

COMMENT

THE *TRADE PRACTICES ACT 1974* (CTH) AND THE DEMISE OF LEGAL PROFESSIONAL PRIVILEGE

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INTRODUCTION

On 15 February 2002, the High Court granted The Daniels Corporation Limited special leave to appeal against the decision of the Full Federal Court in *ACCC v The Daniels Corporation International Pty Ltd*.¹ Leave was also granted to Woolworths Limited and Coles Myer Limited to challenge notices issued to them in October 2001 by the Australian Competition and Consumer Commission (the 'ACCC') pursuant to s 155 of the *Trade Practices Act 1974* (Cth).²

In each case, the issue before the High Court will be whether s 155 of the TPA entitles the ACCC to seek the production of documents that contain communications the subject of legal professional privilege or more accurately client legal privilege.³

This article considers several of the issues that might confront the High Court when it formulates its decision following each appeal. The article begins by placing the issues in context. Far from a dry consideration of statutory interpretation, the issues involve fundamental notions of freedom and truth in contemporary society. The article then

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¹ *ACCC v The Daniels Corporation International Pty Ltd* [2001] ATPR 41-808 ('*Daniels*').

² *Trade Practices Act 1974* (Cth) ('TPA').

³ The High Court in *Esso Australia Resources Limited v FCT* (1999) 201 CLR 49 ('*Esso*') considered that the expression 'legal professional privilege' might erroneously suggest that the privilege is that of the lawyer. Accordingly, the Court suggested that the expression 'client legal privilege' as employed in the *Evidence Act 1995* (Cth) is more accurate—see 54 (Gleeson CJ, Gaudron and Gummow JJ) and 81 (Kirby J).

outlines the *Daniels* decision, explaining how it defines the issues that will eventually confront the High Court.

The article then examines the issues relevant to the conflicting public policies inherent in legal professional privilege and effective investigation by the ACCC. The article assesses criticism that the way courts have approached these issues in the past has involved flawed methodology. The article considers the special arguments concerning the ability of corporations to assert legal professional privilege.

Following this analysis the article offers some thoughts about what approaches the High Court might take. The article concludes that while the High Court is likely to find that corporations can continue to assert legal professional privilege, s 155 of the TPA effectively abrogates it. The article argues that such an approach is consistent with the policies underpinning legal professional privilege.

THE BIGGER PICTURE

It would be tempting to simply characterise the task confronting the High Court as one involving the mechanical application of dusty legal principles of statutory interpretation. After all, the Court will embark on the statutory construction of s 155 of the TPA. It will apply established principles of statutory interpretation in answering the question 'does s 155 of the TPA abrogate legal professional privilege?'

But it would be a mistake to view the task ahead in this way. In reality, the High Court will be struggling with competing public policies that go to the very notions of truth and freedom in contemporary society. If justice is to be adequately served, there is an undoubted need for all information relevant to the truth of an event to be placed before the tribunal of fact and law. But there is also an undoubted public policy served by encouraging freedom of communication between citizen and legal adviser, the law being a complex and difficult matter.

But the notion of freedom is not absolute in complex society. Accordingly,

[o]ne who argues for the imposition of restraints in the interests of the protection of privacy cannot do so in absolute terms. The constant search, in democratic society, we are reminded, must be for the definition of a proper boundary line in each specific situation and for an overall equilibrium that seems to strengthen democratic institutions and processes.⁴

Into this search for an appropriate balance lies the public policy underpinning the TPA. It has been consistently recognised that statutes such as the TPA serve an important public purpose in ensuring the fair and proper conduct of both corporate and private citizens.⁵

As Pagone observes,

[m]odern society being what it is, the growth of intrusions into the seemingly private domain is typically matched by a growing need of that intrusion precisely in order to preserve the great bulk of social liberties and freedoms which we have remaining.⁶

⁴ Sir Zelman Cowan, 'The Private Man' in D McDonald, *Highlights of The Boyer Lectures 1959–2000* (1st ed, 2001) 127.

⁵ *ACCC v IMB Group Pty Ltd (in liq)* (1999) ATPR 41–688, 42,802.

⁶ G T Pagone, 'Access to Information: Guerilla Warfare Under the Trade Practices Act (1982)' 5 *University New South Wales Law Journal* 192, 219.

To what extent should the state, in the form of the ACCC be able employ a statute such as the TPA to intervene in the private affairs of citizens? How can a correct 'balance' between the power of the state and its citizens be adequately maintained?⁷

In seeking this balance, should the search for the truth behind a particular commercial transaction take precedence over the freedom to consult a legal adviser about that transaction?

Can the search for truth, in the form of an administrative investigation come at too great a cost? As the Court in *Pearse v Pearse* reminded:

Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much. And surely the meanness and mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness, and suspicion and fear, into those communications which must take place ... uselessly or worse, are too great a price to pay for truth itself.⁸

But this does not mean that legal professional privilege is an absolute concept which sterilises the operation of any competing notions of justice that might infringe it. As Toohey J in *Carter v Northmore Hale Davey & Leake* reminded '[i]mportant, indeed entrenched, as legal professional privilege is, it exists to serve a purpose, that is to promote the public interest by assisting and enhancing the administration of justice. It is not an end in itself'.⁹

For this reason, the Court in *Commissioner of Australian Federal Police v Propend Finance Pty Limited* warned that

Wigmore has said of legal professional privilege; 'It is worth preserving for the sake of general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle'.¹⁰

A thorough accounting of these fundamental issues cannot be divorced from a consideration of the question 'does s 155 of the TPA abrogate legal professional privilege?' The High Court's decision in *Corporate Affairs Commission v Yuill*¹¹ has been criticised precisely because it is alleged the reasoning of the majority did not contain sufficient doctrinal analysis of the fundamental policies informing the question.¹²

At the risk of simplicity, the over-arching notion of the 'effective administration of justice' embraces at least three competing public policies; all of which come into play in determining whether s 155 of the TPA abrogates legal professional privilege:

1. The need to keep confidential, communications between client and legal adviser;
2. The need to ensure a fair trial by making all relevant evidence available to both the parties and the tribunal of law and fact; and

⁷ The importance of such a balance was determinative for Gleeson CJ in *Caltex Refining Co Pty Ltd v State Pollution Control Commission* (1991) 25 NSWLR 118, 127 (*Caltex*).

⁸ *Pearse v Pearse* (1846) 63 ER 950, 957.

⁹ *Carter v Northmore Hale Davey & Leake* (1995) 183 CLR 121, 147.

¹⁰ *Commissioner of Australian Federal Police v Propend Finance Pty Limited* (1996–97) 188 CLR 501, 527 (*Propend*).

¹¹ *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 (*Yuill*).

¹² Dorne Boniface, 'Legal Professional Privilege and Disclosure Powers of Investigative Agencies' (1992) 16 *Criminal Law Journal* 320.

3. The need to ensure the fair and legal conduct of corporate and personal citizens in society.

The first two public policies underpin legal professional privilege; the third policy underpins the many statutes intended by Parliament to regulate the trading behaviour of corporate and personal citizens.

Difficulties in the application of doctrine have arisen because of a failure to understand that the answer to the question 'should legal professional privilege apply?' has already been worked out.

As the High Court in *Baker v Campbell* noted:

The conflict between the principle that all relevant evidence should be disclosed and the principle that communications between lawyer and client should be confidential has been resolved in favour of the confidentiality of those communications. It has been determined that in this way, the public interest is better served because the operation of the adversary system, upon which we depend for the attainment of justice in our society, would otherwise be impaired.¹³

So, as a matter of analysis, once it is found that legal professional privilege attaches to a particular communication, it is probably incorrect to then ask 'should the privilege be allowed to stand?' Since the balance has already been struck, the policies underpinning legal professional privilege are not re-evaluated. Rather, those policies are re-balanced in order to see whether they sit comfortably with the intent of Parliament expressed in legislation such as the TPA.

As the High Court in *Carter v Northmore Hale Davy & Leake*¹⁴ noted, '[a]lthough the public interest in having all relevant evidence available, is to an extent, defeated by the privilege, there is no occasion for the courts to undertake a balancing of public interests; the balance is already struck by the allowing of the privilege'.

The correct 'conceptualisation' of the legal and policy issues is important when the High Court comes to figure out what mode of analysis or method of reasoning it will employ in answering the question 'does s 155 of the TPA abrogate legal professional privilege?'

What does conceptualising the issues require? It requires the offering of solutions in the three-fold context of past authority, legal principle and legal policy.¹⁵ Such analysis necessarily requires considering the way an eventual decision would actually operate in relation to those individuals affected by it.

It is here that, as a matter of legal policy, the practical concerns with the *Daniels* decision expressed by those who fear an irreparable rupture in the policy underpinning legal professional privilege must be accounted for.¹⁶ It is also here that concerns expressed about the need for 'a brake on the application of legal professional privilege ... to prevent its operation bringing the law into disrepute' are evaluated.¹⁷

¹³ *Baker v Campbell* (1983) 153 CLR 53, 128-9.

¹⁴ *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121, 128.

¹⁵ *Oceanic Sunline Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 252-3 (Deane J).

¹⁶ See for example, Ray Steinwall, 'Abrogation of Legal Professional Privilege in Trade Practices Matters' (2001) 16(10) *Trade Practices Law Bulletin* 105, 106-7.

¹⁷ See Adrian Zuckerman, 'Legal Professional Privilege and the Ascertainment of Truth' (1990) 53 *Modern Law Review* 381; *Propend* (1997) 188 CLR 501, 581; *Esso* (1999) 201 CLR 49, 81.

A failure to correctly conceptualise the issues in this way, compounded by a failure to engage in proper doctrinal analysis of these issues will seriously weaken the eventual decision and the doctrine of legal professional privilege itself.

THE DANIELS DECISION

On 16 March 2001, a specially constituted Full Court of the Federal Court of Australia handed down its decision in the *Daniels* case. In a unanimous decision, Justices Wilcox, Moore and Lindgren held that s 155 of the TPA abrogated the common law doctrine of legal professional privilege. Consequently, the power of the ACCC to require production of documents pursuant to s 155(1) of the TPA extends to documents containing communications for which a claim of legal professional privilege could formerly have been asserted.

At the time the *Daniels* decision was handed down, the ACCC maintained that there would be 'no real change in the Commission's enforcement activities'.¹⁸ Others were not so relaxed. One commentator allegedly stated that the decision represented a 'never ending grab for power'.¹⁹ Another suggested that 'what this means is that companies are not going to come and see lawyers'.²⁰

Mr Donald Robertson is quoted as suggesting that 'there's a real risk that it would certainly cause the open exchange of information between lawyers and clients to be broken down'.²¹ Not surprisingly The Daniels Corporation sought leave to appeal to the High Court.

Since the *Daniels* decision, the ACCC has not been reluctant to employ s 155 in seeking access to documents containing communications subject to legal professional privilege. In late 2001, the ACCC commenced an investigation into allegations of anti competitive agreements between proprietors of licensed premises.

As part of that investigation, the ACCC issued s 155 notices to Woolworths Ltd, Coles Myer Ltd and Liquorland (Australia) Pty Ltd. The s 155 notices required production of certain documents including documents recording communications that could attract a claim for legal professional privilege.

In October 2001, Woolworths notified the ACCC that it had applied to the High Court for orders to prevent the ACCC from employing s 155 of the TPA to gain access to documents subject to legal professional privilege.²² A little over a week later, Coles Myer Ltd and Liquorland (Australia) Pty Ltd also applied to the High Court for similar orders.²³

¹⁸ ACCC, 'Full Federal Court Upholds ACCC Claim: Trade Practices Act Overrides Legal Professional Privilege' (Media Release, No 53/01, 16 March 2001).

¹⁹ Annabel Hepworth, 'Privilege Decision Faces Test', *Australian Financial Review*, 23 March 2001 34.

²⁰ Annabel Hepworth, 'Court Enhances ACCC's Corporate Policing Powers', *Australian Financial Review*, 17 March 2001.

²¹ *Ibid.*

²² ACCC, 'ACCC To Oppose Woolworth's High Court Application To Stop Production of Liquor Investigation Documents', (Media Release, No 256/01, 12 October 2001).

²³ ACCC, 'ACCC To Oppose Cole's High Court Application To Stop Production of Liquor Investigation Documents', (Media Release, No 263/01, 22 October 2001).

On 15 February 2002, the High Court granted special leave to The Daniels Corporation, Woolworths, Coles Myer and Liquorland (Australia) to appeal against the decision of the Full Federal Court.

The facts

The facts in *Daniels* are deceptively straightforward. The ACCC had commenced an investigation into allegations that The Daniels Corporation International Ltd had engaged in conduct in breach of Part IV of the TPA. As part of that investigation, the ACCC issued Daniels two notices pursuant to s 155(1) of the TPA.

Daniels referred the notices to its solicitors, Meerkin & Apel and certain documents were provided to the ACCC in response. Meerkin & Apel considered that some of the documents requested by the notices contained communications that were protected by legal professional privilege.

The ACCC considered that the s 155(1) notices required the production of those documents despite the existence of the privilege. The ACCC then issued two more s 155(1) notices, this time served on Meerkin & Apel requiring the production of the documents.

After an exchange of correspondence about the issue, the ACCC instituted proceedings in the Federal Court seeking declarations that s 155(1) of the TPA abrogated legal professional privilege and an order requiring production of the relevant documents.

The issues

Before the hearing, Justice Wilcox referred three questions to the Full Federal Court pursuant to s 20(1A) of the *Federal Court of Australia Act 1976* (Cth) to be determined as a preliminary issue.

Those questions were:

1. Whether the power conferred on the ACCC by s 155 of the TPA extends to a requirement that documents the subject of legal professional privilege be produced to the ACCC;
2. Whether Daniels was not entitled to refuse to produce documents the subject of a notice issued under s 155 of the TPA on the ground of legal professional privilege; and
3. Whether Daniels was required to produce the documents requested on the basis that legal professional privilege is not a lawful reason to refuse to produce documents in answer to a notice issued under s 155 of the TPA.

In separate judgments, the Full Court unanimously considered that the terms of s 155(5)(a) of the TPA that require a recipient of a s 155 notice to comply 'to the extent that the person is capable of complying with it' were inconsistent with the existence of legal professional privilege. Accordingly, Meerkin & Apel was not entitled to refuse to comply with the s 155 notices on the grounds of legal professional privilege.

However, the Full Court did not make a declaration that s 155 generally extends to a requirement to produce documents for which a claim of legal professional privilege could be asserted.

The reasoning

The decision of the Full Court rested on two bases; (a) the statutory construction of s 155 of the TPA and (b) policy factors that supported that statutory construction.

As a matter of statutory construction, the case turned on their Honour's construction of s 155(5)(a) of the TPA. That sub-section requires a recipient of a s 155 notice to comply with it 'to the extent that the person is capable of complying with it'. This requirement was to be read in the context of s 155 as a whole.

As a matter of statutory interpretation, the Court re-stated the fundamental principle that such is the importance of legal professional privilege that it is not to be abrogated by a statute unless there are clear words indicating a legislative intent to do so.²⁴

However, the Court considered that it was not necessary for s 155 of the TPA to explicitly articulate an intent to abrogate legal professional privilege. That intent could be sufficiently indicated by examining the text of the statute. If the words of the statute and section under consideration were inconsistent with the existence of legal professional privilege then that would be sufficient.

In the *Daniels* decision, the Court considered that determining whether the words used by Parliament in s 155 of the TPA impliedly excluded legal professional privilege, it was necessary to have regard to the nature of the relevant statutory provision, the powers and extent to which legal professional privilege might impede the exercise of those powers and functions.

As a matter of statutory interpretation, the Court held that the existence of the words 'to the extent that the person is capable of complying with it' in s 155(5)(a) of the TPA sufficiently indicated a Parliamentary intent to abrogate legal professional privilege.

In reaching this conclusion, their Honours drew upon the earlier decision of the High Court in *Pyneboard Pty Ltd v Trade Practices Commission*,²⁵ a decision considering the extent to which s 155 abrogated the privilege against exposure to a civil penalty. In that case, the High Court considered that the words in 155(5)(a) of the TPA were 'in themselves (quite) inconsistent with the existence of a privilege entitling the recipient of a notice to refuse to comply, whether on the ground that compliance might involve self-incrimination or otherwise'. Justice Wilcox concluded that the words 'or otherwise' in *Pyneboard* could be explained only on the basis that the High Court intended that s 155 abrogated legal professional privilege.

Justice Moore agreed, finding that the decision in *Pyneboard* must be taken to indicate the expression in s 155(5)(a) 'is capable of complying' imposes an obligation that would not permit exceptions.

In essence, the court in *Daniels* held that the expression 'is capable of complying' refers to what a person is physically capable of doing. So Justice Moore held that the expression refers to circumstances where the recipient is physically able to comply.

Justice Lindgren considered that the expression meant at least immediately physically able without unreasonable practical difficulty and without in any respect acting unlawfully or committing a legal wrong. Justice Wilcox considered the

²⁴ See (2001) ATPR, 42,795 (Wilcox J), 42,802 (Moore J).

²⁵ *Pyneboard Pty Ltd v Trade Practices Commission* (1982-83) 152 CLR 328 (*Pyneboard*).

expression refers to what a person is able to do and is not limited by what a person is entitled not to do.²⁶

The court also considered that various policy issues supported the conclusion that s 155 of the TPA sufficiently disclosed the intention of Parliament to abrogate legal professional privilege.

Both Justices Wilcox and Lindgren draw upon the observations of Mason, Wilson and Dawson JJ in *Pyneboard* where their Honours had stated that

without obtaining information, documents and evidence from those who participate in contraventions of Part IV of the Act, the Commission would find it virtually impossible to establish the existence of those contraventions. The consequence would be that the provisions of Part IV could not be enforced by successful proceedings for civil penalty under section 76(1).²⁷

As a matter of policy therefore, the Full Court in *Daniels* considered that without access to contacts between a person under investigation and his or her legal advisors, it would be difficult (if not impossible) for the ACCC to 'see the whole picture'. In other words, the policy behind s 155 of the TPA was the investigation of potential contraventions of the TPA.

As the High Court in *Pyneboard* had noted, the existence of privileges that would excuse the production of documents would have a serious effect on the functions of the ACCC granted to it by Parliament in enforcing the TPA. This policy applied with equal force to the existence of legal professional privilege.

Accordingly, the Full Federal Court considered that the public policy identified as the legislative purpose of the TPA displaced the public policy underpinning legal professional privilege.

LEGAL PROFESSIONAL PRIVILEGE

What then are the relevant principles of law governing the privilege? It is a question more easily asked than answered, despite all that is to be found in the decided cases and all that has been said in the learned articles.²⁸

It is important to clarify the rationale of legal professional privilege. This is so because a clear understanding of its rationale assists in determining how the privilege is to be confined within the narrowest possible limits consistent with the logic of its principle.

Such a clear understanding assists in analysing the reasoning of those who question whether it is appropriate that corporations should be able to assert legal professional privilege.²⁹ This issue is considered below.

The classic formulation

The classic formulation of the policy of legal professional privilege derives from the High Court:

²⁶ [2001] ATPR 41–808, 42,805.

²⁷ *Pyneboard* (1983) 152 CLR 328, 343.

²⁸ *Grant v Downs* (1976) 135 CLR 674, 682.

²⁹ Vikki Wayne, 'The Corporation and Legal Professional Privilege' (1997) 8 *Australian Journal of Corporate Law* 25; Sue McNicol, 'The High Court Rules—Corporations and the Privilege Against Self Incrimination' (1994) *Law Institute Journal* 1058.

The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor.

The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available. As a head of privilege legal professional privilege is so firmly entrenched in the law that it is not to be exorcised by judicial decision. None the less there are powerful considerations which suggest that the privilege should be confined within strict limits.³⁰

Almost all decisions of the courts have adopted this formulation.

However, care must be exercised when analysing decisions concerning legal professional privilege. Those decisions variously fall into the following broad categories:

1. Whether communications recorded in documents properly attract legal professional privilege in the first place;³¹
2. Whether the requisite lawyer/client relationship exists to properly ground legal professional privilege,³² or whether the communications occurred in a confidential context;³³
3. Whether the ability of an entity (corporate or natural) to assert legal professional privilege has been compromised through waiver³⁴ or whether legal professional privilege has been abrogated entirely,³⁵ and
4. Fundamental issues about the nature and scope of legal professional privilege.³⁶

Boniface has suggested that judicial analysis of legal professional privilege can conveniently be divided into two categories; 'component analysis' and 'public policy analysis'.³⁷ So those cases in 1 and 2 above would conveniently fall into the 'component analysis where the components of the privilege, namely communications, the lawyer, legal work/advice and the client, are defined and redefined'.³⁸

Those cases in 3 and 4 would fall into the 'public policy analysis where the public policy which is said to underpin the privilege is balanced against other public policies which are relevant in the circumstances of each case'.³⁹

Care must be exercised when considering the cases in search of an answer to the question 'does s 155 of the TPA abrogate legal professional privilege'? For example,

³⁰ *Grant v Downs* (1976) 135 CLR 674, 685.

³¹ *Trade Practices Commission v Sterling* [1979] ATPR 40-121; *Propend* (1996-97) 188 CLR 501.

³² *Waterford v The Commonwealth* (1987) 163 CLR 54.

³³ *Constantine v Trade Practices Commission* [1994] ATPR 41-291.

³⁴ *Mann v Carnell* (1999) 201 CLR 1.

³⁵ *Yuill* (1991) 172 CLR 319.

³⁶ *Carter v Managing Partner, Northmore, Hale Davey & Leake* (1995) 183 CLR 121; (1999) 201 CLR 49.

³⁷ Bonifca, above n 12, 323.

³⁸ *Ibid.*

³⁹ *Ibid.*

focusing on whether a certain document contains communications that properly attract legal professional privilege does not particularly help.

In the *Daniels* decision, it was not doubted that legal professional privilege properly attached to the documents sought. The issue was whether the s 155 notices abrogated the privilege.

However, the reasoning in these cases is important for suggesting other answers to the question. For example, there are at least three possibilities open to the High Court in approaching the issue.

1. Hold that corporations are no longer able to assert legal professional privilege, but continue to allow natural persons to assert the privilege.

The High Court has progressively restricted the ability of corporate entities to assert privilege in litigation. In *Environmental Protection Authority v Caltex Refining Co Pty Limited*⁴⁰ (*Caltex*) the High Court considered that corporations could no longer assert privilege against self-incrimination. Could the reasoning of the Court be analogised to deny corporations the ability to assert legal professional privilege?

However, privilege against self-incrimination and legal professional privilege 'rest upon different, although not wholly unrelated, foundations'.⁴¹ If the differing policy bases mean that it is not possible to analogise *Caltex*, then perhaps the statutory construction of s 155 of the TPA abrogates the privilege. This would be a second option.

2. Consider that whether or not s 155 of the TPA should abrogate legal professional privilege, a textual analysis of the section does not reveal a *sufficiently clear* legislative intent to do so.

If the High Court does reinforce the characterisation of legal professional privilege as a fundamental human right, it might be difficult to assert that s 155 of the TPA evidences a sufficiently clear legislative intent to abrogate the privilege.

In *Re Bolton; Ex parte Beane*, Brennan J stated '[u]nless the Parliament makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the courts will not construe a statute as having that operation'.⁴²

This is because it is

in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.⁴³

Section 155 of the TPA does not unmistakably abrogate legal professional privilege. Accordingly, it may be that the High Court will re-state its views in *Coco v The Queen*⁴⁴ that

[t]he courts should not impute to the legislature an intention to interfere with fundamental rights. Such a question must be clearly manifested by unmistakable and

⁴⁰ *Caltex* (1993) 178 CLR 477.

⁴¹ *Yuill* (1991) 172 CLR 319, 332 (Dawson J).

⁴² (1987) 162 CLR 514, 523.

⁴³ *Potter v Minahan* (1908) 7 CLR 277, 304.

⁴⁴ (1994) 179 CLR 427, 437.

unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.

It is also significant that the entire High Court in *Bropho v Western Australia* considered

[i]f what was previously accepted as a fundamental principle or fundamental right ceases to be so regarded, the presumption that the legislature would not have intended to depart from that principle or to abolish that right will necessarily be undermined and may well disappear.⁴⁵

This comment is significant when the reverse conclusion is stated: if legal professional privilege is to be increasingly regarded as a fundamental principle or fundamental right, then it will be less likely that Parliament intended to abolish that right through the general words of a statute.

The fact that such a conclusion might inconvenience the ACCC in implementing the objectives of the TPA is 'not a ground for eroding fundamental common law rights'.⁴⁶ And while such a conclusion might 'temporarily interrupt the attainment of an important legislative purpose ... may even sometimes give rise to a feeling of frustration ... they have a beneficial purpose. It is to permit Parliament, which has the last say, an opportunity to clarify its purpose'.⁴⁷ Accordingly, the court might conclude that Parliament should amend the TPA to abrogate the privilege if that is what was intended.⁴⁸

3. Allow both corporations and individuals to assert legal professional privilege, but hold that s 155 of the TPA abrogates the privilege.

This result would not completely deny the ability of entities to assert legal professional privilege because ss 117 and 118 of the *Evidence Act 1995* (Cth) specifically preserve the privilege at trial stage. If the High Court were to hold that s 155 of the TPA abrogates legal professional privilege, the ACCC could investigate the truth of an alleged breach of the TPA but, with the operation of the *Evidence Act 1995* (Cth), the person under investigation could still assert the privilege at trial.

CORPORATIONS AND LEGAL PROFESSIONAL PRIVILEGE

One possibility open to the High Court that was not open to the Full Federal Court in *Daniels* might be to entertain the argument that corporations should not be able to assert legal professional privilege.

This argument would involve an examination of the fundamental policies of legal professional privilege and its scope. Such an examination would not necessarily involve considering the statutory construction of s 155 of the TPA.

This is because once it is found that corporations cannot assert legal professional privilege, it would not be possible for a corporation to resist producing documents pursuant to a s 155 notice even where those documents contain communications that would otherwise attract legal professional privilege.

⁴⁵ (1990) 171 CLR 1, 18.

⁴⁶ *Plenty v Dillon* (1990) 171 CLR 635, 654 (Gaudron and McHugh JJ).

⁴⁷ *Yuill v Corporate Affairs Commission (NSW)* (1990) 20 NSWLR 386, 403 (Kirby P).

⁴⁸ *Coco v The Queen* (1994) 179 CLR 427, 437-8.

There has always been some concern about whether the public policies inherent in the doctrine of legal professional privilege are 'distorted' in litigation involving corporations.

For example, the High Court in *Grant v Downs*⁴⁹ stated

There is, we should have thought, much to be said for the view that the existence of the privilege makes it more difficult for the opposing party to test the veracity of the party claiming privilege by removing from the area of documents available for inspection documents which may be inconsistent with that case. To this extent the privilege is an impediment, not an inducement, to frank testimony, and it detracts from the fairness of the trial by denying a party access to relevant documents or at least subjecting him to surprise. These difficulties are magnified in cases when privilege is claimed by a corporation.

Recalling the warning that legal professional privilege ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle, the question that should logically be asked is whether there is something about the nature of corporations that is inconsistent with the logic of the principle underpinning legal professional privilege?

Recalling the methodology above, are there proper decisions of past authority, legal principles and legal policy considerations for distinguishing corporate entities in assessing where the competing public interests are demarcated? At least two possibilities present themselves:

1. The High Court has progressively characterised legal professional privilege as a 'fundamental human right'. At the same time, the High Court has progressively denied the availability to corporations of various species of privilege characterised as 'human rights'.⁵⁰ Could it be argued that legal professional privilege should not be available to corporations?; and
2. Corporations have particular characteristics that provide advantages in dealing with natural persons and the state. Being entities that exist by state grant, should corporations be subject to greater state supervision and control? Has the steady expansion of legal professional privilege wrought an imbalance in the policies underpinning the privilege in favour of corporations?

Legal professional privilege as basic 'human' and not 'corporate' right

The recognisable doctrine of legal professional privilege emerged during the 16th century during the reign of Elizabeth I. At that time, the privilege was grounded in the importance placed by the courts on lawyers' oath and honour not to betray a confidence placed in them by persons seeking legal advice.⁵¹ Corporations as mechanisms for general commerce were not visible until the mid-nineteenth century.

Despite the probability that corporations were not contemplated as original beneficiaries of legal professional privilege, 'as a result of the tendency to view the corporation legally in the same manner as an adult individual, the application of legal

⁴⁹ (1976) 135 CLR 674, 686.

⁵⁰ *Pyneboard* (1982) 152 CLR 328; *Caltex* (1993) 178 CLR 477.

⁵¹ See generally Boniface, above n 12.

professional privilege to corporations appears to have been accepted with little debate'.⁵²

There has been a tendency for the law to view a corporation as a sort of 'different person', entitled to the benefits and privileges of natural persons. However, the decision of the High Court in *Caltex* warns against simply assuming that corporations enjoy the same rights as natural persons.

In *Caltex* the High Court denied the ability of corporations to claim privilege against self incrimination. A year later, the Full Federal Court in *Trade Practices Commission v Abbco Ice Works Pty Ltd*⁵³ denied the ability of corporations to assert privilege against exposure to a civil penalty.

The High Court in *Caltex* characterised privilege against self-incrimination as a particularly human right, the policy foundations for which did not apply in a modern context to corporate entities⁵⁴ and, as such 'reveals antipathy towards the natural entity theory and cases which draw analogies between natural persons and corporate entities'.⁵⁵

There is a suggestion therefore that if the High Court characterises legal professional privilege as a fundamental human right, then it might lead to a re-consideration of whether corporations should be able to assert the privilege employing reasoning similar to *Caltex*.

There seems little doubt that in recent decisions, the High Court has positioned legal professional privilege at the level of basic human right. In *Carter*, it was described at a 'substantive and fundamental common law principle',⁵⁶ as being of 'fundamental importance to the protection and preservation of the rights, dignity and equality of the ordinary citizen under the law'⁵⁷ and as a 'substantive rule of law best explained as a practical guarantee of fundamental, constitutional or human rights'.⁵⁸ These characterisations were repeated by the High Court in *Propend*.⁵⁹

This argument cannot be taken too far. It is *non sequitur* to conclude that because *Caltex* says corporations cannot assert privilege against self-incrimination since that privilege is a human right, and because legal professional privilege is also a human right, corporations cannot therefore assert legal professional privilege either.⁶⁰

There are at least two reasons why this conclusion cannot be drawn with certainty:

1. Some commentators doubt that the High Court has actually characterised legal professional privilege as a fundamental human right.

⁵² Vikki Wayne, 'The Corporation and Legal Professional Privilege' (1997) 8 *Australian Journal of Corporate Law* 25, 31.

⁵³ *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96.

⁵⁴ See Andrews, Bondfield and M Dirks, 'The Death of Privilege for the Privileged?' (1994) 4 *Australian Journal of Corporate Law* 1.

⁵⁵ Wayne, above n 52.

⁵⁶ *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121, 132 (Deane J).

⁵⁷ *Ibid* 145 (Toohey J).

⁵⁸ *Ibid* 161 (McHugh J).

⁵⁹ (1996) 188 CLR 501, 552 (McHugh J), 565 (Gummow J) and 582-3 (Kirby J).

⁶⁰ An exercise in 'fuzzy thinking'—see Carl Sagan, 'The Fine Art of Baloney Detection—The Demon Haunted World' (1995) 210-16.

Wayne suggests⁶¹ that, at least up to the decision in *Carter*, the High Court approached legal professional privilege in a pragmatic rather than 'rights-oriented' manner. If a pragmatic characterisation of the rationale for legal professional privilege is 'better lawyering' then Wayne suggests that it 'applies with equal force to a corporation as it might to an individual'.

However, I would suggest that, since *Propend*, the High Court is moving to characterise legal professional privilege as a fundamental human right. I would also suggest that in the *Daniels* appeal, at least some members of the High Court will consider international law in characterising legal professional privilege as a fundamental human right.⁶² There is clear international characterisation of the privilege as a fundamental human right.⁶³

2. Care must be taken to correctly understand the different policies underpinning privilege against self-incrimination and legal professional privilege. If the reasons for denying corporations the right to assert privilege against self-incrimination pivot around specific policies, then it cannot be simply argued that the same reasons can be employed to deny corporations the right to assert legal professional privilege which rests on entirely different policy bases.

In *Re Compass Airlines Pty Ltd*⁶⁴ Lockhart J explained that

The privilege against self-incrimination and legal professional privilege both spring from the common law; but they have different origins and arose for different purposes. Legal professional privilege protects from disclosure communications made to and from a legal adviser for the purpose of obtaining legal advice. The privilege against self-incrimination ensures that a person does not expose himself to prosecution by self-incriminating statements.

If Wayne is correct in concluding that the High Court characterises the rationale for legal professional privilege as pragmatic 'better lawyering' then there is much force to the argument that the privilege applies with equal force to a corporation as it might to an individual.

Unlike privilege against self-incrimination, legal professional privilege is not concerned with the protection of an individual but with the proper administration of justice. Legal professional privilege is predicated on the basis that full and confidential communications between client and legal adviser will promote the proper administration of justice. There is nothing peculiar to corporations that would deny this presumption.

Support for this view can also be found in the High Court's *Esso* decision where Kirby J considered 'to the extent that the corporation specifically seeks and receives legal advice, classified as being solely addressed to and received from a legal

⁶¹ Above n 52, 25.

⁶² As Brennan J stated in *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42 '[I]nternational law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of human rights'. See also *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 418.

⁶³ See *R v Derby Magistrates' Court Ex parte B* [1996] AC 487. See also Article 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.

⁶⁴ (1992) 35 FCR 447, 45.

practitioner, it seems appropriate, as a matter of principle, that it should be in the same position as the individual'.⁶⁵

Accordingly, I would respectfully conclude that the reasoning of the High Court in *Caltex* does not represent definitive authority for holding that corporations cannot assert legal professional privilege. Privilege against self-incrimination and legal professional privilege rest on different policy bases and the reasons for denying the application of the former cannot be analogised to deny the application of the latter in the case of corporations.

BALANCING THE INTERESTS OF THE STATE, INDIVIDUALS AND CORPORATIONS

Are there other policy reasons why corporations should not be entitled to assert legal professional privilege? In recent years, there has been a steady expansion in the ambit of legal professional privilege.⁶⁶ How is this expansion likely to influence the policies that underpin the privilege?

Concerns about the power of corporations and their 'power relationship' with individuals and the state have long been echoed in decisions of the High Court. As a matter of policy, the debate pivots around whether the nature of corporations and the scope of legal professional privilege unfairly disadvantage the state in investigating corporate behaviour, and the individual involved in litigation against corporations.

There are several consistent themes inherent in this policy debate. They include:

1. Corporate activity is complex, carried on through layers of management and principally in documentary form;
2. Often the best and only evidence about the conduct of a corporation can be obtained from that corporation. This is especially so where any 'victim' of corporate misconduct is an 'amorphous entity such as a market';
3. Corporations are large and powerful and better placed to initiate and defend investigation and litigation. They can do this by being better able to conceal evidence of wrongdoing and to deploy resources to frustrate investigation and litigation; and
4. If corporations can employ common law privileges to resist the production of documents concerning the truth of alleged misconduct, the public interest in detecting and punishing crime, as expressed in statutes such as the TPA is likely to be diminished.

These views have manifested when construing statutes such as the TPA. So for example, the High Court in *Pyneboard* was concerned that the legislative purpose underpinning the TPA would not be frustrated by corporations being able to assert privilege against exposure to a penalty.⁶⁷ Likewise, in *Coco v The Queen*, the High

⁶⁵ *Esso* (1999) 201 CLR 49, 91.

⁶⁶ Suzanne McNicol, 'Professional Privilege Spreads its Wings' (1996) 70(11) *Law Institute Journal* 32; Alistair Abadee, 'The Forward March of Legal Professional Privilege' [2000] *Bar News* (Spring) 9.

⁶⁷ *Pyneboard* (1983) 152 CLR 328, 341.

Court stated 'the presumption may be displaced by an implication if it is necessary to prevent the statutory provisions from becoming inoperative or meaningless'.⁶⁸

However, it would also be a mistake to simply analogise the reasoning in *Pyneboard* to conclude that the objectives and functions of the TPA would *necessarily* be frustrated by the continued existence of legal professional privilege. There is a fundamental difference in the *functioning* of privilege against self incrimination and legal professional privilege.

Both privileges have the end result of shielding information relevant to the truth of an allegation. But it is arguable that the relatively confined purpose of legal professional privilege means that the *kind* of communications the subject of the privilege would not be as determinative of an investigation by the ACCC.

Unlike privilege against self incrimination, that would effectively shield information directly relevant to an alleged contravention of the TPA, it is arguable that the continued maintenance of legal professional privilege would not render the administration of the TPA unworkable. Certainly it is unlikely that the continued operation of legal professional privilege would result in the 'Commission [finding] it virtually impossible to establish the existence of those contraventions of Pt IV [of the TPA]'.⁶⁹

It could be argued that Justice Wilcox's reasoning in *Daniels* on this point flatters the extent to which legal professional privilege could be employed to frustrate an investigation by the ACCC.⁷⁰

There is another reason in support of this view. Unlike other common law privileges, legal professional privilege does not 'activate' when the relevant communication is made for the purposes of fraud or in furtherance of an illegal purpose.⁷¹ Privilege against self incrimination really would frustrate the effective administration of the TPA because documents containing evidence of illegal activity would be shielded. However, legal professional privilege would never attach to those documents thereby operating as an excuse for non-production in response to a s 155 notice.

So even if a corporation were to 'wash' its price-fixing arrangements through its legal advisers, it is highly unlikely that legal professional privilege would ever attach to the documents recording those communications. As the High Court in *Carter v Northmore Hale Davey & Leake* noted:

the privilege does not extend to communications or documents made or brought into existence for the purpose of, or as part of the process of, crime, fraud, abuse of statutory powers or, in some circumstances, defeating or frustrating the administration of justice by the courts.⁷²

There are two stages of proceedings where the ACCC might challenge an assertion of legal professional privilege, (a) where the privilege is asserted in response to a s 155

⁶⁸ (1994) 179 CLR 427, 438.

⁶⁹ *Pyneboard* (1983) 152 CLR 328, 341.

⁷⁰ (2001) ATPR 41-808, 42,796.

⁷¹ *Propend* (1997) 188 CLR 501.

⁷² *Carter v Northmore Hale Davey & Leake* (1995) 183 CLR 121, 134 (Deane J).

notice, and (b) where a respondent's verified list of discovered documents asserts the privilege.⁷³

Only the first stage is relevant for the present purposes. This is because once the ACCC has instituted proceedings, conventional reasoning suggests that it cannot issue a s 155 notice.⁷⁴ Following the decision of the High Court in *Caltex*, I would respectfully suggest that this is now an open question.⁷⁵

The difficulty for the ACCC concerns the way it might prove the existence of improper purposes. Leaving aside the debate about challenging an affidavit of discovery⁷⁶ on this basis, the issue is 'what evidence must the ACCC adduce in challenging the assertion of privilege?'

In *Daniels*, Moore J thought

[i]f ... the ACCC sought to put in issue a claim of legal professional privilege ... it would bear the burden of proving, with admissible evidence, that prima facie the communication was for an unlawful purpose. That is, the ACCC would have to establish the very thing it was seeking to investigate by the issue of the notice under s 155.⁷⁷

This is probably placing the question too strongly. Although a mere allegation of illegal purpose is not, of itself, sufficient to displace a claim of legal professional privilege, the person challenging the privilege does not have to prove the 'very thing sought to be investigated' or the actual unlawful conduct.⁷⁸ What is required is 'something to give colour to the charge ... there must be some prima facie evidence that it has some foundation in fact'.⁷⁹

Nevertheless, the varying comments of the High Court in *Propend* make it difficult to extract with certainty a consistent statement of principle concerning the evidence required to establish the crime or fraud 'exception'.

The policy concerns set out above have been consistently reflected from the earliest decisions of the High Court. As far back as *Huddart Parker & Co v Moorehead*, Justice Isaacs noted of corporations

Not only have they many advantages expressly and directly flowing from the language of the law, but their inherent nature, and proceeding from their very magnitude, their wealth, the influence that mere numbers inevitably bring, they possess a power which few individuals can hope for. This power may be exerted for the public good, but it may not, and where it is not, the danger is proportionate to the power ... Add to the power of numbers, the facilities of extension, the comparative personal immunity of individuals who compose the corporation, and the other special features of these artificial beings, and there presents itself a sufficient reason for handing over to a strong national authority for uniform and effective treatment, should it consider the occasion requires it, the comparatively vast and far-reaching transactions of foreign and trading or financial corporations.⁸⁰

⁷³ Where discovery is given pursuant to O 15 of the *Federal Court Rules*.

⁷⁴ *Brambles Holdings Ltd v Trade Practices Commission* (1980) ATPR 40-179.

⁷⁵ Alex Bruce, 'Caltex and Abbco Ice Works—The End of the Road for Corporations?' (1995) 23 *Australian Business Law Review* 7.

⁷⁶ *Beazley v Steinhardt* [1999] FCA 1255 (14 September 1999).

⁷⁷ *Daniels* (2001) ATPR 41-808, 42,804.

⁷⁸ *Propend* (1997) 188 CLR 501, 556 (McHugh J).

⁷⁹ *O'Rourke v Darbyshire* [1920] AC 581, 604.

⁸⁰ *Huddart Parker & Co Proprietary Ltd v Moorehead* (1909) 8 CLR 330, 407.

Justice McHugh noted in *Caltex* that

[c]orporate conduct is often complex. Assessment of a corporation's conduct may only be possible through an examination of its documents. This is particularly so in cases where the alleged wrong is committed as a result of the failure of a system set up by the corporation. A true understanding of the corporation's procedures is likely to be gained only through evidence from the corporation itself, particularly from its records. The difficulty in obtaining independent evidence against corporations is sometimes exacerbated by the inability to identify a victim of corporate behaviour who can testify. Often, the victim is an "amorphous entity such as a market". Furthermore, corporations are often well equipped to cover up their activities and to fund their defences.⁸¹

In *Esso*, the majority considered that the sole purpose test unfairly disadvantaged corporations since documents prepared for several purposes might not attract the privilege.⁸² However, Kirby J (in dissent) considered that the expansion of legal professional privilege would be more likely to advantage corporations and administration at the cost of ordinary individuals.⁸³

His Honour stated,

[t]he dominant purpose test is, of its nature, more likely to advantage corporations and administration at the cost of ordinary individuals ... Any slippage from the sole purpose test potentially allows a very large amount of (documents) to be the subject of a claim for the privilege so as to exclude it from the purview of the opposite party and the ultimate decision maker. In this way, as a matter of practicality, a larger privilege will typically be accorded to the corporation or administration than would ordinarily be accorded to the individual.⁸⁴

In *Caltex*, the High Court described the corporation as a 'creature of the state' and an 'artificial entity' subject to state support and therefore to investigation by the state for malfeasance.

In the New South Wales Court of Criminal Appeal, Gleeson CJ determined that *Caltex* was able to assert privilege against self incrimination. One of His Honour's reasons for this view involved the need to maintain a 'proper balance between the powers of the State and the rights and interests of citizens'⁸⁵ (including corporate citizens).

However, this view was unhesitatingly rejected on appeal to the High Court where Mason CJ and Toohey J stated,

[w]e reject without hesitation the suggestion that the availability of the privilege to corporations achieves or would achieve a correct balance between state and corporation. In general, a corporation is usually in a stronger position vis-a-vis the state than is an individual; the resources which companies possess and the advantages which they tend to enjoy, many stemming from incorporation, are much greater than those possessed and enjoyed by natural persons. The doctrine of the corporation as a separate legal entity and the complexity of many corporate structures and arrangements have made corporate crime and complex fraud one of the most difficult areas for the state to regulate

81 *Caltex* (1992-93) 178 CLR 477, 554.

82 (1999) 201 CLR 49, 72-3 (Gleeson CJ, Gummot and Gaudron JJ), 105 (Callinan J).

83 *Ibid* 91.

84 *Ibid*.

85 *Caltex Refining Co Pty Ltd v State Pollution Control Commission* (1991) 25 NSWLR 118, 127.

effectively ... Accordingly, in maintaining a "fair" or "correct" balance between state and corporation, the operation of the privilege should be confined to natural persons.⁸⁶

To some extent these comments were anticipated by Deane J in *Baker v Campbell* where His Honour stated,

that general principle [ie legal professional privilege] represents some protection of the citizen—particularly the weak, the unintelligent and the ill-informed citizen—against the leviathan of the modern state. Without it, there can be no assurance that those in need of independent legal advice to cope with the demands and intricacies of modern law will be able to obtain it without the risk of prejudice and damage by subsequent compulsory disclosure.⁸⁷

A concern to strike a correct balance between poorer and disadvantaged members of society and large corporations was expressed by Kirby J (in dissent) in *Esso* where His Honour stated:⁸⁸

The ability of the independent courts to secure the evidence essential to provide justice according to law is a vital prerequisite to redressing the power imbalances that sometimes exist in society between poor, modestly represented or unrepresented litigants (on the one hand) and powerful, well advised corporations and administration (on the other).

These are powerful policy considerations in favour of denying corporations the right to assert legal professional privilege. They are discussed later in this paper.

CONSTRUING S 155 OF THE *TRADE PRACTICES ACT 1974* (CTH)

What may be unmistakable to one judicial mind may appear doubtful or uncertain to another. What may clearly emerge as the purpose of Parliament or as an unambiguous implication, in the eye of one judicial reader may seem to another unclear, opaque or irretrievably ambiguous.⁸⁹

Through which 'lens' must the text of s 155 be construed?

The *Daniels* decision ultimately turned on the construction of s 155(5)(a) of the TPA. Their Honours held that, as a matter of statutory construction, the words in s 155(5)(a) 'to the extent that the person is capable of complying with it' were inconsistent with the existence of legal professional privilege.

It is generally accepted that a statute will not be construed to take away a common law right unless the legislative intent to do so clearly emerges, whether by express words or by necessary implication.⁹⁰

The trouble is that the TPA was enacted at a time when it was believed that legal professional privilege was not a substantive right, but a rule of evidence. It was then commonly accepted that, following *Minter v Priest*⁹¹ as a rule of evidence, legal professional privilege was available only in judicial or quasi-judicial proceedings.

⁸⁶ *Caltex* (1992–93) 178 CLR 477, 500.

⁸⁷ *Baker v Campbell* (1983) 153 CLR 52, 120.

⁸⁸ *Esso* (1999) 201 CLR 49, 89.

⁸⁹ *Yuill v Corporate Affairs Commission of New South Wales* (1990) 20 NSWLR 386, 398 (Kirby P).

⁹⁰ *Baker v Campbell* (1983) 153 CLR 52, 95, 96, 97.

⁹¹ *Minter v Priest* [1930] AC 558.

This characterisation of legal professional privilege was fundamentally altered by the High Court in *Baker v Campbell* where the court determined that legal professional privilege was not confined to judicial or quasi-judicial proceedings and was available to resist a claim for the production of documents demanded by search warrant.

Accordingly, at the time the TPA was enacted, Parliament would not have considered that legal professional privilege would be an answer to questions asked during an administrative investigation. In those circumstances it would have been very surprising if Parliament had included express words removing a species of privilege that, at the time, would not have been available to resist producing documents or information pursuant to s 155 of the TPA.

This reasoning produces a neat paradox; how can the High Court attempt to discover a legislative intent to abrogate a species of privilege that Parliament would not have thought required express abrogation?

Through which lens is s 155 of the TPA to be scrutinised? Should s 155 be examined in light of the law in operation at the time it was enacted? Or should s 155 be examined in light of contemporary legal principles?

The answer to this question is important because of the following argument. If s 155 of the TPA is to be construed through the lens of the law as at 1974, then it is no surprise that the section did not contain an express abrogation of legal professional privilege. Accordingly, Parliament expressly abrogated privilege against self incrimination⁹² because of the universal application of that right. It did not abrogate legal professional privilege because, as the law then stood, that privilege was not available in response to an administrative investigation.

If that view is accepted, the most likely intent of Parliament as disclosed in the text of s 155, was the effective and thorough investigation by the then Trade Practices Commission, of alleged contraventions of the TPA.

The integrity of this argument rests on employing the maxim of statutory interpretation; *contemporanea expositio et fortissima in lege*— 'the best and surest mode of construing an instrument is to read it in the sense which would have been applied when it was drawn up' to determine the subjective intent of Parliament in enacting the TPA.

In *Yuill*, the first limb of Justice Brennan's argument applied this principle to produce the result that at the time the *Companies (New South Wales) Code* was enacted, legal professional privilege was not available to resist production of material.

Justice Moore in the *Daniels* decision considered (at 42,801) that if this rule of construction were applied, it would produce the result that s 155(5) of the TPA would have been intended to abrogate privileges recognised by the common law as at 1974.

There are at least two reasons to conclude that such an approach to determining the legislative intent in s 155 of the TPA is flawed: (a) it is a mistake to seek the subjective intent of Parliament in interpreting statutes; and (b) as a rule of statutory construction, *contemporanea expositio et fortissima in lege* is dramatically limited.

Holding to this argument involves misunderstanding the task of illuminating 'the intent of the legislature'. Once described as 'somewhat of a fiction',⁹³ the argument

⁹² In s 155(7) of the TPA.

⁹³ *Mills v Meeking* (1990) 169 CLR 214, 234.

above rests on finding that the legislative intent to abrogate legal professional privilege, embodied in s 155 of the TPA, is coextensive with the subjective intent of the legislature at the time the TPA was enacted in 1974.

The difficulty with this approach is that the intent of the legislature 'may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature would have meant, although there was an omission to enact it'.⁹⁴

Accordingly, the High Court in *Yuill* comprehensively rejected such a view⁹⁵ reaffirming the consistently stated principle that it is the ordinary meaning of the words in a statute that are to be construed in determining the intent of the legislature. This view is consistent with the reminder of the House of Lords that '[w]e are seeking the meaning of the words which Parliament used. We are not seeking what Parliament meant in some subjective sense'.⁹⁶

In its application to the present question,

it is one thing to say that the legislature accepted the law as it thought it to be; it is quite another thing to speculate upon whether the legislature would have sought to change the law had it realised that it went as far as *Baker v Campbell* held it did ... While the legislature may have acted upon the basis that the doctrine was confined to the law of evidence and had not application in a proceeding which was not of a judicial nature, it is not possible to know from that circumstance alone how the legislature might have provided had it appreciated that the doctrine embodied a fundamental right of more general application.⁹⁷

It follows that to employ the rule of construction *contemporanea expositio et fortissima in lege* in aid of seeking the subjective legislative intent of Parliament is also incorrect. As Justice Moore in *Daniels* noted, the application of this rule has been severely criticised both academically⁹⁸ and by recent Full Federal Court decisions.⁹⁹

What policies must be analysed in construing s 155 of the TPA?

Does the answer to the question of whether a section of a statute such as the TPA abrogate legal professional privilege involve balancing the same policies that underpin that privilege, or does the answer involve balancing other policies?

The decisions in *Yuill* and *Daniels* are interesting in that they do not appear to involve a balancing of the policies that underpin legal professional privilege. In each of those cases, the Court resolved the issue by balancing the policy underpinning the legislation in questions against the effect of the privilege.

In *Daniels*, the Full Court undertook a linguistic, textual and investigative policy analysis of s 155 of the TPA. Both Justices Wilcox and Lindgren drew upon the observations of Mason, Wilson and Dawson JJ in *Pyneboard* where their Honours had stated that

without obtaining information, documents and evidence from those who participate in contraventions of Part IV of the Act, the Commission would find it virtually impossible

⁹⁴ *Salomon v Salomon* [1897] AC 22, 38 (Lord Watson).

⁹⁵ *Yuill* (1991) 172 CLR 319, 331 (Dawson J), 339 (Gaudron J).

⁹⁶ *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG* [1975] AC 591, 613.

⁹⁷ *Yuill* (1991) 172 CLR 319, 331 (Dawson J).

⁹⁸ Craig Carracher, 'Legal Professional Privilege, Statutory Interpretation and Yuill' (1991) 12 *Statute Law Review* 228, 232.

⁹⁹ *Joyce v Grimshaw* [2001] FCA 52, para 66.

to establish the existence of those contraventions. The consequence would be that the provisions of Part IV could not be enforced by successful proceedings for civil penalty under section 76(1).

This approach is misplaced according to Boniface, who argues that 'instead of confining themselves to the traditional focus on the public policy that underpins legal professional privilege, the courts have felt obliged to focus on the intention of the legislature and the public policy that specific legislation was intended to promote'.¹⁰⁰

But isn't this the approach required in interpreting statutes? It is true that in interpreting a statute 'each statutory provision must be construed according to its own language and to achieve its expressed purposes'.¹⁰¹

However, recalling that at least three public policies present themselves in this calculus:

- 1 The legislative policy behind a particular statute such as the TPA;
- 2 The policy served in ensuring that all material relevant to the truth of a particular matter or event is placed before the tribunal; and
- 3 The policy served in ensuring that individuals are able to seek legal advice without fearing that such advice is liable to be disclosed

the issue is what 'purposes' or policies must be balanced in determining whether a statute abrogates legal professional privilege.

Decisions such as *Yuill* and *Daniels* call into questions all of these policies. But according to Boniface,

The majority decisions in *Yuill* did not acknowledge the important part that professional legal advice can play in encouraging compliance with the law ... instead, the reasoning of the majority was confined to analysing linguistic, textual and historical considerations without reference to the underlying policy debate ... by implication, the public policy that underpins legal professional privilege was displaced in *Yuill* by the court's identification of the public policy that underpinned the *Companies Code*. Such a method of analysis reinforces the application of the assumption that the public policy identified by the courts as the legislative intention is of paramount importance rather than the public policy that is said to underpin legal professional privilege.

There is a difference in the methodology employed by Kirby J in the Court of Appeal,¹⁰² and that employed by the High Court on appeal in discovering the existence of a legislative intent to abrogate legal professional privilege.

In the Court of Appeal, Kirby J asked whether the statute disclosed an intent to abolish the policy underpinning legal professional privilege—hence his concern to accentuate the correct policy consideration

weight is given to the rigorous instruction of *Baker* by going beyond the bare formulae used by the justices of the High Court of Australia set out above to examine, in the reasons of the majority, the strong grounds of public policy which led the court to its conclusion in that case.¹⁰³

However, the High Court appeared to focus on the policy behind the legislation to the diminution of the public policy that underpinned legal professional privilege. The

¹⁰⁰ Boniface, above n 12, 328.

¹⁰¹ *Propend* (1996–97) 188 CLR 501, 582 (Kirby J).

¹⁰² *Yuill v Corporate Affairs Commission of New South Wales* (1990) 20 NSWLR 386.

¹⁰³ *Ibid* 405.

decisions in *Yuill* and *Daniels* do not engage in any doctrinal analysis of the policy foundations of legal professional privilege; simply asking whether as part of discovering legislative intent, the policy behind a particular statute would be subverted by the continued existence of the privilege.

Therefore, at best, the argument is about whether insufficient weight was given to the public policies underpinning legal professional privilege and excessive weight given to the legislative intent underpinning a particular statute in determining whether legal professional privilege has been abrogated.

At worst, the argument is about misplaced focus. The inquiry should not be whether the maintenance of legal professional privilege would frustrate the public policy underpinning a particular statute' but 'whether the statute discloses a sufficient legislative intent to displace the public policy underpinning legal professional privilege. Boniface would argue that the focus of the court's analysis is misplaced. Instead of asking whether the purpose of an individual statute such as the TPA would be thwarted by the existence of legal professional privilege, the court should be asking whether displacing legal professional privilege would undermine the policy it was intended to serve; that is, compliance with the law.

Weighing the issues

Mindful of the need to offer solutions in the three-fold context of past authority, legal principle and legal policy,¹⁰⁴ how are the various policies underpinning legal professional privilege to be assessed when asking the question 'does s 155 of the TPA abrogate the privilege?'.¹⁰⁵

The person asking this question does not 'arrive at the problem ... to find a blank page. On the page of the law are written the holdings (of the High Court)'.¹⁰⁵ In terms of methodology, 'it is useful ... to collect and reflect upon the competing arguments stated at their strongest'.¹⁰⁶

The starting point for the resolution of what the law is, must be a recognition of the importance, for the proper administration of justice, of having all relevant evidence available to the decision maker.¹⁰⁷

Against the desirability of having all evidence before the courts lies the competing public policy in the administration of justice of encouraging communications between client and legal adviser by keeping such communications confidential.

However, legal professional privilege may be abrogated by statute, and, in many cases Parliament has seen fit to do so.¹⁰⁸ Where a statute is silent as to the question, parliamentary intention can be established through necessary implication.

That implication can be discerned through the application of established rules of statutory construction. Several of these rules are directly relevant to the present

¹⁰⁴ *Oceanic Sunline Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 252–3 (Deane J).

¹⁰⁵ *Eso Australia Resources Limited v FCT* (1999) 201 CLR 49, 93.

¹⁰⁶ *Emanuele v Australian Securities Commission* (1997) 71 ALJR 171, 731.

¹⁰⁷ *Propend* (1996–97) 188 CLR 501, 581.

¹⁰⁸ See generally, Benjamin Saul, 'Is Removing Legal Professional Privilege a Policy Imperative?' (2001) (October) *Law Society Journal* 67.

question. A statute will not be construed to abolish fundamental common law rights, including legal professional privilege, save to the extent directed.¹⁰⁹

However, another rule is that a

common law privilege will be impliedly abrogated by an obligation, expressed in general terms, to answer questions or produce documents if the character and purpose of the provision indicate that the obligation is not intended to be subject to any qualification'.¹¹⁰

In determining the purpose of the provision (s 155), 'it is a rule of construction that the purpose of the legislation must be taken into account'.¹¹¹

There is no prior High Court authority determinative of the issue. *Pyneboard* considered whether s 155 of the TPA abrogated privilege against exposure to a civil penalty.¹¹² Nevertheless, the Full Court in *Daniels* considered *Pyneboard* to be significant to the extent that the High Court considered the scope of s 155 of the TPA.

During the special leave application of 15 February 2002, Gummow J suggested that '*Yuill* is an authority that might not be in a state of vigorous good health, I think'.¹¹³

Changes to the composition of the High Court may have prompted His Honour's observations. In *Yuill*, Gaudron and McHugh JJ were in the minority, holding that legal professional privilege had not been abrogated in that case. They are the only remaining Justices from *Yuill* constituting the present High Court.

Justice Gaudron considered that, as a matter of statutory interpretation, the words 'without reasonable excuse' in the *Companies Code (NSW)* were sufficiently ambulatory in character to apprehend legal professional privilege.¹¹⁴

However, the text of s 155(5)(a) of the TPA does not admit to any form of excuse. Its language is significantly stronger. This was noted by McHugh J in *Yuill* where his Honour stated,¹¹⁵ '[u]nlike s 155 of the Trade Practices Act, therefore, the general terms of s 295 show no implied intention to abolish all relevant common law rights and privileges'.

As a matter of policy, there are strong considerations militating in favour of the abrogation of legal professional privilege by s 155 of the TPA. These factors become particularly relevant in relation to corporations. They were discussed above.

The High Court has consistently observed that corporations are in a stronger position vis-à-vis the state and individuals. Corporate power can be employed to inhibit the effective administration of justice on at least two levels:

1. By shielding documentary evidence, the state in the form of an investigatory authority such as the ACCC cannot effectively pursue suspected contraventions of the TPA.

Referring to privilege against self-incrimination, McHugh J in *Caltex* considered that

¹⁰⁹ *Baker v Campbell* (1989) 153 CLR 1, 96-7, 104-5.

¹¹⁰ *Pyneboard* (1983) 152 CLR 382, 341; *Yuill* (1991) 172 CLR 319, 348.

¹¹¹ *Yuill* (1991) 172 CLR 319, 346.

¹¹² *Pyneboard* (1983) 152 CLR 382.

¹¹³ Transcript of Proceedings, *Daniels Corporation International Pty Ltd v ACCC* (High Court of Australia, Gummow J, 15 February 2001).

¹¹⁴ *Yuill* (1991) 172 CLR 319, 338-9.

¹¹⁵ *Ibid* 351.

[i]f a corporation can refuse to produce documents, the public interest in detecting and punishing crime is diminished so that the integrity of the adversary system can be maintained for the benefit of an artificial entity. This is too high a price to pay for allowing corporations to claim the privilege.¹¹⁶

His Honour's reasoning does not rely on notions of protection of fundamental human rights, rather, the conclusion is one of weighing the effects of non-disclosure of documents against the policy of the effective administration of justice. This is particularly relevant to the ACCC since much of its enforcement activity has a public interest character.¹¹⁷

2. By shielding documentary evidence, the human rights of 'the weak and the unrepresented individuals' to a fair and fully documented trial would be disadvantaged.

This concern was forcefully expressed by Kirby J (in dissent) in *Esso* where his Honour stated:

The ability of the independent courts to secure the evidence essential to provide justice according to law is a vital prerequisite to redressing the power imbalances that sometimes exist in society between poor, modestly represented or unrepresented litigants (on the one hand) and powerful, well advised corporations and administration (on the other) ... it is often the fact that an individual will be unable to come at justice in proceedings against a well advised corporation or administration unless he or she can secure by discovery or subpoenas ... original documentation critical to the matter in dispute. To the extent that communications in the form of documents can hide under the protection of the privilege equal justice under law may be denied.¹¹⁸

Accordingly, 'the human right of equal access to the courts argues against an expansion of a privilege which, as a matter of practicality, will diminish such right or at least its utility'.¹¹⁹

These considerations militate in favour of the view that, as a matter of policy, the TPA should be construed to abrogate legal professional privilege. In *Kartinyeri v Commonwealth*, Kirby J considered that

[w]here the Constitution is ambiguous, this Court should adopt that meaning which conforms to the principles of universal and human rights rather than an interpretation which would involve a departure from such rights ... such violations (of human rights and dignity) are ordinarily forbidden by the common law and every other statute of this land is read, in the case of ambiguity, to avoid so far as possible such a result.¹²⁰

In context, the ambiguity in s 155 of the TPA concerning legal professional privilege should be resolved consistently with the preservation of fundamental human rights. However, it is respectfully suggested that given the observations of the High Court concerning the power of corporations, to interpret s 155 of the TPA as *not* abrogating legal professional privilege would be to discount the basic rights of persons in their dealings with corporations.

¹¹⁶ *Caltex* (1992-93) 178 CLR 477, 556.

¹¹⁷ *World Series Cricket Pty Ltd v Parish* (1977) ATPR 40-040, 17,426; *ACCC v The IMB Group Pty Ltd (in liq)* (1999) ATPR 41-688, 42,802-3.

¹¹⁸ *Esso* (1999) 201 CLR 49, 89.

¹¹⁹ *Ibid* 92.

¹²⁰ (1998) 195 CLR 337, 417-8 (Kirby J).

CONCLUSIONS

Does s 155(1) of the TPA abrogate legal professional privilege? I would respectfully suggest that it does as a matter of both law and policy. As a matter of law, I suggest that the text of s 155(5)(a) is sufficiently clear to disclose a legislative intent to abrogate the privilege. This is especially so given the legislative purpose of the TPA discussed by the High Court in *Pyneboard*.

I do not think that the comments of Gaudron J in *Yuill* are easily translated to the text of s 155(5)(a) of the TPA. There is no notion of 'reasonable excuse' in s 155. Likewise, there is strong support from McHugh J in *Yuill* that textually, s 155 of the TPA is sufficiently strong to abrogate all common law privileges.

As a matter of policy, I suggest that s 155 of the TPA should abrogate legal professional privilege. The scope of the privilege has expanded in recent years prompting closer scrutiny of the logic of its principle when asserted by corporations. The potential diminution wrought to the effective administration of justice by non-disclosure of documents calls for counter-balancing by effective regulation of corporate activity.

In this sense, the state in the form of the ACCC exercising its power under s 155 of the TPA functions as a counter-balance to ability of corporations to shield from the courts and natural persons, documents relevant to the truth of a matter. Such an interpretation of the TPA is consistent with striking a balance between allowing corporations to continue to assert legal professional privilege while maintaining the basic human rights inherent in the right to a well prepared and informed trial.

This approach might be attractive when it is considered that s 118 and s 119 of the *Evidence Act 1995* (Cth) expressly preserves the right to assert legal professional privilege at trial.¹²¹

¹²¹ This is a view shared by Ian Tonking, '2001—The Year in Review', (2002) *Australian Trade Practices News*, Report 516, 6 February 2002, 4.