by senior Bank employees who were not members of the Bingham Inquiry Unit.

3.21 There is only one paragraph in the Court of Appeal's judgment which directly considers the client question as it applied to the Bank of England. Delivering the opinion of the court, Lord Justice Longmore stated:

> We therefore conclude that the Bank is not entitled to privilege … Mr Stadlen asked what the position would be if the Governor himself had noted down what he remembered in relation to the supervision of BCCI with the intention of giving it to the [Bingham Inquiry Unit] for transmission to Freshfields. No privilege has been claimed for any such specific document but, as it seems to us, Mr Pollock was right to say that on the evidence before the court, the [Bingham Inquiry Unit], which was established to deal with inquiries and to seek and receive Freshfields' advice, is for the purpose of this application, the client rather than any single officer however eminent he or she may be.[22]

3.22 **Implications of the decision** It is clear from the passage just quoted that the Court of Appeal decided the client question solely by reference to the facts before it. However, to make the case-specific finding that the Bingham Inquiry Unit was the client for the purpose of the application, the court also had to find, expressly or implicitly, that not all employees

[18] *Three Rivers No 5* [18]–[19] (n 2).
[19] *Three Rivers No 5* [27]–[29] (n 2).
[20] *Balabel v Air India* [1988] Ch 317 (CA) 322.
[21] *Three Rivers No 5* [30] (n 2).
[22] *Three Rivers No 5* [31] (n 2).

were necessarily part of the corporate client as a matter of law. For without this finding of principle the fact-specific question as to whether the Bingham Inquiry Unit was the client would not have arisen. While the outcome of the application turned on the facts of the case, the principle which underpinned the court's decision has potentially far reaching implications. Unfortunately the court did not address the questions raised by their judgment regarding the scope of the corporate client. Declaring that no employees apart from members of the Bingham Inquiry Unit were the client, begs the question as to which employees will be considered part of the corporate client. Additionally, if employees might be part of the corporate client for some purposes and not others, when will their communications be protected as communications of the client? The court did not give an authoritative definition or guidelines for deciding these questions.

3.23 One could attempt to read between the lines of the Court of Appeal's finding that the Bingham Inquiry Unit was the client in order to extract general principles that a court might apply to the client question in future cases. Such an exercise must be subject to the caveat that it is far from clear that the Court of Appeal intended to lay down guidelines of general application. However, given that lawyers and corporate clients have little to guide them in working out which employees are members of the corporate client and/or the circumstances in which employees will be considered part of the corporate client it is inevitable that clients will endeavour to read between the lines. Based on the Court of Appeal's decision one might be tempted to draw two further inferences beyond the basic proposition that not all employees are necessarily members of the corporate client: first, seniority alone is not sufficient to establish an employee as a member of the corporate client, given that not even the Governor qualified as the client in that case; and secondly, to be a member of the corporate client an employee has to be authorized to deal with corporate counsel and seek and receive advice from them, given that this is what distinguished the Bingham Inquiry Unit from other employees of the Bank. It is questionable whether these additional inferences should be drawn from the judgment. The proposition that seniority alone is not sufficient to establish an employee's membership of the corporate client in most cases will be inconsistent with the proposition that employees who are authorized to seek and obtain legal advice will be considered part of the corporate client. Ordinarily the hierarchy of an organization includes senior employees (or officers) who are authorized under the entity's own articles of association or charter, or impliedly authorized as a matter of law, to seek and receive advice on behalf of the organization regarding its affairs. It will be a very rare case indeed, if one exists at all, that the CEO or head of an organization is not authorized to seek and receive legal advice on behalf of the company.

3.24 The dicta from the Court of Appeal suggesting that the Governor was not part of the corporate client appears to be based on the fact that the Governor had delegated the task of seeking and receiving advice to the Bank officials who constituted the Bingham Inquiry Unit. There is no obvious reason in principle or practice why a CEO's decision to delegate the task of communicating with lawyers would have the effect of removing the CEO from the protection of privilege. After all, they are one of the persons with the power to authorize other employees to get advice on behalf of the organization, and one of the persons with the power to decide whether or not to act on the advice. On the other hand, the fact of delegation of the seeking and receiving of advice and dealing with lawyers cannot itself be the relevant touchstone if the point of the Court of Appeal's decision was to avoid an overly broad definition of the corporate client. If it were otherwise, companies would be able to

3.33 The House of Lords granted leave from this decision. Their Lordships unanimously overturned the Court of Appeal's decision, and gave a resounding endorsement of the value of the legal advice privilege and the right of all persons, small and powerful, real and artificial, to claim the privilege. Lord Scott stated:

> [The authorities] recognize that in the complex world in which we live there are a multitude of reasons why individuals, whether humble or powerful, or corporations whether large or small, may need to seek the advice or assistance of lawyers in connection with their affairs; they recognize that the seeking and giving of this advice so that the clients may achieve an orderly arrangement of their affairs is strongly in the public interest.[32]

Similarly Baroness Hale stated that 'it is in the interests of the whole community that lawyers give their clients sound advice, accurate as to the law and sensible as to their conduct' and legal advice privilege facilitates the giving of such advice.[33]

3.34 These statements, which were endorsed again by the Supreme Court in *Re Prudential*,[34] undermine the theoretical justification for the Court of Appeal's decision in *Three Rivers No 5*. The Court of Appeal expressed doubts about the rationale for legal advice privilege in *Three Rivers No 5* and *No 6*, suggesting that clients seeking purely legal advice (and, it might be added, acting in good faith) did not need a guarantee of confidence because the prospect of winning or losing litigation will not normally cloud their judgement about what facts to put before the lawyer: self-interest in obtaining sound legal advice would motivate the client to provide full disclosure.[35] The Court of Appeal's 'lack of enthusiasm' for legal advice privilege almost certainly influenced the way it interpreted the rule to deny the Bank of England's privilege claims. This purposive approach to setting the boundaries of privilege is not new. Courts dating back to at least the eighteenth century have considered the potential effects of ordering disclosure of a client's communications on them and others who are similarly situated both to uphold and deny privilege claims. The point of this consequential analysis is obvious: if disclosure of the information would have a chilling effect on the client, ie deterring clients from seeking legal assistance and reducing candour in lawyer–client consultations, then there is a case to give it greater protection from disclosure than other confidential information which may have to be produced in legal disputes or legal investigations, but if there is no chilling effect then there is no need to give greater protection.

3.35 The House of Lords took the same purposive approach to reach the opposite conclusion to the Court of Appeal, although all of the scenarios identified by their Lordships in which it was asserted a client might need the protection of legal advice privilege involved individuals rather than corporations.[36]

3.36 Having reached these conclusions about the value of the legal advice privilege to all legal persons, it is a little surprising that the House of Lords did not go on to address the definition

[32] *Three Rivers No 6* [34] (n 5). See also Lord Carswell, who stated that while the interests of a bank and the individual in their reputations may differ, that does not mean that the bank's interests should be disregarded: [113].

[33] *Three Rivers No 6* [61] (n 5).

[34] *R (on the application of Prudential Plc) v Special Commissioner of Income Tax* [2013] UKSC 1; [2013] 2 WLR 325.

[35] *Three Rivers No 5* [26] (n 2).

[36] See Chapter 2 for a discussion of the rationale for legal advice privilege, and Chapter 9 for a discussion of how it applies to corporations.