SQUIRE PATTON BOGGS

CONSTRUCTION MATTERS

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In this month's edition of Construction Matters:

- 'Wear and tear' exclusions in an industrial and construction context
- What law applies to your contract? Governing law clauses and their implications
- Refresher on Key Proposed Changes in AS 11000
- Privilege: What you need to know

The Meaning of "Wear and Tear" Exclusions in an Industrial and Construction Context

Although the "wear and tear" exclusion is prevalent in real estate dealings, the phrase is occasionally used in an industrial and construction context. For instance, a "wear and tear" argument may exclude warranties for products manufactured pursuant to supply or construction contracts. Although there is ambiguity over the meaning of "wear and tear" in this context, it is important to understand how the phrase may be interpreted.

Traditionally, the concept of "wear and tear" arises in the property context, particularly in leases. Tenants are exempt from liability to remedy defects as a result of 'wear and tear'. Ordinarily, the scope of "wear and tear" includes depreciation:

- by natural causes; or
- triggered by the tenant as a normal incident of occupying the premises.

However, there is little guidance on this phrase when used outside the property context. There is some authority, both in Australia and internationally, on the meaning of this term in industrial and construction insurance policies. The table below elucidates the meaning of "wear and tear" in this field. These interpretations are likely to influence what is classified as "wear and tear" exclusions in an industrial and construction environment.

Country	Authority	Meaning of "Wear and Tear"
Australia	*JSM Management Pty Ltd v QBE Insurance (Australia) Ltd*[1]	"Wear" is concerned with usage and "tear" with ordinary natural causes impacting on an object. The ordinary meaning of "wear and tear" is damage or deterioration due to or sustained during ordinary usage.
United Kingdom	*Arnould Law of Marine Average and Insurance*[2]	"Wear and tear" is defined as "…the result of ordinary service conditions… for instance where a part wears out or undergoes some process of deterioration, such as corrosion…introduced in the ordinary course of trading and remains uncorrected." This meaning has been adopted with approval in numerous decisions considering "wear and tear".[3]
United States of America	*Cyclops Corporation v Home Insurance Company*[4]	The phrase was interpreted to mean: "…**natural deterioration**…which an object experiences by its expected contacts between its component parts and outside objects **during the period of its natural life expectancy**…"

1 (2011) VSC 339

2 (16th edition)

3 These cases include JSM Management Pty *Ltd v QBE Insurance (Australia) Ltd (2011) VSC 339 and Midland Mainline Ltd. & Ors v Commercial Union Assurance Company Ltd. & Ors* [2003] EWHC 1771 (High Court, UK)

4 352 F.Supp 931 (1973)

United States of America	*Potomac Electric Power Co v Arkwright-Boston Manufacturers Mutual Insurance Co*[5]	"Wear and tear" should be considered in light of the particular properties of the object and the factual circumstances surrounding such properties. The case considered whether excessive abrasion of the generators in question could be classified as "wear and tear". As abrasion was a common condition resulting from the normal operation of the generators, it amounted to "wear and tear".
South Africa	*Toron Screen Corporation (Pty) Ltd v Mutual and Federal Insurance (Pty) Ltd*[6]	"Wear and tear" is interpreted as "a consequence of a part wearing out or by **general debility brought about by use**".

5 No. 85-1702 slip op. (D.D.C.January 23 1986)

6 SC of South Africa delivered 23 August 1996

Take Away Points

The concept of "wear and tear" can arise for consideration in supply and construction contracts. For example, suppliers and constructors often provide warranties in relation to goods where "wear and tear" is excluded and the requirements for obtaining insurance sometimes expressly exclude "wear and tear". The above authorities will be helpful in interpreting the meaning and ambit of the concept of "wear and tear" in that context.

Based on those authorities, the following points can be gleaned:

- Ordinarily, a defect caused by "wear and tear" is one which is:
  - unavoidable in the course of ordinary events; or
  - occurs due to deterioration triggered by normal use over time.
- Factors that are relevant in determining whether "wear and tear" has occurred include:
  - the nature of the object;
  - the object's factual context;
  - the duration of time before "wear and tear" occurs; and
  - the object's natural life expectancy.
- It is important to be aware of the common consequences from normal use of an object over time, as this may determine whether "wear and tear" has occurred.

What Law Applies to Your Contract? Governing Law Clauses and Its Implications

This article discusses the benefits of an express choice of governing law, the implications of failure to include a governing law clause in a contract, and the factors to be considered in drafting such clauses.

Parties should ensure that their contracts contain a 'governing law' or 'choice of law' clause, which will affect the interpretation of the contract terms and vary depending on the chosen legal system.

What is a Governing Law Clause?

A governing law clause governs the interpretation and effect of terms in commercial contracts. Such a clause also specifies the law of a particular jurisdiction for the governing of any legal disputes that may arise.

Express Selection of a Governing Law Clause

Generally, contracting parties select the laws of a specific jurisdiction to govern the contract between them. If a contract expressly specifies the governing law, this will generally be upheld. Governing law clauses are especially relevant in the modern context, given that many contracts now have an international aspect to them. A clear governing law clause gives certainty of the contract terms and avoids the applicability of legal systems that are less predictable or preferable.

Determining the Governing Law in the Absence of an Express Selection

In the absence of an express governing law clause, the contract circumstances will be considered to determine the most appropriate law applicable to the contract. Any evidence of the legal system "by reference to which the contract was made" will be relevant in inferring a governing law in the contract.[1] For instance, if legislation of a certain country is mentioned, this may indicate the law the parties intended that the contract is to be ruled by.

However, if the contract is completely silent on this matter, the proper law may be the legal system "with which the transaction has its closest and most real connection".[2] In this regard, the relevant factors include:

- where the contract was executed;
- where the transaction or business of the contract is based; or
- other territorial connections among the parties, contract activity or contract itself.

1 *Bonython v Commonwealth of Australia* (1948) 75 CLR 589.

2 *Compagnie D'Armament Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] AC 572. Also see *Re United Railways of Havanna* [1961] AC 1007.

Governing Law Clauses in Australian Standard Contracts

The AS 4000 and proposed AS 11000 contracts allow parties to elect the jurisdiction that will govern the contract. If the parties do not elect a legal system, the jurisdiction where the "site" (defined as the lands and other places made available for the purposes of the contract) is located will be the law applicable to the contract.

Tips for Drafting an Express Governing Law Clause

- **Use of specific terms or concepts**
  Be prudent if a contract incorporates terms or ideas which are specific to a legal system. If the law elected by the parties does not recognise such concepts, there will be inherent difficultly in interpreting such clauses.
- **Clarity**
  Ensure the wording of governing law clauses are simple and clear to understand. Complex or ambiguous terms will lead to problems in interpretation or applicability of the chosen legal system.
- **Scope**
  Thought should be given on whether to limit the governing law clause to the contract only, or to extend it so non-contractual obligations in connection with the contract are also binding. Depending on the ambit prescribed, pre-contractual and post-contractual dealings may warrant consideration.

  Furthermore, the parties should also consider whether the governing law chosen allows or requires alternative dispute resolution methods, such as mediation, to be conducted.
- **Effect of electing a governing law**
  Ensure the legal system selected supports a governing law clause, particularly if the contract will be operating across different legal jurisdictions.

Refresher on Key Proposed Changes in AS 11000

The July 2015 edition of *Construction Matters* highlighted the key proposed changes to AS 11000 outlined in the draft published by Standards Australia.

We understand it is likely (but not confirmed) that AS 11000 will be released in December. Given the importance of this event, we have included the summary of the significant changes that we anticipate will be included in AS 11000.

The updated AS 11000 has been drafted to provide a more balanced approach to risk allocation between the Contractor and the Principal. The summary below identifies the risk allocations for each proposed change, as compared to the previous AS 2124 and AS 4000 contracts.

Please feel free to contact us if you have any queries ahead of the release.

Proposed Change	Description	Risk Allocation
Good faith	Subclause 2.1 of the draft AS 11000 contains a new obligation for the parties to act in good faith. However, "good faith" is not defined. The previous obligation under AS 4000 for the superintendent to fulfil its role and functions "reasonably and in good faith" has been removed. In the AS 11000, the superintendent is only required to act "honestly".	Neutral
Early warning	Subclauses 2.2 to 2.5 of the draft AS 11000 initiate an "early warning" procedure, where a party must notify the other party and the superintendent as soon as it becomes aware of any event or circumstance that "may impact upon the time, cost, scope or quality" and "may become an issue". This is aimed at ensuring that issues are promptly resolved.	Neutral
Service of notices	Subclause 10.1 of the draft AS 11000 now allows for the service of notices by email. This is in addition to the other methods of service (e.g. fax, mail). This means that security of payment claims can be served by email.	Neutral
Programming	The draft AS 11000 requires the contractor to submit a program to the superintendent after accepting a tender. The program must be activity-based and time-linked, show the dates and times by which the work is to be carried out, and demonstrate how the Contractor will achieve practical completion on time.	More principal-friendly

Interest rate	The draft AS 11000 proposes a drop in the prescribed interest rate to 12% (see item 31 in Part A). The interest rate was previously 18% in AS 2125 and AS 4000.	Neutral
Subcontracting	For subcontracts with a value in excess of a specified amount, clause 12 of the draft AS 11000 requires that the main contractor use the AS 11002 subcontract conditions, with no other amendments or additions except those necessary to reflect the contract between the principal and contractor. Failure to use AS 11002 is proposed to constitute a substantial breach of the contract.	More principal-friendly
Causes of delay	The draft AS 11000 contains provisions allowing the contractor to claim an extension of time for any events beyond the reasonable control of the contractor which cause delay and which occur before the date for practical completion. Delays occurring after the date of practical completion are separate grounds for an extension of time.	More contractor-friendly
Notification of delay	The draft AS 11000 contains an obligation on a party who becomes aware of anything which will "probably cause delay" to promptly and in any event within five business days give the Superintendent and the other party written notice of the cause and the estimated delay. If it is the contractor giving the notice, it must also state whether it anticipates claiming an extension of time for the delay.	More principal-friendly
Overlapping delays	The draft AS 11000 proposes a new method for assessing an extension of time if there are two or more causes of delay which overlap. Unlike in clause 34.4 of AS 4000, the superintendent is not required to apportion overlapping delays according to the respective causes' contribution. If not all those causes of delay would entitle the contractor to an extension of time, then the contractor will be entitled to an extension of time for the period of the overlap but not any delay damages (even where the cause of delay is an act of prevention).	More contractor-friendly
Extensions of time	Clause 37.9 of the draft AS 11000 proposes an EOT regime as follows: Within 20 business days of receiving an EOT claim, the superintendent must assess and direct the EOT or request additional information reasonably necessary to assess the claim. The contractor must provide any additional information requested by the superintendent within 20 business days. The superintendent must assess and direct the EOT within 20 business days after receiving the additional information from the contractor. Failure to do so will automatically entitle the contractor to an extension of time unless, the superintendent or a party has issued an early warning notice in respect of that claim.	More principal-friendly
Delay damages v delay costs	The draft AS 11000 differentiates delay damages and delay costs under proposed clauses 37.22 and 37.23. Delay damages will only be available for delays caused by an act of prevention. Delay costs will only be available for delays arising out of variations.	Neutral
Prospective variations	The draft AS 11000 requires the Contractor to promptly, and in any event, within five business days, notify the superintendent if the contractor considers a direction by a superintendent to be a variation. The superintendent must then respond within five business days. If the superintendent does not agree that the direction is a variation, the early warning procedure will apply. **Pricing Variations** Rates and prices for variations include an allowance for profit and overheads, unless otherwise stated. There is a specific right to recover delay costs for delays caused by a variation if not already priced as part of the variation.	More contractor-friendly
Defects	Subclause 32.1 of the draft AS 11000 requires the contractor to rectify any work upon becoming aware that such work does not comply with the contract, even in the absence of a direction from the principal or superintendent.	More principal-friendly

Security of Payment (SOP) legislation	The draft AS 11000 contains a number of provisions to enable compliance with SOP legislations of the states and territories. For example: • time is to be calculated in business days as defined in the relevant SOP legislation; • the superintendent can receive payment claims and issue progress certificates on behalf of the principal; and • payment claims and payment certificates issued under the contract are deemed to be payment claims and payment schedules under the SOP legislations.	Neutral
Dispute resolution	Clause 45 of the draft AS 11000 provides additional flexible dispute resolution procedures. There are options including conferences, mediation, arbitration, expert determination, litigation, contract facilitation, and a dispute resolution board.	Neutral

Privilege: What You Need to Know

Overview

It is an invaluable exercise to remind oneself from time to time of the importance of legal professional privilege and how it can be inadvertently lost. The protection afforded by the different types of privilege and the manner in which it can be waived (both expressly and impliedly) is not commonly understood by many. Privilege exists to protect and enhance public interest and does so by encouraging open communication with one's lawyers without the fear of disclosure generally. To use the words of Justice Bromberg:

> "Legal professional privilege exists to protect the confidentiality of communications between the lawyer and client. It is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement".[1]

The same observation could be made about other types of privileges. The *Evidence Act 1995* (NSW) (*Evidence Act*) covers a broad range of privileges including:

1. client legal privilege (known as legal professional privilege at common law) – comprising of legal advice privilege (s.118) and litigation privilege (s.119)
2. professional confidential relationship privilege (s.126B)
3. sexual assault communications privilege (s.126H)
4. journalist's privilege (s.126K)
5. religious confessions privilege (s.127)
6. privilege against self-incrimination (s.128)
7. judicial and jury reasons (s.129)
8. public interest immunity (s.130)
9. settlement negotiations privilege (also known as "without prejudice" privilege) (s.131)

Clients in the course of their dealings with lawyers will most commonly come across client legal privilege and settlement negotiations privilege. Below is a snapshot of what you need to know about these two types of privileges.

Client Legal Privilege

Client legal privilege (also known as legal professional privilege) at common law is now largely absorbed by and reflected in what is now client legal privilege under the *Evidence Act*. It is a form of privilege that protects communications (both written and oral) between a client and their lawyer from the prying eyes of others. However such privilege will not extend to all communications.

Client legal privilege is made up of two limbs:

1. legal advice privilege (s.118) – this attaches to confidential communications between a client and a lawyer (or between two lawyers acting for the client) and to the contents of confidential documents brought into existence for the dominant purpose of the client obtaining legal advice. Legal advice is a wide concept that *"…extends to professional advice as to what a party should prudently or sensibly do in the relevant legal context; but it does not extend to advice that is purely commercial…"*[2]; and
2. litigation privilege (s.119) – this attaches to confidential communications between the client and another person (or between a lawyer acting for the client and another person) and to the contents of confidential documents that were prepared for the dominant purpose of the client being provided professional legal services relating to existing or anticipated court proceedings in which the client is or might have been a party.

In NSW, client legal privilege not only applies to evidence adduced in proceedings but extends to "disclosure requirements" which includes, inter alia, subpoenas, pre-trial discovery, non-party discovery, interrogatories and notices to produce.[3]

1 *Mann v Carnell* (1999) 168 ALR 86 at [94].

2 *AWB Ltd v Cole and Another (No 5)* [2006] FCA 1234 ("*AWB*") at [44(7)] per Young J.

3 *Evidence Act 1995* (NSW) s.131A.

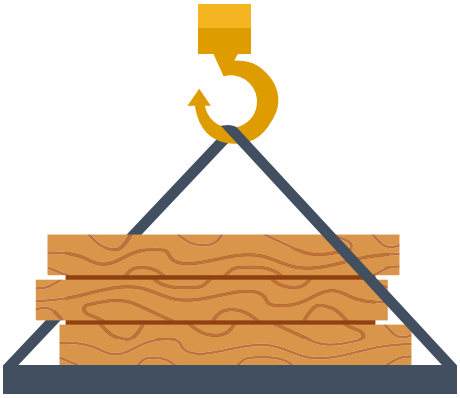
Analogous privileges recognised in common law continue to have a role in preserving privilege in similar circumstances when matters are not subject of legal proceedings where evidence is to be adduced.

Dominant Purpose Test

At common law, the High Court in *Esso*[4] adopted the dominant purpose test as applied under the *Evidence Act*. The test is whether the communication was made or the document was prepared for the dominant purpose of providing the client with legal advice or professional legal services relating to existing or pending court proceedings.

The dominant purpose must be determined objectively[5] and has been observed to be that purpose which was "the ruling, prevailing or most influential purpose"[6].

Client legal privilege will extend to drafts, notes and any other material that is prepared by the client, subject to meeting the dominant purpose test, for the purpose of communication to the lawyer irrespective of whether or not it is actually provided to the lawyer.[7]



4 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* [1999] HCA 0067; (1999) 168 ALR 123 at [62], [65], [99], [167].

5 *The Commissioner of Taxation of the Commonwealth of Australia v Pratt Holdings Pty Ltd* [2005] FCA 1247 at [30].

6 *Sydney Airports Corporation Ltd v Singapore Airlines Ltd & Qantas Airways Ltd* [2005] NSWCA 47 at [7] per Spigelman CJ citing *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404.

7 *AWB* at [44(9)] per Young J.

Confidentiality

A requirement of client legal privilege is that the communication or the contents of a document must have an element of confidentiality for the privilege to apply.

A "confidential communication" is a communication made in circumstances that, when it was made, the person who made it, or the person to whom it was made, was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law.[8]

A "confidential document" is a document prepared in circumstances that, when it was prepared, the person who prepared it, or the person for whom it was prepared, was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law.[9]

Communications with third parties

Both at common law[10] and under the *Evidence Act*[11], client legal privilege will extend to communications between the client and a third party or between a lawyer acting on behalf of the client and a third party where such a communication is for the dominant purpose of the client being provided with legal advice or professional legal services in existing or anticipated proceedings.

This includes experts briefed to provide an expert opinion for the dominant purpose of the client obtaining legal professional services, however, this privilege will be waived when a report is filed and/or served or where the expert is called to give evidence because the effect of reliance on the report would also be to disclose any underlying privileged material relied upon.

Loss of Client Legal Privilege

Under the *Evidence Act*, client legal privilege may be lost, amongst others, where:

- it would prevent the enforcement of a court order (s.121(2));
- it was waived either expressly or impliedly (s.122) ;
- it is adduced by a defendant in a criminal proceeding (subject to certain exceptions) (s.123);
- in circumstances where there are joint civil clients (s.124);
- the communication is made in the furtherance of the commission of an offence or fraud (s.125); and
- related communications/documents are disclosed (s.126).

Clients will most commonly come across situations involving loss of privilege by waiver.

8 *Evidence Act 1995* (NSW) s.117.

9 Ibid.

10 *Pratt Holdings Pty Ltd v Commissioner of Taxation* [2004] FCAFC 122.

11 *Evidence Act 1995* (NSW) ss 118, 119.

Waiver

Waiver of privilege can be express or implied. Express waivers tend to be uncontroversial and occur for example where a party files and/or serves expert evidence in proceedings or knowingly and deliberately discloses privileged material. Implied waivers on the other hand tend to be problematic as often the party doing it is oblivious to its consequences resulting in much debate before the Courts.

Circumstances governing loss of client legal privilege is now largely codified by the *Evidence Act* sections 121 to 126. The principal provision for waiver is section 122 of the *Evidence Act* which provides, inter alia, two ways in which client legal privilege can be lost. The first is by consent of the client or party concerned which is an express form of waiver. The second being an implied form of waiver where:

> "(2)…the client or party concerned has acted in a way that is inconsistent with the client or party objecting to the adducing of the evidence because it would result in a disclosure of a kind referred to in sections 118, 119 and 120.
>
> (3) Without limiting subsection (2), a client or party is taken to have so acted if:
>
> c. the client or party knowingly and voluntarily disclosed the substance of the evidence to another person, or
>
> d. the substance of the evidence has been disclosed with the express or implied consent of the client or party."[12]

The introduction of the test of "inconsistency" into the *Evidence Act* reflects the common law position as was applied by the majority in *Mann v Carnell* (1999) 168 ALR 86 (*Mann*). In that case, the test applied by the Court was whether an act of disclosure is inconsistent with the maintenance of the confidentiality which the privilege was intended to protect[13]. Whether an inconsistency exists is to be determined objectively[14] notwithstanding any subjective intention of the disclosing party:

> "…it is sometimes said that waiver is "imputed by operation of law". 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."[15]

A client will not be taken to have acted inconsistently merely because:

- the substance of the evidence has been disclosed in the course of making a confidential communication or preparing a confidential document, or as a result of duress, or under compulsion of law;[16]or
- of a disclosure by a client to another person if the disclosure concerns a matter in relation to which the same lawyer is providing, or to provide, legal professional services to both the client and the other person[17]; or
- of a disclosure by a client to a person who, at the time of disclosure, has a common interest relating to the proceeding or anticipated proceeding[18].

However, the Courts will impute an intention where the actions of a party are plainly inconsistent with the maintenance of the confidentiality which the privilege is intended to protect.[19] It does not operate as some overriding principle at large but considerations of fairness will also be taken into account by the Courts[20] in recognition perhaps that a strict application of the rules would produce harsh results arising from the inconsistent actions of parties. These considerations that have been articulated in relation to waiver at common law will apply with equal force in relation to the statutory question posed by section 122(2) of the *Evidence Act*.[21]

In *Asahi*[22] the Court was faced with a situation where an applicant had voluntarily disclosed the contents of a confidential report prepared by their lawyers to an insurer. The question was whether the protection conferred by the privilege was lost as against the respondent when the report was provided by the applicant to the insurer who was a potential adverse party for instance where the insurer declined the claim under the policy. It was held that the:

> "…disclosure of the information contained in the insurer's EA report for its use by the insurer was entirely antithetical to that confidential purpose and was thus "inconsistent with the maintenance of the confidentiality which the privilege was intended to protect"…in those circumstances, an implied waiver of privilege occurred….the waiver was complete and not merely limited to the insurer"[23].

12 *Evidence Act 1995* (NSW) s 122.

13 *Mann v Carnell* (1999) 168 ALR 86 at [94].

14 *Asahi Holdings (Australia) Pty Ltd & Anor v Pacific Equity Partners Pty Ltd and Others (No 2)* [2014] FCA 481 at [59].

15 *Mann v Carnell* (1999) 168 ALR 86 at [29].

16 *Evidence Act 1995* (NSW) s.122(5)(a)(i)-(iii).

17 Ibid s.122(5)(b).

18 Ibid s.122(5)(c).

19 *Mann v Carnell* (1999) 168 ALR 86 at [94].

20 Ibid.

21 *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCA 46; (2013) 303 ALR 199 at 206.

22 *Asahi Holdings (Australia) Pty Ltd & Anor v Pacific Equity Partners Pty Ltd and Others (No 2)* [2014] FCA 481.

23 Ibid at [82].

Whilst a party can preserve the confidentiality in the information it discloses to an opposing party (by express agreement for example) by placing restrictions on the use of documents so as to secure the confidentiality,[24] it is important to remember that the test of inconsistency is an objective one and where the disclosure is entirely antithetical to the confidential purpose that was to be protected an implied waiver will be taken to have occurred and cannot be supplanted by some agreement.

There will however be circumstances where there is inadvertent disclosure of a privileged document by mistake and the Courts have permitted correction of that mistake. This for example occurred in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCA 46 where the High Court held that inadvertent disclosure of a privileged document during the discovery process, in circumstances where the disclosing party acted promptly, did not constitute waiver of client legal privilege and ordered the documents to be returned.

Settlement Negotiations Privilege

Settlement negotiations privilege (also known as "without prejudice privilege") protects:

- communications made between parties in dispute, or between one or more persons in dispute with a third party, or
- documents prepared (whether or not delivered),

in connection with an attempt to negotiate a settlement of a dispute (excluding settlement of criminal proceedings).[25]

A communication labelled "without prejudice" is not determinative of the issue as to whether the communication is protected by settlement negotiations privilege and whilst it may be suggestive of an attempt to negotiate it is not a necessary element[26]. What must be shown is that the communication was made in the course of a bone fide attempt to resolve a dispute[27] of a kind in respect of which relief may be given in an Australian or overseas proceeding[28].

In NSW, settlement negotiations privilege not only applies to evidence adduced in proceedings but extends to "disclosure requirements" which includes, inter alia, subpoenas, pre-trial discovery, non-party discovery, interrogatories and notices to produce.[29]

Unlike legal professional privilege, settlement negotiations privilege can only be waived with the consent of all persons in the dispute[30].

Points to Remember

- It is difficult to establish that a communication directly between a client and a third party was prepared for the dominant purpose of obtaining legal advice. Clients should therefore consider getting lawyers to engage third parties such as experts on their behalf.
- Clients can be tempted to refer to or include legal advice in their communications with other parties to strengthen their position. Comments such as "our legal advice is…" or "our lawyer says…" are not uncommonly employed by clients to strengthen their position during negotiations but could have the effect of waiving the privilege in relation to such advice. Avoid such embellishments.
- Clients who have to comply with an order for discovery or subpoena should endeavour to review documents carefully to ensure that privilege documents are not disclosed. When in doubt, speak to your lawyer first.

24 Ibid at [74]-[75].

25 *Evidence Act 1995* (NSW) s.131.

26 *Rosebanner Pty Ltd v Energy Australia* [2009] NSWSC 43 at [256] per Ward J.

27 Ibid.

28 *Evidence Act 1995* (NSW) s.131(5)(a).

29 Ibid s.131A.

30 Ibid s.131(2)(b).

Upcoming Event

AS 11000: New Beginning or Beginning of the End?

Thursday, November 5, 2015 at 5:30 p.m.

Squire Patton Boggs Level 21, 300 Murray Street, Perth.

Please contact Isla Rollason to register on +61 8 9429 7624 or **isla.rollason@squirepb.com.**

Contacts

Cris Cureton
Partner, Darwin
T +61 8 9429 7460
E cris.cureton@squirepb.com

Brendan Reilly
Partner, Perth
T +61 8 9429 761
E brendan.reilly@squirepb.com

Avendra Singh
Partner, Sydney
T +61 2 8248 7810
E avendra.singh@squirepb.com

Greg Steinepreis
Partner, Perth
T +61 8 9429 7505
E greg.steinepreis@squirepb.com