



Latest & Greatest: The ACT Perspective

PRESENTED BY GRAEME BLANK

2026 FAMILY LAW CONFERENCE - 19 AUGUST

ACT Law Society – 2026 Family Law Conference



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- Family law
- Property, equity, trusts, wills & estates
- Bankruptcy & insolvency and commercial disputes
- AMDRAS Advanced Mediator

Waiver of Privilege & Unacceptable Risk: Three Recent Appellate Decisions



Three Cases

Morris & Morris [2023] FedCFamC1A 193

Mastercard v ACCC [2026] FCAFC 37

Hronn & Tracey (No 2) [2026] FedCFamC1A 56



Morris & Morris

[2023] FedCFamC1A 193 — Federal Circuit and Family Court of Australia (Division 1), Appellate Jurisdiction

CORAM

Aldridge, Carew and Curran JJ

DATE OF JUDGMENT

10 November 2023 (heard 3
November 2023)

APPEAL FROM

Morris & Morris (No 3) [2023]
FedCFamC1F 927

LEAVE TO APPEAL REFUSED

Interlocutory order — leave to appeal required. Costs of \$19,800 ordered against the appellant husband.



Key Facts

1

The proceedings:

s 79 property settlement, Family Law Act 1975 (Cth); wife (66) commenced July 2021. Married 1999, separated March 2021; husband 70.

2

The share transfer:

Late 2021: husband transferred B Limited shares (he is chairman/CEO) to D2 Limited, his admitted "alter ego," for no consideration.

3

The husband's stated purpose:

Affidavit (29 Jan 2022, [17]): "accounting and estate planning purposes." Wife alternatively pleads to set aside under s 106B, Family Law Act 1975 (Cth).

4

The subpoena:

NZ accountants' subpoena (Trans-Tasman Proceedings Act 2010 (Cth)) produced an advice letter and 2 emails (privileged), plus 3 tax invoices.



The Privilege Issue — Primary Judge's Reasoning

Privileged, but waived:

- 1 The advice letter and two emails were privileged — but the primary judge held privilege had been impliedly waived.

Why:

- 2 Asserting "accounting and estate planning purposes" put his state of mind in issue; the advice was relevant to that state of mind.

Forensic unfairness:

- 3 Maintaining privilege would stop the wife testing that assertion — unfair in the Mann v Carnell sense.

Reinforced by repetition:

- 4 Similar explanations to the ASX, to the wife's solicitors, and in his Points of Defence — arguably vindicating the transfer.



Full Court's Ruling & Legal Principles Applied

Interlocutory order — leave required: a conjunctive test of sufficient doubt to warrant reconsideration, and substantial injustice if leave is refused.

- 1** **Mann v Carnell [1999] HCA 66; 201 CLR 1 at [28]–[29]:**
Implied waiver turns on inconsistency between conduct and maintaining confidentiality, informed by fairness.
- 2** **Expense Reduction Analysts [2013] HCA 46; 250 CLR 303 at [30]–[31]:**
Waiver is assessed objectively — may be imputed regardless of the privilege holder's subjective intention.
- 3** **Qld Local Govt Superannuation Board v Allen [2016] QCA 325 at [69]:**
Adopted this summary of implied-waiver principles — issue waiver where a party asserts a subject-matter while keeping related advice confidential.
- 4** **Held:**
Not attended by sufficient doubt — leave to appeal refused; costs of \$19,800 ordered against the husband.



Other decisions

Bilal v Omar [2015] FamCAFC 30 – full court (set aside a financial agreement)

1 *Objective test as to inconsistency; not subjective as to intent to waive privilege*

In her affidavit *"the solicitor gave me an explanation in Arabic"* (paraphrasing)

In cross she went further, contradicted her affidavit and gave evidence about what the solicitor had said, including *"It's all false. It's all mistaken"*

and that the solicitor *"didn't talk much about it. He just asked me to sign and that was it"*

Pickford [2023] FedCFamC1F 1087 – Altobelli J (interim costs application)

2 *Although enough to waive, it was not voluntary disclosure; s122 Evidence Act applies*

Affidavit: "I have been advised that: I have a strong prima facie case and good prospects of ... at least 50 per cent of the non-superannuation net asset pool"

and that the anticipated settlement

"will be more than sufficient to cover the amount now sought by me for interim costs"



Mastercard Asia/Pacific (Australia) Pty Ltd v Australian Competition and Consumer Commission

[2026] FCAFC 37 — Full Court of the Federal Court of Australia

CORAM

Perram, Wheelahan and
McElwaine JJ

DATE OF JUDGMENT

30 March 2026 (heard 6
March 2026)

APPEAL FROM

ACCC v Mastercard
Asia/Pacific Pte Ltd (No 3)
[2025] FCA 1043

APPEAL DISMISSED

Leave to appeal granted 20 October 2025. File no. NSD 1652 of 2025.



Background & Procedural History

Civil penalty proceeding: ACCC alleges Mastercard contravened ss 45(1), 46(1) and 47(1), Competition and Consumer Act 2010 (Cth).

1 2017–2020, then Aug–Sep 2023:
Relevant period of the alleged strategy; Mastercard files the Koh (25 Aug) and Molu (8 Sep) affidavits addressing the SMAs' purpose.

2 29 August 2025:
Primary judge orders production of documents claimed privileged: ACCC v Mastercard Asia/Pacific Pte Ltd (No 3) [2025] FCA 1043 (PJ).

3 20 October 2025 – 6 March 2026:
Full Court grants Mastercard leave to appeal the interlocutory order; the appeal is heard in Sydney.

4 30 March 2026 & 13 April 2026:
Full Court dismisses the appeal: [2026] FCAFC 37. Trial listed to commence 13 April 2026 (eight-week estimate).



Key Facts — The Alleged Conduct

The credit leverage strategy:

- 1 From 2017, Mastercard entered Strategic Merchant Agreements (SMAs) via Mastercard Singapore, offering merchants discounted credit interchange rates.

ACCC's pleaded purpose case:

- 2 Alleged purpose — discourage merchants from routing debit transactions to Eftpos (EPAL), lessening competition: ss 45(1), 46(1), Competition and Consumer Act 2010 (Cth).

Mastercard's position:

- 3 Admits the SMAs, denies any anti-competitive purpose; pleads legitimate commercial rationales, including competing with Visa, Eftpos and Amex.

Relevant period:

- 4 6 November 2017 to 5 November 2020.



Key Facts — The Affidavit Evidence

Mr Koh (aff. 25 Aug 2023):

- 1** VP Finance, Mastercard Singapore. Deposed no one at Mastercard ever told him the SMA strategy aimed to discourage Eftpos routing.

Mr Molu (aff. 8 Sept 2023):

- 2** Former CFO, Mastercard Singapore. Deposed to similar effect — never understood SMAs were used to hinder Eftpos.

The common thread:

- 3** Both formed their understanding through communications with other Mastercard officers, including in-house counsel (e.g. Mr Chuah, General Counsel).

The privilege claim:

- 4** Mastercard claimed privilege over communications to and from Koh and Molu addressing that same subject-matter.



Legal Principle — Implied Waiver

- 1** **Mann v Carnell [1999] HCA 66; (1999) 201 CLR 1 at [29]:**
Waiver turns on inconsistency between conduct and confidentiality — informed by fairness, not fairness "operating at large."
- 2** **An objective test:**
Waiver may be imputed by law even without a subjective intention to abandon the privilege.
- 3** **Content assertions are illustrative, not exhaustive:**
Rio Tinto [2006] FCAFC 86; 151 FCR 341 at [52] is one category — not, as Mastercard argued, the only route to waiver.
- 4** **"Subject-matter" waiver:**
Asserting a purpose while keeping related communications confidential can itself be inconsistent — Grocon [2023] NSWSC 1144 (Ball J).



Held — Grounds 1 & 2: Waiver Established

1 **No error of principle:**
Correct not to confine inconsistency to assertions about the content of a privileged communication (PJ [20], upheld).

2 **Beyond joining issue:**
Koh and Molu positively asserted no one conveyed an anti-competitive purpose — an implied assertion about their own privileged communications.

3 **Forensic unfairness:**
Unfair, in the Mann v Carnell sense, to let that evidence stand while denying the ACCC the ability to test it.

4 **Scope of production upheld:**
Documents (Aug 2017–Nov 2020) on the strategy/purpose of the SMAs — not too broad; narrows in practice to about 10 emails.



Held — Ground 3: Timing of the Waiver

The issue:

1

Could implied waiver arise before the affidavits were actually read into evidence at trial?

Archer Capital distinguished:

2

[2013] FCA 1160 concerned unsigned witness statements; sworn, filed affidavits are a "significant formal step" under ss 37M, 37N, FCA Act 1976 (Cth).

Filing waives privilege in the affidavit itself:

3

Cadbury Schweppes v Amcor [2008] FCA 88 at [16]; ACCC v Cadbury Schweppes [2009] FCAFC 32.

Held:

4

Waiver over related communications can arise once production is ordered — it need not await the affidavit being read at trial.



Outcome & Practical Takeaway

Result:

1 Appeal dismissed; costs follow the event — Mastercard to pay the ACCC's costs.

Breadth of the test:

2 Implied waiver is a fact-specific inconsistency inquiry, not confined to assertions about the content of privileged communications.

Subject-matter waiver is real:

3 Asserting a purpose while withholding related privileged communications on that topic risks waiver of the whole subject-matter.

Timing risk:

4 Filing a sworn affidavit on purpose/state of mind can trigger waiver once discovery is ordered — not only when read at trial.



Hronn & Tracey (No 2)

[2026] FedCFamC1A 56 — Federal Circuit and Family Court of Australia (Division 1), Appellate Jurisdiction

CORAM

Aldridge, Altobelli and Kari JJ

DATE OF JUDGMENT

1 April 2026 (heard 23
February 2026, Brisbane)

APPEAL FROM

Hronn & Torleif (No 2) [2025]
FedCFamC1F 821

APPEAL DISMISSED

Final parenting orders — X to live with the first respondent in a remote NT community. No error established.



Key Facts

The child and the contest:

- 1 X, an Aboriginal boy born 2016. Contest between Ms Hronn (appellant, unrelated, non-Aboriginal) and Ms Tracey (first respondent, a kinship "mother" in Town N).

Where X had been living:

- 2 Ms Hronn cared for X since Sept 2022; at trial X lived with her in Town C, about 1,700km from Town N, the remote NT community of X's kin.

The primary judge's orders:

- 3 14 Nov 2025: X to live with Ms Tracey in Town N, connecting him to country, culture and kinship under s 60CC(3), Family Law Act 1975 (Cth).

The central risk issue:

- 4 Ms Hronn alleged X disclosed, over ~40 conversations since Oct 2022, that he had been sexually abused by Mr M, a cousin, in Town N.



Issue 1 — Correctness or Discretionary Error?

Ground 2: did the primary judge err in assessing unacceptable risk — and on what standard is that reviewed on appeal?

1

The competing standards:

Is unacceptable risk reviewed for correctness (Warren v Coombes (1979) 142 CLR 531) or discretionary error (House v The King (1936) 55 CLR 499)?

2

Binary outcome, evaluative process:

The finding is binary, but the judge must weigh likelihood, the gravity of harm (slight to fatal), and protective measures — an evaluative task.

3

Held — the correctness standard applies:

Binary-but-evaluative risk findings are reviewed for correctness — GLJ v Trustees, Diocese of Lismore [2023] HCA 32 at [16]; Yoxall & Eide [2024] FedCFamC1A 200 at [48].

4

But an error must still be shown:

Differing evaluative weightings can both be legally permissible (SZVFW (2018) 264 CLR 541 at [45]) — the appellant must still identify a material error.



Issue 2 — Factors Against Accepting the Risk

The primary judge gave 16 reasons at [127] for finding the risk of sexual abuse in Town N low. Key groupings:

1

Contemporaneous records preferred over recall:

Exhibits 6, 7 and 21 (professional records) preferred over the appellant's affidavit recount of conversations "some years earlier" — applying *Watson v Foxman*.

2

Fragmented, undated, leading:

~40 conversations since Oct 2022 recounted as a "jumbled recitation"; the questions asked were often omitted; X was six for many of them.

3

The vocabulary came from the appellant:

She agreed in cross-examination that she suggested the word "rape" to X; the alleged perpetrator's identity arose via leading questions.

4

Corroboration gaps:

No contemporaneous notes were made; the medical exam recorded no anal injury; the "broken tooth" claim was contradicted by the medical record.



Watson v Foxman (1995) 49 NSWLR 315; Hronn & Tracey (No 2) at [127(a)]

“...human memory of what was said in a conversation is fallible for a variety of reasons... particularly where disputes or litigation intervene... All too often what is actually remembered is little more than an impression from which plausible details are then... constructed.”

prove words spoken with a degree of precision sufficient to enable the court to be reasonably satisfied they were in fact [misleading] in the proved circumstances.

Contemporaneity & a complete record:

- 1 Note when the record was made; give the full, chronological conversation — not extracted fragments (Hronn at [127(a)],(c)).

Record the question, not just the answer:

- 2 Omitting what was asked invites an inference of leading; state the context and the speaker's demeanour (Hronn at [127(c)],(d),(g)).

Corroborate, and disclose your own role:

- 3 Identify independent corroboration; disclose if you supplied the key word or concept yourself (Hronn at [127(e)],(f)).



Conversations in affidavits — Direct Speech or the Gist?

Recent NSWCA and Federal Court authority

- 1 Kane's Hire v Anderson Aviation [2023] FCA 381 [118]-[129] (Jackman J, 27 Apr 2023):**
No rule requires direct speech; the form must match actual memory — inventing direct speech from mere gist is "logically, ethically and grammatically wrong."
- 2 Gan v Xie [2023] NSWCA 163 (White JA [119], Simpson AJA, Basten AJA):**
Endorsed that approach — a witness may depose to the gist/substance of a conversation, including via qualified direct speech ("to the effect of").
- 3 Wild v Meduri [2024] NSWCA 230 (Bell CJ [252], Kirk JA, White JA [285]-[332]):**
By majority, defended the traditional "words to the effect of" practice as a useful discipline, tempering Kane's Hire/Gan v Xie. White JA accepted Jackman's view
- 4 Punchbowl Casual Dining v Rashays [2024] FCA 1265 [27]-[33] (Jackman J, 1 Nov 2024):**
Reaffirmed indirect speech as the default unless verbatim recollection is genuinely claimed, notwithstanding Wild v Meduri.