Implied waiver of legal professional privilege: A search for consistency

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The law will impute waiver of legal professional privilege where the conduct of a client is inconsistent with the maintenance of the confidentiality that the privilege is intended to protect. In applying this test, a court may be informed by considerations of fairness. This article first considers the role of fairness in the application of the inconsistency test. As with any question of waiver, the question of inconsistency is a matter of fact and degree. By drawing on principles derived from cases involving the disclosure of privileged communications to a third party, this article highlights two factors to which a court should give primacy in applying the inconsistency test, thereby instilling some certainty and predictability in an area of the law that is heavily litigated and devoid of guidance.

I Introduction

The law on implied waiver of legal professional privilege is no stranger to uncertainty and unpredictability — two bugbears in a rational system of law.[1] For some time, the sole touchstone for determining whether the law should impute a waiver of privilege was the notion of 'fairness', which has been likened to the Chancellor's foot in equity for its subjectivity and variability.[2] The decision of the High Court in *Mann v Carnell* marked a turning point in the implied waiver inquiry, giving prominence to the familiar test of 'inconsistency': the law will impute waiver where the conduct of a client is inconsistent with the maintenance of the confidentiality that the privilege is intended to protect.[3] However, it also brought with it two difficulties that this article seeks to confront. The first difficulty stems from the High Court's statement that the inconsistency test is to be informed, where necessary, by considerations of fairness: what exactly is the role of fairness in the application of the inconsistency test? The second difficulty is the lack of guidance around the factors to which a court should have regard before determining whether there is inconsistency: how is the inconsistency test to be applied?

This article first explains the rationale of legal professional privilege. It introduces the doctrine of waiver and describes the notion of fairness as it applied before *Mann v Carnell*. It also examines the inconsistency test expressed in *Mann v Carnell* and the continuing role of fairness in applying

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1 Sir Anthony Mason, 'The Use and Abuse of Precedent' (1988) 4 *Australian Bar Review* 93, 93–5.

2 *Bayliss v Cassidy [No 2]* [2000] 1 Qd R 464, 473 (McPherson JA). See also *Mann v Carnell* (1999) 201 CLR 1, 40–2 [129]–[133] (McHugh J dissenting).

3 (1999) 201 CLR 1, 13 [29] (Gleeson CJ, Gaudron, Gummow and Callinan JJ). For convenience, this article refers to the question whether such inconsistency exists as 'the inconsistency test'.

that test. In this respect, it contends that the notion of fairness is limited to ensuring that a party in judicial or quasi-judicial proceedings would not be denied natural justice, or otherwise be prejudiced in the conduct of its case, by the maintenance of privilege.

By drawing on the approach of the court in cases involving the disclosure of privileged communications to a third party, this article highlights two factors that have become prevalent in the application of the inconsistency test in that context: first, the existence and effectiveness of any obligations of confidentiality imposed on the third party recipient with respect to the disclosed communications; and second, the several interests of the privilege holder and the recipient. It contends that a court should give primacy to these factors in applying the inconsistency test. Finally, this article re-examines the decision in *Mann v Carnell* in the light of the proposed two-factor approach and draws attention to aspects of the reasoning in *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Ltd [No 2]*,[4] a recent decision of the Federal Court that shows what appears to be a novel approach to applying the inconsistency test.

II Legal professional privilege and waiver

A Rationale

At common law, legal professional privilege protects the confidentiality of communications passing between legal practitioner and client where those communications have been made or brought into existence for the dominant purpose of the client obtaining, or the legal practitioner giving, legal advice or for use in existing or contemplated litigation.[5]

The privilege is a rule of substantive law and a fundamental common law immunity, not merely a rule of evidence.[6] The rationale for the privilege is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal practitioners.[7] By protecting the confidentiality of communications passing between the legal practitioner and the client, the client is induced to retain the legal practitioner, seek his or her advice and make full and frank disclosure of the relevant circumstances.[8] In this way, the privilege is a precondition of the informed and competent representation of the interests of the client in both

4 (2014) 312 ALR 403 ('*Asahi Holdings*').

5 *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49, 64 [35] (Gleeson CJ, Gaudron and Gummow JJ). The principle is known as 'client legal privilege' under the uniform evidence legislation. See *Evidence Act 1995* (Cth) ss 117–19.

6 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 552–3 [9]–[10] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), 563 [44] (McHugh J), 575–6 [85]–[86] (Kirby J), 591–2 [132] (Callinan J); *Osland v Secretary, Department of Justice* (2008) 234 CLR 275, 307 [81] (Kirby J), 327 [151] (Hayne J dissenting). See also *Three Rivers District Council v Governor and Company of the Bank of England [No 6]* [2005] 1 AC 610, 659 [61]–[62]; *Swidler & Berlin v United States*, 524 US 399, 403 (DC Cir, 1998).

7 *Grant v Downs* (1976) 135 CLR 674, 685 (Stephen, Mason and Murphy JJ).

8 Ibid. See also *Fisher v United States*, 425 US 391, 403 (3rd Cir, 1976).

judicial and quasi-judicial proceedings.[9] It underscores the need of the client to obtain professional assistance in the protection, enforcement or creation of his or her legal rights.[10]

The public interest in the administration of justice promoted by the privilege conflicts with the more general public interest in ensuring the availability of all relevant evidence in an individual case.[11] The privilege is itself the product of a balancing exercise between these competing public interests; and it is the public interest in 'the perfect administration of justice' that prevails.[12] Thus, the law permits the search for the truth in legal proceedings to yield to the public interest in preserving the secrecy of communications between legal practitioner and client.[13] When it applies, the privilege may be seen as an obstacle to the pursuit of truth in an individual case.[14]

B Waiver and 'fairness' in implied waiver

Through the operation of the doctrine of waiver, the law recognises that, in some cases, the pursuit of truth in the individual case should prevail over the fundamental right afforded by the privilege and the public interest in the administration of justice promoted by the privilege. But in what circumstances will this occur?

In answering this question, it is necessary first to distinguish between express waiver and implied waiver. Express waiver occurs when the privilege holder intentionally discloses a privileged communication.[15] Implied waiver occurs when the conduct of the privilege holder is inconsistent with the maintenance of the confidentiality that the privilege is intended to protect, irrespective of the subjective intention of the party that has lost the privilege.[16]

Before the decision of the High Court in *Mann v Carnell*, implied waiver, or waiver 'imputed by operation of law',[17] was based on the notion of

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9 *A-G (NT) v Maurice* (1986) 161 CLR 475, 490 (Deane J).

10 Ibid 487 (Mason and Brennan JJ), 490 (Deane J). See also *R v Bell* (1980) 146 CLR 141, 152 (Stephen J).

11 *Grant v Downs* (1976) 135 CLR 674, 685. It is because of this conflict that 'the privilege should be confined within strict limits'. See also *A-G (NT) v Maurice* (1986) 161 CLR 475, 487 (Mason and Brennan JJ); *Baker v Campbell* (1983) 153 CLR 52, 74–5 (Mason J); *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, 64–5 [35] (Gleeson CJ, Gaudron and Gummow JJ).

12 *Waterford v Commonwealth* (1987) 163 CLR 54, 64–5 (Mason and Wilson JJ) quoting *Bullivant v A-G (Vic)* [1901] AC 196, 200 (Earl of Halsbury LC). In *Spotless Group Ltd v Premier Building and Consulting Pty Ltd* (2006) 16 VR 1, Neave JA said: 'The benefits of free and uninhibited access to candid legal advice are generally regarded as outweighing the competing benefit of having all relevant and probative material available to the court to facilitate the trial process': at 20 [63].

13 *Benecke v National Australia Bank* (1993) 35 NSWLR 110, 111 (Gleeson CJ). See generally Justice Stephen Gageler, 'Evidence and Truth' (2017) 13 *Judicial Review* 249.

14 Ronald J Desiatnik, *Legal Professional Privilege in Australia* (LexisNexis Butterworths, 3rd ed, 2016) 4.

15 *A-G (NT) v Maurice* (1986) 161 CLR 475, 481 (Gibbs CJ), 487 (Mason and Brennan JJ), 491–2 (Deane J), 497 (Dawson J); *Goldberg v Ng* (1994) 33 NSWLR 639, 674 (Clarke JA).

16 *Mann v Carnell* (1999) 201 CLR 1, 13 [29].

17 *Goldberg v Ng* (1995) 185 CLR 83, 95 (Deane, Dawson and Gaudron JJ); *Mann v Carnell* (1999) 201 CLR 1, 13 [29].

'fairness'.[18] When the conduct of a privilege holder touched a certain point of disclosure, fairness required the privilege to cease, whether the privilege holder intended that result or not.[19] In other words, an implied waiver occurred when, by reason of some conduct on the part of the privilege holder, it became unfair to maintain the privilege.[20] Such an approach also found favour in England, the United States and Canada.[21]

Fairness has been described as a nebulous concept that calls for an examination into the circumstance of a privileged communication coming into existence and the entire history of dealings between the parties to litigation.[22] During its tenure as the sole criterion in the implied waiver inquiry, the notion of fairness invited the court to consider the existing state of affairs between the parties and to balance competing interests in the administration of justice.[23] It had the potential to produce different results even among different judges in the same case.[24] McPherson JA summed it up as follows:

> As a criterion for decision, 'fairness' has always seemed a somewhat imprecise guide because, like the Chancellor's foot, it is largely the product or impression of a subjective state or attitude of mind which has a propensity to vary greatly from one individual to another.[25]

How did courts apply the notion of fairness in the implied waiver inquiry? The different approaches from different members of the High Court in *Attorney-General (NT) v Maurice*, a leading authority on implied waiver and the application of the notion of fairness, suggested that a court should ask such questions as whether it would be unfair or misleading to allow a party to refer

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18 *A-G (NT) v Maurice* (1986) 161 CLR 475; *Goldberg v Ng* (1995) 185 CLR 83.

19 J T McNaughton, *Evidence in Trials at Common Law* (Little, Brown, revised ed, 1961) vol 8 635–6 [2327] quoted in *A-G (NT) v Maurice* (1986) 161 CLR 475, 481 (Gibbs CJ), 488 (Mason and Brennan JJ); *Goldberg v Ng* (1995) 185 CLR 83, 96 (Deane, Dawson and Gaudron JJ). Professor Wigmore described the element of fairness as an 'objective consideration'.

20 *A-G (NT) v Maurice* (1986) 161 CLR 475, 487 (Mason and Brennan JJ).

21 See *Lillicrap v Nalder & Son* [1993] 1 WLR 94; *Duplan Corporation v Deering Milliken Inc*, 397 F Supp 1146, 1161–2 (D SC, 1974); *Weil v Investment/Indicators, Research and Management Inc*, 647 F 2d 18, 24 (9th Cir, 1981). See also John Sopinka, Sidney N Lederman and Alan W Bryant, *The Law of Evidence in Canada* (Butterworths, 1992) 666 quoted in *Goldberg v Ng* (1995) 185 CLR 83, 120 (Gummow J dissenting).

22 See *Mann v Carnell* (1999) 201 CLR 1, 41–2 [131] (McHugh J dissenting). McHugh J also criticised the notion of fairness in this context for giving rise to potential inconvenience, time and expense in what is almost always an interlocutory stage of a proceeding: at 41–2 [131]–[133]. He also said that, in cases where 'unfairness' does not arise from the characteristics of the communication itself, an inquiry that encourages the court to analyse the extant state of affairs between parties is, as a matter of principle, difficult to reconcile with a doctrine that traditionally inheres in communications as a matter of law: at 40 [128]. See also *Sevic v Roarty* (1998) 44 NSWLR 287, 310 (Fitzgerald AJA).

23 See, eg, *Goldberg v Ng* (1995) 185 CLR 83, 100–1 (Deane, Dawson and Gaudron JJ). See also *Equuscorp Pty Ltd v Kamisha Corporation Ltd* (1999) ATPR 41-697, 42,894 (Heerey J); *Mann v Carnell* (1999) 201 CLR 1, 40 [128] (McHugh J dissenting); *DSE (Holdings) Pty Ltd v Intertan Inc* (2003) 127 FCR 499, 505 [14], 509 [24]. Cf *Derby & Co Ltd v Weldon [No 8]* [1990] 3 All ER 762, 783; *Meltend Pty Ltd v Restoration Clinics of Australia Pty Ltd* (1997) 75 FCR 511, 524 (Goldberg J).

24 See *A-G (NT) v Maurice* (1986) 161 CLR 475; *Goldberg v Ng* (1995) 185 CLR 83. See generally *Mann v Carnell* (1999) 201 CLR 1, 40–2 [129]–[133] (McHugh J).

25 *Bayliss v Cassidy [No 2]* [2000] 1 Qd R 464, 473.

to or use privileged material and yet assert that the material, or material associated with it, is privileged from production;[26] whether withholding such material would give a partial or misleading picture or prejudice or embarrass the opposing litigant in the conduct of its case;[27] whether the privilege holder has sought to reveal beneficial parts of that material, while keeping injurious parts hidden;[28] and whether disclosure is in accordance with a procedural requirement.[29] And the different approaches in *Goldberg v Ng*, another leading authority, suggested that a court should take into account such matters as the importance of the part played by legal professional privilege in the administration of justice;[30] the sensitivity of the material in question;[31] whether the privilege holder would enjoy an advantage over its opponent, either in a related proceeding or the proceeding in which the privilege is claimed;[32] and considerations of natural justice.[33]

The decision of the High Court in *Mann v Carnell* represented what may be seen, at least in theory, as a turning point in the implied waiver inquiry.

III Inconsistency test

Following *Mann v Carnell*, the role of fairness seemingly assumed less importance in the implied waiver inquiry, as the High Court shifted focus away from 'some overriding principle of fairness operating at large' to a principle of 'inconsistency': waiver will occur where there is inconsistency between the conduct of the privilege holder and the maintenance of the confidentiality that the privilege is intended to protect.[34] However, it recognised that 'considerations of fairness may be relevant to a determination of whether there is such inconsistency'.[35]

A *Mann v Carnell*

The Australian Capital Territory ('ACT') settled a proceeding brought against it by Dr Mann. Dr Mann wrote to a member of the ACT Legislative Assembly complaining about the conduct of the litigation. The member passed on the complaint to the chief minister for the ACT. At the time, the chief minister and the member had an informal arrangement whereby the chief minister would provide the member with information from time to time, on a confidential basis, to enable the member to discharge his legislative duties. On this occasion, the chief minister wrote to the member explaining the basis of the settlement. She enclosed copies of legal opinions received by the ACT. Having been told that the opinions were the subject of the informal

26 *A-G (NT) v Maurice* (1986) 161 CLR 475, 481 (Gibbs CJ).
27 Ibid 484 (Gibbs CJ).
28 Ibid 489 (Mason and Brennan JJ).
29 Ibid 493 (Deane J).
30 (1995) 185 CLR 83, 101 (Deane, Dawson and Gaudron JJ).
31 Ibid.
32 Ibid 110 (Toohey J dissenting), 119 (Gummow J dissenting).
33 Ibid 102 (Deane, Dawson and Gaudron JJ).
34 *Mann v Carnell* (1999) 201 CLR 1, 13 [28], 15 [34] (Gleeson CJ, Gaudron, Gummow and Callinan JJ).
35 Ibid 15 [34]. In this respect, the majority cited *Goldberg v Ng* (1995) 185 CLR 83.

arrangement described above, the member returned them to the chief minister without copying them. He then sent a copy of the letter, without the opinions, to Dr Mann. Dr Mann applied for preliminary discovery of the opinions to ascertain whether they were defamatory. The issue, relevantly, was whether privilege in the opinions had been lost following their disclosure by the chief minister to the member.

In a joint judgment, Gleeson CJ, Gaudron, Gummow and Callinan JJ held that privilege had not been waived. They set out the following principles with respect to implied waiver:

> Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is 'imputed by operation of law'.[36] This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege. Thus, in *Benecke v National Australia Bank*,[37] the client was held to have waived privilege by giving evidence, in legal proceedings, concerning her instructions to a barrister in related proceedings, even though she apparently believed she could prevent the barrister from giving the barrister's version of those instructions. She did not subjectively intend to abandon the privilege. She may not even have turned her mind to the question. However, her intentional act was inconsistent with the maintenance of the confidentiality of the communication.[38]

The majority continued:

> What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.[39]

The majority identified the privilege to be that of the body politic, the ACT. To describe what had occurred as 'disclosure to a third party' was an oversimplification of the facts.[40] The majority said that the purpose of the privilege was to enable the ACT to seek and obtain legal advice about the litigation involving Dr Mann without the apprehension of being prejudiced by subsequent disclosure of that advice. That included subsequent disclosure of the advice to Dr Mann.[41] The purpose being so, 'there was nothing inconsistent with that purpose in the Chief Minister conveying the terms of that advice, on a confidential basis, to a member of the Legislative Assembly who wished to consider the reasonableness of the conduct of the Territory in relation to the litigation'.[42]

McHugh J dissented. He considered the privilege to be that of the ACT

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36 See, eg, *Goldberg v Ng* (1995) 185 CLR 83, 95.
37 (1993) 35 NSWLR 110.
38 *Mann v Carnell* (1999) 201 CLR 1, 13 [29].
39 Ibid.
40 Ibid 14–15 [33].
41 Ibid 15 [34].
42 Ibid 15 [35].

Executive, as distinct from the ACT Legislative Assembly.[43] On that footing, he said that, by sending the copied documents to the member, 'a stranger for privilege purposes',[44] the ACT Executive had waived its privilege in the communication recorded in the original documents.[45] McHugh J said that the notion of fairness is plagued by uncertainty and conceptual difficulties and conducive to expensive litigation.[46] He set out what he called 'the preferable rule' as follows: 'Once there is *voluntary* disclosure of privileged material to a stranger to the privileged relationship (ie, to a person who is not the lawyer or the client), privilege in that material is waived as against the world.'[47] This rule accorded with his insisting that 'any common law doctrine which would extend the scope of legal professional privilege must not go beyond the rationales for the privilege',[48] for those rationales 'represent an exception to the common law's pursuit of the truth'.[49] For McHugh J, an abrogation of the common law's basal pursuit of truth is not justified by any countervailing consideration, and '[a] rule that permits a person to disclose a privileged communication to a stranger without waiving the privilege can only be maintained if it promotes the rationales for legal professional privilege.'[50]

In a separate judgment, Kirby J agreed with the conclusion and orders of the majority. He did not address explicitly the notion of fairness, but shared the concern of McHugh J that the ambit of legal professional privilege should not be expanded by a liberal approach to the question of waiver.[51]

B Operation of inconsistency test

The principle of inconsistency that was articulated in *Mann v Carnell* is not foreign to the implied waiver inquiry.[52] Nor, for that matter, is the notion of 'inconsistency' to the doctrine of waiver generally.[53] In *Craine v Colonial*

43 Ibid 31 [93].
44 Ibid 33 [103].
45 Ibid 44 [140].
46 Ibid 40–2 [129]–[133].
47 Ibid 42 [134] (emphasis in original).
48 Ibid 37 [116]. McHugh J explained that rationale, in the context of the litigation privilege, as follows:

> The rationale for the second head of legal professional privilege arises from the need to maintain, in an adversary system of litigation, the freedom of the lawyer and client to make such investigations and inquiries and to engage in such preparation as they think fit in order to further their case. A party to litigation should not be forced to prepare his or her case knowing that statements, advices and other documents, which have been created, may be required to be disclosed to the other party who can then make use of the documents for his or her own advantage: at 36 [114].

See also *Baker v Campbell* (1983) 153 CLR 52, 108 (Brennan J).
49 *Mann v Carnell* (1999) 201 CLR 1, 36 [115].
50 Ibid 37 [116].
51 Ibid 46 [148].
52 In emphasising the notion of inconsistency, the majority in *Mann v Carnell* (1999) 201 CLR 1 appears to have drawn inspiration from the 5th edition of J D Heydon, *Cross on Evidence* (Butterworths, 5th ed, 1996), which was cited during oral argument. See Transcript of Proceedings, *Mann v Carnell* (High Court of Australia, C10/1999, Gleeson CJ, Gaudron, McHugh, Gummow, Kirby and Callinan JJ, 31 August 1999) 971–4 (Gleeson CJ).
53 See generally Jeremy Stoljar, 'The categories of waiver' (2013) 87 *Australian Law Journal* 482.

Mutual Fire Insurance Co Ltd,[54] the High Court described waiver as 'a doctrine of some arbitrariness introduced by the law to prevent a man in certain circumstances from taking up two inconsistent positions'.[55] In similar terms, Latham CJ in *Grundt v Great Boulder Pty Gold Mines Ltd* said that waiver 'involves an abandonment of a right by acting in a manner inconsistent with the continued existence of the right'.[56] In a passage quoted with approval by Gibbs CJ in *Maurice*, Professor Wigmore said that, in deciding a question of implied waiver, 'regard must be had to the double elements that are predicated in every waiver ... not only the element of implied intention, but also the element of fairness and consistency'.[57]

As a matter of principle, the inconsistency test requires the court to analyse the context and circumstances of the case.[58] More precisely, it asks the court: first, to examine the disclosure or other acts or omissions of the privilege holder; and second, to form an evaluative opinion about whether such conduct is inconsistent with the confidentiality that attaches to the privileged communications.[59] In this sense, a finding of inconsistency may be described as a finding of 'secondary fact' that is made after certain primary facts in relation to the conduct of the privilege holder have been proven or assumed as if proved.[60] The inconsistency test itself may be viewed as an objective inquiry or, at any rate, an inquiry that imports a greater degree of objectivity than the application of the notion of fairness.[61] Following *Mann v Carnell*, the inconsistency test is to be applied to all cases that raise the question of implied waiver, such as where a person discloses privileged communications to a third party;[62] a client sues a former solicitor;[63] or a privilege holder, by pleading a

54 (1920) 28 CLR 305.

55 Ibid 326 (citation omitted). See also *Commonwealth v Verwayen* (1990) 170 CLR 394, 406 (Mason CJ).

56 (1937) 59 CLR 641, 658.

57 McNaughton, above n 19, [2327] quoted in *A-G (NT) v Maurice* (1986) 161 CLR 475, 481 (Gibbs CJ).

58 See *Osland v Secretary, Department of Justice* (2008) 234 CLR 275, 296–7 [45], 298–9 [49] (Gleeson CJ, Gummow, Heydon and Kiefel JJ), 310–1 [93] (Kirby J). See also *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303, 315 [30]. There, in a unanimous judgment, the High Court said that an intention to waive privilege will be imputed 'where the actions of a party are plainly inconsistent with the maintenance of the confidentiality which the privilege is intended to protect'. Whether the addition of the word 'plainly' has modified the operation of the inconsistency test remains to be seen.

59 Cf *AWB Ltd v Cole [No 5]* (2006) 155 FCR 30, 68 [134] (Young J); *Asahi Holdings* (2014) 312 ALR 403, 416 [62] (Bromberg J).

60 See Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford University Press, 1978) 93–7. As MacCormick observed, such findings reflect 'the particular facts' of the case and should not be regarded as 'rulings in point of law'.

61 See *Spotless Group Ltd v Premier Building and Consulting Pty Ltd* (2006) 16 VR 1, 12 [27] (Chernov JA; Warren CJ agreeing), 23–4 [81] (Neave JA); *Carey v Korda* (2012) 45 WAR 181, 198 [72] (Murphy JA; Martin CJ and Newnes JA agreeing); *Asahi Holdings* (2014) 312 ALR 403, 416 [59] (Bromberg J). In *Goldberg v Ng* (1995) 183 CLR 85, Toohey J, in dissent, dismissed a test based on fairness and instead asked 'whether a waiver should be imputed, viewing the conduct of the party concerned objectively': at 110 — a sentiment echoed by Gummow J in the same case: at 122.

62 This article is concerned with the application of the inconsistency test in this context.

63 *Benecke v National Australia Bank* (1993) 35 NSWLR 110. See also *Lillicrap v Nalder & Son* [1993] 1 WLR 94, 98–9 (Dillon LJ); *Nederlandse Reassurantie Groep Holding NV v*

certain allegation, has put in issue legal advice that he or she has received.[64]

C Role of fairness

In *Mann v Carnell*, the High Court saw a continuing role for the notion of fairness within the guise of the inconsistency test: 'considerations of fairness may be relevant to a determination of whether there is such inconsistency'.[65] However, judicial opinion has been divided on the role of fairness and the interplay between inconsistency and fairness in the implied waiver inquiry. In *DSE (Holdings) Pty Ltd v Intertan Inc*, Allsop J said that the language used by the majority in *Mann v Carnell* had the effect of subordinating the notion of fairness 'to possible relevance in the assessment of the inconsistency between the act and the confidentiality of the communication'.[66] The Full Court of the Federal Court in *Commissioner of Taxation v Rio Tinto Ltd* doubted that *Mann v Carnell* worked any real change in the law on implied waiver.[67] In *Bailey v Director-General, Department of Land and Water Conservation*, Allsop P (with whom Hodgson JA agreed) stood by his view in *DSE*, saying that *Mann v Carnell* 'brought an important clarification and sharpness to the analysis which cannot be easily reconciled with [*Maurice*] in its application to specific circumstances, or generally'.[68]

The overriding principle of fairness that was in operation before *Mann v*

Bacon & Woodrow [1995] 1 All ER 976, 986 quoted in *DSE (Holdings) Pty Ltd v Intertan Inc* (2003) 127 FCR 499, 506–8 [20]–[21] (Allsop J). See generally D L Mathieson and Julian Page, 'Implied Waiver of Privilege' [2000] *New Zealand Law Journal* 355.

64 *DSE (Holdings) Pty Ltd v Intertan Inc* (2003) 127 FCR 499, 505 [13]. The principle of issue waiver, while falling within the broader category of implied waiver, has unique features, the consideration of which would fall outside the ambit of this article. See generally Andrew Corkhill and Madeleine Selwyn, 'Evolution of the common law principle of "issue waiver"' (2008) 82 *Australian Law Journal* 338. A number of cases on issue waiver decided between *Maurice* (1986) 161 CLR 475 and *Mann v Carnell* (1999) 201 CLR 1 proceeded on the basis that issue waiver was ultimately founded on fairness. See, eg, *Standard Chartered Bank of Australia Ltd v Antico* (1993) 36 NSWLR 87, 93–5 (Hodgson J); *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1995) 37 NSWLR 405, 411 (Giles CJ); *Southern Equities Corporation Ltd (in liq) v Arthur Andersen & Co* (1997) 70 SASR 166, 175 (Doyle CJ), 189–93 (Bleby J); *Adelaide Steamship Co Ltd v Spalvins* (1998) 81 FCR 360, 371 (Olney, Kiefel and Finn JJ); *Wayne Lawrence Pty Ltd v Hunt* [1999] NSWSC 1044 (19 October 1999) [12] (Hodgson CJ). See now *Hastie Group Ltd (in liq) v Moore* (2016) 339 ALR 635, 645–6 [48]–[53] (Beazley P and Macfarlan JA).

65 *Mann v Carnell* (1999) 201 CLR 1, 13 [28], 15 [34]. In this respect, the majority cited *Goldberg v Ng* (1995) 185 CLR 83. See also *Osland v Secretary, Department of Justice* (2008) 234 CLR 275, 296–7 [45] (Gleeson CJ, Gummow, Heydon and Kiefel JJ).

66 *DSE (Holdings) Pty Ltd v Intertan Inc* (2003) 127 FCR 499, 505 [14].

67 *Commissioner of Taxation v Rio Tinto Ltd* (2006) 151 FCR 341, 354 [44] (Kenny, Stone and Edmonds JJ). The Court noted that the majority in *Mann v Carnell* (1999) 201 CLR 1 did not indicate that the reformulated principle was intended to depart from *Maurice* (1986) 161 CLR 475 and *Goldberg v Ng* (1995) 183 CLR 85, each of which attached significant weight to the notion of fairness.

68 *Bailey v Director-General, Department of Land and Water Conservation* (2009) 74 NSWLR 333, 337 [4]. Allsop P added:

> a review of many of the decisions based on a general overriding principle of fairness and a reconsideration of them based on assessing the inconsistency with the confidentiality underlying the privilege (even informed in part by fairness) leads one to appreciate the practical reality of the change. The approaches in many of the cases discussed in [*DSE*] (at 521 [70]–[113]) would be difficult to sustain under *Mann v Carnell*.

Carnell could be seen as a means of ensuring that a party in judicial or quasi-judicial proceedings, typically the party seeking production of privileged communications, would not be denied natural justice, or otherwise be prejudiced in the conduct of its case, by the maintenance of privilege.[69] It is difficult to see why the notion of fairness should not continue to have a tangible role to play in these circumstances, but subject to two qualifications.

First, the mere fact that a party enjoys an advantage over its opponent in preserving the confidentiality of privileged communications that are relevant to a forensic contest 'cannot be a reason for the abrogation of the right' conferred by the privilege.[70] Rather, fairness operates to prevent the party enjoying that advantage from abusing the privilege so as to disadvantage the other party forensically,[71] such as by creating an inaccurate perception of the privileged communication following partial disclosure or revealing beneficial parts of that communication while keeping injurious parts hidden.[72]

Second, a court should not view the notion of fairness, in the context described above, as a licence simply to balance competing interests in the pursuit of avoiding what is perceived to be an 'unfair' result.[73] Such an approach would conflict with the status of legal professional privilege as a rule of substantive law and a fundamental common law immunity that should not be destroyed as a result of an intuitive balancing exercise.[74]

Since *Mann v Carnell*, it is clear that the notion of fairness is subordinate to the inconsistency test in the implied waiver inquiry. However, some uncertainty lingers as to how, if at all, the notion of fairness is to be applied sensibly outside the context of *inter partes* litigation where questions of

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69 See, eg, *MGICA (1992) Ltd v Kenny & Good Pty Ltd [No 2]* (1996) 61 FCR 236; *Meltend Pty Ltd v Restoration Clinics of Australia Pty Ltd* (1997) 75 FCR 511; *Bayliss v Cassidy [No 2]* [2000] 1 Qd R 464, 473. '[T]he underlying principle is one of fairness in the conduct of the trial and does not go further than that': *General Accident Fire & Life Assurance Corporation Ltd v Tanter* [1984] 1 WLR 100, 114 quoted in *A-G (NT) v Maurice* (1986) 161 CLR 475, 483 (Gibbs CJ). Cf *NSW Council for Civil Liberties Inc v Classification Review Board [No 1]* (2006) 236 ALR 313, 320 [33] (Edmonds J).

70 *Watkins v State of Queensland* [2008] 1 Qd R 564, 590 [55] (Keane JA; Jerrard JA and Mackenzie J agreeing).

71 Ibid 591 [57]; *Mann v Carnell* (1999) 201 CLR 1, 33 [103] (McHugh J dissenting). See also *G & S Engineering v Lampson Australia Pty Ltd* [2009] QSC 361 (12 November 2009) [28] (Applegarth J).

72 *A-G (NT) v Maurice* (1986) 161 CLR 475, 489 (Mason and Brennan JJ). See, eg, *British American Tobacco Australia Ltd v Secretary, Department of Health and Aging* (2011) 195 FCR 123, 138 [47] (Keane CJ, Downes and Besanko JJ). As noted by Desiatnik, above n 14, 247, in the context of experts' reports, 'unfairness' has been viewed in terms of allowing a party's witness to refer to privileged communications while also allowing that party to shield those communications from scrutiny and testing by a claim of privilege. See *Atkinson v T & P Fabrications Pty Ltd* (2001) 10 Tas R 57, 59 (Evans J). It has also been viewed as 'the abuse of the right to claim [privilege] by conduct apt to confuse or deceive the opponent': see *Sandvik Mining & Construction Australia Pty Ltd v Dempsey Australia Pty Ltd* [2009] QSC 233 (21 July 2009) (P Lyons J). See generally Paul Mendelow, 'Expert Evidence: Legal Professional Privilege and Experts' Reports' (2001) 75 *Australian Law Journal* 258.

73 See, eg, *Goldberg v Ng* (1995) 185 CLR 83, 100–2 (Deane, Dawson and Gaudron JJ).

74 *DSE (Holdings) Pty Ltd v Intertan Inc* (2003) 127 FCR 499, 509 [24]. See generally Desiatnik, above n 14, 239.

forensic disadvantage or natural justice do not arise.[75] On a practical level, it is arguable that the difference in the application of the inconsistency test and that of the notion of fairness lies not in the reasoning that leads to the conclusion as to whether privilege has been impliedly waived, but how that conclusion is expressed.[76] The reasoning, while often specific to the circumstances of an individual case, has endured through time: both tests require an examination of the circumstances of the case, and what inevitably follows is a conclusion based on either the principle of inconsistency or the notion of fairness.[77] In both tests, each of the relevant factors to which the court has regard is given weight and each bears on the conclusion, irrespective of whether that conclusion is expressed in terms of inconsistency or fairness.[78] And both tests, heavily reliant as they are upon an examination of the circumstances of the case, are susceptible to impressionistic assessment.

IV Third party disclosure: A search for consistency

Judges and commentators alike have recognised the uncertain and unpredictable state of the law on implied waiver.[79] Indeed, the objective factual inquiry inherent in the inconsistency test makes it difficult to devise precise guidelines that outline what may amount to inconsistency in any given case. However elusive precise guidelines may be, one way to instil some certainty and predictability is to examine the types of conduct that the court has treated as inconsistent. This approach is not to transform 'factual questions of judgment into (inconsistent) statements of principle'.[80] Rather, as a matter of good policy for the purpose of the doctrine of precedent, and consistently with the notion of formal justice, it is to promote the view that a court that decides what conduct is inconsistent should be prepared to treat the same conduct as inconsistent in other like cases.[81]

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75 *AWB Ltd v Cole [No 5]* (2006) 155 FCR 30, 67 [131] citing *Mann v Carnell* (1999) 201 CLR 1, 40 [128] (McHugh J); *Goldberg v Ng* (1995) 185 CLR 83, 110 (Toohey J).

76 Cf Desiatnik, above n 14, 232–3. Desiatnik asserts that the notion of fairness 'need only be resorted to where the inconsistency test is inconclusive, or to reinforce a finding over waiver based on the inconsistency test, for the two tests may certainly give the same result'.

77 See, eg, *Standard Chartered Bank of Australia Ltd v Antico* (1993) 36 NSWLR 87; *Woollahra Municipal Council v Westpac Banking Corporation* (1994) 33 NSWLR 529; *Network Ten Ltd v Capital Television Holdings Ltd* (1995) 36 NSWLR 275; *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* (1999) 165 ALR 253. Cf *Bailey v Director-General, Department of Land and Water Conservation* (2009) 74 NSWLR 333, 337 [4] (Allsop P).

78 Cf *Council of the New South Wales Bar Association v Archer* (2008) 72 NSWLR 236, 252 [48] (Hodgson JA; Campbell JA and Handley AJA relevantly agreeing).

79 *A-G (NT) v Maurice* (1986) 161 CLR 475, 498 (Dawson J); *Goldberg v Ng* (1995) 185 CLR 83, 95 (Deane, Dawson and Gaudron JJ). Cf Richard Wilkinson, 'How confidential is that legal advice now? Part 1' (2005) 17 *Australian Construction Law Bulletin* 28, 29; Desiatnik, above n 14, 229, 269–70; Corkhill and Selwyn, above n 64, 348.

80 *DSE (Holdings) Pty Ltd v Intertan Inc* (2003) 127 FCR 499, 520 [62]. See also *Viterra Malt Pty Ltd v Cargill Australia Ltd* [2018] VSCA 118 (11 May 2018) [44], [72] (Whelan, Kyrou and McLeish JJA) citing *Archer Capital 4A Pty Ltd v Sage Group plc* (2013) 306 ALR 414, 422 [26] (Wigney J); *Commissioner of Taxation v Rio Tinto Ltd* (2006) 151 FCR 341, 358–9 [60].

81 See MacCormick, above n 60, 97–9. MacCormick emphasised that reasons for decisions must be universalisable — that is, treating like cases alike 'implies that I must decide today's

Cases involving the voluntary disclosure of privileged communications to a third party have proved a fertile ground for courts to consider the scope of legal professional privilege and the extent to which the privilege prevails in the face of inconsistent conduct by the privilege holder. The primary reason is that the inquiry in such cases is often broader in scope than cases that involve disclosure under compulsion of law[82] or inadvertence,[83] for example. Moreover, such cases are not necessarily constrained by existing principles on waiver arising from specific circumstances, such as issue waiver[84] or the law underpinning expert reports in litigation.[85] Accordingly, they are instructive in their illumination of the factors that affect the implied waiver inquiry.

A survey of cases that have embarked on the implied waiver inquiry in the context of disclosure of privileged communications to a third party reveals two factors that are influential, if not determinative, in the application of the inconsistency test in cases involving third party disclosure.[86] The first, and perhaps foremost, of those factors is the existence and effectiveness of any obligations of confidentiality imposed on the third party recipient with respect to the disclosed communications. The second factor is the several interests of the privilege holder and the recipient.

Without intending to be exhaustive, it is suggested that a court should undertake no fewer than five tasks in applying the inconsistency test in cases involving third party disclosure.[87] First, the court should identify any circumstances of confidentiality that exist between the privilege holder and the recipient of the relevant privileged communications. Second, it should objectively assess whether those circumstances are effective in preserving confidentiality. Third, it should have regard to the several interests of the

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case on grounds which I am willing to adopt for the decision of future similar cases, just as much as it implies that I must today have regard to my earlier decisions in past similar cases': at 75. See also Darryn Jensen, 'The Problem of Classification in Private Law' (2007) 31 *Melbourne University Law Review* 516: 'The requirement of universalisability flows naturally from the notion that human interaction is governed by law and not by any person's preferences as to the outcome in the particular case': at 526–7.

82 See, eg, *Goldman v Hesper* [1988] 3 All ER 97; *Trans America Computer Co Inc v IBM Corporation*, 573 F2d 646, 651 (9th Cir, 1978) cited in *AWB Ltd v Cole [No 5]* (2006) 155 FCR 30, 69 [138] (Young J). See generally Andrew Eastwood, 'Providing your legal advice to the regulator' (2013) 41 *Australian Business Law Review* 66.

83 See, eg, *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303.

84 See, eg, *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1995) 37 NSWLR 405.

85 See, eg, *Australian Securities and Investments Commission v Southcorp Ltd* (2003) 46 ACSR 438.

86 The cases to which this article has had regard include *Woollahra Municipal Council v Westpac Banking Corporation* (1994) 33 NSWLR 529; *Network Ten Ltd v Capital Television Holdings Ltd* (1995) 36 NSWLR 275; *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* (1999) 165 ALR 253; *Rickard Constructions Pty Ltd v Rickards Hails Moretti Pty Ltd* [2006] NSWSC 234 (5 April 2006); *Spotless Group Ltd v Premier Building and Consulting Group Pty Ltd* (2006) 16 VR 1; *Tarong Energy Corporation Ltd v South Burnett Regional Council* (2010) 1 Qd R 575; *Asahi Holdings* (2014) 312 ALR 403.

87 A prerequisite for these tasks being carried out is that the court has resolved any conflicts of evidence in relation to the conduct of the privilege holder and that the primary facts in relation to the conduct of the privilege holder have been proven or assumed as if proved. For an example of the application of the inconsistency test in the context of issue waiver, see *Rio Tinto Ltd v Commissioner of Taxation* (2005) 224 ALR 299, 311 [43] (Sundberg J).

privilege holder and the recipient with a view to determining whether what is known at common law as 'common interest privilege' exists or, if the court is not persuaded that it exists, whether those interests are positioned in such a way as to persuade the court that those interests nevertheless have a bearing on the determination of whether there is inconsistency, such as, for example, where the several interests of the parties are potentially adverse. Fourth, it should have regard to any other factors that it considers relevant to whether there is inconsistency. Finally, it should make a value judgment about whether the conduct of the privilege holder, taking into account all relevant factors, is inconsistent with the maintenance of the confidentiality that the privilege is intended to protect.

It is worth noting that the second and third tasks are conceptually entwined; whether any circumstances of confidentiality are sufficient or effective may depend on the alignment of interests between the privilege holder and the recipient. The effect of any single factor on the inconsistency test will undoubtedly vary from case to case. It is not suggested that the two key factors identified above are exhaustive of all the factors to which a court is to have regard before determining whether there is inconsistency. Rather, they provide a concrete starting point in the analysis that the court is to undertake in the first place. Moreover, the structure of the analysis described above is likely to promote clearer reasoning. Each of the two key factors is considered below in turn.

A Circumstances of confidentiality

Self-evidently, a court is less likely to conclude that privilege has been impliedly waived following the disclosure of privileged communications to a third party where that disclosure takes place in circumstances of confidentiality. Expressed in the language of the majority in *Mann v Carnell*, the existence of these circumstances is consistent with the maintenance of the confidentiality that the privilege is intended to protect. However, it is useful to note the varying degrees of confidentiality and the different measures that can be employed to safeguard confidentiality.

At its most robust, a confidentiality restriction can constitute an express undertaking by a recipient to keep a privileged communication confidential and not to use it for an unauthorised purpose.[88] It should emphasise confining the dissemination of the communication and regaining any copies of it once the purpose of the disclosure has been served.[89] The restriction may also take the form of a confidentiality agreement in similar terms.[90] In some cases, an

88 *Network Ten Ltd v Capital Television Holdings Ltd* (1995) 36 NSWLR 275, 286. Cf *Seven Network Ltd v News Ltd* [2005] FCA 864 [30] (Graham J).

89 *Network Ten Ltd v Capital Television Holdings Ltd* (1995) 36 NSWLR 275, 286; *Spotless Group Ltd v Premier Building and Consulting Group Pty Ltd* (2006) 16 VR 1, 24 [87] (Neave JA dissenting); *Asahi Holdings* (2014) 312 ALR 403, 420 [82] citing *Cadbury Schweppes Pty Ltd v Amcor Ltd* (2008) 246 ALR 137, 142–3 [16]–[17] (Gordon J).

90 *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd* (2009) 174 FCR 547, 555–6 [35] (Mansfield, Kenny and Middleton JJ). See also *Tarong Energy Corporation Ltd v South Burnett Regional Council* (2010) 1 Qd R 575, 590 [31].

accompanying letter, fax or email to that effect may suffice.[91] So too may an assurance, possibly even where the recipient cannot properly give that assurance.[92] Whatever the form of restriction, there must be an endeavour on the part of the privilege holder to retain confidentiality. Importantly, there should be nothing to suggest that confidentiality was not respected.[93]

It is one thing to take into account the existence of confidentiality restrictions; it is entirely another to examine their effectiveness. The imposition of a confidentiality restriction is not guaranteed to maintain privilege. Viewed objectively, any of the measures described above may be insufficient or, at all events, futile to maintain privilege.[94] The subjective expectation of the privilege holder is of no moment.[95] In *Asahi Holdings*, Bromberg J imputed waiver of privilege in a copy of a report sent by the solicitors for an insured to the insurer, despite the presence in the report of the notation 'Privileged and Confidential'; correspondence from the solicitors for the insured informing the insurer that aspects of the report were privileged and confidential; and an expectation on the part of a solicitor for the insured that the insurer would maintain confidentiality and privilege in the report.[96] The decision in *Asahi Holdings* is discussed at length below.

In the absence of an express obligation of confidentiality, an agreement as to confidentiality may be inferred from the circumstances in which the disclosure was made.[97] Whether those circumstances give rise to such an inference must be determined by reference to what was expressly or impliedly communicated between the privilege holder and the recipient and what they must or ought reasonably to have understood.[98] To that end, it is permissible to have regard to the nature of the relationship between the privilege holder and the recipient, including any conduct or conversations surrounding the communications.[99] It is also permissible to have regard to the nature of the communications and the purpose and context of their disclosure.[100] For

91 *Spotless Group Ltd v Premier Building and Consulting Group Pty Ltd* (2006) 16 VR 1, 24 [87] (Neave JA dissenting).

92 *Woollahra Municipal Council v Westpac Banking Corporation* (1994) 33 NSWLR 529, 540.

93 Ibid. See, eg, *New South Wales v Jackson* [2007] NSWCA 279 (10 October 2007) [50]–[52] (Giles JA; Mason P and Beazley JA agreeing).

94 See, eg, *Asahi Holdings* (2014) 312 ALR 403, 420 [82], 421–2 [84], 422 [86].

95 Cf *Asahi Holdings* (2014) 312 ALR 403, 422 [86].

96 *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Ltd [No 2]* (2014) 312 ALR 403, 408 [21], 420 [82], 422 [85].

97 *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* (1999) 165 ALR 253, 263 [44] (Sackville J); *Asahi Holdings* (2014) 312 ALR 403, 418–9 [75] (Bromberg J) citing *Gotha City v Sotheby's* [1998] 1 WLR 114, 122 (Staughton LJ; Aldous LJ and Hutchison LJ agreeing); *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* (1999) 165 ALR 253, 263 [44]; *Bulk Materials v Coal & Allied Operations* (1998) NSWLR 689, 695; *Rickard Constructions Pty Ltd v Rickards Hails Moretti Pty Ltd* [2006] NSWSC 234 (5 April 2006) [33] (Bergin J); *New South Wales v Jackson* [2007] NSWCA 279 (10 October 2007) [46]–[47] (Giles JA; Mason P and Beazley JA agreeing)

98 *Berezovsky v Hine* [2011] EWCA Civ 1089 (7 October 2011) [29].

99 *Rickard Constructions Pty Ltd v Richard Hails Moretti Pty Ltd* [2006] NSWSC 234 (5 April 2006) [33] (Bergin J). See, eg, *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* (1999) 165 ALR 253, 263 [44]; *Gotha City v Sotheby's* [1998] 1 WLR 114, 122: 'This is the sort of situation where, in the ordinary way, one would expect confidentiality to be assumed by all present rather than expressly agreed upon.'

100 *Rickard Constructions Pty Ltd v Richard Hails Moretti Pty Ltd* [2006] NSWSC 234 (5 April

example, a communication may be objectively viewed as 'obviously sensitive' or 'obviously privileged' such that a reader of it would readily understand that the privilege holder intended that its confidentiality be maintained.[101]

B Interests of privilege holder and recipient

The second key factor that the court should take into account in the implied waiver inquiry in cases involving third party disclosure is the several interests of the privilege holder and any third party recipient of privileged communications. These interests may inform the inconsistency test in two ways.

The first is where the interests of the privilege holder and those of the recipient are such as to give rise to 'common interest privilege',[102] which operates as a defence to an assertion that privilege has been waived.[103] Thus, waiver is unlikely to be implied where the privilege holder and the recipient 'have such a commonality of interest in relation to the subject matter of the privilege that sharing of the content is consistent, rather than inconsistent, with an ongoing intention to preserve confidentiality and privilege'.[104] The common interest may be that of insured and insurer;[105] holding company and wholly owned subsidiary;[106] liquidator and creditor with respect to the recovery of moneys owed by a company being wound up;[107] and neighbours in opposing a proposed development in a residential area.[108] The operation of common interest privilege presupposes that the recipient has a relationship with the privilege holder and the litigation or transaction in question, thereby bringing that recipient within the ambit of confidence that obtains between the legal practitioner and his or her immediate client in relation to advice or other communications.[109]

In determining the existence of common interest privilege, three elements must be established.[110] First, the communication in question must be privileged in the hands of the party communicating the information. Second, the relationship between the parties must have such a commonality of interest that the disclosure does not show an objective intention on the part of the privilege holder to waive privilege. Third, the disclosure of the

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2006) [33] citing *Bulk Materials (Coal Handling) Services Pty Ltd v Coal & Allied Operations Pty Ltd* (1988) 13 NSWLR 689, 695 (Giles J).

101 *Asahi Holdings* (2014) 312 ALR 403, 421 [83].

102 See also *Evidence Act 1995* (Cth) s 122(5)(c).

103 Desiatnik, above n 14, 220.

104 *Marshall v Prescott* [2013] NSWCA 152 (6 June 2013) [57] (Barrett JA; McColl and Ward JJA agreeing). See also Desiatnik, above n 14, 220.

105 *Southern Cross Airlines Holdings Ltd (in liq) v Arthur Anderson & Co* (1998) 84 FCR 472.

106 *South Australia v Peat Marwick Mitchell & Co* (1995) 65 SASR 72.

107 *Thiess Contractors Pty Ltd v Terokell Pty Ltd* [1993] 2 Qd R 341. Cf *Asahi Holdings* (2014) 312 ALR 403.

108 *Farrow Mortgage Services Pty Ltd (in liq) v Webb* (1996) 39 NSWLR 601, 608.

109 LexisNexis, *Cross on Evidence* (at May 2018) [25265]. Cf *Marshall v Prescott* [2013] NSWCA 152 (6 June 2013) [65].

110 See *Hansfield Developments v Irish Asphalt Ltd* [2009] IEHC 420 (23 January 2009) [53] cited in *Marshall v Prescott* [2013] NSWCA 152 (6 June 2013) [63]–[64]; *Lane v Admedus Regen Pty Ltd* [2016] FCA 864 (1 August 2016) [27] (McKerracher J).

communication must relate to that common interest.[111] If these elements are established, the law will protect the confidentiality preserved by the privilege in the interests of justice.[112] Several claims of common interest privilege have fallen at the second hurdle.[113] However, common interest privilege does not exist where one person has a direct interest in the outcome of a proceeding, such as that of a plaintiff, while the other has merely an indirect interest, such as that of a person funding the plaintiff.[114] Two persons interested in a particular question will not have a common interest if their several interests in the question are selfish and potentially adverse to each other.[115]

The second way in which the several interests of the privilege holder and a third party recipient may inform the inconsistency test is where those interests are positioned in such a way as to persuade a court that common interest privilege does not exist, but that those interests are nevertheless relevant in determining whether disclosure is inconsistent with the maintenance of the confidentiality that the privilege is intended to protect. A gradation of three examples will suffice. One is where the several interests of the parties are aligned but insufficient to give rise to common interest privilege.[116] This weighs against finding that disclosure was inconsistent. Another, more nuanced, example is where those interests are potentially adverse to each other; in such a case, a court may decide not only that common interest privilege does not arise,[117] but also that the disclosure is inconsistent, subject to any circumstances of confidentiality that exist.[118] A third example is where the disclosure is made to a recipient with interests that are hostile to those of the privilege holder.[119] This weighs in favour of finding that disclosure was inconsistent.

C Observations on purpose

In deciding whether the disclosure of a privileged communication to a third party amounts to waiver, it is unnecessary to consider whether that

111 *Lane v Admedus Regen Pty Ltd* [2016] FCA 864 (1 August 2016) [27].

112 LexisNexis, above n 109 citing *Formica Ltd v Export Credits Guarantee Department* [1995] 1 Lloyd's Rep 692.

113 See, eg, *Network Ten Ltd v Capital Television Holdings Ltd* (1995) 36 NSWLR 275, 283; *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1998) 81 FCR 526, 564 (Goldberg J); *Spotless Group Ltd v Premier Building and Consulting Group Pty Ltd* (2006) 16 VR 1, 14 [34]; *University of Western Australia v Gray [No 12]* [2007] FCA 396 (19 March 2007) [13] (French J); *Rich v Harrington* (2007) 245 ALR 106, 122 [75] (Branson J); *Elders Forestry Ltd v Bosi Security Services Ltd [No 2]* (2010) 271 LSJS 100, 110 [33] (Kourakis J).

114 *Spotless Group Ltd v Premier Building and Consulting Group Pty Ltd* (2006) 16 VR 1, 14 [34].

115 *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1995) 37 NSWLR 405, 410 citing *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd* [1992] 1 AC 233; *Network Ten Ltd v Capital Television Holdings Ltd* (1995) 36 NSWLR 275. See also *Farrow Mortgage Services Pty Ltd (in liq) v Webb* (1996) 39 NSWLR 601, 612.

116 See, eg, *Network Ten Ltd v Capital Television Holdings Ltd* (1995) 36 NSWLR 275, 283.

117 Cf *Marshall v Prescott* [2013] NSWCA 152 (6 June 2013) [62] (Barrett JA; McColl and Ward JJA agreeing).

118 See, eg, *Asahi Holdings* (2014) 312 ALR 403, 418 [73], 420 [81], [83], 422 [88].

119 See, eg, *Patrick v Capital Finance Corporation (Australasia) Pty Ltd* (2004) 211 ALR 272, 274 [11], 277 [21] (Tamberlin J).

communication was disclosed for the dominant purpose of obtaining legal advice or for use in litigation.[120] To adopt such an approach would be at odds with the majority view in *Mann v Carnell*, which instead requires a court to consider whether the existing privilege in the original communication had been waived.[121] It would also undermine the rationale of facilitating the representation of clients by legal practitioners: a client who may wish to pass on a privileged communication to a third party for a reason other than obtaining legal advice or for use in litigation may well be deterred from communicating frankly with his or her lawyer out of fear that privilege would be waived upon disclosure of that communication to the third party.[122] The authorities on common interest privilege prove that this fear is not purely academic, especially in an age of complex litigation and transactions where the interests of several parties in one matter may be aligned and there is some legitimate imperative that necessitates the disclosure of privileged communications to a third party whose interests are aligned with those of the privilege holder. Further and obvious support for this view may be found in the authorities that deal with disclosure for a limited and specific purpose, where the law recognises the concept of limited waiver.[123]

The relevant purpose, instead, is the limited and specific purpose of the disclosure, which is determined objectively.[124] That purpose may concern a particular person, material or subject matter[125] and must accommodate the limited extent of the disclosure.[126] Examples of limited and specific purposes include disclosure in opposition to an application to strike out a pleading;[127]

120 Cf *Mann v Carnell* (1999) 201 CLR 1 32 [96]–[97] (McHugh J dissenting); *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49, 80 [82] (McHugh J dissenting); *Spotless Group Ltd v Premier Building and Consulting Group Pty Ltd* (2006) 16 VR 1, 20–1 [64]–[68], 22 [75] (Neave JA dissenting).

121 *Tarong Energy Corporation Ltd v South Burnett Regional Council* (2010) 1 Qd R 575, 588–9 [25]–[26] (Fraser JA; Muir JA and White J agreeing).

122 Cf *Spotless Group Ltd v Premier Building and Consulting Group Pty Ltd* (2006) 16 VR 1, 20 [64] (Neave JA dissenting).

123 See, eg, *British Coal Corporation v Dennis Rye Ltd [No 2]* [1988] 1 WLR 1113, 1121–2 (Neill LJ; Stocker and Dillon LJJ agreeing); *Network Ten Ltd v Capital Television Holdings Ltd* (1995) 36 NSWLR 275, 286 (Giles J); *B v Auckland District Law Society* [2003] 2 AC 736, 761–2 [68]–[69] (Lord Millett); *Spotless Group Ltd v Premier Building and Consulting Group Pty Ltd* (2006) 16 VR 1, 11–12 [26] (Chernov JA; Warren CJ agreeing); *Eurasian Natural Resources Corporation Ltd v Dechert LLP* [2016] 1 WLR 5027, 5044 [49] (Gloster LJ; King and David Richards LJJ agreeing). See also *Goldberg v Ng* (1995) 185 CLR 83, 109 (Toohey J dissenting): 'The concept of limited waiver of professional privilege is well accepted.'

124 See *Network Ten Ltd v Capital Television Holdings Ltd* (1995) 36 NSWLR 275, 286 (Giles J); *B v Auckland District Law Society* [2003] 2 AC 736, 761–2 [68]–[69] (Lord Millett); *Spotless Group Ltd v Premier Building and Consulting Group Pty Ltd* (2006) 16 VR 1, 9 [20], 11–12 [26] (Chernov JA; Warren CJ agreeing).

125 Cf *Goldberg v Ng* (1995) 185 CLR 83, 96 (Deane, Dawson and Gaudron JJ).

126 *Network Ten Ltd v Capital Television Holdings Ltd* (1995) 36 NSWLR 275, 286; *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* (1999) 165 ALR 253, 263 [44].

127 *British American Tobacco Australia Services Ltd v Cowell* (2003) 8 VR 571. See also *National Australia Bank Ltd v C & O Voukidis Pty Ltd [No 2]* [2015] NSWSC 258 (20 March 2015). In *Eurasian Natural Resources Corporation Ltd v Dechert LLP* [2016] 1 WLR 5027, privileged communications were disclosed in opposition to an application for

in order to obtain an expert report for use in litigation;[128] and in order to encourage a defendant to accept substituted service on behalf of another defendant.[129]

V Re-examining *Mann v Carnell*

The two key factors will now be considered against the factual background in *Mann v Carnell*.

It will be recalled that, in applying the inconsistency test, the majority first focused on the purpose of the privilege.[130] The majority identified that the purpose was 'to enable the Australian Capital Territory to seek and obtain legal advice, in relation to the litigation which Dr Mann had instituted, without the apprehension of being prejudiced by subsequent disclosure of that advice', especially to Dr Mann. Later, the majority restated, in simpler terms, that the purpose of the privilege was 'to protect the Territory from subsequent disclosure of the legal advice it received concerning the litigation' brought by Dr Mann.[131] On that footing, the majority held that 'there was nothing inconsistent with that purpose in the Chief Minister conveying the terms of that advice, on a confidential basis, to a member of the Legislative Assembly who wished to consider the reasonableness of the conduct of the Territory in relation to the litigation'.[132]

What circumstances did the majority take into account? Earlier in its reasons, the majority said:

> It does less than justice to [the chief minister's] position to describe what occurred in the present case as disclosure to a third party. The privilege was that of the body politic, the Australian Capital Territory. The head of the Territory's Executive, the Chief Minister, in response to a question raised by a member of the Territory's Legislative Assembly as to the reasonableness of the conduct of the Territory in relation to certain litigation, gave the member, confidentially, access to legal advice that had been given to the Territory, and on the basis of which it had acted. Although 'disclosure to a third party' may be a convenient rubric under which to discuss many problems of this nature, it represents, at the least, an oversimplification of the circumstances of the present case.[133]

In applying the inconsistency test, the standard against which the majority assessed the conduct of the chief minister was the purpose of the privilege.[134] Strictly speaking, this approach conforms to a proper application of the inconsistency test: the purpose of the privilege, which is to protect from disclosure communications to which the privilege attaches, is achieved by the confidentiality that the privilege is intended to protect. Thus, it may be said,

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detailed assessment of costs. Gloster LJ said that waiver in these circumstances 'is (i) limited; (ii) temporary; and (iii) extends only to the opposing party and the judge': at 5044 [49].

128 *Dingwall v Commonwealth* (1992) 39 FCR 521; *Sevic v Roarty* (1998) 44 NSWLR 287. See generally Mendelow, above n 72.

129 *Hills v Raunio* [2001] ACTSC 63 (28 June 2001).

130 *Mann v Carnell* (1999) 201 CLR 1, 15 [34]–[35].

131 Ibid 15 [35].

132 Ibid (emphasis added).

133 Ibid 14–15 [33] (footnote omitted).

134 Ibid 15 [35].

as the majority did, that the conduct of the chief minister was not inconsistent with the purpose of the privilege.[135] However, this approach is rather circular and does not make immediately apparent the very factors that were relevant to the application of the inconsistency test in the circumstances.

An alternative approach to applying the inconsistency test, by reference to the two key factors, might take the following form.

First, the circumstances of confidentiality are plain from the evidence that was before the primary judge. That evidence was to the effect that:

> it was established practice in the legislature of the Australian Capital Territory, and in other Australian legislatures, for Ministers, in appropriate cases, to provide members, confidentially, with background information concerning matters of Government administration.[136]

There were sound policy reasons behind this practice.[137] The member gave evidence that, from time to time, he sought and obtained information from the chief minister on a confidential basis, and that he regarded this as a useful method of discharging his responsibilities.[138] While the arrangement was relatively informal, the member nevertheless respected the wishes of the chief minister if she desired that any information provided to him in that fashion should remain confidential.[139] In the present case, the member, upon receipt of the chief minister's letter to him, checked with her office as to whether the legal documents were the subject of confidentiality. Having been told that they were, he returned the documents without making any copies, saying that he was doing so out of respect for 'the agreement that has been reached between you and me'.[140]

Second, the several interests of the chief minister and the member were aligned to a certain extent. Both the chief minister and the member were part of the same body politic.[141] They were broadly concerned with the governance of the ACT. Both were accountable to the ACT electorate through the institutions of representative and responsible government.[142] Although the chief minister made no claim for common interest privilege at common law, it is unlikely that such a claim would have succeeded. The subject matter of the privilege was the provision of legal advice in relation to the litigation brought by Dr Mann. By the time that the chief minister disclosed copies of those advices to the member, that litigation had settled. At all events, the broad interests of each individual in the governance of the ACT, and the potential for

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135 Ibid 15 [35].
136 Ibid 7 [12].
137 Ibid 7–8 [12]. The majority said:

> This practice assisted members of the legislature to be fully informed on issues of interest to them, and assisted Government Ministers seeking to satisfy the concerns of members, without the necessity of ventilating, in an open and adversarial context, matters which were capable of appropriate explanation.

138 Ibid 8 [12].
139 Ibid.
140 Ibid 8 [13].
141 Ibid 14–15 [33] (Gleeson CJ, Gaudron, Gummow and Callinan JJ), 46–7 [149]–[150] (Kirby J).
142 *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438, 467–8 [94] (Kirby J dissenting). See also Justice McHugh, 'The strengths of the weakest arm' (2004) 25 *Australian Bar Review* 181, 193.

the divergence of those interests,[143] would have been insufficient to give rise to a common interest at law.[144] Assuming, as the Full Court of the Federal Court in *Carnell v Mann* did,[145] erroneously,[146] that s 122(4)(b) of the *Evidence Act 1995* (Cth) applied,[147] there is no relevant 'common interest' for the same reasons, since such an interest must relate 'to a proceeding or an anticipated or pending proceeding'.[148]

In summary, it is apparent that, during the time of disclosure, the chief minister endeavoured to retain confidentiality in the legal advice received by the ACT. Objectively viewed, neither the conduct of the chief minister nor that of the member suggested that the confidential arrangement in place between them was not respected, despite the informal nature of that arrangement. The circumstances of confidentiality were not undermined by their several interests. Although insufficient to give rise to common interest privilege, it is nevertheless arguable that those interests were aligned, both broadly in their concern with the governance of the ACT and vis-à-vis Dr Mann. The potential that those interests might diverge — for example, by the chief minister losing the confidence of the ACT Legislative Assembly and imperilling her retention of office if she failed to provide adequate information in response to the member's request[149] — was nullified by the disclosure itself.

VI *Asahi Holdings*: A test of reasonable foreseeability?

The decision in *Asahi Holdings* offers an elaborate example of the importance of the two key factors, and the relationship between each of those factors, in the application of the inconsistency test to a case involving third party disclosure. Importantly, the reasoning emphasises the objective assessment

143 See *Mann v Carnell* (1999) 201 CLR 1, 47 [150] (Kirby J).

144 Cf *Network Ten Ltd v Capital Television Holdings Ltd* (1995) 36 NSWLR 275, 283; *University of Western Australia v Gray [No 12]* [2007] FCA 396 (19 March 2007) [13] (French J).

145 (1998) 89 FCR 247.

146 *Mann v Carnell* (1999) 201 CLR 1, 12 [27] (Gleeson CJ, Gaudron, Gummow and Callinan JJ), 16–17 [41] (McHugh J dissenting). See *Northern Territory v GPAO* (1999) 196 CLR 553; *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49.

147 Sections 122(4)–(5) relevantly provides:

> (4) Subject to subsection (5), this Division does not prevent the adducing of evidence if the substance of the evidence has been disclosed with the express or implied consent of the client or party to another person other than: ...
>
> (5) Subsections (2) and (4) do not apply to: ...
>
> > (b) a disclosure to a person with whom the client or party had, at the time of the disclosure, a common interest relating to a proceeding or an anticipated or pending proceeding in an Australian court or a foreign court.

148 This issue was raised during oral argument. See Transcript of Proceedings, *Mann v Carnell* (High Court of Australia, C10/1999, Gleeson CJ, Gaudron, McHugh, Gummow, Kirby and Callinan JJ, 31 August 1999) 1881–6 (S J Odgers), 1913–5 (Callinan J). An inquiry, 'which could presumably be set up by the ACT Legislative Assembly passing appropriate legislation and which would be a means by which the ACT Legislative Assembly could ensure the ACT Executive Government was held to account for its actions taken in relation to the litigation', is unlikely to be an anticipated proceeding within the meaning of *Evidence Act 1995* (Cth) s 122(4)(b).

149 *Mann v Carnell* (1999) 201 CLR 1, 47 [150] (Kirby J).

that is necessary in determining inconsistency. It also shows what appears to be a novel approach to applying the inconsistency test — one that resembles a test of reasonable foreseeability.

A Facts

A company bought the shares of another company pursuant to a share sale agreement between the first company and a number of sellers. Later, the purchaser sued the sellers, among others, claiming that they had engaged in misleading and deceptive conduct and breached certain warranties. The purchaser also made a claim to its insurer for loss occasioned by the alleged breach of warranties. The purchaser's solicitors, Corrs, prepared a report containing financial information that was relevant to the claim ('the EA report'). The purchaser contended that the EA report was protected by privilege at the time that it was prepared. In support of a claim made under an insurance policy, Corrs sent a copy of the EA report to the purchaser's insurer ('the insurer's EA report'). The insurer's EA report contained particulars of conduct in support of the claim under the policy. The sellers made an application seeking the production of an unredacted copy of the EA report in its entirety.

B Decision

During the hearing of the application, the sellers conceded that the EA report — and by extension the insurer's EA report — was privileged. The only live issue for Bromberg J to decide was 'whether there was a waiver of the privilege that was attached to the insurer's EA report immediately prior to its disclosure to the insurer'.[150] Bromberg J said that this was a case where privileged communications were voluntarily disclosed to a potential opponent:[151] the terms of both the insurance policy and the share sale agreement were such that it was in the interests of the purchaser, in relation both to the claim made to the insurer and the claim made in the proceeding, to establish that the sellers had engaged in misleading or deceptive conduct; conversely, so as to avoid liability, it was in the interests of the insurer and the sellers to establish that the sellers did not engage in misleading or deceptive conduct.[152] The case was '[u]nlike many situations where an insurer and its insured may have a commonality of interest'.[153]

Bromberg J rejected a contention by the purchaser that an agreement as to confidentiality between it and the insurer could be inferred in the circumstances. His reasoning developed as follows:

(a) the privileged communications were provided as particulars given in support of a claim made under the policy;
(b) the objective purpose of the provision of those communications must clearly have included the use of them by the insurer to assess the claim;

150 *Asahi Holdings* (2014) 312 ALR 403, 416 [58].
151 Ibid 418 [73].
152 Ibid 418 [70]–[71].
153 Ibid 417 [69].

(c) the possibility must have been objectively contemplated that, in assessing the claim, the insurer may want to evaluate it by disclosing the information to others including persons who would not be under any restriction as to its further disclosure;
(d) it must also have been objectively appreciated that the insurer could use the communications in open court in the event that any legal proceeding was brought against it by the purchaser, if, for example, the insurer rejected the purchaser's claim;
(e) it must have been objectively understood that, in pursuit of the purposes for which the communications were disclosed, the contents of those communications may pass into the public domain; and
(f) therefore, the insurer was not under an implied obligation not to disclose the contents of the insurer's EA report while pursuing the purposes for which it was provided.[154]

Bromberg J also pointed to evidence that the EA report was prepared to enable the purchaser to be advised in relation to any claim under the insurance policy and in preparing the notice of claim to the insurer. In that respect, Bromberg J observed:

> That lawyers were utilised for that task not only points to a recognition by [the purchaser] that their interests were potentially adverse to those of the insurer, but more significantly, it serves to highlight the confidentiality purpose relating to the insurer which was protected by the privilege which attached to the EA report. That confidentiality purpose was, in plain language, to keep from the prying eye of the insurer (for such time as may be necessary to best protect the interest of [the purchaser]) any information that may prejudice [the purchaser] in relation to the claim made under the policy.[155]

Bromberg J referred to seven other matters in support of his conclusion.[156] First, the privileged material was being provided to what must have been recognised as a potential adversary. Second, the terms of the insurance policy did not require the insurer to keep material provided by the purchaser confidential, and no assurances as to confidentiality were sought or obtained from the insurer, 'despite the fact that the disclosure was made as between sophisticated commercial parties and facilitated by a lawyer'.[157] Third, the policy included a process by which privileged communications could be provided to the insurer on terms that would limit its use and maintain its confidentiality; while that process was directed to third party claims, the policy nevertheless provided an agreed process that could readily be adopted for other claims. Fourth, the material provided was not 'obviously sensitive' or 'obviously privileged' such that a reader of it would readily understand that its confidentiality was intended to be maintained.[158] Fifth, at the time that the notice of claim was lodged and some 2 weeks prior to the disclosure, the insurer was informed that proceedings would be brought against various sellers. This information, and the terms of the claim made on the insurer,

154 Ibid 420 [80].
155 Ibid 420 [81].
156 Ibid 420–1 [83].
157 Ibid 421 [83].
158 Ibid.

would have made it apparent to the insurer that the same or similar claims of misleading or deceptive conduct that supported the purchaser's claim under the policy were about to be pursued against the sellers. Sixth, by reason of the relationship between the share sale agreement and the policy, it must have been appreciated that there was a possibility that the manner and extent to which the purchaser had properly pursued any rights to recovery of its alleged loss against the insurer would become an issue in the proceeding. Seventh, the prospect that the claim on the insurer could become an issue in the proceeding would have been understood as making it even more unlikely that sensitive material would have been provided to the insurer or, if provided, provided without express undertakings maintaining confidentiality that were designed to protect the purchaser from an application to produce that material.

Bromberg J concluded that the disclosure of privileged communications in the insurer's EA report 'was entirely antithetical to that confidential purpose and thus was "inconsistent with the maintenance of the confidentiality which the privilege is intended to protect"'.[159] It would have been entirely reasonable for the insurer to have assumed that what had been provided to it by way of particulars of conduct in support of the claim under the policy would likely be provided to the sellers in support of the purchaser's claim in the proceeding.[160] And the absence of any attempt by the purchaser 'to have the insurer expressly agree to restrictive terms under which the disclosure would be made was likely to have been objectively understood as flowing from the absence of any need for such restrictions because of the absence of any subsisting confidentiality'.[161] The implied waiver was complete and not merely limited to the insurer since the purchaser could no longer control its further dissemination by the insurer.[162]

C Discussion

Asahi Holdings is another example of a case in which consideration of the two key factors may assist in applying the inconsistency test. In relation to the circumstances of confidentiality, there were no restrictive terms under which the purchaser could disclose the report containing the privileged communications or otherwise control its dissemination by the insurer. Further, the terms of the insurance policy did not require the insurer to keep material provided by the purchaser confidential, and no assurances were sought or obtained from the insurer. The report was expressed to be privileged and confidential, and a solicitor for the insured expected the insurer to treat the report as such. However, these factors carried little weight in the end. By virtue of the nature of the communications and the purpose for which they were provided, no agreement as to confidentiality could be inferred in the circumstances. In relation to the several interests of the purchaser and the insurer, the purchaser was seeking to establish that the sellers had engaged in misleading or deceptive conduct; however, it was in the interests of the

159 Ibid 420 [82] citing *Mann v Carnell* (1999) 201 CLR 1, 13 [29].
160 *Asahi Holdings* (2014) 312 ALR 403, 421 [84].
161 Ibid 421–2 [84].
162 Ibid 420 [82] citing *Cadbury Schweppes Pty Ltd v Amcor Ltd* (2008) 246 ALR 137, 142–3 [16]–[17] (Gordon J).

insurer, by reason of the claim made by the purchaser, to establish that the sellers did not engage in misleading or deceptive conduct. In the final analysis, the report containing privileged communications was voluntarily disclosed to a potential opponent. Incidentally, this reinforced the view that an agreement as to confidentiality between the purchaser and the insurer could not be inferred in the circumstances.[163]

Perhaps most striking about the decision is the reasoning in support of the conclusion that no agreement as to confidentiality between the purchaser and the insurer could be inferred in the circumstances. Bromberg J recognised at the outset that the purpose of the disclosure of the privileged communications was to provide the insurer with particulars in support of a claim under the insurance policy — objectively determined, a purpose that included the use of those communications by the insurer to assess the claim. From there, Bromberg J appears to have imputed to the purchaser a form of constructive knowledge as to the possible uses to which those communications might be put. It is an approach that has regard not only to the objective purpose of the disclosure, but to the reasonably foreseeable consequences of pursuing that purpose. In effect, it involves the court asking whether a reasonable person in the position of the privilege holder would have foreseen that the disclosure of the relevant privileged communications to a third party would involve a risk of those communications subsequently passing into the public domain or being disseminated to a person to whom confidentiality restrictions do not apply. On this view, inconsistency may be established where the privilege holder ought to have foreseen that the disclosure would involve such a risk.[164]

The closest analogy to this kind of reasoning might be found in the law of negligence, where the concept of reasonable foreseeability is an element in determining the existence of a duty of care. The question in that context is whether a reasonable person in the position of the defendant would have foreseen that his or her conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff.[165] But that is about as far as the analogy goes; it is difficult to see how one could sensibly impose a standard of care on the privilege holder or use concepts equivalent to proximity or breach when dealing with the law on implied waiver. In the end, the reasoning, while appealing in form, does no more than reflect in substance the principally objective inquiry that attends the inconsistency test. Incidentally, in the case of *Asahi Holdings*, a fundamental reason why an agreement as to confidentiality could not be inferred lay in the relationship between the several interests of the purchaser and the insurer; as potential opponents in litigation, any confidentiality restrictions that had been imposed were futile, and an obligation of confidentiality in the circumstances could not be inferred.

VII Conclusion

A number of settled principles on implied waiver emerge from the discussion above. Following *Mann v Carnell*, waiver is to be imputed where the conduct of a client is inconsistent with the maintenance of the confidentiality that the

163 *Asahi Holdings* (2014) 312 ALR 403, 420 [83].
164 Ibid 420 [80].
165 *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47 (Mason J).

privilege is intended to protect. Such inconsistency is to be determined objectively, having regard to the context and circumstances of the case, and considerations of fairness may be relevant. This article suggests that the role of fairness in the application of the inconsistency test is one that is limited to ensuring that a party in judicial or quasi-judicial proceedings would not be denied natural justice, or otherwise be prejudiced in the conduct of its case, by the maintenance of privilege. Where such considerations do not arise, it is unlikely that considerations of fairness would affect the inconsistency test.

The factors that influence the determination of inconsistency may be myriad in a particular case. For this reason, there has been no settled approach to applying the inconsistency test. However, at least in cases involving the voluntary disclosure of privileged communications to a third party, a court should have regard at least to two factors that are influential, if not determinative, in the application of the inconsistency test in that context: the existence and effectiveness of any obligations of confidentiality imposed on the third party recipient with respect to the disclosed communications; and the several interests of the privilege holder and that recipient. This article contends that, at the outset of its examination into the conduct of a privilege holder, a court should have regard to these two factors before turning to any other factor that it considers relevant to whether there is inconsistency. It also contends that it is unnecessary to consider whether the communications were disclosed for the dominant purpose of obtaining legal advice or for use in litigation. The approach put forward in this article is likely to promote clearer reasoning and reduce uncertainty and unpredictability in the law on implied waiver.

In the cases that this article has examined using the two-factor approach, *Mann v Carnell* and *Asahi Holdings*, both factors contributed to the objective determination of whether there was inconsistency. In *Asahi Holdings*, the Court seemingly took the analysis one step further by imputing a form of constructive knowledge to the privilege holder as to the possible uses to which the relevant privileged communications might be put by the recipient — an approach that has regard to the reasonably foreseeable consequences of pursuing the purpose of the disclosure. This article suggests that, far from showing a novel approach to applying the inconsistency test, the reasoning in that case reflects a careful consideration of the several interests of the privilege holder and the recipient and the implications of those interests being unaligned. It is against this background that the Court assessed the effectiveness of the express obligations of confidentiality and considered whether it could infer an obligation of confidentiality in the circumstances.