

COMPARATIVE PROFESSIONAL RESPONSIBILITY AND LEGAL ETHICS EDUCATION: PRIVILEGE IN GLOBAL LEGAL SERVICES

By MAGDALENE D'SILVA*

ABSTRACT

This paper discusses the impact of globalisation on Australian professional responsibility and legal ethics education by a brief critical analysis of the doctrine of client/legal professional privilege in global legal services such as international arbitration.

The analysis is used to support the paper's premise that current approaches to Australian professional responsibility and legal ethics education that are de-lined by a state and territory focus, can be up-dated. This is not only because of moves toward a national Australian legal profession, but because of the need to equip all Australian law graduates with the requisite skills to identify and handle new ethical challenges posed by a global legal services environment.

I. INTRODUCTION

[G]lobalisation has directly affected the delivery of legal services ...¹
Law schools and other legal education providers should recognise their own professional responsibility in integrating legal and comparative ethics in their programs ...²

The impact of globalisation on the ethics of Australian legal practice is gaining national attention. In April 2012 the Honourable Chief Justice Bathurst, of the Supreme Court of New South Wales, spearheaded debate on this topic in a presentation to the Commonwealth Lawyers' Regional Conference,³ in which he addressed the arrival of the mega global law firm phenomenon in Australia and the rise of litigation funders.⁴ These changes in Australian legal practice are caused by globalisation, and as His Honour rightly highlighted, they in turn pose new challenges for the ethical traditions of Australia's legal profession. In addition, the growth in global legal services in Australia is formally recognised by Australian law schools and national bodies.⁵ Law schools in Australia and indeed everywhere, therefore have an arguable duty to provide law graduates with an awareness and ability to deal with new ethical challenges:

* BA/LLB (Tas) LLM (Sydney) Admitted to the roll of practitioners (currently non-practising) in the Supreme Courts of: Tasmania (Barrister and Solicitor), New South Wales, England and Wales, and in the High Court of Australia (Solicitor). The author wrote this paper while acting as a sessional lecturer at the School of Law, the University of Western Sydney. The author acknowledges: Monica Ibrahim LLB (Macq) for providing Table 1, and the anonymous referee for their help with the section on international arbitration.

1 Susan Saab Fortney, 'Challenges and Guidance for Lawyering in a Global Society' (2007) 38(4) *St Mary's Law Journal* 849, 850.

2 Ibid 851.

3 TF Bathurst 'Commercialisation of Legal Practice: Conflict Ab Initio, Conflict De Futuro' (2012) 21(2) *Journal of the Commonwealth Lawyer* 35, 36-7.

4 Ibid.

5 See the *International Legal Services Advisory Council (ILSAC) Third Statistic's Survey 2008-2009*, which provides statistics evidencing empirical profit growth and expansion in Australia's global legal services market of an increase by \$165.1 million AUD since the first survey was conducted in the 2004-05 financial year. Also consider initiatives by the Australian Government Office of Learning and Teaching Project on Internationalising the Australian Law Curriculum (see French, CJ, 'Horses for Courses', *International Legal Services Advisory Council and Internationalising the Australian law curriculum for enhanced global legal education and practice National Symposium*, Canberra, 16 March 2012).

The global practitioner must carry more in his legal toolbox than the latest laptop or the most powerful cell phone ... to be successful in a global practice and to operate in a global environment, these individuals must also possess a deep ethical keel to steady them so that they do not forget their ethical obligations to the fundamental public trust of the profession And I believe you – as legal educators who equip these individuals for the lightning-paced world of cross-border deals and 24-hour work days – also must teach these young lawyers that the mission of law is not only money, but justice.⁶

Australian law graduates who intend to become lawyers need to be conscious of the new legal ethics challenges they will face in their future legal practice careers. This need has increased following several major corporate scandals domestically and abroad over the last decade, that in turn triggered national and international legislative reform which specifically sought to modify lawyer behaviour *extra-territorially* through the regulation of privilege, among other matters.⁷ This paper therefore suggests that it is timely for ‘Professional Conduct’, as a Priestley 11⁸ core subject in the Australian law school curriculum, to integrate examples of ethical challenges caused by globalisation across its key elements. The elements currently required to be taught within this subject entail: coverage of personal and professional conduct in a practitioner’s duties to: the law, to the Courts, to clients and fellow practitioners, as well as a basic knowledge of holding monies in trust accounts.⁹ Professional conduct (which is more broadly referred to in this paper as *professional responsibility and legal ethics*) does not necessarily need to be altered to include globalisation as a separate component in itself. Rather, the suggestion here is that issues of globalisation need to be integrated across each of the required elements so that law graduates are aware of the ethical issues that can arise in a global legal services environment.

One reason for suggesting this update is that legal education standards in Australia already indicate that graduates of the Bachelor of Laws degree should demonstrate an understanding of international and comparative contexts.¹⁰ As an overseas scholar has more bluntly put it: ‘[i]t is educational malpractice to ignore the present and ever growing impact of globalization on the delivery and regulation of legal services.’¹¹ This becomes relevant where pedagogy does not address professional responsibility and legal ethical issues arising in cross-border legal practice¹² (such as where a Professional Conduct course focuses on the formal position in only one Australian state).

Another reason to update Professional Conduct is that globalisation involves and affects the operation of domestic law firms,¹³ not just global law firms.¹⁴ Furthermore, economic

6 Jonathan D Cahn, ‘The Global Legal Professional and the Challenges to Legal Education’ (2001) 20(1) *Penn State International Law Review* 55, 63.

7 James McComish, ‘Foreign Legal Professional Privilege: A New Problem for Australian Private International Law’ [2006] 28 *Sydney Law Review* 297, 299.

8 As encompassed in *Legal Profession Admission Rules 2005* (NSW) Regulation 95(1)(b).

9 For further discussion see Michael Robertson, ‘Embedding “Ethics” in Law Degrees’ in Sally M. Kift et al (eds), *Excellence and Innovation in Legal Education* (Lexis Nexis, 2011) 99–109.

10 Ibid 121.

11 Janine Griffiths-Baker and Nancy J. Moore, ‘Regulating Conflicts of Interest in Global Law Firms: Peace In Our Time?’ (2012) 80 *Fordham Law Review* 2541; Mary C. Daly, ‘The Ethical Implication of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century’ (1997) 21(4) *Fordham International Law Journal* 1239, 1251.

12 Daly, above n 11, 1253.

13 See generally Steve Mark, ‘The Future Is Here: Globalisation and the Regulation of the Legal Profession — Views From An Australian Regulator’ (Paper presented in Chicago, 27 May 2009).

14 Laurel S Terry, ‘The Legal World is Flat: Globalization and Its Effect on Lawyers Practicing in Non-Global Law Firms’ (2007-2008) 28 *Northwestern Journal of International Law and Business* 527.

globalisation in the form of international trade agreements,¹⁵ is arguably influencing the nature and operation of the legal profession within each Australian state and territory. Aside from moves by the Council of Australian Governments (COAG) toward a national legal profession,¹⁶ globalisation has changed the way in which the State now regulates the profession as ‘legal services providers’¹⁷ whose skills are seen as doing more than facilitating the attainment of justice, but rather as ‘creating value’¹⁸ by adding efficiencies in commercial transactions and making legal services a profitable national trade export¹⁹ in a market environment that has simultaneously transformed clients into ‘legal services consumers’.²⁰ The State may also now regard the legal profession as a major contributor to national gross domestic product.²¹ This approach may be legitimate if one accepts the view that ‘lawyers do not merely respond to client demands, they take the initiative to construct services that appeal to clients who want to operate transnationally ... Certain kinds of lawyers prosper with globalisation’.²²

Comments from current and former members of Australia’s judiciary, about the impact of the global law firm phenomenon²³ and legal outsourcing²⁴ on Australian legal practice, manifest strong interest in the effect globalisation is having on the professional conduct standards of Australian lawyers. Such interest sits alongside initiatives for international mutual recognition of foreign lawyers and law degree qualifications from different nations.²⁵ Although this paper is written primarily for a readership of Australian legal education providers of undergraduate law students, its main premise may be equally pertinent for continuing legal education providers of

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- 15 Laurel S Terry, ‘From GATS to APEC: The Impact of Trade Agreements on Legal Services’ (2010) 43 *Akron Law Review* 875.
- 16 See generally Catherine Gale, ‘The Future of the Legal Profession — Insights on the Implementation of the National Legal Profession Reforms’ (Paper presented at the Law Council of Australia 3rd Annual Public Sector Legal Officers Forum 6 March 2012).
- 17 Laurel S Terry, ‘The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as “Service Providers”’ (2008) *Journal of the Professional Lawyer* 189, 205.
- 18 Ronald Gilson, ‘Value Creation By Business Lawyers: Legal Skills and Asset Pricing’ (1984) 94(2) *The Yale Law Journal* 239.
- 19 Steve Mark, ‘Harmonization or Homogenization? The Globalization of Law and Legal Ethics — An Australian Viewpoint’ (2001) 34 *Vanderbilt Journal of Transnational Law*, 1173, 1187–8. Also consider Alison Hook, ‘Sectoral Study on the Impact of Domestic Regulation on Trade in Legal Services’ (Paper presented at the *OECD World Bank Sixth Services Experts Meeting on Domestic Regulation and Trade in Professional Services*, Paris, 15–16 February 2007) 9.
- 20 Consider the terminology used by legal profession regulators: Steve Mark, ‘The Office of the Legal Services Commissioner – Consumer protection’ *Precedent Issue* 90 January/February 2009 available from <[www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/vwFiles/OLSC_article.pdf/\\$file/OLSC_article.pdf](http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/vwFiles/OLSC_article.pdf/$file/OLSC_article.pdf)>.
- 21 See ILSAC, *Australian Legal Services Strategic Global Engagement International Legal Services Advisory Council Report* (2009–2012) 18–19. The report states that ILSAC’s *Second Survey of International Legal Services* (2006–2007) ‘revealed Australia’s export and cross-border income amounted to an impressive \$675 million’ and defines legal service providers to include professionals other than qualified lawyers, such as international debt collectors and migration agents. Also see ILSAC’s *Third International Legal and Regulated Services Statistics Survey* (2008–2009) 10.
- 22 Chris Arup, ‘Legal Services and Professional Regulation Internationally? Australia Abroad’ (2009) 37 *Federal Law Review* 417, 418.
- 23 The Honourable T F Bathurst, ‘Commercialisation of Legal Practice: Conflict AB Initio: Conflict De Futuro’ Speech Presented to the Commonwealth Law Association Regional Conference Sydney 21 April 2012, 2.
- 24 The Honourable JJ Spigelman, ‘Global Engagement By Australian Lawyers’ Speech made to the Opening of Law Term Dinner 2011 Law Society of New South Wales Sydney 31 January 2011, 9.
- 25 Laurel S Terry et al, ‘Transnational Legal Practice’ (2009) 43 *The International Lawyer* 943, 944–5; Ted Schneyer, ‘Thoughts on the Compatibility of Recent UK and Australian Reforms with US Traditions in Regulating Law Practice’ (2009) *Journal of the Professional Lawyer* 13.

postgraduate law students and admitted practising lawyers because questions about the impact of global corporate governance on legal education,²⁶ and on professional responsibility and legal ethics per se, have been the subject of critical analysis in Australia²⁷ and overseas²⁸ for at least a decade.²⁹

Accepting for the present the premise that globalisation needs to be integrated across each of the required elements of a Professional Conduct course, the paper attempts to garner support by examining the doctrine of legal professional privilege and client legal privilege (also conjunctively referred to in this article as ‘privilege’) in two parts. The first part critically analyses the law on privilege in Australia and abroad — with greater emphasis on the law in Australia — to demonstrate the ethical tensions between national and global legal practice. The second part briefly discusses privilege in front-end and back-end global legal services. The article’s conclusion is that globalisation makes it necessary for professional responsibility and legal ethics pedagogy to include discourse on comparative legal cultures and values.³⁰

It is worth briefly explaining the reasons for choosing to examine the law on privilege to support the case for integrating globalisation into Australian professional responsibility and legal ethics education. First, privilege is regarded throughout the common law world as an integral aspect of professional responsibility and legal ethics in the sense that it is a part of ‘the integrity of legal representation’.³¹ Second, privilege is studied in the Professional Conduct course curriculum because it involves the lawyer’s duty to maintain the confidentiality of their client’s communications. Third, large law firms themselves may be taking a scrupulous approach to these issues given the potential repercussions in large-scale litigation.³²

In addition, the author’s experience is that latent uncertainty seems to persist about the differences between legal professional privilege and client legal privilege in Australia, which may be more wide spread given the nuanced differences in the formal regulation of professional

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- 26 Bernhard Grossfield, ‘Global Corporate Governance and Legal Education’ (2005) 11 *Law and Business Review of the Americas* 185.
- 27 Terry Hutchinson, ‘The Transnational Lawyer: GATS, Globalisation and the Effects on Legal Education’ (2006) 11 *Australian and New Zealand Journal of Law and Education* 93; Steve Mark, ‘Harmonization or Homogenization? The Globalization of Law and Legal Ethics — An Australian Viewpoint’ (2001) 34 *Vanderbilt Journal of Transnational Law*, 1173.
- 28 Laurel S Terry, ‘US Legal Ethics: The Coming of Age of Global and Comparative Perspectives’ (2005) 4(3) *Washington University Global Studies Law Review* 463; Richard Collier, ‘“We’re All Socio-Legal Now?” Legal Education, Scholarship and the “Global Knowledge Economy” — Reflections on the UK Experience’ (2004) 26 *Sydney Law Review* 503; Carole Silver, David Van Zandt, Nicole de Bruin Phelan, ‘Globalization and the Business of Law: Lessons for Legal Education’ (2008) *Maurer School of Law: Indiana University Faculty Publication* 52 <<http://www.repository.law.indiana.edu/facpub/52>>; Carole Silver, ‘Educating Lawyers for the Global Economy: National Challenges’ (2009) *Kyung Hee University Law Review* <http://works.bepress.com/cgi/viewcontent.cgi?article=1012&context=carole_silver>.
- 29 Douglas R. Richmond, ‘The New Law Firm Economy, Billable Hours, and Professional Responsibility’ (2000) 29(1) *Hofstra Law Review* 207; Marc S. Galanter and Thomas M. Palay ‘Large Law Firm Misery: It’s the Tournament, Not the Money’ (1999) 52 *Vanderbilt Law Review* 953; Ronald J. Daniels, ‘The Law Firm As Efficient Community’ (1992) 37(3) *McGill Law Journal* 801; Milton C. Regan Jr, ‘Corporate Norms and Contemporary Law Firm Practice’ (2002) 70 *George Washington Law Review* 931; James Faulconbridge et al, ‘Global Law Firms: Globalization and Organizational Spaces of Cross-Border Legal Work’ (2008) 28(3) *Northwestern Journal of International Law and Business* 455.
- 30 Dr Marcel Barth and Florian Schumacher, ‘Cultural Clashes and Conflicting Ethics: The Professional Conduct of Attorneys in International Arbitration Practice’ 27 June 2006 (2007) 32 *DAJC Newsletter* 40.
- 31 H L Ho, ‘Legal Professional Privilege and the Integrity of Legal Representation’ (2006) 9 *Legal Ethics* 163, 165–8.
- 32 Consider *Boulderstone Hornibrook Pty Ltd v Queensland Investment Corporation* [2011] NSWSC 127.

responsibility and legal ethics that remain between Australia's states and territories. Uncertainty about the law on privilege in Australia may be further compounded by globalisation when Australian lawyers are involved in: cross-border national legal practice, act for an overseas client, deal with an overseas-admitted lawyer, or are involved in international arbitration — a private form of multi-jurisdictional dispute resolution process which falls *outside* the normal civil procedures and rules of evidence that apply in Australian courts, and requires lawyer sensitivity and adaptability to the convergence of differences in diverse national legal systems.³³ This is especially important when acting in matters involving conflicts of law questions in transnational civil procedure, cross-border contracts, as well as international arbitration.³⁴ These questions include: deciding which laws apply in the absence of a global law on privilege³⁵ or, in the absence of a global regulator, who decides and oversees the decision's enforcement?³⁶ However caution is warranted against any assumption that the absence of formal global legal ethics regulation means unbridled conduct without self-regulation.³⁷

This paper does not seek to answer these questions, which are instead used to demonstrate why aspects of globalisation, comparative professional responsibility and legal ethics,³⁸ need to be integrated into the Australian law school curriculum. How that is done is a matter for further discussion involving direct collaboration between legal education providers (including overseas law schools),³⁹ academics, the practising legal profession (particularly global law firms), and

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- 33 S I Strong, *Research and Practice in International Commercial Arbitration Sources and Strategies* (Oxford University Press 2009), 3; Rashda Rana and Michelle Sanson, *International Commercial Arbitration* (Thomson Reuters 2001) 98–101; Yves Dezalay and Bryant G Garth, *Dealing In Virtue International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press, 1996) 18–29.
- 34 Winston P Nagan and Danie Visser, 'The Global Challenge to Legal Education: Training Lawyers For a New Paradigm of Economic, Political and Legal-Cultural Expectations in the 21st Century' (2004) 11(1) *ILSA Journal of International & Comparative Law* 9, 33.
- 35 Catherine A Rogers, 'Fit and Function in Legal Ethics: Developing A Code of Conduct for International Arbitration' (2002) 23(2) *Michigan Journal of International Law* 341, 373–4. Voluntary rules and guidelines issued by international legal profession bodies such as the International Bar Association aim to positively influence legal profession behaviour around the world might be considered a form of soft-law global legal ethics regulation. See for example Danielle Jasmin Kirby, 'The European Union's Gatekeeper Initiative: The European Union Enlists Lawyers In The Fight Against Money Laundering and Terrorist Financing' (2008) 37(1) *Hofstra Law Review* 261, 263.
- 36 John Flood, 'Transnational Lawyering: Clients, Ethics and Regulation' in Lynn Mather and Leslie Levin (eds) *Lawyers In Practice: Ethical Decision Making In Context* (University of Chicago Press, 2012) 8.
- 37 Large law firms that implement internal risk management systems could be seen as a form of self-regulation. See for example Christine Parker, Adrian Evans, Linda Haller, Suzanne Le Mire, Reid Mortensen, 'The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour' (2008) 31(1) *UNSW Law Journal* 158, 178–9; John Flood, 'Transnational Lawyering: Clients, Ethics and Regulation' in Lynn Mather and Leslie Levin (eds) *Lawyers In Practice: Ethical Decision Making In Context* (University of Chicago Press, March 2012) 17; Elizabeth Chambliss, 'The Professionalization of Law Firm In-House Counsel' (2005-2006) 84 *North Carolina Law Review* 1515; Susan Saab Fortney, 'Law Firm General Counsel as Sherpa: Challenges Facing the In-Firm Lawyer's Lawyer' (2005) 53(4) *University of Kansas Law Review* 835; Susan Saab Fortney and Jett Hanna, 'Fortifying A Law Firm's Ethical Infrastructure: Avoiding Legal Malpractice Claims Based on Conflicts of Interest' (2002) 33(3) *St Mary's Law Journal* 669.
- 38 Mark, above n 13, 1178–83.
- 39 See suggestions for an approach to teaching global professional responsibility on the particular issue of privilege in Daly, above n 11, 1277–82. Also see Philip M. Genty, 'The Challenges of Developing Cross-Cultural Legal Ethics Education, Professional Development, and Guidance for the Legal Professions' (2011) *Journal of the Professional Lawyer* 37.

the legal profession's representative bodies,⁴⁰ so that courses are well structured, accurately informed and legitimate. This also requires an honest appraisal of an academy's co-ordination of its course materials and assessment methods.⁴¹

II. PRIVILEGE: A BRIEF OVERVIEW

This section will demonstrate that multi-jurisdictional issues of professional conduct exist within Australia and internationally for the law on privilege, for which there is a plethora of common law, text book commentary and academic literature.⁴² It is thus suffice for present purposes to give a brief overview of the main substantive elements. In the rest of this section, *client legal privilege*, *legal professional privilege* will be referred to as *privilege* to encompass the notion that certain confidential client communications are protected from otherwise lawfully mandated disclosure. This term also encompasses the concept of *professional secrecy*⁴³ in civil law jurisdictions. Although as the next section of the article attempts to explain, a distinction between these terms should otherwise be maintained because substantive and procedural differences remain.

Privilege in Australia and in most of the common law world, can be broadly defined as: a right which belongs to a lawyer's client, for confidential communications between a lawyer and a client (which includes communications made to or from the lawyer or client with a third party), to be protected from compulsory production in legal proceedings or where otherwise required by law, if such communications were made for the *dominant purpose* of obtaining legal advice or current or anticipated legal proceedings.⁴⁴ Although this dominant purpose test for determining which communications are protected by this privilege, applies at common law as well as under the uniform evidence legislation, its operation and availability, and the test for the waiver of each form of privilege, are slightly different between Australia's state and territories. The following sections explain some of the key differences within Australia and then briefly consider the legal approach to privilege that is taken in other common law and civil law systems.

A. Australia

In Australia privilege is both a substantive right at common law ('legal professional privilege') and a rule of evidence in litigation under uniform evidence legislation ('client legal privilege').⁴⁵ Both forms of privilege require that at the time the relevant communications were created, they

40 Groups include the International Legal Services Advisory Council (ILSAC) and Australia's Large Law Firms Group Ltd (LLFG).

41 Daly, above n 11, 1257.

42 See for example RJ Desiatnik *Legal Professional Privilege in Australia* (LexisNexis Butterworths 2005). Ysaiah Ross *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (LexisNexis, 5th ed, 2010) Ch 11.

43 Kirby, above n 35, 266.

44 *Grant v Downs* (1976) 135 CLR 674, 688; *Baker v Campbell* (1983) 153 CLR 52, 112; *Eso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49. *Evidence Act 1995* (NSW) ss 118, 199. Also see Ross, above n 42, 377–81.

45 The uniform evidence legislation has been enacted in the jurisdictions of the Commonwealth, New South Wales, the Australian Capital Territory, Victoria and Tasmania: Gino Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 4th ed, 2010), 245.

were confidential⁴⁶ and made for the dominant purpose of legal advice or existing or anticipated litigation.⁴⁷ Under the dominant purpose test at common law, the party claiming privilege (namely the client), must show on the balance of probabilities that as a matter of objective fact, the purpose of obtaining legal advice, or existing or anticipated litigation, dominated all other purposes which motivated the creation of the communication(s).⁴⁸ A practical conundrum that arises is what constitutes ‘anticipated litigation’, which the courts have said must be more than just a general apprehension of any litigation; it is the anticipation of *particular* litigation by *parties who can be identified*.⁴⁹

Another practical conundrum which has been the subject of increasing litigation in Australia⁵⁰ and overseas⁵¹ is whether confidential in-house communications with in-house lawyers,⁵² are protected by privilege, as such lawyers usually serve other purposes in the lawyer–employer/client relationship beyond giving legal advice or acting in litigation.⁵³ In-house lawyers in Australia are not necessarily required to hold a current practicing certificate in order for privilege to attach to their communications;⁵⁴ indeed, so long as any lawyer is admitted to practice (including foreign admitted lawyers in Australia), the lack of a current practicing certificate will not abrogate the lawyer–client relationship that is required for privilege to attach.⁵⁵ This is because the key factor is whether the relevant legal advice for which the communications were created, was given with the ‘necessary degree of independence’.⁵⁶

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- 46 Where litigation is on foot, confidentiality is subjectively defined under s 117 of the uniform evidence legislation as having been made by or to a person who was under an express or implied obligation not to disclose its contents, *whether or not the obligation arises under law*. By comparison, the legal test for establishing confidentiality at common law is arguably more objective. See for example *Smith Kline & French Laboratories (Aust) Ltd v Secretary Department of Community Services and Health* (1990) FCR 73; *Rickard Constructions Pty Ltd v Rickard Hails Moretti & Ors* [2006] NSWSC 234.
- 47 *Grant v Downs* (1976) 135 CLR 674 at 688; *Baker v Campbell* (1983) 153 CLR 52 at 112; *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49.
- 48 *Ibid.*
- 49 Ross, above n 42, 378. *Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* (2002) 4 VR 332.
- 50 *Commonwealth v Vance* [2005] 224 FLR 243; *Sydney Airports Corporation Ltd v Singapore Airlines & Qantas Airways* [2005] NSWCA 47.
- 51 This is particularly with regard to determining who *is* the client for the purpose of legal advice privilege: *Three Rivers District Council v Governor & Company of the Bank of England* (No 5) [2004] 2 WLR 1065; *Three Rivers District Council v Governor & Company of the Bank of England* (No 6) [2005] 1 AC 610; *Managing General Partner Ltd and others v Babcock & Brown Global Partners* [2010] EWHC 2176 (Ch).
- 52 This includes government lawyers by virtue of the inclusive definition of ‘client’ under s 117 of the uniform evidence legislation.
- 53 Dal Pont, above n 45, 293–301; *AWB v Cole (No 5)* [2006] FCA 1234. Fraudulent and illegal purposes are not protected by privilege at common law (*Re Kearney: Ex parte Attorney-General for the Northern Territory* (1985) 59 ALJR 749) or under the uniform evidence legislation (S 125).
- 54 *Commonwealth v Vance* (2005) 224 FLR 243.
- 55 *Waterford v Commonwealth* (1987) 163 CLR 54; *Australian Hospital Care v Duggan (No 2)* [1999] VSC 131. Privilege attaches to client communications with foreign lawyers in Australia at common law (*Grofam Pty Ltd v Australia & New Zealand Banking Group Ltd* (1993) 117 ALR 669; *Kennedy v Wallace* (2004) 142 FCR 185). Privilege also similarly attaches under the uniform evidence legislation. For example the *Evidence Act 1995* (NSW) s 177 (c) defines ‘lawyer’ as including ‘an overseas-registered foreign lawyer or a natural person who, under the law of a foreign country, is permitted to engage in legal practice in that country’.
- 56 Ross above n 42, 406, cites *Re Proudfoot and Human Rights and Equal Opportunity Commission* (1992) 28 ALD 734 (AAT).

By contrast, client legal privilege under the uniform evidence legislation applies where the confidential communication's dominant purpose is for legal advice⁵⁷ or litigation,⁵⁸ and also where an unrepresented party has made their own communication with another person for the dominant purpose of preparing for or conducting the legal proceeding.⁵⁹ Client legal privilege thus applies to situations requiring the disclosure of otherwise confidential communications where evidence is being adduced in legal proceedings in a relevant court. However client legal privilege under the uniform evidence legislation does not apply in non-judicial proceedings, such as tribunal hearings.⁶⁰

Although both forms of privilege invoke the dominant purpose test,⁶¹ important differences remain between legal professional privilege at common law, and client legal privilege under the uniform evidence legislation. These differences mean that other than for the purposes of this paper, in legal education and legal practice the terms should not be conceptually conflated. One difference is that unlike client legal privilege under the uniform evidence legislation, legal professional privilege at common law does not exist outside the lawyer–client relationship, meaning that parties who are not legally represented by a lawyer cannot claim privilege over their own communications with third parties in situations where disclosure of those communications has been mandated by law in a forum outside judicial legal proceedings.⁶²

Another difference relates to when each form of privilege applies. In New South Wales for example, the provisions for client legal privilege under the *Evidence Act 1995* (NSW) apply to the tendering of evidence at trial *as well as* to pre-trial procedures (such as discovery and subpoena for production) due to the operation of the *Uniform Procedure Rules 2005* (NSW).⁶³ By contrast, in other Australian jurisdictions there is some uncertainty as to when and whether client legal privilege under the uniform evidence legislation applies to pre-trial procedures and at trial.⁶⁴ There is senior commentary to the effect that litigation in the Federal jurisdiction still requires the application of common law legal professional privilege for the exchange of evidence exchange at the pre-trial stage, but client legal privilege under the *Evidence Act 1995* (Cth) applies when adducing evidence at trial.⁶⁵ The application of each form of privilege is depicted below in Table 1.

57 *Evidence Act 1995*(NSW) s 118.

58 *Evidence Act 1995*(NSW) s 119.

59 *Evidence Act 1995*(NSW) s 120.

60 *Ingot Capital Investments Pty Ltd & Ors v Macquarie Equity Capital Markets Ltd & Ors* [2006] NSWSC 530.

61 Some commentators suggest that when the High Court changed the common law legal professional privilege from sole purpose to dominant purpose in *Esso* (1999) above n 43, that it did so to bring Australian common law into line with the position under the uniform evidence legislation. Other commentators however say that the High Court was influenced by the law that already existed in other common law jurisdictions. See Dal Pont, above n 46, 250.

62 *Ingot Capital Investments Pty Ltd & Ors v Macquarie Equity Capital Markets Ltd & Ors* [2006] NSWSC 530.

63 Ysaiah Ross and Peter McFarlane, *Lawyers' Responsibility and Accountability Cases, Problems and Commentary* (Lexis Nexis Butterworths, 2012) 361. Mr Justice Robert McDougall, 'Some Aspects of Privilege Concerning Communications With Lawyers' 3 October 2006 <www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_campbell080306>.

64 Ross above n 42, 361. McDougall, above n 63, has said that 'the High Court has now decided that the Evidence Act test if client legal privilege does not apply outside the context of adducing evidence in court and does not result in any alteration of the common law.' R McDougall cites the cases of: *Northern Territory v GPAO* (199) 196 CLR 553, *Esso Australia Resources Ltd v FCT* (1999) 201 CLR 49 and *Mann v Carnell* (1999) 201 CLR 1.

65 McDougall, above n 63.

Table 1: Forms of privilege and their application (NSW and Commonwealth)⁶⁶

	<i>Evidence Act 1995</i> (NSW) Client legal privilege	<i>Evidence Act 1995</i> (Cth) Client legal privilege	Common Law Legal Professional Privilege
Before litigation			✓
Before hearing (NSW)	✓		
Before hearing (CTH)			✓
At hearing (NSW, CTH)	✓	✓	

These jurisdictional differences in turn affect the applicable test for *waiver*, which describes the circumstance in which the protection of privilege is forfeited. At common law:

[O]nce the conditions for the existence of legal professional privilege are established, there is no room for the court to decide whether, in light of some particular public interest, the privilege should be overridden or disregarded.⁶⁷

However the actions of the parties can still amount to a client’s claim for privilege effectively being waived. This is the case in the test for waiver of legal professional privilege at common law, which is generally referred to as the *fairness doctrine*.⁶⁸ Here, depending on the particular circumstances of the matter and the question of what is fair for the parties involved, privilege over a confidential communication can be lost if it is ‘leaked, overheard or intercepted by a third party, or a copy is obtained by the opposing party’.⁶⁹

There is more uncertainty in the common law as to whether a determination of fairness involves considerations of inconsistent behaviour. The High Court said (in obiter) in *Mann v Carnell* (1999):⁷⁰

It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege ... 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.

Decisions of the Supreme Court of New South Wales such as *Goldberg v Ng* (1995)⁷¹ have similarly invoked notions of fairness which demonstrate that at common law, privilege can be inadvertently lost by waiver where the disclosing party or client did not subjectively intend

66 Table prepared by Monica Ibrahim LLB (Macq).

67 McDougall, above n 63.

68 *Goldberg v Ng* (1995) 132 ALR 57; *Mgica (1992) Ltd v Kenny & Good Pty Ltd (No 2)* (1996) 135 ALR 743; *Complete Technology Pty Ltd v Toshiba (Aust) Pty Ltd* (1994) 124 ALR 493.

69 Ross, above n 42, 381 cites *Rumping v DPP* [1964] AC 814; *Calcraft v Guest* [1898] 1 QB 759.

70 201 CLR 1, 28–9.

71 132 ALR 57.

for this to occur. These cases show that the law on privilege in Australia, widely differs in its operation and application, depending on the jurisdiction.

By comparison, the test for waiver of client legal privilege under the uniform evidence legislation immediately invokes notions of inconsistency under s 122.⁷² This section allows evidence of otherwise confidential and privileged communications to be adduced where the client or relevant party has consented or acted in a way that is inconsistent with the claim for legal advice or litigation privilege (under s 118 or s 119) being maintained. In contrast to principles of fairness at common law, s 122(3)(a)(b) of the uniform evidence legislation refers to the inconsistent act by the client or relevant party, amounting to disclosure to another of the *substance of the evidence* sought to be adduced *knowingly and voluntarily, or, with express or implied consent*.⁷³ Parties to litigation who disclose the substance of legal advice they have received, to third parties (such as through the broadcast media), may therefore be interpreted as having waived privilege over such advice.⁷⁴ However this is not always the case where the disclosure was for other reasons outside the litigation, such that it could not be said to be inconsistent with maintaining a claim of privilege.⁷⁵

In summary, the general law on privilege in Australia is unsettled, with principles of notions of fairness and inconsistency applying in some courts while others have ruled it out,⁷⁶ and yet others considering a client or relevant party's state of mind to assess whether waiver of privilege was done knowingly and voluntarily.⁷⁷ Recent case law and academic commentary in Australia⁷⁸ suggest that common law fairness apply when interpreting the uniform evidence legislation. However, as these questions remain unsettled they demonstrate the point that legal education in Australia needs to ensure law graduates are aware of the differences when acting across state and territory borders, *as well as when providing legal services to international/ global clients* who retain lawyers in Australia to represent their interests within Australian borders.

B. Other Legal Systems

This section briefly covers some different approaches to the law on privilege in overseas legal systems. As the purpose is to illustrate the point that Australian law graduates entering a global legal services environment need to be aware that legal ethics challenges are addressed differently across national borders, the section does not seek (or need) to provide an in-depth analysis. Although '[b]oth the common and civil law systems respectfully acknowledge the fundamental duty of a lawyer to maintain the confidentiality of client information',⁷⁹ McComish⁸⁰ has eruditely analysed the question of whether and how foreign legal professional privilege should be recognised in Australia where a multi-jurisdictional cross-border matter involves a foreign/ overseas admitted lawyer. Acknowledging that the prevailing Anglo-American view is that the law of the forum of the matter should apply, McComish opines that this is by no means clear, and advocates for the application of foreign law rather than 'entangle the law of the forum in

72 Ross, above n 42, 380–81.

73 This is subject to exceptions in s 122(5) with regard to disclosures by third parties who are not the client or a party as defined under s 117.

74 *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1996) 137 ALR 28.

75 *Osland v Secretary to the Department of Justice* [2008] HCA 37; *Timothy Mills v Walter Wojcech* [2011] NSWSC 86 (17 February 2011).

76 *Adelaide Steamship Pty Ltd v Spalvins* (1998) 81 FCR 360.

77 *Telstra Corp Ltd v BT Australasia Pty Ltd* (1998) 156 ALR 634.

78 *Artistic Builders Pty Ltd v Nash* [2009] NSWSC 102. Ross, above n 43, 383 cites D Moujali, 'Recent Developments' *Barnews: Journal of the NSW Bar Association* (Summer 2008-2009) 13–15.

79 Daly, above n 11, 1277.

80 James McComish, 'Foreign Legal Professional Privilege: A New Problem for Australian Private International Law' [2006] 28 *Sydney Law Review* 297.

questions of foreign privilege'.⁸¹ The debate's existence shows why law graduates and practising lawyers in Australia need to be conscious of professional responsibility and legal ethical issues beyond state and national borders (privilege being the example used in this paper to illustrate the point). Yet as there is no 'level playing-field'⁸² across the world for the law on privilege, the consistency of regulation by individual nation states is perhaps patchwork at the global level, meaning that law firms and lawyers providing global legal services need to self-regulate on such issues.⁸³

In countries such as Japan, where the law recognises the protection of confidential information, such protection is not afforded on the basis of any concept of privilege over communications made for the purpose of legal advice or litigation.⁸⁴ In the United States, which like Australia regulates its legal profession in a federal manner,⁸⁵ privilege (referred to as *attorney-client privilege*) exists to protect not only communications made for the purpose of legal advice but also other work done so that legal advice can be given (the *work-product doctrine*).⁸⁶ A similar form of liberalisation occurred in the United Kingdom to some extent when the House of Lords in *Three Rivers* (No 6)⁸⁷ extended the scope of legal advice privilege in corporate legal services by stating that 'legal advice is not confined to telling the client the law; it must include advice as to what should be prudently and sensibly done in the *relevant legal context*'⁸⁸ (author's emphasis). As the House of Lords did not comment on key aspects of the lower Court of Appeal's decision in *Three Rivers* (No 5),⁸⁹ both decisions are relevant to the question of 'who is the client' in a privilege claim by a corporate entity.⁹⁰

Nevertheless, the operation of that class of privilege is still considered uncertain⁹¹ (the meaning of *relevant legal context* is regarded to be unclear)⁹² with some commentators suggesting the uncertainty be answered by the law of agency.⁹³ Others have referred to English law on privilege as adopting a 'liberal approach ... English law permits privilege in a document, once established, to be retained as against the rest of the world'.⁹⁴

By contrast, privilege operates differently in the civil law systems of many European Union nations. In Germany, lawyer-client confidentiality is contained in its national constitution (*Grundgesetz*). Under Germany's Criminal Code *all* information received by a lawyer while acting in that capacity must be kept confidential; breaching it is an offence.⁹⁵ However disclosure

81 Ibid 298.

82 Louise L Hill, 'The Financial Action Task Force Guidance for Legal Professionals: Missed Opportunities to Level the Playing Field' (2010) *Journal of the Professional Lawyer* 151, 156.

83 See the articles cited above n 37.

84 McComish, above n 81, 306.

85 McComish, above n 81, 309.

86 Mathew M Cronin cites *Upjohn Co v United States* (1981) (US) 449 in 'Slow and Steady Wins the Race: Lessons Learned, and Why it is Time to Establish a Corporate Legal Advice Privilege' (2007-2008) 26 *Penn State International Law Review* 913, 921.

87 *Three Rivers District Council v Governor & Company of the Bank of England* (No 6) [2005] 1 AC 610.

88 Cronin, above n 87, 917.

89 *Three Rivers District Council v Governor & Company of the Bank of England* (No.5) [2003] QB 1556; Joan Loughrey, 'Legal Advice Privilege and the Corporate Client' (2005) 9 *International Law Journal of Evidence and Proof* 183, 195-197.

90 Joan Loughrey, *Corporate Lawyers and Corporate Governance* (Cambridge University Press, 2011) 109-10.

91 Ho Hock Lai, 'Legal Advice Privilege and the Corporate Client' (2006) *Singapore Journal of Legal Studies* 231.

92 Cronin, above n 87, 918.

93 Loughrey, above n 91, 110.

94 Richard S Pike, 'The English Law of Legal Professional Privilege: A Guide for American Attorneys' (2006-2007) 4 *Loyola University Chicago International Law Review* 51, 67.

95 Kirby, above n 35, 268; McComish, above n 81, 304.

is permitted to prevent a crime.⁹⁶ In comparison, privilege in France (*professional secrecy*) operates as follows:

[I]n all matters, whether in the domain of counselling or defence, the consultations addressed by a lawyer at his client or destined thereto, the correspondence exchanged between the client and his lawyer ... and, more generally, all items of the file, are covered by professional secrecy.⁹⁷

French professional secrecy cannot be: waived by the client, breached by a lawyer to prevent the commission of a crime, nor divulged by the lawyer to anyone including a person to whom the client has already confided the information.⁹⁸ A similar approach is taken in Greece,⁹⁹ and in Switzerland where privilege is strengthened by the fact of privacy being enshrined as a constitutional right.¹⁰⁰ In Islamic *shari'a* law a protection is imposed for all communications related to a client's legal representation by a lawyer.¹⁰¹ A distinguishing feature of privilege in civil law systems is that it belongs to the lawyer; not the client.¹⁰² In addition, confidential communications with in-house lawyers are not protected by privilege within the EU, even where a privilege claim involves a lawyer from a common law jurisdiction to whose communications privilege would otherwise have attached.¹⁰³

C. *Privilege in Global Legal Services*

The issue of culture is one of the neglected aspects of the globalisation of the legal profession. Culture is ... fundamental to our discussion because of the relationship between ethical norms and cultural norms.¹⁰⁴

If it is recognised that a nation's legal system manifests unique cultural norms and values, it follows that nuanced differences in the law on privilege within Australia and other nations present legal ethical challenges for lawyers and law firms providing global legal services across national borders. This section critically analyses a few examples of such challenges in global legal services.

1. *Non-Contentious Legal Services: Privilege In Cross-Border Transactions*

Legal advice privilege applies to non-contentious transactional legal advice services that traverse national and international borders such as: mergers and acquisitions, corporate due diligence, securitisation, private equity and capital markets. Retaining lawyers to act in such matters at a transnational level, arguably gives international clients an added degree of protection from any legal compulsion to disclose confidential communications and documents to third parties or state based regulators.¹⁰⁵ The consequence is that lawyers providing global cross-border transactional legal advice services, face regulatory risks by virtue of inconsistent or non-existent global regulation of global legal services. The risk may be heightened by economic pressure if

96 McComish, above n 81, 305.

97 McComish above n 81, 303 quotes Jo du 5 Janvier 1972 p 131 (Law Reforming Certain Judicial and Legal Professions) art 66-5 (amended by *Loi no 2004-130 du 11 février 2004*, JO no 36 du 12 février 2004 p 2847 art 34).

98 Ibid.

99 Daly, above n 11, 1278.

100 McComish, above n 81, 303.

101 Rogers, above n 35, 371.

102 Daly, above n 11, 1278.

103 *Akzo Nobel Chemicals Limited & anor v European Commission* [2003] ECR II-4771, [2004] ECR II-315, [2004] ECR II-1603, [2004] ECR I-8739. Tilmann Hertel, Dr. Annette Keilman 'No Legal Professional Privilege for In-house Counsel in European competition law proceedings' (2011) 36 *DAJV Newsletter* (2) 67.

104 Andrew Boon and John Flood, 'Globalization of Professional Ethics? The Significance of Lawyers' International Codes of Conduct' (1999) Vol 2(1) *Legal Ethics* 29, 51.

105 See Hill, above n 83.

it is accepted that a legitimate role for lawyers is to create value in front-end transactional legal advice services by ‘reducing a transaction costs’.¹⁰⁶

Although it is not possible to fully analyse that notion here,¹⁰⁷ leading commentators have long raised attention to the fact that lawyers fulfil a gatekeeper role as reputational intermediaries in corporate governance, by facilitating transaction legitimacy in lending the firm’s reputational capital to the deal.¹⁰⁸ Lawyers also create value in front-end transactional legal advice services by providing the added protection of privilege, as perhaps illustrated by common law decisions which invariably entail pre-trial skirmishes over privilege claims by corporate clients attempting to prevent the divulgence of evidence, in litigation or to state based regulatory third parties.¹⁰⁹

Concerns have thus arisen about the potential misuse of privilege in international cross-border legal services such as money laundering.¹¹⁰ Although the protection of privilege in many jurisdictions is not available where the communication’s purpose is fraudulent or criminal,¹¹¹ some lawyers (such as those in Australia) are not directly subject to anti-money laundering regulation.¹¹² This contrasts with the position in other common law jurisdictions such as the United Kingdom (UK), whose lawyers are subject to anti-money laundering regulation that requires them to disclose confidential client information to regulator third parties where the necessary suspicion is formed.¹¹³ Such regulation does not override litigation privilege but may still override legal advice privilege, because UK law does not absolve lawyers of a statutory duty to report money-laundering suspicions about clients in transactional legal advice.¹¹⁴ Indeed, this aspect of the United Kingdom’s regulation of front-end legal services¹¹⁵ may apply to all lawyers from overseas who physically serve clients in the UK, whether or not they obtain local legal admission, or maintain their status as a foreign admitted lawyer from overseas.¹¹⁶ In summary, it is submitted that international differences in the law on privilege in non-contentious transactional global legal services, present legal ethical challenges for the global lawyer.¹¹⁷

106 Gilson, above n 18.

107 Australian legal academic commentary appears to recognise the idea that lawyers create value in transactions as trite. See for example Michelle Sanson, Thalia Anthony and David Worswick *Connecting With Law* (Oxford University Press, 2011) 360.

108 See John Flood, ‘Lawyers as Sanctifiers: The Role of Elite Law Firms in International Business Transactions’ (Spring 2007) 14 *Indiana Journal of Legal Studies* 35, 38; Loughrey, *Corporate Lawyers*, above n 91, 49–81; John Coffee *Gatekeepers: The Professions and Corporate Governance* (Oxford University Press, 2006) 2.

109 For example *Kirby v Centro Properties Limited* (No. 2) [2012] FCA 70; *Rio Tinto Ltd v Commissioner of Taxation* [2006] FCA 1200; *AWB Ltd v Cole* [2006] FCA 571; *Balabel v Air India* [1988] Ch 317; *Federal Commissioner of Taxation v Pratt Holdings Pty Ltd* (2005) 225 ALR 266.

110 Emmanuelle Chevrier, ‘The French Government’s will to fight organized crime and clean up the legal profession: The Awkward Compromise Between Professional Secrecy and Mandatory Reporting’ (2004) 42 *Crime, Law and Social Change* 189, 196.

111 For example in the United States concerns arose about the erosion of attorney-client privilege by state attempts to regulate against tax evasion and money-laundering; Matthew P Harrington and Eric A Lustig, ‘IRIS Form 8300 The Attorney-Client Privilege and Tax Policy Become Casualties In The War Against Money Laundering’ (1995) 24(2) *Hofstra Law Review* 623, 644.

112 The second tranche of the *Anti-Money Laundering and Counter-Terrorist Financing Act 2006* (Cth) which was originally intended to directly regulate legal services provided within Australia, has not been enacted at the time of writing.

113 *Proceeds of Crime Act 2002* (UK) s 330.

114 John A Kelley, ‘International Anti-Money Laundering and Professional Ethics’ (2006) 40 *The International Lawyer* 433, 438.

115 See *Proceeds of Crime Act 2002* (UK) Part 7.

116 Patricia Shaughnessy, ‘The New EU Money-Laundering Directive: Lawyers As Gatekeepers and Whistle-Blowers’ (2002-2003) 34 *Law and Policy In International Business* 25, 35.

117 See Chevrier, above n 111, 192–3.

2. Contentious Legal Services: Privilege In International Arbitration

[T]he most significant lesson I have learnt in several decades of practical experience as counsel or arbitrator, my choice would unhesitatingly be the extreme importance of the cultural dimension.¹¹⁸

This section briefly discusses global legal ethics in international arbitration where the law on confidentiality and privilege may be uncertain and require the lawyers involved to exercise a multi-jurisdictional ethical sensitivity.¹¹⁹ International arbitration is a private dispute resolution adjudication process that occurs outside the public courts of a nation's judicial system by which the contracting parties agree to be bound by an enforceable decision of a neutral third-party arbitrator.¹²⁰ Globalisation has enabled international arbitration to become the preferred method of private cross-border commercial contract dispute resolution for at least two reasons: the perceived neutrality of the arbitral process outside the national court system of any one country, and in theory at least, the relative ease by which an international arbitral award (as compared to a national court judgment) may be enforced in the 146 nations that have signed the United Nations' 1958 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ('New York Convention').¹²¹ Although most international commercial arbitrations invariably take place in the world's leading financial centres, Australia is striving to position itself as an attractive seat for international arbitration in the already competitive Asia-Pacific region, spearheaded by the introduction of supportive amendments to the *International Arbitration Act 1974* (Cth) that follow international standards to the extent it adopts the UNCITRAL Model Law.¹²²

Commentary by leading Australian international arbitrators highlight the fact that complex substantive and procedural differences exist between the legal rules for the conduct of litigation and arbitration (at both the domestic and the international level), to which lawyers in this field must be fully conversant and able to address.¹²³ While it is not possible here to outline all the complexities, a key difference concerns confidentiality. Although the conduct of the arbitration proceeding itself is private (behind closed doors, *in camera*),¹²⁴ confidentiality obligations are not automatically imposed upon the parties at common law in Australia for matters such as the exchange of evidence or discovery of documents, meaning that confidentiality needs to have already been agreed by the parties in the arbitration agreement.¹²⁵ The position might well be different if the same arbitration is being conducted overseas.¹²⁶ In England for instance,

118 Boon and Flood, above n 105, 51, quote Pierre Lalive in J Flood, 'Globalisation: The Context: The Globalizing World' (1995) 23 *International Business Lawyer* 509, 512.

119 For an excellent analysis and discussion see Rogers, above n 35.

120 Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, 2008) 1.

121 White and Case/Queen Mary University of London *International Arbitration Survey 2010*; Bernard Hanotiau, 'International Arbitration in a Global Economy: The Challenges of the Future' (2011) 28(2) *Journal of International Arbitration* 89-103; Nana Japaridze cites Klaus Peter Berger *International Economic Arbitration* 8 (1993) in 'Fair Enough? Reconciling The Pursuit of Fairness and Justice With Preserving the Nature of International Commercial Arbitration' (2008) 36(4) *Hofstra Law Review* 1415, 1418; Katherine L Lynch, *Globalization and International Commercial Arbitration* (Kluwer Law International, 2003).

122 Richard Garnett and Luke Nottage, 'The 2010 Amendments to the International Arbitration Act: A New Dawn For Australia?' (2011) 7(1) *Asian International Arbitration Journal* 29, 31.

123 Doug Jones, 'Recent Developments in International Commercial Arbitration' (2008) 11 *International Trade and Business Law Review* 83.

124 Rana and Sanson, above n 33, 206.

125 Rana and Sanson, above n 33, 207, cite *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10. The confidentiality provisions for international arbitration in Australia under the *International Arbitration Act 1974* (Cth) ss 23 C, 23D only apply if the parties opt in.

126 Rana and Sanson, above n 33, 207.

where London is widely recognised as the leading global arbitral centre, the courts have adopted the view¹²⁷ that confidentiality is a requisite denouement of the inherently private character of arbitration.¹²⁸

Furthermore, the law on privilege in international arbitration is uncertain because no consistent global rules that govern when privilege arises¹²⁹ and when it is waived, presently exist.¹³⁰ This means law graduates entering a global legal services environment in areas as such as international arbitration will inevitably face different approaches to the regulation of legal ethics issues that are inherent in global legal practice itself. As Rana and Sanson state:

International commercial arbitration typically involves a blend of the rules of evidence in both the common law and civil law systems ... Arbitral tribunals are not bound by national laws on the admissibility of evidence.¹³¹

The parties' lawyers may thus need to possess an arsenal of sensitive cultural and legal ethical skills, because such issues are determined by an arbitral tribunal in a way that converges 'distinct norms and values of different legal cultures'.¹³² Accordingly, variances in the law on privilege present potential legal ethical challenges for lawyers providing contentious global legal services, such as in international arbitration. In Australia the domestic rules of evidence that would usually apply to litigation in a public court, do not apply in the private forum of an international arbitration in Australia¹³³ — meaning that client legal privilege under the uniform evidence legislation would be irrelevant. One might then presume that Australian common law on legal professional privilege would apply, but only to such extent that the disputing parties' arbitration clause has not specified that the law of another nation shall apply.

Acknowledgment needs to be made of the existence of voluntary conduct codes issued by international bodies which seek to encourage increased convergence on professional responsibility and ethical standards in global legal services, such as in international arbitration. These include: the *International Bar Association (IBA) Rules on the Taking of Evidence in International Commercial Arbitration* (1999), the *IBA Guidelines on Conflicts of Interest in International Arbitration* (2004) and the *IBA Rules of Ethics for International Arbitrators*.¹³⁴ These rules remain optional and their adoption by the world's arbitral institutions, or by parties in ad hoc international arbitration, may be influenced by whether the disputing parties' lawyers are from a civil law or common law system.¹³⁵ As Rogers has adroitly stated:

It is ... perplexing to contemplate how to ascertain the 'cultural values' of the international arbitration community. International arbitration exists between cultural boundaries and is intended to fuse multiple diverse traditions... Indeed, the dynamic increase in the ranks of

127 With a few exceptions.

128 See the leading Court of Appeal decisions in *Dolling-Baker v Merrett* (1991) 2 All ER 890 and, more recently, in *Ali Shipping Corporation v Shipyard 'Trogir'* (1998) 2 All ER 136.

129 On the issue of the uncertainty of confidentiality in international arbitration see Michael Hwang SC and Katie Chung, 'Defining the Indefinable: Practical Problems of Confidentiality in Arbitration' (2009) 26(5) *Journal of International Arbitration* 609, 610–13.

130 Javier H. Rubinstein, 'International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions' (2004) 5(1) *Chicago Journal of International Law* 303, 306–7.

131 Rana and Sanson, above n 33, 189.

132 Jeffrey Waincymer, 'Promoting Fairness and Efficiency of Procedures in International Commercial Arbitration — Identifying Uniform Model Norms' (2010) 3 *Contemporary Asia Arbitration Journal* 25, 60.

133 Rana and Sanson, above n 33, 189. Also see *Ingot Capital Investments Pty Ltd & Ors v Macquarie Equity Capital Markets Ltd & Ors* [2006] NSWSC 530.

134 Moses, above n 121, 270–305.

135 Nathan O'Malley, 'The Procedural Rules Governing the Production of Documentary Evidence in International Arbitration — As Applied in Practice' (2009) 8 *The Law and Practice of International Courts and Tribunals* 27, 67.

participants is one of the major sources of pressure for development of an established ethical regime.¹³⁶

The prospect of more international arbitration in Australia brings with it inherent cross-jurisdictional and cross-cultural legal ethical questions for the parties' lawyers as well as for the international arbitrator(s) presiding over the arbitral tribunal.¹³⁷ If and where Australian law schools seek to include courses on global legal services (such as international arbitration), this arguably entails a corresponding duty to include education on the global legal ethics issues which are inherent in such services.

III. CONCLUSION

This paper has argued that Australian professional responsibility and legal ethics education needs to include aspects which are affected by globalisation as the pursuit of more global legal services work by Australia's legal profession, attracts new global legal ethical challenges. The law on privilege in Australia and overseas is only one example — but a clear one — in which national and global legal services present new and complex ethical challenges for lawyers and law firms providing cross-border legal services to global clients. A state based Professional Conduct curriculum based on legal formalism thus needs to be up-dated to ensure that Australian law graduates have the requisite skills to meet global legal ethical standards of duty, competence and care.

136 Rogers, above n 35, 407.

137 It is the arbitrator who is empowered by the parties' agreement to decide these questions: Charles N Bower, 'Keynote Address: The Ethics of Arbitration: Perspectives from a Practicing International Arbitrator' (2010) 5 *Berkeley Journal of International Law Publicist* 1, 2; J Martin, H Hunter and J Paulsson, 'A Code of Ethics for Arbitrators in International Commercial Arbitration?' (1985) 13 *International Business Lawyer* 153.