It's been a privilege. Or has it?

In our previous article,[1] we noted a number of exceptions to legal professional privilege in circumstances where:

1. the privilege has been waived;

2. it is in the public interest;

3. a statute modifies or removes the privilege where the legislature affords a competing public interest a higher priority; or

4. the communication is for the purpose of facilitating a fraud or crime.

Where a communication is for the purpose of facilitating a fraud or crime it will of course not be privileged. The fraud contemplated under this exception is however much broader than the name suggests, as noted by Lander J in *Gartner v Gartner* [2004] FCA 258, it is as wide as a 'fraud on justice'. Bearing in mind that a key aim of the doctrine of legal professional privilege exists to promote justice, it makes sense that the privilege ought not to be maintained where the privilege is claimed to avoid justice being done.

Instances where the claim for the privilege has been denied, as noted by Dr Ronald J Desiatnik in *Legal Professional Privilege in Australia,* include circumstances where communications:

1. related to the failure to file tax returns;

2. created in the course of implementing a scheme to evade sales tax;

3. evidencing transactions entered into at a reduced amount to prejudice the interests of persons entitled to claim against them;

4. relating to a contravention of the Australian Consumer Law;

5. showing the furtherance of dishonest breaches of a person's duties as an employee;

6. which evidence the institution of proceedings which constitute an abuse of process; and

7. which disclose an attempt to claim privilege without foundation.

Such communications will defeat a claim for legal professional privilege, where the contravening purpose of the communication is demonstrated, and even in circumstances where the legal practitioner is not aware of the contravening purpose.

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[1] *Legal Professional Privilege: what is it?*