Parliament may legislatively abrogate PII by express words or necessary implication. It can also confer absolute immunity from production. This will always be a matter of statutory construction which will necessarily depend upon the terms of the given provision and parliamentary intention.[6] Legislation of this nature is very unusual.

PII is sometimes referred to as 'Crown privilege'. This label is misleading for a number of reasons, principally relating to the manner in which it is claimed and the mode of it being asserted. Firstly, PII is determined by a court pursuant to an inherently evaluative process, rather than simply being claimed as a 'privilege' by a party. Secondly, PII may be asserted where evidence is held by third parties and whether or not the State is a party to a proceeding. PII may be considered by a court even if no party has asserted it, although this is uncommon. Generally speaking, if the State makes no PII claim, a court is unlikely to second-guess this. Finally, being an immunity based on public interest (and not the personal interest of a party), caselaw suggests that PII cannot be waived.[7] If the State either makes no PII claim or submits that it has considered the claim but does not wish to object to production, this may tilt the balance in favour of disclosure.[8] While such a course may not properly be described as a waiver, it effectively approximates one.

The test for PII

There are two types of PII claims that can be made: 'class' claims and 'content' claims. A class claim is one where documents are asserted to belong to identifiable class which, regardless of the contents of the documents, and production of that class of document would be injurious to public interest. A common class claim is Cabinet documents (eg minutes/submissions). A content claim is a PII claim made over a given document in relation to its specific content, some or all of that content being argued to be against the public interest to produce. In either case, a court will evaluate the basis of the claim, balance any competing interests, and rule accordingly.

The party asserting a PII claim (ie normally the State) bears the burden of establishing that there is risk that production would be injurious to the public interest. In the case of a class claim, this has been described as a 'heavy burden' for the entity asserting the claim.[9] A relevant public interest must also be identified where a contents claim is to be made. If the State is successful in establishing that there is

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immunity under s 130. Relevantly, Tate JA's observed, at [53], that '[t]here is considerable support in the authorities for the view that the principles governing public interest immunity under s 130 of the Act reflect those applicable at common law; what differences exist are of no practical significance'. See also, Tate JA's findings, at [100] where she stated 'the [s 130] statutory immunity is intended substantially to reflect common law principles and its content and operation is informed by the common law'.

[5] See Australian Law Reform Commission, Uniform Evidence Law (Report No. 102), which, at recommendation 15-11, recommended that the uniform evidence Acts be amended so as to apply s 130 to pre-trial processes. See s 131A of the Victorian Act (the *Evidence Act 2008* (Vic)), which effected these changes. There is currently no equivalent provision in the *Evidence Act 1995* (Cth).

[6] See *Smith v Victoria Police* [2012] VSC 374 where a provision of this nature was considered.

[7] See TG Cooper, *Crown Privilege* (1990), pp 2-3; *Rogers v Home Secretary* [1973] AC 388, 413 per Lord Salmon).

[8] *Sankey v Whitlam* (1978) 142 CLR 1, 68-9 (Stephen J), 100-1 (Mason J).

[9] *Conway v Rimmer* [1968] AC 910.

an identifiable public interest in favour of non-production, the burden shifts to the party seeking production of the document. That party must establish that there is a competing public interest in favour of production. If that party is able to do this, the court will then perform a balancing exercise to evaluate whether a PII claim should be sustained. If the State is successful in establishing the first step and the balancing stage has been reached, the scales must tip decisively in favour of disclosure before it will be ordered.

Common bases argued for PII claims are that disclosure would:

- *Reveal the deliberations of Cabinet or matters put to Cabinet:* documents that would fall within this category are Cabinet minutes and Cabinet submissions — the public interest being that Cabinet must be able to freely debate and be fully informed of matters but remain collectively responsible for decisions;

- *Reveal the confidential high level deliberative processes of government*: documents may include Ministerial briefs — the public interest being protected here is candour in the (and the ability to undertake) proper examination and assessment of options in advising decision-makers;

- *Harm intergovernmental relations (including between Australian jurisdictions):* documents may include minutes of intergovernmental bodies but may also include portions of Ministerial briefs and other documents — the interest is self-evident;

- *Reveal law enforcements methodology and/or the identity of confidential police informers:* documents may include police investigative documents, police logbooks and police reports which contains such information — the interest is keeping police methods confidential, not prejudicing police investigations and ensuring that police informer are not harmed; and

- *Reveal information obtained confidentially by the State:* documents could include information in tenders of private companies to government — this is a very problematic basis but is often raised by clients — it suffices to say that courts have generally not seen this as sufficient basis for PII and have ordered production but the parties may agree upon some confidentiality regime.[10]

Once the public interest in non-disclosure has been considered, it will be balanced with the public interest in production. There are a broad range of matters that may affect the balancing exercise, including the:

- The relevance of the documents — relevance is the primary consideration — if they are not relevant then a PII claim need not be made; conversely, if they are highly relevant, then a PII claim is *less* likely to be upheld;

- Currency of the documents or information in them (eg if documents/contents have 'passed into history' they are less likely to sustain a PII claim);

[10] The normal so-called 'Harman undertaking' (derived from *Home Office v Harman* [1983] 1 AC 280) would apply, in any case, which operates as an implied undertaking by parties to use documents produced in evidence only for the purposes of that litigation.

- Nature of proceedings, the character of the information contained in the documents and, as referred to above, the documents' level of relevance (eg in *Sankey v Whitlam* Cabinet-type documents were ordered to be produced by the High Court because they were highly relevant, were arguably the sole source of relevant evidence and because the focus of the proceeding was the activities of members of a Cabinet-like body to which the documents related and the relevant proceeding was a criminal one);

- Interests of third parties/non-parties; whether disclosure/non-disclosure would cause injustice (eg essentially deprive a person of a cause of action); and

- Whether there are alternative sources of evidence and what is in the public domain already.

Asserting/contesting PII

The process for contested PII claims will reveal any weaknesses in the PII assessment strategy. As with any aspect of the discovery process, it is advisable for settled protocols to be formulated at the start of the process and detailed notes to be recorded in the assessment process. This will assist if a claim is made (or if claims are waived) and will ensure that contested claims will be easier to manage.

The process for asserting PII claims closely mirrors that for production documents in discovery generally. The following are the basic steps:

- All relevant documents are identified by parties (ie 'discovered');

- Relevant documents assessed for PII — PII claims over part/all made and other parties informed of claims;

- Non-PII/redacted portions of PII documents produced;

- The other party may raise objection, usually initially by in correspondence;

- If PII claims are contested, both parties will swear/affirm affidavits setting out basis for the claims/the basis for production (a senior agency officer/Minister will usually do so on behalf of the State);

- The court will hear submissions on PII from both parties and, if the parties establish both a PII basis and a basis for production, it will consider the public interest balance;

- The court has the discretion to, itself, inspect actual documents to determine the balance; and

- The court will make a ruling made on claims.

  A flow chart of this process is set out in the **Appendix** to this document.

The following cases add some colour to situations where PII claims were found to be made out. In *Clifford v Victorian Institute of Forensic Health*, a hospital file containing a mental health interview with a person accused of murder (which allegedly contained admissions) was found to support a PII claim.[11] The court noted that such interviews were compulsory under statute for persons in the prison system and that the administration of the prison system, including managing persons in custody with mental illnesses, would be compromised if such documents could be disclosed to prosecuting authorities. In *SBEG v Secretary, Department of Immigration and Citizenship*, the court found that certain Australian Security Intelligence Organisation documents setting out the basis for an adverse security assessment for an asylum seeker were subject to PII.[12] The court noted that the proceeding, despite dealing with the liberty of the person (an adverse assessment effectively meaning that the person would be detained indefinitely), was civil, not criminal, and noted the strong public interest in keeping such security documents (and the sources in them) confidential.

The following cases add some colour to situations where PII claims were not found to be made out. In *Marks v Beyfus*, the court noted that documents relating to police sources may not support PII claims where a document is necessary to establish innocence, the interests of justice (and the risk of criminal sanction) being held to take precedence.[13] In *Savage v Chief Constable of Hampshire Constabulary*, the court found that the interests of a person seeking to be paid a police reward in civil proceedings (ie who was the police source) outweighed the public interest in keeping police sources confidential.[14] In *Cadbury Schweppes P/L Amcor Ltd*, a court found that documents containing information provided by a cartel whistle-blower to (and held by) the Australian Competition and Consumer Commission (**ACCC**) could not sustain a PII claim. The proceeding involved a claim against a company that had previously been found guilty of engaging in cartel conduct and the court held no relevant public interest arose in favour of non-disclosure by the ACCC of the whistle-blower documents held by it.[15] In *Sankey v Whitlam*,[16] documents of the 'Loan Council' (which was found to be akin to a Cabinet body) were found not to sustain a PII claim in a private prosecution brought against certain politicians including Gough Whitlam and three other ex-Ministers. The allegations were, effectively, misfeasance in public office and the High Court found that the nature of the proceedings made it appropriate for these documents to be revealed despite the fact that, ordinarily, such documents will rarely be ordered to be produced.

Tips and tricks

PII claims, like any other facet of litigation, proceed most smoothly where they are the end product of a clear, reasoned process which involves the relevant decision-makers from the start. There should be an internal process put in place, which is understood by the clients and solicitors, to assess claims. This should require the assessors to characterise the nature of the claim, including identifying the relevant

[11] *Clifford v Victorian Institute of Forensic Health* [1999] VSC 359.
[12] *SBEG v Secretary, Dept. of Immigration and Citizenship* [2012] FCA 277.
[13] *Marks v Beyfus* (1890) 25 QBD 494.
[14] *Savage v Chief Constable of Hampshire Constabulary* [1994] 2 All ER 631.
[15] *Cadbury Schweppes P/L Amcor Ltd* (2008) ALR 137.
[16] (1978) 142 CLR 1.

public interest and having some regard to the competing interest that might be raised by the other side. This information should be recorded, even if briefly, and any debate, contrary view or change in assessment also be recorded. Court documents setting out claims should be expressed in a nuanced manner so as to ensure that the stronger claims are not expressed in the same manner as weaker claims (this may help forestall a judge from making sweeping findings on claims which vary in their strength and basis). If PII claims are contested and an affidavit prepared, the person swearing/affirming can be cross-examined. This person ought to be involved early in the assessment process and, if necessary, the risks of making what might be considered 'weak' claims should be brought to that person's attention and possibility of him/her having to explain the State's position in court. Proper evidence needs to be led on the basis for PII. There have been some cases in which the basis for claims has been assumed to be self-evident and the State has not put sufficient evidence on for a claim to be sustained (eg in *State of Victoria v Brazel*).[17]

Cases involving over-inclusive claims can be highly problematic for the State, as can cases in which the State has raised PII claims but, when pressed, has difficulty characterising a public interest basis at all for having made the claim. For this reason, the PII process works best when weaknesses are identified before a PII claim is formally made. This also ensures that the decision-maker who may, ultimately, have to characterise the basis for the claim in court as a witness, makes a fully-informed decision in making the claim in the first place. In *State of Victoria v Brazel*, the Victorian Court of Appeal illustrates this proposition starkly:

> We have already referred to the complete lack of evidence from the State as to whether anything identified in these portions as an actual or potential security deficiency is in the same condition now as it was nine years ago…
>
> For these reasons, we consider that the State has failed to satisfy the threshold test — of potential damage to the public interest — in respect of any of the disputed portions of the report. No occasion arises therefore to undertake the balancing exercise…
>
> This conclusion — and the analysis on which it is based — should provide a salutary lesson for any government official or agency contemplating a claim for public interest immunity. Since immunity will not be lightly conferred, it should not be lightly claimed.[18]

Further Questions?

I am available to assist you with any queries in relation to PII, including in relation to documentary discovery/subpoena processes. I am also available to conduct in-house presentations on PII for professional development purposes and also to assist teams in substantiative preparations for discovery and other evidentiary processes.

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[17] *State of Victoria v Brazel* [2008] VSCA 37.
[18] *State of Victoria v Brazel* [2008] VSCA 37 at [6]-[68].

Appendix - flow chart of PII process