

Reasons

1. On 24 March 2006 there was tendered a document entitled “Draft Statement of Contrition – Andrew Lindberg”. It became exhibit 665. The document was provided to the Inquiry as part of two volumes with a cover sheet stating “Email Documents: Richard Fuller Prepared for the Cole Inquiry”.

After the document was tendered, Mr Judd QC, appearing for AWB Limited (“AWB”) and its directors said:

It may be, sir, that we ought to make some additional inquiries about its provenance. It hasn't been hitherto brought to our attention as one that was brought into existence for the purpose of seeking some advice, but it may well be.¹

And later, Mr Judd stated:

Perhaps I can do no more at this stage than to indicate that we are not yet satisfied that it is covered by the privilege, but I don't want to interrupt my friend in the course of perhaps asking some questions that might identify the role that this witness had in its preparation. But we will seek some instructions on it in any event.²

2. After discussion I permitted examination of Dr Fuller regarding the circumstances in which the document came into existence. The substance of Dr Fuller's evidence was:

- a. Following the release of the final report of the Independent Inquiry Committee into the United Nations Oil-For-Food Programme, and at about the time of this Inquiry, AWB retained an expert in the field of “crisis management”, a Mr Peter Sandman.³
- b. Mr Sandman's thesis “was essentially to over-apologise, to apologise for things that had happened, to cover the ground and in fact to go further than was necessary, and that was in the interests of the corporation to do that, in terms of its public reputation and its recovery from events such as this.”⁴
- c. Mr Lindberg was chosen, presumably by AWB, to make the apology.⁵
- d. Mr Lindberg considered the documents “as a piece of professional advice which he would consider along with others, as well as his own views.”⁶ Mr Lindberg “had mixed views about it.”⁷

¹ Transcript 5270/25 – 29.

² Transcript 5270/34 – 39.

³ Transcript 5272.

⁴ Transcript 5272/41 – 46.

⁵ Transcript 5274.

⁶ Transcript 5274/46 – 5275/1.

- e. There “might have been quite a number” of drafts of the document.⁸
- f. Initially, there was some uncertainty as to whether delivery of the draft statement of contrition “was to be proceeded with.”⁹
- g. A final version of the document was not settled.¹⁰
- h. Ultimately, Mr Lindberg decided not to proceed with the “over apology” strategy.¹¹
- i. Drafts of the document were discussed amongst the Chairman of AWB and some of its directors.¹²

3. Dr Fuller was asked:

Q: Did anyone at those meetings [being the meetings between Mr Stewart and Board Members] suggest they couldn't go ahead with the strategy because any of this [meaning the substance of exhibit 665] was untrue?

A: No, I don't believe so, no. Sorry, I should correct that. I think that was the – I think that was the – in large part, the objection to it, that it was untrue, in the sense that it went much further in apologising, as it were, than was in fact the case, and I think that that was the objection to it, that that might be a good crisis management strategy, but it didn't reflect the reality of what had happened, and for that reason that was objected to, so, yes.¹³

- 4. At that point Mr Judd sought an opportunity to seek instructions to determine whether the document was subject to a claim for legal professional privilege.
- 5. I made a non-publication order in respect of the document. I also directed that any evidence in support of a claim that legal professional privilege attached to the document be filed so that the matter could be resolved.
- 6. On 27 March 2006 Mr Judd pressed AWB's claim for legal professional privilege in respect of the document. I was provided with a statutory declaration of Ms Rosemary Peavey, Senior Corporate Counsel at AWB, in support of the claim. That statutory declaration became exhibit 666. The affidavit sought to establish that exhibit 665 had been provided to the Inquiry in error because it was privileged. Two paragraphs of the affidavit are relevant:

- 3. On 28 February 2006 two volumes of hard copy documents were produced to the Inquiry and described as “Email Documents: Richard Fuller”. Those documents were delivered to ABL in Sydney for delivery to the Inquiry. At the time of production to the Inquiry I believed that those two volumes had been reviewed to exclude from production any document (or part of any documents) that may be privileged on the grounds that they contained confidential communications passing between lawyer and client for the purpose

⁷ Transcript 5275/1.

⁸ Transcript 5275/10 – 11.

⁹ Transcript 5275/14.

¹⁰ Transcript 5275.

¹¹ Transcript 5276.

¹² Transcript 5277.

¹³ Transcript 5277/27 – 37.

of obtaining or recording legal advice or that came into existence for the purpose of or in contemplation of this Inquiry.¹⁴

...

6. The document that is now exhibit 665 was a document that was not removed as privileged following the review and consequently was not reviewed by counsel. It was included by mistake in the two folders delivered to the Commission. Upon a subsequent review of the documents produced in the two volumes it appears that other privileged material has also been erroneously provided to the Commission. The only explanation for the production of the document (exhibit 665 entitled “Cole Inquiry – Draft Statement of Contrition”) is that it was erroneously included because there appears to be no corresponding email attached to it in the two volumes to help explain the provenance or source of that document. Upon looking at the document and the covering email that should have been attached to the document it is apparent to me that it forms part of documentation prepared in late December 2005 which was prepared for the purpose of obtaining legal advice and in contemplation of this Inquiry.¹⁵
7. Mr Agius SC, Counsel Assisting, contended that the statutory declaration of Ms Peavey did no more than raise a claim for legal professional privilege. He submitted it disclosed no basis upon which the claim could be upheld. There was no evidence in her statutory declaration of any background or qualification to support her statement that it was apparent to her that the document formed part of documentation prepared in late December 2005 which was prepared for the purpose of obtaining legal advice. Further, the document appeared to be prepared as part of the strategic response referred to in exhibit 661. That exhibit was a Board Briefing on “Project Rose” which, speaking generally, was a project aimed at formulating responses to the United States Wheat Associates’ complaints, and the Volcker Inquiry, and which, it seems, merged into Project Lilac which was to address issues related to this Inquiry. Exhibit 661 illustrated a “summary of work streams” which showed that the progression of activity involved first, preparation of a factual chronology, second the obtaining of legal advice and a review of implications for AWB’s US operations leading to, third, a development of AWB’s strategic options/actions, leading to, fourth, ongoing management of issues and negotiations with various investigations.¹⁶
8. I asked Mr Judd to consider whether he wished to put on any further evidence regarding the claim for legal professional privilege.¹⁷ No further evidence was provided.

¹⁴ Exhibit 666, Statutory Declaration of Rosemary Veronica Peavey dated 27 March 2006 at [3].

¹⁵ Exhibit 666, Statutory Declaration of Rosemary Veronica Peavey dated 27 March 2006 at [6].

¹⁶ Transcript 5309 – 10.

¹⁷ Transcript 5311/41 – 42.

9. The central issue raised by Mr Judd's submissions was that this Inquiry did not have the power to determine whether any claim for legal professional privilege should be upheld, thus justifying non-production of documents. He said:

It is not a claim to be made out in this Commission, sir. It is a claim to be made out, if at all, in a court of law. This Commission, sir, does not have the power or authority, in our submission, to determine whether or not there is a claim for legal professional privilege. If the Commission contends that the claim, if made, is inappropriately made or bad, and insists on the production of a category of documents, then it may be up to us to seek to have the matter resolved. We acknowledge that. But it is not for this Commission to make the determination.¹⁸

10. Expanding up on this, Mr Judd submitted:

If the parties agree that the Commissioner should resolve the issues, so be it, but if, in response to coercive process issued by an inquiry such as this, the AWB declines to produce a category of documents that would otherwise be required to be produced, that crystallizes the issue, and it is at that point that one must decide what is the appropriate procedure.

It is not for this Commission to then decide on the extent and scope of the notice which has issued the coercive process. It is for some other tribunal to do that, with respect. That tribunal must be, in this present instance, the Federal Court, because we say that we are not required to produce those documents under the notice, the coercive process, that we have received.¹⁹

11. Mr Judd contended that the reason why AWB was not required to produce documents in response to a notice issued by the Inquiry pursuant to the power contained in the *Royal Commissions Act 1902* (Cth) ("the Act") was because:

...in the proper exercise of power, the Commission is not authorised to issue a notice for the production of privileged material. Now, if it is caught up in the general form of the notice because it is relevant, then if the Commission insists on its production we must do something about that. But the power of this Commission, in our submission does not extend to the production of privileged material.²⁰

12. I asked for any authority to support the proposition that an executive body, exercising the executive power of the Commonwealth, and conferred with the powers contained within the Act, did not have the power to decide a claim made for privilege, here legal professional privilege, but none has been provided to me.

13. Exhibit 665 is a document produced by the solicitors for AWB Limited to this Inquiry pursuant to a notice addressed to Dr Fuller, being Notice 14 of 2006 dated 14 January 2006. In response to that notice, three tranches of documents were produced, the first on 17 February 2006, the second on 23 February 2006, and the third on 3 March 2006. Exhibit 665 was contained in the last tranche. The notice was issued to Dr Fuller pursuant to s 2(3A) of the Act.

¹⁸ Transcript 5298/2 – 11.

¹⁹ Transcript 5299/25 – 41.

²⁰ Transcript 5300/8 – 15.

AWB's Submissions Regarding Privilege

14. On 12 January 2006, prior to the commencement of the public hearings, AWB provided to the Inquiry a helpful memorandum regarding its submissions concerning legal professional privilege. It did so upon the basis that the Inquiry had summoned Mr Cooper, General Counsel for AWB, to give oral evidence before the Commission, and had served several notices pursuant to s 2(3A) of the Act seeking to compel AWB or its employees to produce various categories of documents including documents over which AWB claims legal professional privilege. It is convenient to set out a portion of those submissions.

D. THE ACT DOES NOT ABROGATE LEGAL PROFESSIONAL PRIVILEGE

36. In *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission (Daniels)*, the High Court unanimously held that legal professional privilege could be claimed to resist a notice to produce documents issued pursuant to s155 of the *Trade Practices Act 1974* (Cth) (a section that confers upon the ACCC powers that are in many respects analogous to those available to the Commission).

37. Gleeson CJ, Gaudron, Gummow and Hayne JJ said:

Being a rule of substantive law and not merely a rule of evidence, legal professional privilege is not confined to the processes of discovery and inspection and the giving of evidence in judicial proceedings. Rather and in the absence of provision to the contrary, legal professional privilege may be availed of to resist the giving of information or the production of documents in accordance with investigatory procedures of the kind for which s 155 of the Act provides...

Legal professional privilege is not merely a rule of substantive law. It is an important common law right or, perhaps, more accurately, an important common law immunity. It is now well settled that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect. That rule, the expression of which in this Court can be traced to *Potter v Minaham*, was the foundation for the decision in *Baker v Campbell*. It is a rule which, subject to one possible exception, has been strictly applied by this Court...

38. In the above passage the High Court confirmed that 'legal professional privilege may be availed of to resist the giving of information or the production of documents in accordance with investigatory procedures' of the kind conferred by the Act, unless the Act overrides that privilege by clear words or necessary implication. That rule of interpretation is to be 'strictly applied'.

39. The Act does not mention legal professional privilege. Plainly, therefore, it does not abrogate that privilege expressly. The only issue is whether the Act abrogates legal professional privilege by 'necessary implication'.

40. The phrase 'necessary implication' 'imports a high degree of certainty as to legislative intention'. In *Daniels*, McHugh J said that the courts will not hold that the legislature has overridden a fundamental right by necessary implication unless:

the legislative provision would be rendered inoperative or its object largely frustrated in its practical application, if the right, freedom or immunity were to prevail over the legislation. A power conferred in general terms, however, is unlikely to contain the necessary implication because “general words will almost always be able to be given some operation, even if that operation is limited in scope”.

41. The Act does not reveal any intention to abrogate legal professional privilege. It contains three provisions that authorise a Commission to require the production of documents, each of which is found in s 2 of the Act. That section empowers the Commission to obtain documents by:
 1. summoning a person to produce documents at a hearing (s2(1)(b));
 2. orally require a person who is present at a hearing to produce a document (s2(2)); or
 3. issuing a written notice that requires a person to produce a document at a time and place specified in the notice (usually in advance of the hearing) (s2(3A)).

42. Section 3 gives coercive effect to the powers conferred by s 2, by creating various offences that relate to failure to comply with requirements imposed under s 2. Consequently, the extent of the obligations imposed by s 2 can only be understood when that provision is read in light of the consequences of non-compliance specified under s 3. That is significant, because s 3 provides that in certain circumstances a person will not commit an offence even if the person refuses to comply with a requirement imposed pursuant to s 2.

43. Section 3 relevantly provides:
 - (2) A person appearing as a witness at a hearing before a Commission shall not fail to produce a document or other thing that the person was required to produce by a summons under this Act served on him or her as prescribed or that the person was required to produce by the member of the Commission presiding at the hearing.
 - (2A) Subsection (2) is an offence of strict liability.
 - (2B) Subsection (2) does not apply if the person has a reasonable excuse.
 - (3) It is a defence to a prosecution for an offence against subsection (2) constituted by a failure to produce a document or other thing to a Commission if the document or other thing was not relevant to the matters into which the Commission was inquiring.

Note: A defendant bears an evidential burden in relation to the matters in subsection (1B), (2B) and (3) (see subsection 13.3 (3) of the Criminal Code).

 - (4) A person served with a notice under subsection 2(3A) must not refuse or fail to produce a document or other thing that the person was required to produce in accordance with the notice.

Penalty: \$1,000 or imprisonment for 6 months.

 - (5) Subsection (4) does not apply if the person has a reasonable excuse.
 - (6) It is a defence to a prosecution for an offence against subsection (4) constituted by a refusal or failure to produce a document or other thing if the document or other thing was not relevant to the matters into which the Commission was inquiring.

Note: A defendant bears an evidential burden in relation to the matters in subsection (5) and (6) (see subsection 13.3(3) of the Criminal Code).

44. Section 6.1 of the *Criminal Code* provides that:
 - (1) If a law that creates an offence provides that the offence is an offence of strict liability:
 - (a) there are no fault elements for any of the physical elements of the offence; and
 - (b) the defence of mistake of fact under s 9.2 is available.

45. The combined effect of the above provisions is that:
- (1) If a person is required to produce documents at a hearing (either by summons, or orally **during** the course of the hearing), the person commits an offence against s3(2) (which is a strict liability offence) unless the person can discharge the evidential burden of showing either that:
 - (a) the person had a ‘reasonable excuse’ for failing to produce the document; or
 - (b) the document or other thing was not relevant to the matters into which the Commission was inquiring.
 - (2) If the person is required by a notice issued under s 2(3A) of the Act to produce documents **prior to** a hearing, the person commits an offence against s 3(4) (which is **not** a strict liability offence) unless the person can discharge the evidential burden of showing either that:
 - (a) the person had a ‘reasonable excuse’ for failing to produce the document; or
 - (b) the document or other thing was not relevant to the matters into which the Commission was inquiring.
46. The offences created by s 3(2) and 3(4) of the Act are both subject to a ‘reasonable excuse’ defence. The meaning of that term is therefore critical to the question of whether a person is required to produce documents to the Commission (whichever of the three powers to require the production of documents is used).
47. Section 1B of the Act provides that:
reasonable excuse...means an excuse which would excuse an act or omission of a similar nature by a witness or a person summoned as a witness before a court of law.
48. That definition makes it plain that the Act does not abrogate legal professional privilege. That is so because a claim of legal professional privilege would obviously excuse a failure or refusal to provide documents before a court of law.
49. Indeed, even if the term ‘reasonable excuse’ was not defined it would likely have included legal professional privilege. As Gaudron J said in *Commissioner of Corporate Affairs (NSW) v Yuill*, the term ‘reasonable excuse’ ‘is quite wide enough to cover any matter which the law acknowledges by way of answer, defence, justification or excuse for refusing or failing to provide information.’ The phrase includes, but extends beyond, the established common law privileges.
50. The existence of a ‘reasonable excuse’ defence demonstrates that the Act does not reveal any intention, let alone an unequivocally clear ‘necessary intention’, to abrogate legal professional privilege.

E. CONCLUSION

51. Accordingly, the Commission has no power to require AWB to produce documents or answer questions in circumstances in which legal professional privilege applies. As the privilege applies in relation to each of the documents identified in this submission, AWB is not required to produce those documents.²¹

15. I take that submission, together with the oral submissions from Mr Judd, to which I have referred, to be the submission in support of AWB’s contentions.

²¹ Submissions of AWB Limited Concerning Legal Professional Privilege dated 12/1/06 at [36] – [51] (footnotes omitted).

16. It is to be noted that:

- a. the written submissions do not address the issue of whether this Inquiry has power to determine whether any claim for legal professional privilege should be upheld. Presumably that is because of what is said in paragraph 48, namely that “*a claim*” of legal professional privilege would excuse a failure or refusal to provide documents before a court of law. Thus the mere making of the claim, as distinct from establishing the claim, is said to negate the otherwise existing obligation to produce documents. That was the oral submission advanced.
- b. Nonetheless, in the conclusion in paragraph 51, non-production is justified because legal professional privilege “applies” to documents the subject of a s 2(3A) notice.

In the submissions, there has been elision from ‘claim’, to established claim.

17. Since the commencement of public hearings, AWB has claimed before me, on a myriad of occasions, legal professional privilege to prevent disclosure of legal advice, either through production of documents or the giving of oral evidence. I have made clear I would uphold those claims and have invariably done so.²² This practice, over some 50 days, does not sit comfortably with the submission made in respect of exhibit 665, that the Inquiry does not have power to rule on a claim for legal professional privilege.

Issues for Consideration

18. Eight issues arise for consideration:

- a. Does the Act abrogate legal professional privilege in relation to the production of documents?
- b. If not, does the existence of the entitlement to claim legal professional privilege in respect of documents otherwise the subject of a notice pursuant to s 2(3A) negate the power to issue a notice pursuant to s 2(3A) to require production of such documents?

²² For a recent decision on the scope of matters to which the concept of legal professional privilege applies, see *Three Rivers District Council and Ors v Governor and Company of the Bank of England (No 5)* [2005] 4 All ER 948, in particular at 964, 991.

- c. If the answer to questions (a) and (b) is no, is the making of a claim for legal professional privilege sufficient to negate the obligation to produce documents to a Royal Commissioner, or person nominated by such commissioner, imposed by s 3(4) of the Act?
- d. Is it necessary for a claim for legal professional privilege to be established (as distinct from claimed) before a person served with a s 2(3A) notice is released from the obligation to produce documents otherwise the subject of the notice?
- e. Does the existence of:
 - i. a claim for legal professional privilege, or
 - ii. an established claim for legal professional privilege
 constitute “reasonable excuse” within s 3(5) of the Act?
- f. Can a Royal Commissioner determine whether a claim for legal professional privilege is established, or must such a claim be resolved before a court, relevantly the Federal Court?
- g. Does a person served with a s 2(3A) notice bear the onus of establishing the claim for legal professional privilege?
- h. If this Inquiry has power to determine whether a claim for legal professional privilege has been established, has such claim been established in relation to exhibit 665?

Reasons for Decision

19. In my view the submission that documents are excluded from the obligation of production merely because an unestablished claim of legal professional privilege is made when documents are required to be produced pursuant to compulsory process under the Act does not accord with a proper construction of the Act. I also do not accept that a commission of inquiry or Royal Commission, exercising powers under the Act, does not have power to determine whether a claim for legal professional privilege should be upheld, and that the matter must be determined by the appropriate court.

20. It is to be understood that when a notice is issued pursuant to s 2(3A) of the Act, requiring production of documents, it is not known whether any claim for legal

professional privilege will be available or made in respect of documents within the purview of the notice.

21. The power to compulsorily require production is a power conferred by the Act. The extent of the power so conferred is thus to be determined by a construction of the provisions of the Act.
22. Resolution of the issue concerning the obligation to produce documents when a summons or notice issued under compulsive process requires production of documents in respect of which legal professional privilege is claimed is resolved by the decision in *Daniels Corporation v ACCC*.²³ That decision did not establish that a mere claim of legal professional privilege negated the obligation to produce documents as required by a compulsive summons or notice. It established that where a statute permitted the issue of a compulsive summons for production of documents, unless the statute expressly or by necessary intendment negated the claim for legal professional privilege, such legal professional privilege could be claimed, and, if established, the obligation of production was negated because the statute had to be read down to accommodate the substantive immunity of legal professional privilege.
23. The appropriate principles and approach are found in the joint judgement of the majority of Gleeson CJ, Gaudron, Gummow and Hayne JJ. It is important to understand the nature of the proceedings in that case.
24. In *Daniels Corporation*, a notice had been issued pursuant to s 155 of the *Trade Practices Act 1974* (Cth). The majority judgement recorded:

The solicitors produced some but not all of the documents specified in the notices. They and the Corporation claimed that the remaining documents were the subject of legal professional privilege and that s 155 of the Act does not authorise the ACCC to require production of documents to which that privilege attaches.²⁴
25. The ACCC commenced proceedings in the Federal Court for a declaration that the corporation was not entitled to refuse to produce documents on the grounds of legal professional privilege and, also, an order requiring it to produce specified

²³ (2002) 213 CLR 543.

²⁴ *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 at 549 [2] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

documents.²⁵ The question whether s 155 of the Act authorised the ACCC to require production of documents to which legal professional privilege attaches was isolated as a preliminary issue and referred to the Full Court of the Federal Court for decision. The Full Court held s 155 did authorise notices requiring the production of such documents and declared that the solicitors were “not entitled to refuse to comply with...the notices...on the ground of legal professional privilege”.²⁶ As paragraph 4 of the joint judgement in the High Court states:

Having made those orders, it was unnecessary for the Federal Court to determine whether or not privilege attached to any of the documents the subject of the notices under s 155 of the Act.²⁷

26. The High Court reversed that order. In lieu, it held that:

...it should be declared that s 155 of the Act does not abrogate legal professional privilege and the ACCC should be ordered to pay the appellants’ costs of the proceedings in the Full Court. The matter should be remitted to the Federal Court to determine what, if any, of the documents specified in the notices are the subject of legal professional privilege.²⁸

27. It is apparent from the order made by the High Court that the mere making of a claim for legal professional privilege is not sufficient to rebut the obligation of production. Only those documents which are found to be covered by an established claim for legal professional privilege are not required to be produced. Were a mere claim of legal professional privilege sufficient, there would have been no need for the High Court to refer the matter back to the Federal Court to determine whether privilege in fact attached to the documents in respect of which it was claimed.

28. Quite apart from the orders made, there is nothing in the judgement in *Daniels* which suggests that the making of a claim is a sufficient ground to rebut the obligation of production. The majority judgement spoke of material “to which legal professional privilege attached”, not of documents in respect of which a claim for legal professional privilege was made. In paragraph 27 of the joint judgement it was said:

²⁵ *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 at 549 [3] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

²⁶ *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 at 549 [4] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

²⁷ *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 at 549 [4] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

²⁸ *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 at 561 [37] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

Section 155(2) authorised what would otherwise constitute a trespass. In that respect, it is similar to the search warrant provision in s 10 of the *Crimes Act 1914* (Cth) considered in *Baker v Campbell* and, later, in *Propend*. Those decisions, which were subsequent to the decision in *Pyneboard*, respectively held and confirmed that the provision did not authorise the seizure of material to which legal professional privilege **attached**. Given the generality of the words of s 10 of the *Crimes Act 1914* (Cth) and their similarity to the words of s 155(2), it is difficult to see any basis upon which that subsection can be construed, consistently with *Baker v Campbell* and *Propend*, as authorising entry to premises for the purpose of inspecting and copying material to which legal professional privilege **attaches**.²⁹

29. The proper approach to the construction of a statute which authorises the issue of compulsory process requiring production of documents in respect of which legal professional privilege might be claimed is addressed in the majority judgement:

Legal Professional Privilege

9. It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings. It may here be noted that the “dominant purpose” test for legal professional privilege was recently adopted by this Court in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* in place of the “sole purpose” test which had been applied following the decision in *Grant v Downs*.
10. Being a rule of substantive law and not merely a rule of evidence, legal professional privilege is not confined to the processes of discovery and inspection and the giving of evidence in judicial proceedings. Rather and in the absence of provision to the contrary, legal professional privilege may be availed of to resist the giving of information or the production of documents in accordance with investigatory procedures of the kind for which s 155 of the Act provides. Thus, for example, it was held in *Baker v Campbell*, that documents to which legal professional privilege **attaches** could not be seized pursuant to a search warrant issued under s 10 of the *Crimes Act 1914* (Cth).
11. Legal professional privilege is not merely a rule of substantive law. It is an important common law right or, perhaps, more accurately, an important common law immunity. It is now well settled that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect. That rule, the expression of which in this Court can be traced to *Potter v Minahan*, was the foundation for the decision in *Baker v Campbell*. It is a rule which, subject to one possible exception, has been strictly applied by this Court since the decision in *Re Bolton; Ex parte Beane*. Cases in which it has since been applied include *Bropho v Western Australia*, *Coco v The Queen* and *Commissioner of Australian Federal Police v Propend Finance Pty Ltd*. The possible exception to the strict application of that rule was the decision in *Yuill*.³⁰

The Construction of the *Royal Commissions Act 1902*

30. Section 2 of the Act confers a power to issue a summons to require “a person to appear before the Commission at a hearing”, give evidence and produce

²⁹ *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 at 558 [27] per Gleeson CJ, Gaudron, Gummow and Hayne JJ (emphasis added).

³⁰ *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 at 552 – 553 [9] – [11] per Gleeson CJ, Gaudron, Gummow and Hayne JJ (emphasis added).

documents,³¹ and to issue a notice merely for the production of documents.

Section 2(3A) provides:

A member of a Commission may, by written notice served (as prescribed) on a person, require the person to produce a document or thing specified in the notice to a person, and at the time and place, specified in the notice.³²

31. The obligations which arise on the service of a notice pursuant to s 2(3A), and the consequences of a failure to comply with those obligations are contained in s 3.³³

Section 3(4) provides:

A person served with a notice under subsection 2(3A) must not refuse or fail to produce a document or other thing that the person was required to produce in accordance with the notice.³⁴

32. Section 3(5) provides:

Subsection (4) does not apply if the person has a reasonable excuse.³⁵

33. Where a person is required to produce documents pursuant to a notice under s 2(3A), the penalty for non-production is \$1,000 or imprisonment for six months.

34. “Reasonable Excuse” is defined in s 1B to mean:

In relation to any act or omission by a witness or a person summoned as a witness before a commission means an excuse which excuses an act or omission of a similar nature by a witness or a person summoned as a witness before a court of law.³⁶

35. It is to be noted that in s 1B, “reasonable excuse” relates only to “an act or omission by a witness or a person summoned as a witness before a Commission”.³⁷ It does not, in terms, relate to non-compliance by a person served with a s 2(3A) notice who is not a witness or summoned as a witness. It may be that the definition thus applies only in relation to the obligation imposed by s 3(1) or 3(2).

36. As a matter of statutory construction, the Act does not negate the entitlement to claim legal professional privilege in respect of documents required by summons or by notice to be produced. There are no provisions which expressly negate that privilege, nor are there provisions which are sufficiently plain to make any such

³¹ *Royal Commissions Act 1902* (Cth), s 2(1) – (2).

³² *Royal Commissions Act 1902* (Cth), s 2(3A).

³³ *Royal Commissions Act 1902* (Cth), s 3. Refer also to *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 at 551 [7] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

³⁴ *Royal Commissions Act 1902* (Cth), s 3(4).

³⁵ *Royal Commissions Act 1902* (Cth), s 3(5).

³⁶ *Royal Commissions Act 1902* (Cth), s 1B.

³⁷ *Royal Commissions Act 1902* (Cth), s 1B.

legislative intention apparent. Thus legal professional privilege is not abrogated by the Act.

37. Accordingly, the question arises whether non-production of a document, if it was established that the document was properly the subject of a claim for legal professional privilege, would constitute “reasonable excuse”.

38. It is to be noted that s 3(4) is expressed in absolute terms. The person served “must not refuse or fail to produce a document”.³⁸ That obligation remains in absolute terms unless and until the provision in s 3(4) is rendered inapplicable. Such provision is rendered inapplicable only if it is established by the recipient of the notice, it bearing the onus of so establishing, that it has reasonable excuse for non-production.

39. Unless and until “reasonable excuse” is established the obligation to produce remains. It necessarily follows that there must be a mechanism for determining whether ‘reasonable excuse’ has been established.

Reasonable Excuse

40. The expression “reasonable excuse” was considered by Hely J in *Bank of Valletta PLC v National Crime Authority*.³⁹ An appeal from his Honour’s decision was dismissed.⁴⁰ His Honour said:

[36] The existence of a "reasonable excuse" is a familiar ground of exculpation from what would otherwise be the operation of a statutory prescription. Sometimes the ground of exculpation is expressed in terms of "lawful excuse" or "lawful authority". There may be a "lawful excuse" even though no "lawful authority" exists: *Yin v Public Prosecutor* [1955] AC 93 at 101; similarly there may be a reasonable excuse without a legal justification for the conduct in question: *Poole v Wah Min Chan* (1947) 75 CLR 218 at 232.

[37] In *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385; 57 ALR 751 the High Court considered whether the privilege against self-incrimination was a reasonable excuse for failure to produce books in response to a notice issued by the National Companies & Securities Commission. The statutory context indicated an intention to exclude the privilege. For that reason the defence of reasonable excuse did not include the privilege against self-incrimination so far as production of books is concerned. "Reasonable excuse" (at CLR 392; ALR 755):

³⁸ *Royal Commissions Act 1902* (Cth), s 3(4).

³⁹ (1999) 164 ALR 45.

⁴⁰ Refer to *Bank of Valetta PLC v National Crime Authority* (1999) 90 FCR 565.

...is directed to other matters, such as the physical or practical difficulties which may be involved in their production.

[38] Clearly enough, the reference to physical or practical difficulties in complying with the notice was illustrative of matters which might constitute a reasonable excuse, rather than a description or definition of the scope of the concept. While s 30 of the NCA Act specifies some matters which constitute a reasonable excuse, and others which do not, the present problem is not dealt with either expressly or by implication by the stipulations in s 30. There is a qualitative difference between the production of a document which might implicate the bank in some prior criminal activity, and a case where the very production of the documents called for by the notice constitutes the criminal offence under foreign law: *Brannigan v Davison* [1997] AC 238; *Société Internationale v Rogers* (1958) 357 US 197 at 211.

[39] The observations of Dawson J in *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 336; 100 ALR 609 that "reasonable excuse" more aptly refers to any physical or practical difficulties in complying with the notice, rather than to legal professional privilege, is no more than an application of the point made in *Controlled Consultants*. It is not a holding, as counsel for the respondent submitted, that in legislation such as this, exculpation expressed in terms of reasonable excuse, is confined to physical and practical difficulties in complying with the notice. In any event the submission begs the question as to whether the fact that compliance with the notice may involve the bank in the commission of an offence under the laws of Malta is a "practical difficulty". In *Taikato v R* (1996) 186 CLR 454 at 464; 139 ALR 386, the High Court indicated that decisions on other statutes provide no guidance on what constitutes reasonable excuse in the instant case.

[40] In *Ganin v New South Wales Crime Commission* [1993] 32 NSWLR 423 Kirby P, with whom Meagher JA and O'Keefe AJA agreed, speaking of "reasonable excuse" (at 436), said that:

...there is every reason to give the words used their ordinary construction. They simply ask whether the refusal to answer the question was "without reasonable excuse" ... In accordance with orthodox canons of construction these words would not be given a narrow meaning. They appear in a provision which imposes a criminal sanction for its breach.

And (at 439) said that:

It is undesirable that different formulae should be substituted for that which parliament has enacted.

Nevertheless, in judging whether a "reasonable excuse" exists, it was clearly appropriate for the decision-maker to put out of mind imaginary and insubstantial fears or those which, in the practical world, are so remote as to be safely ignored or over-ruled as unreasonable. In each case, a judgment must be made.

[41] *Ganin* was cited by the majority in *Taikato* without disapproval. Although Dawson J was in the minority in that case in the result, his Honour said (at CLR 470; ALR 398):

A reasonable excuse is no more or less than an excuse which would be accepted by a reasonable person. It is different from a lawful excuse...

That is the same notion that Kirby J was describing in *Ganin*. It is also the notion expressed by Mansfield CJ, in a rather different context, in *Pascoe v Nominal Defendant (Qld) (No 2)* [1964] Qd R 373 at 378:

What is to be determined is whether the applicant has shown any cause which can be deemed by the court to be a reasonable excuse. I think this means a cause which a reasonable man would regard as an excuse, a cause consistent with a reasonable standard of conduct...

[42] Thus while a reasonable excuse would include any current legal right to resist the compulsory production of documents, it is not confined to cases in which the resistance is on the basis of some right, privilege or immunity recognised by the general law. Nor is it necessarily confined to physical or practical difficulties in complying with the notice. It includes any excuse which would be accepted by a reasonable person as sufficient to justify non-compliance with a notice lawfully issued by NCA, but bearing in mind the central role that such notices play in the discharge by NCA of its statutory functions.

[43] *Brannigan v Davison* [1997] AC 238 is a decision of the Privy Council, on appeal from New Zealand, in a situation which, in some respects, is similar to the present. There a Commission of Inquiry in New Zealand required the plaintiffs, who were citizens and residents of New Zealand, but who also practised as chartered accountants in the Cook Islands, to give evidence to the inquiry, about matters involving the Cook Islands, when the giving of that evidence was likely to render them liable to prosecution in the Cook Islands pursuant to that country's secrecy legislation. That legislation was enacted to promote the attractions of the Cook Islands as a tax haven. The New Zealand legislation under which the Commission of Inquiry operated preserved the privilege against self-incrimination. Under that legislation, a refusal to answer questions, to be punishable, must be "without sufficient cause" or without offering any "just excuse".

[44] The Privy Council held that:

- The common law privilege against self-incrimination does not run when the criminal or penal sanctions arise under a foreign law. That is because, having regard to the absolute nature of the privilege where it exists, the effect of its recognition would be to give primacy to the foreign law. That would be an unacceptable encroachment on the domestic country's legitimate interest in the conduct of its own judicial (and presumably, inquisitorial) proceedings.
- By the same process of reasoning the privilege does not run where the feared criminality under the foreign law, lies not in the previous conduct of the plaintiffs, but in the fact of them giving evidence to the Commission of what they know of the transactions which involved the Cook Islands.
- If the unqualified application of the privilege to foreign law is unsatisfactory, so also is the opposite extreme. The opposite extreme is that the prospect of punishment under foreign law is neither here nor there. This would be a harsh attitude which would be a reproach to any legal system.
- The "sufficient cause" and "just excuse" exceptions (which are synonymous) provide ample scope for all the circumstances to be taken into account. Inherent in those expressions is the concept of weighing all the consequences of the refusal to give evidence: the adverse consequences to the inquiry if the questions are not answered, and the adverse consequences to the witness if he is compelled to answer.
- It was a matter for the Commissioner to determine whether the statutory exceptions were applicable. Although he misdirected himself on that question he also conducted the weighing exercise which the Privy Council considered to be appropriate. He held that the justification for compelling

the plaintiffs to give evidence in New Zealand was so strong that no balancing considerations under the foreign State compulsion principle could lead to their being allowed to refuse to give evidence. That decision was unassailable.

[45] Their Lordships noted (at 253E) an acceptance on the part of the Commission that the firm of accountants could not reasonably be expected to produce documents currently located in the Cook Islands.

[46] The Privy Council in *Brannigan* allowed a much broader scope, in the statutory context there under consideration, for the notion of "reasonable excuse", or equivalent expressions, than did the New South Wales Court of Appeal in *Australian Securities Commission v Ampolex Ltd* [1995] 38 NSWLR 504, in the context of the *Australian Securities Commission Act* 1989 (Cth) ("ASC Act"). In *Ampolex* the existence of an undertaking to the Court to protect the confidentiality of documents was not regarded as a reasonable excuse for not complying with a notice which required their production. The NCA Act differs from the ASC Act, and corresponding provisions commonly found in companies legislation, in as much as the NCA Act allows the recipient of a notice to claim to the person to whom he is required to produce the documents that he is entitled to refuse production: s 29(5). An adverse decision on that claim is the subject of an internal merits review (s 32(1)(b)), and to judicial review: s 32(2). The nature and extent of the provisions for determining an alleged entitlement to refuse to produce documents, particularly the internal review, suggests that the notion of "reasonable excuse" may be broader than common law privileges to the extent that they are preserved by s 30, and physical or practical difficulties in producing the documents called for by the notice, particularly if "practical" difficulties is used in a narrow sense.

[47] I do not think that I am bound by the decisions of the High Court to which I have referred to find, or that I should otherwise find, that the structure of the NCA Act is such that "reasonable excuse" is confined to physical excuse (for example, documents cannot be found or insufficient time allowed) and the specific categories of legal excuse referred to in s 30. To the extent to which the structure of the NCA Act provides guidance on the question, it points in a different direction. The result is that a value judgment has to be made in the circumstances of each individual case, as to whether the recipient of the notice has a reasonable excuse, in the sense that this term is ordinarily understood, for not producing the documents in question. If the range of factors which may be taken into account in making that judgment is as the Privy Council suggests, not all of them may be known to the recipient of the notice at the time when production of the documents is called for, and each case may be highly sensitive to its own facts. However, I should follow the decision of the Privy Council, which involves the making of an objective determination as to the existence or otherwise of a reasonable excuse.⁴¹

41. I respectfully agree with this analysis. I see no reason why an established claim for legal professional privilege should not be considered a "reasonable excuse" for negation of the obligation to produce documents because of the operation of s 3(5) so as to deny the operation of s 3(4) in respect of those documents to which the claim is established.

⁴¹ *Bank of Valetta PLC v National Crime Authority* (1999) 164 ALR 45 at 53 – 57 per Hely J.

42. The definition of “reasonable excuse” in s 1B relates only to “any act or omission by a witness or a person summoned as a witness before a Commission”.⁴² In terms, it would not appear to apply to obligations flowing from the service of a notice pursuant to s 2(3A). That does not mean, however, as a matter of statutory construction, that where the expression “reasonable excuse” is used in s 3(5), it should not be given either the meaning referred to in the definition section, or indeed a wider meaning. An established claim for legal professional privilege would excuse non-production of documents if a witness was summonsed to produce such documents before a court of law. An established claim to legal professional privilege equally would constitute a “reasonable excuse” for not producing documents otherwise the subject of a notice issued pursuant to s 2(3A).

By Whom is ‘Reasonable Excuse’ Determined

43. There remains the question of by whom the existence of a “reasonable excuse” is to be determined. AWB has submitted that it can be determined only by a body exercising a judicial power, here relevantly the Federal Court. No reason why a body such as a Royal Commission exercising the executive power could not resolve such an issue was advanced. Of course, any decision by a body such as a Royal Commissioner exercising the executive power would not be final, and would be subject to review either pursuant to the *Administrative Decisions (Judicial Review) Act 1977* or s 39B of the *Judiciary Act 1903*.

44. It is beyond doubt that the onus of establishing the claim for legal professional privilege lies on the party asserting it. That is so as a matter of construction of s 3(4) and (5) of the Act, and authority. In *National Crime Authority v S*,⁴³ the Full Court of the Federal Court held that it was for the party asserting or claiming legal professional privilege to establish the facts giving rise to it. In so doing the Full Court followed the decision in *Grant v Downs*.⁴⁴ The decision turned upon the construction of the *National Crime Authority Act 1984* (Cth). The Full Court held that s 28 of that Act empowered the Authority to summon a witness to give evidence and produce documents. Section 28 of the Act required that a person

⁴² *Royal Commissions Act 1902* (Cth), s 1B.

⁴³ (1991) 100 ALR 151.

⁴⁴ (1976) 135 CLR 674.

served with a summons shall not “without reasonable excuse” fail to attend.

Section 30(2) provided:

a person appearing as a witness at a hearing before the authorities shall not, without reasonable excuse:

...

c. refuse or fail to produce a document or thing that he was required to produce by a summons under this Act served on him as prescribed.

45. By s 32 the Authority was required, where a person claimed to be entitled to refuse to furnish information or produce documents to it under various sections, to decide as soon as practical whether in its opinion the claim is justified, and notify the person of its decision. The person, if dissatisfied, could apply to the Federal Court for a review of the decision pursuant to s 32(2) of the *National Crime Authority Act 1984*.⁴⁵

46. Whilst the court was considering a statutory regime under the *National Crime Authority Act 1984*, the Authority was not a judicial body. Lockhart J said:

When questions of legal professional privilege arise in proceedings before courts there are well established procedures for dealing with them. The claim is asserted on oath and it is open to the court or the person who seeks access to the document or the answer to the question to cross-examine the person who makes the claim. The extent to which the court allows cross-examination or itself asks questions of the deponent is, of course, a matter for the discretion of the judge; but generally it cannot be sufficient for someone merely to assert that the disclosure of the identity of a person or of a document, or of the number of persons who were present at a meeting, or who was present at the meeting, or who on behalf of the client (if the person makes the assertion is a solicitor) spoke to him or that he spoke to a particular officer of the client, to enliven a claim of legal professional privilege.

What S did in this case was simply to make a bald assertion that to answer certain questions or to identify particular documents would be to disclose matters which would reveal privileged communications. But if an assertion of this kind is made under oath how can it be tested, short of requiring the questions to be answered or the documents disclosed? S was in truth performing the function of the Authority because he drew the conclusion which it was for the Authority to reach if material had been put before it from which it could have drawn a conclusion as to whether legal professional privilege was correctly raised. But the material to establish the validity of the claim was never placed before the Authority. It is not sufficient for the person asserting the claim to merely assert it; or, as Brett LJ said in *Gardner v Irvin* (1878) 4 Ex D 49 at 52, to have a “skeleton”.

If S wished to make good his claim to refuse to answer questions or produce documents, it was for him to lead the requisite material so that the Authority could consider its attitude and examine him with respect to it. The procedure that should be adopted before the Authority is akin to a *voir dire* examination, where once the claim for privilege is asserted, it is for the person asserting it to lead his evidence or make submissions in support of his claim and for interested parties or the tribunal to test it by cross examination or other evidence. At the conclusion of *voir dire* examination the tribunal would then have before it the material to enable it to make a decision as to the correctness of the claim. This procedure was not followed here, doubtless because of the nature of the claim itself which was inseparably associated with the conclusion of counsel for S that sub-s (3) of s 30 extended privilege to the mere fact of the communication, an erroneous submission.

⁴⁵ *National Crime Authority v S* (1991) 100 ALR 151 at 156 per Lockhart J.

The claim for privilege asserted by the respondent before the Authority was a bare or skeletal claim unsupported by any evidence which would have enabled it to assess the correctness of the claim. Faced with a bare assertion of privilege by S, it is difficult to know what counsel assisting the Authority could have asked him or what evidence it could have led to test or refute the correctness of the claim short of disclosing to the Authority the material for which confidentiality was claimed.⁴⁶

47. Whilst the Court was considering a statutory regime which explicitly required the Authority to determine a claim for legal professional privilege, that very statutory regime is indicative that the Parliament has indicated that, in appropriate circumstances, a claim for legal professional privilege may be decided by a non-judicial body, subject to appeal to the Federal Court.⁴⁷

48. I see no reason in principle why a Royal Commissioner, frequently a former judicial officer or experienced legal practitioner, should not resolve a claim for legal professional privilege.

49. In *Baker v Campbell*, Mason J wrote:

When we move beyond the arena of curial proceedings to the realm of administrative and investigatory procedures the desirability of preserving the confidentiality of lawyer-client communications is not opposed by the public interest in facilitating the production of relevant materials in litigation, except in those cases (a) in which the investigatory procedures are designed as a preliminary to litigation, and (b) in which the disclosure of the communications in the administrative or investigatory procedures would impair the exercise of the privilege in pending or future litigation. However, other countervailing considerations then arise. The nature and force of those considerations depend on the object and purpose of the procedures for which the relevant statute makes provision. But it may be deduced from the very existence of the statutory obligation to answer questions, provide information or produce documents that there is a strong public interest in obtaining the materials the provision of which is the object of the statute.

Quite apart from the force of these considerations there is the problem which I mentioned in *O'Reilly* and Brennan J referred to in *Pyneboard Pty Limited v Trade Practices Commission*...that of imposing upon unqualified persons the task of deciding difficult questions of legal professional privilege. Their decision of such a question would not be conclusive. A decision of a court (a) on a prosecution for contravention of the statutory obligation, or (b) in proceedings for a declaration as to the existence of the privilege, would be required in order to provide a conclusive answer.

In this respect it is scarcely to be supposed that Parliament, when it imposes the obligation to furnish information, intends that in the course of an administrative inquiry or investigation it should be delayed or interrupted by the necessity to obtain a final decision of a court on the question whether a claim of legal professional privilege can be sustained in relation to a particular answer or particular documents. This, of course, would be relevant to the existence of a statutory intention to abrogate the privilege, assuming it to be otherwise inherently available. Nonetheless, it is a material factor to be considered in deciding whether the privilege is capable of being claimed in administrative or investigatory procedures. The determination of a claim of privilege in curial proceedings stands in sharp contrast because it entails no similar delay or interruption.⁴⁸

⁴⁶ *National Crime Authority v S* (1991) 100 ALR 151 at 159 – 160 per Lockhart J.

⁴⁷ Refer to s 32(1) and (2) of the *National Crime Authority Act 1984* (Cth).

⁴⁸ *Baker v Campbell* (1983) 153 CLR 52 at 75 – 76 per Mason J.

50. Although Mason J was addressing the issue of whether legal professional privilege extended beyond curial or semi-curial proceedings, his words are apposite. I respectfully agree that, where the Act retains the doctrine of legal professional privilege in relation to the production of documents, and contemplates that a party claiming it bears the onus of establishing that privilege so as to negate the obligation to produce documents otherwise caught by a notice, the legislature would not have contemplated that the course of the investigation must cease until there is a final determination by a court of that claim. If that view be correct, and in my opinion it is, it necessarily means that the claim for legal professional privilege should be made before the person exercising the powers under the Act. If it is not sustained, the producing party has rights of review. If it is sustained the processes of the Royal Commission continue.⁴⁹

51. The consequence of the view of Mason J is that a Royal Commissioner has the power to receive, consider and determine the claims for legal professional privilege in respect of documents the subject of its notice.

52. The alternative would be extraordinary. It was contended that a Royal Commissioner had no such power. It was said that, when a claim of legal professional privilege is made, if the Commission wished to challenge that claim, it should require production of the document, with the party adversely affected then having the obligation to approach the Federal Court to resist that claim. I do not think the legislature could have intended that a Royal Commissioner should be obliged to require production of a document in respect of which legal professional privilege was claimed without knowing the details or basis of that claim, and considering for himself or herself whether it should be upheld. Royal Commissions are normally established to consider matters which the Executive Government regards as matters of importance. There is normally a date in the Letters Patent by which the Royal Commissioner must report. Public monies are expended in conducting such a Commission. I do not think that the legislature

⁴⁹ It is to be noted that in *Brannigan v Davison* [1997] AC 238, noted by Hely J, the Privy Council held, when considering the position in regard to a New Zealand Commission of Inquiry that it was for the Commissioner to determine whether the statutory exception to the requirement to produce was applicable. However, s 13 of the *New Zealand Commissions of Inquiry Act 1908* conferred upon a Commissioner, who was a judge or former judge of the High Court, the same powers as are possessed by a judge of the High Court in the exercise of his or her civil jurisdiction under the *Judicature Act 1908*.

could have contemplated such a clumsy or practically unworkable circumstance as to require, first, a Royal Commissioner to make a determination to require production of the document without considering the basis for the claim (for if the Commissioner has no power to determine the claim, he must have no power to consider it), and second, to require every claim for legal professional privilege to be determined by a separate body, namely the Federal Court.

53. There is nothing in the Act which suggests that the applicability of s 3(5) is to be determined in the first instance, otherwise than by the Royal Commissioner. It is to be borne in mind that subs 5 may render subs 4 inapplicable if there is a “reasonable excuse” for non-production of documents, which reasonable excuse may include matters other than claims for legal professional privilege. Physical difficulty of production may be a reasonable excuse.⁵⁰ There is no reason why a Royal Commissioner should not determine whether as a matter of fact, physical difficulty of production constitutes a reasonable excuse. If “reasonable excuse” encompasses matters which a Royal Commissioner is plainly capable of deciding, it becomes difficult to understand how one limits the power to make the determination required by s 3(5) merely because other grounds for making that determination may be more difficult, or involve consideration of legal principles.

Incidental or Ancillary Power

54. It is well established that:

An authority conferred by statute is construed as authorising everything which can fairly be regarded as incidental to or consequential upon the authority itself.⁵¹

55. No narrow approach is taken in determining such incidental or consequential power. In *Re Northern Ireland Human Rights Commission*,⁵² in the speech of Lord Hutton, the passage in Wade and Forsyth on Administrative Law (8th Ed at page 219) was approved:

A statutory power will be construed as impliedly authorising everything which can fairly be regarded as incidental or consequential to the power itself; and this doctrine is not applied narrowly.

And later:

⁵⁰ *Bank of Valetta v National Crime Authority* (1991) 164 ALR 45 at 55 per Hely J.

⁵¹ *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 428-9 per Brennan J.

⁵² [2002] UKHL 25.

Statutory powers therefore have considerable latitude, and by reasonable construction the courts can soften the rigour of the ultra vires principle. Although this book contains many instances of that principle being infringed, it must be remembered that the courts intervene only where the thing done goes beyond what can fairly be treated as incidental or consequential.⁵³

56. In my opinion where the legislature has conferred upon a Royal Commission the power to issue a summons requiring the compulsory production of documents to the Commission, or a person nominated by it, and where the statute further provides that a person may establish a “reasonable excuse” for not so producing the documents, that reasonable excuse negating the obligation of production, the legislature has conferred upon the Royal Commissioner the power to decide whether the claim of reasonable excuse for non-production is established. There is nothing in the statute which suggests the contrary. The inconvenience, delay and expense of any alternative system of resolution of the claim of “reasonable excuse” is obvious. In my view, it cannot be thought that the Parliament intended to require that a person served with a notice pursuant to s 2(3A) of the Act was required in every instance to approach a court for a determination whether it had “reasonable excuse” for non-production so as to negate the obligation otherwise imposed by s 2(4).

57. It follows, in my view, that a Commissioner exercising the powers under the Act, has authority to issue a summons which encompasses documents which, after service, may give rise to a claim for legal professional privilege in respect of some but not all of the documents, and to hear and determine that claim for legal professional privilege so as to determine whether the provisions of s 3(5) apply so as to negate the obligation of production. I see no reason why procedures such as the placing of the documents in a sealed envelope and producing them to the Royal Commissioner pending determination of the claim should not be availed of. The need to establish a process to permit this to happen does not negate the power conferred by the statute when properly construed.

58. In the report of the HIH Royal Commission, the Royal Commissioner, Justice Owen, wrote:

It is not so clear whether a claim for legal professional privilege will constitute a reasonable excuse against production in answer to a commission summons or notice. Unlike the privileges against self-incrimination and self-exposure to a penalty, legal professional

⁵³ *Re Northern Ireland Human Rights Commission* [2002] UKHL 25 at [57] per Lord Hutton.

privilege is not specifically dealt with by the Act. On first consideration, it may seem odd that, although individuals may not avail themselves of the privileges against self-incrimination or self-exposure to a penalty, they may rely on legal professional privilege to withhold documents from production. It might be observed, however, that this is the position that now pertains in relation to the production of documents to the Australian Competition and Consumer Commission under s155 of the *Trade Practices Act 1974*.

It is well accepted that statutory provisions are not to be construed as abrogating important common law privileges—such as legal professional privilege—in the absence of clear words or a necessary implication to that effect. It remains an unresolved matter of construction whether the provisions of the *Royal Commissions Act 1902* necessarily imply the abrogation, or perhaps partial abrogation, of legal professional privilege. The Commission did not consider it necessary to resolve the question of construction or to rule formally on any claims for legal professional privilege. In the event, either claims were not pressed or the Commission did not require production of documents or parts of documents over which a claim for legal professional privilege had been made.⁵⁴

59. It is to be noted that His Honour raised no doubt concerning the capacity of a Royal Commissioner to resolve claims for legal professional privilege.⁵⁵
60. The procedures and processes of a Royal Commission are much more flexible and adaptable than those in a court. There are no regulatory rules, or fixed rules of procedure. Royal Commissioners usually issue a practice note to prescribe procedures to be followed in the conduct of the inquiry but such practice notes are inherently liable to amendment or waiver depending upon the exigencies of the inquiry.
61. There is thus no difficulty in prescribing a process to accommodate the determination of a claim for legal professional privilege in respect of documents the subject of a s 2(3A) notice. One would expect a procedure to be agreed between the solicitors for the inquiry and those for the person served with a notice. Absent agreement a practice note or direction can be issued. One would expect a process to be determined whereby those documents said to be the subject of such a claim would be identified and isolated, and retained separately by one of the solicitors, initially perhaps in a sealed box or envelope. The affidavit in support of the claim may be able to describe such documents and the basis of the claim with sufficient clarity to make inspection of the documents unnecessary to rule upon the claim. In other instances, inspection of the documents by the deciding tribunal may be necessary, as commonly occurs in the courts. Material

⁵⁴ Owen, The Hon. Justice *The Failure of HIH Insurance Volume I: A corporate collapse and its lessons* Canberra Publishing and Printing Canberra at [2.9] <<http://www.hihroyalcom.gov.au>>.

⁵⁵ Compare *Re HIH Insurance Limited* [2002] NSWSC 231 at [13] per Barrett J, a judgement delivered after the decision of the Full Court of the Federal Court in *Daniels* which was reversed in the High Court.

received on such an application, analogous in some respect to a voir dire examination, is disregarded in the conduct of the inquiry, as are any documents inspected for the purpose of ruling on the privilege claim. Only such documents in respect of which the claim is rejected and which are thus formally produced to the inquiry may be had regard to.

62. There are thus no procedural barriers to a Royal Commission determining a claim for legal professional privilege, when it is claimed in response to a notice issued under s 2(3A).

AWB: Contrary Submissions

63. Reliance was placed by AWB upon the decision of the High Court in *Baker v Campbell*.⁵⁶ It contended that the effect of that decision was that documents claimed to be legally professionally privileged were excluded from any compulsory notice for production because there was no power to issue a notice to require production of documents subject to a claim for legal professional privilege. In my view *Baker v Campbell* did not so decide.

64. *Baker v Campbell* was a decision concerning the proper construction of s 10 *Crimes Act 1914*. A magistrate issued a search warrant to the defendant, a federal police officer. The warrant authorised the seizure of documents on the premises of solicitors for the plaintiff. The defendant, acting pursuant to the search warrant, attempted to seize the documents held by the solicitors. The plaintiff sued the defendant in the High Court to restrain him from seizing the documents pursuant to the search warrant. Wilson J stated a case pursuant to s 18 of *Judiciary Act 1903*. The question so referred to the Full Court of the High Court was:

In the event that legal professional privilege attaches to, and is maintained, in respect of the documents held by the firm, can those documents be properly made a subject of a search warrant issued under s 10 of the *Crimes Act*.⁵⁷

65. The plaintiff contended that the documents held by the firm were the subject of legal professional privilege. The defendant police officer contended that legal professional privilege did not attach to the documents because of the purposes for

⁵⁶ (1983) 153 CLR 52.

⁵⁷ *Baker v Campbell* (1983) 153 CLR 52 at 54.

which the plaintiff consulted the firm, and further contended that even if it did, the documents might lawfully be seized under the search warrant.⁵⁸ Dawson J said:

It is unnecessary to decide between the rival contentions as to the existence of the privilege because the question which is asked of the Court is whether, in the event that legal professional privilege attaches to and is maintained in respect of the documents held by the firm, they can properly be made subject of a search warrant issued under s 10 of the *Crimes Act*. For the purposes of the question, privilege is assumed.⁵⁹

66. No question of how the issue of privilege was to be resolved arose.

67. The Court held, in the words of Deane J:

There is, however, no warrant for restricting the broad statements of the principle of the confidentiality of legal professional communications to the particular privilege against being compelled to give evidence or produce documents in judicial (or quasi judicial) proceedings.⁶⁰

68. Accordingly, since the *Crimes Act 1914* did not evince an intention to oust the privilege, the privilege applied to documents within the scope of a search warrant under s 10.

69. As Deane J continued:

It is a settled rule of construction that general provisions of a statute should only be read as abrogating common law principles or rights to the extent made necessary by express words or necessary intendment. As has been seen, the underlying principle that a person should be entitled to preserve the confidentiality of relevant communications between himself and his attorney is regarded as of such importance by the common law that the courts themselves do not require disclosure of the content of such communications even if it appears that such disclosure would be conducive to justice in a particular case and even if the proceedings be between parties neither of whom is entitled to claim the protection of the privilege as regards the relevant documents or information. Both logic and authority support the present day acceptance of the preservation of that confidentiality as a fundamental and general principle of the common law. It is to be presumed that if the Parliament intended to authorise the impairment or destruction of that confidentiality by administrative action it would frame the relevant statutory mandate in express and unambiguous terms.⁶¹

70. Having set out the terms of s 10, Deane J said:

As can be seen, s 10 contains no express reference to communications between a person and his legal advisers. It neither expressly includes them in, nor expressly excludes them from, the things to which it refers. There is nothing in either s 10 or in any other provision of the Act which indicates either that the Parliament directed its attention to the particular matter of modifying or destroying the confidentiality of relevant communications between a person and his legal advisers or that there existed a legislative intention to modify the common law principle that the confidentiality of such communications should be preserved. In accordance with the ordinary principles of construction, the section should be construed as not including, in the things which it authorises to be inspected or seized, documents whose confidentiality would be protected in the courts of the land by the doctrine of legal professional privilege. That construction of s 10 is also supported by the consideration that it is scarcely likely that Parliament would have intended to authorise an administrative seizure of documents on the ground that they would afford “evidence as to the commission” of an offence either in

⁵⁸ *Baker v Campbell* (1983) 153 CLR 52 at 120 – 121 per Dawson J.

⁵⁹ *Baker v Campbell* (1983) 153 CLR 52 at 121 per Dawson J.

⁶⁰ *Baker v Campbell* (1983) 153 CLR 52 at 115 per Deane J.

⁶¹ *Baker v Campbell* (1983) 153 CLR 52 at 116 – 117 per Deane J.

circumstances where legal professional privilege would be applicable to prevent the documents being received in evidence on a prosecution for that offence or in circumstances where the administrative seizure of the documents would destroy that privilege on the hearing of such a prosecution. The consequence of that construction of the section is that the search warrant in the present case should be read as not referring to documents to which legal professional privilege attaches.⁶²

71. As the question referred to the Full Court assumed that legal professional privilege attached to the documents, as Dawson J made clear, the Court answered the question asked, by excluding documents assumed to be the subject of legal professional privilege, from the documents permitted to be seized under the warrant. That flowed from a construction of s 10.

72. *Baker v Campbell* stands for the proposition that where a search warrant issued under s 10 *Crimes Act 1914*, as it then stood, and where documents otherwise falling within a warrant had attached to them legal professional privilege, the warrant should be read down to exclude such documents from being within its terms.

73. This led to a difficulty referred to by Brennan J. His Honour, in the minority along with Gibbs CJ and Mason J, said:

If the privileges which affect the obligation to testify or to produce documents in judicial proceedings are to be engrafted upon or to modify powers conferred on investigative agencies, some procedure for determining the validity of a claim of privilege has to be devised. The European Court of Justice prescribed such a procedure in *A.M. & S. Europe Limited v Commission of the European Communities*...utilising for the purpose of the Commission's power to impose fines. But it is quite beyond the power of an Australian court to prescribe such procedures. If the power of search and seizure conferred by a s 10(b) warrant does not extend to privileged documents, there is no judicial procedure prescribed to resolve contested claims. Declaratory relief or prosecution seem to be the only avenues of judicial resolution.

The Court's primary function in the present case is not to mould a common law rule of evidence, but to construe a statute which confers investigative power.⁶³

74. As is apparent from the passages quoted, once it was recognised that legal professional privilege was a fundamental right, one had first to construe the statute under which a power was exercised, which resulted in the claim being raised, to determine whether that statute abrogated in sufficiently clear terms that fundamental privilege. If it did not, the power conferred by the statute had to be read down to accommodate the fundamental right to legal professional privilege. The matter thus became one of statutory construction.

⁶² *Baker v Campbell* (1983) 153 CLR 52 at 117 – 118 per Deane J.

⁶³ *Baker v Campbell* (1983) 153 CLR 52 at 105 per Brennan J.

75. By the time the High Court came to consider *Commissioner of Australian Federal Police v Propend Finance Pty Limited*,⁶⁴ a procedure to enable the determination of claims for legal professional privilege in respect of documents otherwise falling within a search warrant had been agreed between the Commissioner of the Australian Federal Police and the Law Council of Australia. Brennan CJ said:

As I pointed out in *Baker v Campbell*, the view that legal professional privilege qualified the power of search and seizure conferred by a warrant issued pursuant to s 10(1) of the *Crimes Act 1914* (Cth) as it stood at the time – and as it stood with some immaterial variations when the warrants in the present case were issued – necessitated the devising of some procedure for determining a claim of privilege if it should be raised during the execution of a warrant. Such a procedure was not devised by the Courts, but the Law Council of Australia and the Australian Federal Police agreed upon ‘General Guidelines’.⁶⁵

76. Under those guidelines, warrants issued for service upon solicitors’ offices were endorsed “in accordance with the procedure set out” in the General Guidelines. That provided for legal professional privilege to be preserved by documents seized from the solicitors’ office being placed in a sealed envelope, held by the police under the warrant, with the documents being returned if and when legal professional privilege was established. The agreed process for establishing legal professional privilege was for the party claiming it to commence proceedings in the Federal Court seeking an order for review under the *Administrative Decisions (Judicial Review) Act 1977*, and also under s 39B of the *Judiciary Act 1903*.

77. The provisions of the Act conferring a power to issue a summons for the production of documents, and prescribing the obligations upon those served with such a summons, are quite different to those in s 10 of the *Crimes Act 1914*. Plainly enough there is no specific or sufficient indication negating the right of legal professional privilege. However, the statutory provisions found in s 3(4) and (5) indicate the circumstances in which and the time at which, an established claim of legal professional privilege negates the obligation of production. Section 3(4) is in mandatory terms. Documents, the subject of a claim for legal professional privilege, must be produced. However, if that claim is established, s 3(4) ceases to apply such that the documents produced and subject to the established claim must be held to have been excluded from those required to be produced under the summons. Subsection (5) imposes on the party making the

⁶⁴ (1996) 188 CLR 501.

⁶⁵ *Australian Federal Police v Propend Finance Pty Limited* (1996) 188 CLR 501 at 505 – 506 per Brennan CJ.

claim to establish it. It is not necessary to read down the power contained in s 3(4), as was done in the case of s 10 *Crimes Act*, to accommodate an established claim for legal professional privilege. That is because the statute contemplates a process whereby that claim can be established and ruled upon, such that the plenary power contained in s 3(4) is maintained but ceases to apply to particular documents if there be a reasonable excuse, including the excuse that the documents are properly subject to legal professional privilege, from production. There was no such contemplation in s 10.

Conclusion

78. It follows, in my view, that :

- a. The Act does not abrogate an entitlement to claim legal professional privilege when documents are required to be produced pursuant to a notice issued under s 2(3A);
- b. The making of a “claim” for legal professional privilege does not negate the obligation imposed by s 3(4) to produce such documents in answer to the notice;
- c. The obligation of production is negated only if “reasonable excuse” is shown within the meaning of s 3(5), which then reduces the obligation of production imposed by s 3(4) to exclude documents the subject of an established claim for legal professional privilege;
- d. “Reasonable excuse” within s 3(5), includes an established claim for legal professional privilege;
- e. The Act confers an ancillary or incidental power upon a Royal Commissioner to determine whether the claim of legal professional privilege is established;
- f. The onus of establishing the claim for legal professional privilege lies on the party claiming it. The claim must be supported by evidence sufficient to justify the making of an order upholding the claim; and

- g. A decision by a Royal Commissioner rejecting a claim for legal professional privilege, and thus requiring production of the documents to the Commission because of the operation of s 3(4), is subject to review by the Federal Court pursuant to the *Administrative Decisions (Judicial Review) Act 1977* and s 39B *Judiciary Act 1903*.

79. There remains the question whether the claim of legal professional privilege is established on the evidence placed before me in relation to exhibit 665.

80. In my view, it is not. The evidence of Dr Fuller makes plain that the document was prepared for the dominant purpose of considering whether a strategy of apology would be adopted by AWB. It was not prepared for the dominant purpose of obtaining legal advice.

81. The affidavit of Ms Rosemary Peavey does not contradict that evidence, nor does it establish any basis for the claim. At its highest, it contains her unsupported conclusion. That is not sufficient to establish a contested claim for legal professional privilege.

82. Accordingly, I reject the claim for legal professional privilege in respect of exhibit 665. As a non-publication order pursuant to s 6D of the Act was made pending a determination of the privilege, it is appropriate that such order be revoked.

83. In accordance with convention, AWB should be given the opportunity to consider these reasons and, should it wish to do so, seek review of the orders proposed in the Federal Court.

84. The formal orders I propose to make are:

- a. The claim for legal professional privilege in respect of exhibit 665 is rejected; and
- b. The non-publication order made pursuant to s 6D in respect of exhibit 665 is revoked.

85. I will defer making these orders until 10am on Thursday 6 April 2006. In the event of AWB wishing to challenge the first order in the Federal Court, I will continue the second order pending the determination of the Federal Court.

5 April 2006