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***Hodgson v Amcor Ltd; Amcor Ltd v Barnes (No 2) [2011] VSC 204***  
(11 May 2011)

Background

The applicant Amcor sought non-party discovery of a number of documents from the respondent solicitors. The solicitors resisted production on the grounds of client legal privilege, and filed and served an affidavit listing the relevant documents along with a brief description of each, including the basis of the claim to privilege.

Identifying third parties

The Court rejected Amcor's submission that the identity of third parties to whom communications were made must be disclosed in order to establish the privilege. Likewise the Court rejected Amcor's claim that the respondent must identify of third parties to whom communications were made, and the circumstances in which these communication took place, in order to prove that there was no waiver.

Rule 29.04(1)(d) of the Supreme Court Rules requires a party making an affidavit of documents to disclose the *grounds* of the privilege, and does not require a statement describing the evidence upon which the claim is founded. Justice Vickery considered what might be a sufficient statement of the grounds of the privilege, finding at [36] that the party claiming privilege must:

1. identify the legal basis of the claim to privilege; and
2. provide a sufficient description of the elements of the document relied upon to support the claim made on that basis.

On the other hand, it was held at [37] that 'a claiming party cannot be compelled to provide such particularity as would compromise the very privilege that is claimed' as this would defeat the object of the protection.

In the present case, it was held at [43] that the schedule of documents provided by the respondent was sufficient to support the claim for privilege as it contain a description of the basis of the claim to privilege and a description of the essential elements of the communication that gave rise to the claim to privilege. For example, Document 89 was described as "Email between Solicitors to third parties and D. Macken and attachment", and the claim to privilege was particularised by the description: "Record of confidential communication between Mr Hodgson's legal advisor and third parties created for the dominant purpose of use in existing or

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anticipated legal proceedings". In these circumstances, there was no necessity to identify the so-called "third parties" in order to sufficiently make out the claims to privilege (at [46]).

### Memoranda of costs and time ledgers

In determining whether a memorandum of costs and a time ledger were protected by client legal privilege, Vickery J pointed out at [60] that these kinds of documents are not usually brought into existence for the dominant purpose of obtaining legal advice or for use in legal proceedings. Their purpose, in general, is to record and raise charges in respect of completed work.

However, where a memorandum of costs or a time ledger is detailed and discloses – directly or indirectly – communications protected by client legal privilege, that document is likewise protected by the privilege (at [62]).

In the present case, Vickery J inspected the memorandum of costs and the time ledger and found, at [64]-[65], that they disclosed the nature or content of privileged material, and thus were themselves subject to client legal privilege.