Client Legal Privilege & the Dominant Purpose Test

Grant v Downs (1976) and Esso (1999)

Lecture notes — restructured for independent study

Source: Client Legal Privilege — the purpose test · Synthetic demonstration transcript · **Processed:** 3 September 2026 · ScribeBloc v1

LECTURE OVERVIEW

This lecture works through the **purpose test** in client legal privilege, using two High Court decisions to trace how the Australian common law changed: **Grant v Downs** (1976) and **Esso Australia Resources Ltd v Commissioner of Taxation** (1999).

> **If you remember the rule but not why the rule changed, it is easy to get tangled up in an exam problem. The two cases are taught together because they show the shift from the sole purpose test to the dominant purpose test.**

PART 1 — WHAT PRIVILEGE IS DOING

Client legal privilege protects certain **confidential** communications and documents from **compulsory disclosure**. The policy is that a person should be able to communicate candidly with their lawyer to obtain legal advice or legal services, without assuming the communication will later have to be handed over to the other side.

The important qualification

Not everything touched by a lawyer is privileged:

- Not every document sent to a lawyer is privileged.
- Not every document created inside a company after an accident is privileged.
- Not every email copied to the legal department becomes privileged.

> **What matters is the purpose for which the communication was made, or the document was prepared.**

PART 2 — GRANT V DOWNS (1976): THE SOLE PURPOSE TEST

Citation	Court	Year
(1976) 135 CLR 674; [1976] HCA 63	High Court of Australia	1976

The facts and the problem

The case concerned reports relating to an injury suffered by a patient in a psychiatric institution. The reports had **more than one possible use**: ordinary administrative purposes — finding out what happened, considering whether procedures should change — and the possibility of being supplied to legal advisers if litigation arose.

So this was not a document that existed only because a lawyer asked for it. It was a routine or semi-routine institutional document with several possible purposes. The Court had to decide **what degree of legal purpose was enough**.

The split in the Court

Who	Approach
Barwick CJ	Favoured what we would now recognise as a **dominant purpose** approach — a document could be privileged where its dominant purpose was obtaining legal advice or conducting or assisting litigation, even with other subsidiary purposes.
The majority	Adopted the **sole purpose** test — where a document was created for multiple purposes, the legal purpose had to be the **only** purpose for which the document was brought into existence.

Why that is a demanding test

Consider a company after a serious incident. A report might be prepared so management can work out what happened, so safety procedures can be reviewed, so disciplinary issues can be considered, **and** so lawyers can advise on possible litigation. Under a strict sole purpose test, the existence of those non-legal purposes can defeat privilege.

That was the difficulty in *Grant v Downs* itself. The evidence did not establish that submission to legal advisers was the only purpose for which the reports existed — they had an administrative character as well. **The majority rejected the claim of privilege.**

> **Common error to avoid. Students sometimes write that "Grant v Downs established the dominant purpose test." That is not correct as a statement of the majority rule. Barwick CJ supported a dominant purpose formulation — but the majority adopted the sole purpose test.**

PART 3 — ESSO (1999): THE DOMINANT PURPOSE TEST

Citation	Court	Decided
[1999] HCA 67	High Court of Australia	21 December 1999

The central issue: should the common law test for legal professional privilege in Australia remain the sole purpose test from *Grant v Downs*, or should the Court adopt a dominant purpose test?

The legislative backdrop

By this time the **Evidence Act 1995** had adopted a dominant purpose formulation for client legal privilege:

Provision	Covers
s 118	Confidential communications or documents made or prepared for the **dominant purpose** of a lawyer providing **legal advice** to a client.

Provision	Covers
s 119	Confidential communications and documents prepared for the **dominant purpose** of a client being provided with professional legal services relating to an Australian or overseas **proceeding** — including anticipated or pending proceedings.

Do not collapse the statutory and common law questions into each other. In *Esso* the High Court was considering the common law test in the context of discovery — but the existence of the Evidence Act formed part of the legal landscape.

The holding

The Court held that the **common law should also use the dominant purpose test**. *Esso* displaced the sole purpose test from *Grant v Downs*. That is the headline: the correct common law test became the dominant purpose test.

Purpose is objectively determined

The Court also made clear that purpose is to be **objectively determined** — although evidence of a person's subjective purpose can be highly relevant and may be decisive. In practice, organisations establish purpose through evidence about why a document was commissioned, who requested it, what instructions were given, who received it, and what was happening at the time.

PART 4 — THE TWO CASES SIDE BY SIDE

	Grant v Downs (1976)	Esso (1999)
Court	High Court of Australia	High Court of Australia
Test adopted	**Sole purpose** (majority)	**Dominant purpose**
Effect of other purposes	Multiple material purposes can **defeat** privilege — the legal purpose must be the only one.	Other purposes **can exist** — but the legal purpose must be the ruling or prevailing one.
Minority note	Barwick CJ favoured a dominant purpose approach — anticipating what the Court later adopted.	—
Status today	Explains the **earlier** position; still important for the historical development.	The authority for the **current** common law test.

For a contemporary Australian common law problem, Esso is the authority for the test. Bring in *Grant v Downs* to show the historical change.

PART 5 — WHAT "DOMINANT PURPOSE" REQUIRES

The legal purpose does not have to be the only purpose. There can be others. But the purpose of obtaining legal advice, or legal services in relation to litigation, must be the **ruling, prevailing or dominant** purpose.

Labels are not magic

- Writing "privileged and confidential" at the top of a document does **not** itself create privilege.

- Sending a document to a lawyer does **not** necessarily create privilege.
- Copying a lawyer into an email does **not** necessarily create privilege.

> **You cannot say "legal was involved, therefore privilege." Look at the substance of the communication and why it came into existence.**

The machinery failure — the same facts, two ways

Scenario	Why it was commissioned	Likely result
A company commissions an investigation after a machinery failure.	Primarily to determine **why the machine failed** and how production can safely restart. Someone also thinks lawyers may want to see it if litigation happens later.	The legal purpose **may not be dominant**.
The company's external lawyers retain an expert immediately after the failure.	Specifically so the lawyers can **advise on potential liability and anticipated proceedings**. The report may also help management understand the incident.	Much more likely to **satisfy** the dominant purpose test.

> **Notice what the question is. Not "was there a legal purpose somewhere in the mix?" but "what purpose was dominant?" — and that is a factual inquiry.**

PART 6 — WORKED EXAMPLE: THE DEFECTIVE PRODUCT

A corporation discovers a product may be defective. On Monday morning the head of quality emails: "We need a full report into the defect because we need to decide whether to **recall** the product, determine whether **staff followed procedure**, provide information to the **regulator**, and send something to **our lawyers** in case customers sue." A report is prepared.

Is the report privileged?

Do not answer too quickly. There is clearly a legal purpose — but also several significant operational and regulatory purposes. The task is to determine the **dominant** purpose.

> **A useful diagnostic: if the evidence shows the report would have been prepared in substantially the same way even if litigation had never been contemplated, that tends to weaken the privilege claim.**

Now change the facts

External solicitors write to the company: "We anticipate claims arising from the defect. Please commission an independent technical investigation so that we can advise you on liability and prepare for anticipated litigation." The expert prepares a confidential report for the solicitors. Management later uses some of the findings to improve manufacturing processes.

Does that later use destroy privilege?

No. The fact that information is useful for another purpose does not automatically mean that the other purpose was dominant when the document was created. The focus is on the purpose for which the communication was made or the document was prepared — which is why chronology and evidence of instructions matter.

PART 7 — TERMINOLOGY AND PRECISION

Term	Where you see it
Client legal privilege	The expression used in the **Evidence Act**. Useful language, because the privilege belongs to the **client**, not the lawyer.
Legal professional privilege	Still frequently used at **common law**.

Do not let the terminology distract from the underlying issue: **is this confidential communication or document protected from compulsory disclosure because of the purpose for which it was made or prepared?**

Be precise about whose purpose, and which document

Students sometimes write "the company's purpose was litigation." That is too general. Ask instead:

- Which **document**?
- Which **communication**?
- **Who** caused it to be made?
- **When**?
- For what **reason**?

Several documents can arise from the same event and not all share the same status. An ordinary incident report created under a standing safety procedure might not be privileged. A separate confidential memorandum prepared for external counsel, so counsel can advise on anticipated litigation, may be. Same incident — different documents, different purposes. That is why this area is so fact-sensitive.

PART 8 — EXAM METHOD

When a fact pattern gives you an internal report, an investigation, an expert opinion, an accident report, a board paper or an email copied to counsel — your first reaction should not be "lawyer equals privilege." Work through it in order:

Step	Ask
1	Why was this document or communication **brought into existence**?
2	Identify the **competing purposes**.
3	Ask which purpose was **dominant**.

Step	Ask
4	Apply **Esso**.
5	Bring in **Grant v Downs** if you want to show the historical change.
6	If the problem is under the **uniform evidence legislation**, identify the relevant statutory provisions rather than assuming the common law alone applies.

If asked: "What is the significance of Esso?"

> **More than "it is about privilege." Say that Esso is the High Court authority that replaced the sole purpose approach associated with the majority in *Grant v Downs* with the dominant purpose test at common law — then explain the practical consequence: a communication or document does not lose privilege merely because it serves some additional purpose, but the protected legal purpose must be dominant rather than incidental.**

The four things to be able to do

- Explain what client legal privilege is **trying to protect**.
- Distinguish the **sole purpose** test in the majority decision in *Grant v Downs* from the **dominant purpose** test adopted in *Esso*.
- Explain what "dominant purpose" requires **in practical terms**.
- **Apply** the test to a document with several possible purposes — rather than just repeating the rule.

KEY TAKEAWAYS

- Privilege protects **confidential** communications from **compulsory disclosure** — but only where the purpose test is satisfied.
- **Grant v Downs (1976)** — the majority adopted the **sole purpose** test. Barwick CJ, in the minority, favoured dominant purpose.
- **Esso (1999)** — the High Court adopted the **dominant purpose** test at common law, displacing the sole purpose test.
- **Evidence Act 1995 ss 118–119** use dominant purpose language for client legal privilege — but do not collapse the statutory and common law questions.
- Purpose is **objectively determined**, though subjective evidence can be highly relevant and may be decisive.
- **Labels are not magic** — marking a document privileged, sending it to a lawyer, or copying counsel does not create privilege.
- The dominant purpose test is **not a free pass**. If the legal purpose is merely incidental, or one among several equal purposes, privilege may not be established.
- Later use of a document for another purpose does **not** destroy privilege — the focus is the purpose at the time it was created.

- Be precise: **which** document, **who** caused it, **when**, and **why**. Same incident, different documents, different status.

LEFT OPEN IN THIS CLASS

The session set these aside deliberately — either for a later class, or to keep the focus on the purpose test. Worth picking up before the exam.

- **Waiver** — expressly deferred to the next class, along with what can happen after privilege has arisen.
- **Confidentiality, third-party communications and statutory modification** — acknowledged as part of a full privilege analysis, but set aside so the session could focus on the purpose test.
- **How the statutory and common law tests interact** — flagged as something not to collapse into each other, but not worked through in this session.

About this document. This is a structured record of the class, rebuilt from a text transcript of the session. Nothing has been added and nothing has been left out — where the class was unclear, that is shown rather than smoothed over. Because the transcript was generated from audio, spoken citations, section numbers and case names may have been captured imprecisely at that stage; check them against your prescribed materials as you would with your own notes.

Created with **ScribeBloc** — accessible study documents from lecture transcripts.

Structured, plain-language, WCAG-considered. Built with, not just for.