



# *The state of play in administrative law 2008*

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## Legal professional privilege for decision makers

*Presented by:*

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## LEGAL PROFESSIONAL PRIVILEGE FOR DECISION MAKERS\*

### INTRODUCTION

In general terms, the principles governing when legal professional privilege will attach to a particular communications have been reasonably well settled for some time. It has also been clear, at least since the High Court's decision in *Waterford v The Commonwealth* (1986) 163 CLR 54, that governments are entitled to rely on legal professional privilege where those principles are invoked.

From the point of view of Commonwealth decision makers however, some aspects of the application of legal professional privilege have been surprisingly uncertain in recent years. The purpose of this paper is to explore recent developments in some of the more controversial areas of interaction between legal professional privilege and Commonwealth decision making.

The particular topics I propose to explore are:

- Some of the circumstances in which a decision maker may be found to have waived privilege in an advice considered by them in reaching a decision;
- Whether legal advices provided to a decision maker must be provided to the AAT pursuant to s.37 of the *Administrative Appeals Tribunal Act 1975* (the AAT Act); and
- The application of 'litigation privilege' in the AAT.

Before exploring those topics however, it may be helpful to 'set the scene' by briefly referring to the underlying rationale for legal professional privilege, and the reasons for its application in the government context.

### 1. LEGAL PROFESSIONAL PRIVILEGE AND ITS APPLICATION TO GOVERNMENT

#### When does legal professional privilege apply?

The common law in Australia is that legal professional privilege attaches to:

- Confidential communications passing between legal adviser and client or third party, for the dominant purpose of obtaining or giving legal advice (advice privilege); and
- Confidential communications passing between a client, the client's legal advisor and third parties, for the dominant purpose of use in or in relation to litigation, then existing or reasonably anticipated (litigation privilege).

The common law definitions of legal professional privilege are also reflected in the definition of 'client legal privilege' in sections 118 and 119 of *The Evidence Act 1995*

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\* This paper is based on a paper by Simon Daley, AGS Special Counsel Litigation, prepared for and presented at GLGs in Sydney, Melbourne and Perth during 2007.

(*Cth*), which applies to evidence adduced at trial in a federal court or an Australian Capital Territory court.

### **The rationale for and nature of legal professional privilege**

In *Baker v Campbell* (1983) 153 CLR 52, Deane J explained the rationale of legal professional privilege as being that:

a person should be entitled to seek and obtain legal advice in the conduct of his affairs and legal assistance in and for the purposes of the conduct of actual or anticipated litigation without the apprehension of being thereby prejudiced.

In *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 54 [11] the High Court described legal professional privilege as 'not merely a rule of substantive law' but rather 'an important common law right, or perhaps, more accurately, an important common law immunity'.<sup>1</sup>

These descriptions have important consequences. In particular, the fact that legal professional privilege is a substantive rule of law rather than a rule of evidence, means that it can be relied upon to resist all forms of compulsory disclosure. Further, as it is an important common law immunity it cannot be abrogated or overridden by statute other than by clear and unambiguous words or by necessary implication.<sup>2</sup>

### **Legal professional privilege and government**

In *Waterford v The Commonwealth* (1986) 163 CLR 54, the former Solicitor-General when he was at the private bar argued on behalf of Mr Waterford, a well known Canberra journalist, that the underlying rationale of the privilege was the need for a client to be able to communicate frankly with his lawyers so that justice may be done, and that this did not apply to government instrumentalities which should be model litigants free from the need to engage in tactics and the temptation not to disclose all relevant facts. That argument was rejected.

Mason and Wilson JJ said, at 62, that:

there is no reason to place legal officers in government employment outside the bounds of legal professional privilege

and that:

it is clearly in the public interest that those in government who bear the responsibility of making decisions should have free and ready confidential access to their legal advisors.

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<sup>1</sup> At [11].

<sup>2</sup> *Daniels* at [11].

A second argument advanced on behalf of Mr Waterford was that if privilege does attach to communications between government decision-makers and their legal advisors, it does not attach to such communications which relate to the manner in which the decision-maker should exercise the decision making power.

As to this argument, Mason and Wilson JJ said, at 64, that:

there is no warrant to draw an arbitrary line through the functions of government in order to exclude the privilege from those described as of an administrative nature. All the functions of the executive government may be so described.

Further, their honours said that:

the growing complexity of the legal framework within which government must be carried on renders the rationale of the privilege, as expressed in *Grant v Downs*, increasingly compelling when applied to decision-makers in the public sector.

Brennan J found to similar effect at pages 74-75.

Against this background, this paper will look at several cases which have considered the circumstances in which a decision maker may be found to have waived privilege in an advice considered by them in reaching a decision.

## 2. IMPLIED WAIVER

At common law, a person who is otherwise entitled to legal professional privilege may waive the privilege, with the result that the privilege will be lost.<sup>3</sup> Waiver can be express or implied and whether a waiver of privilege has occurred does not depend on the subjective intention of the party who has lost the privilege. In *Mann v Carnell* (1999) 201 CLR 1 at [28] the High Court decided that the fundamental test for whether waiver has occurred is whether the conduct of the holder of the privilege is inconsistent with the maintenance of the privilege.<sup>4</sup>

In some of the earlier cases subsequent to *Mann v Carnell*, decision makers had been found to have waived privilege by 'incorporating' an advice into the decision making process.<sup>5</sup> However, some recent cases have served to define more clearly the circumstances in which a decision maker's conduct is likely to be considered to be inconsistent with the maintenance of legal professional privilege and result in waiver of the privilege.

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<sup>3</sup> Waiver is also dealt with in section 122 of the Commonwealth Evidence Act. However that provision provides a narrower basis for an argument of waiver and as noted above, the Evidence Act only applies in more limited circumstances. Accordingly it is not proposed to deal with waiver under the Evidence Act for the purposes of this paper.

<sup>4</sup> At [28].

<sup>5</sup> See, for example, *Minister for Education v Lovegrove Turf* [2003] WASC 213, *Candacal Pty Ltd & Ors v Industry Research and Development Board* (2005) 223 ALR 284.

## Rio Tinto

*Rio Tinto v Commissioner of Taxation* (2005) 224 ALR 299 concerned whether the dividend stripping provisions of the *Income Tax Assessment Act* applied to a dividend paid to the applicant. The relevant provision was invoked if the Commissioner was 'satisfied' that the arrangement in question was by way of dividend stripping.

In response to an assertion by the company that the Commission's statement of facts, issues and contentions was inadequate, the Commissioner provided by way of further and better particulars, schedules of documents which had been taken into consideration by the decision-maker in reaching the requisite state of satisfaction and exercising the relevant discretion. One schedule listed documents which were the subject of privilege claims. The covering letter said that, subject to any claims of privilege, the documents referred to would be available for inspection.

One of the documents eventually produced to the taxpayer was an audit report which stated that the Commissioner would be relying on particular grounds which had been confirmed by senior tax counsel and supported by the Commissioner's solicitors, as well as by the opinions of counsel.

One of the arguments relied on by the applicant was that the Commissioner, as part of a 'positive case' (namely, his statement of facts, issues and contentions) had put in issue his state of mind and that by the particulars provided he had disclosed that the privilege schedule documents had a bearing on those states of mind so that it would be inconsistent with the fair and proper determination of the issues before the Court to maintain privilege over those documents.

The Commissioner argued that because of the terms of the *Taxation Administration Act*, which put the onus onto the applicant, it was the applicant and not the Commissioner who had put in issue the Commissioner's state of mind. This argument was rejected by Sundberg J who said:

when one puts the onus cast by section 14 ZZO of the *TAA* to one side, all one sees is the situation where the respondent has, by his statement, indeed raised as an issue in the instant proceedings his states of mind.

In *Commissioner of Taxation v Rio Tinto Limited* (2006) 151 FCR 34, the Full Court considered the Commissioner's appeal against the decision of Sundberg J and held that to say that the Commissioner had put his state of mind in issue in the proceedings was to oversimplify the position. The Full Court said that the reason the Commissioner's state of satisfaction was before the Court was because the taxpayer had challenged the relevant assessment and indeed, had done so prior to the formulation of the Commissioner's statement of facts, issues and contentions.

The Full Court went further and said that even if his Honour was correct in holding that the Commissioner had put in issue his state of mind, this alone would not provide a proper basis for issue waiver as the question is not whether the owner of

the privilege has put his state of mind in issue, but whether he directly or indirectly puts *the contents* of the otherwise privileged communications in issue in the litigation, either in making a claim or by way of defence.

That is, the question in this case was whether the Commissioner had made an assertion as part of his case in the litigation which thereby laid open the privileged documents to scrutiny so that an inconsistency arose between the making of the assertion and the maintenance of the privilege.

As to this, the Full Court said that in the ordinary case, the Commissioner's compliance with his procedural obligations in a taxation appeal would not result in a waiver of privilege. One might interpolate here that the same conclusion should hold for a decision maker's compliance with his or her obligations to provide a statement of reasons under s 13 of the *Administrative Decisions (Judicial Review) Act (1977)*, particular as under the Federal Court Rules, the obligation to lodge a s 13 statement rests with an applicant.

The Full Court reiterated the principle established in *Waterford* that legal professional privilege may attach to communications brought into existence by government officers seeking or giving legal advice as to the nature and extent of governmental powers, whether statutory or otherwise. They went on to hold that even though such communications may contribute to the making of a decision, the mere reference to this fact by a decision-maker in the course of defending a judicial review application or on a taxation appeal is not inconsistent with the maintenance of the privilege.

The Court said that a decision-maker would not put such legal advice in issue merely by saying that the advice was relevant or contributed to his or her decision. However, the Court did note that the situation might be otherwise if the decision-maker does put the contents of the legal advice in issue by specifically relying on the *contents* of the advice (and not merely the fact of the advice) to vindicate a claimed state of satisfaction or exercise of discretion.

The Full Court then applied this distinction to the case before them and found that the Commissioner had done more than merely make an assertion about the relevance of the legal advices as he had said in his particulars that he had taken into account certain matters which were *evidenced* by listed documents, including the relevant privilege schedule documents. The Court held that in doing so the Commissioner had made an assertion that put the *contents* of the relevant privileged documents in issue, or necessarily laid them open to scrutiny, with the consequence that there was an inconsistency between the making of the assertion and the maintenance of the privilege, and privilege had been waived.

## NSW Council for Civil Liberties

Another case relevant to this issue is *NSW Council for Civil Liberties Inc v Classification Review Board (2006)236 ALR 313*, a decision of Justice Edmonds handed down in November 2006.

This case involved a judicial review application by the Council for Civil Liberties of a decision of the Classification Review Board to refuse classification of two books which promoted violent Jihad (so-called hate books). The proceedings before the Review Board followed an application by the Attorney-General for review of the decision of the Classification Board which classified the books as Unrestricted.

The respondents were required to give discovery and the discovery list included two advices by AGS to the Office of Film and Literature Classification, which is part of a Division within the Attorney-General's Department and which provides secretariat functions for both the Classification Board and the Review Board. The advices were obtained for the purposes of the Review Board's consideration of the application for review. After the Review Board's decision was made, copies of the advices were provided to the Attorney-General's Department and then by the Department to AGS as the solicitor for the Attorney-General in the judicial review proceedings.

The Attorney-General (as the active party in the proceedings) asserted privilege over the advices.

One of the arguments that the applicant advanced was that there had been an implied waiver. First, it argued that the Review Board's 'use' of the advices in making its decision meant that the advices were incorporated into the decision and this was inconsistent with the maintenance of the privilege.

The applicant further argued that an implied waiver arose through the voluntary disclosure of the advices by the Department to AGS as the solicitor acting for the Attorney-General in the proceedings. This argument sought to draw a line of separation between the Attorney-General and his Department.

In rejecting the 'incorporation' argument, Edmonds J relied on *Rio Tinto* to conclude that the act of using legal advice in a way that contributes to a statutory decision does not itself constitute a waiver of privilege, a conclusion his Honour said was also at least implicit in *Waterford* as there would have been no point in the High Court allowing legal privilege in respect of communications to persons exercising statutory powers if consideration of the advice in the course of exercising those powers would effect a waiver of the advice.

As to the argument that there had been disclosure of the advice, his Honour concluded that there had been no disclosure beyond the Commonwealth as the Review Board is an emanation of the Commonwealth, as is the Department and as is the Attorney-General as a Minister of the Commonwealth.

Further, his Honour held that even if there had been a 'disclosure', such disclosure was not inconsistent with the maintenance of the privilege. That is, the distinction that the applicant sought to propound between the Department and the Attorney-General was contrary to the constitutionally entrenched position of Ministers as officers appointed by the Governor-General to administer Departments of State.

### **Osland v Secretary to the Department of Justice**

Although arising from circumstances outside the Commonwealth decision making context, the recent decision of the High Court in *Osland v Secretary to the Department of Justice* (2008) 249 ALR 1 provides further guidance as to considerations which are likely to be relevant in determining whether a decision maker has waived privilege.

The matter concerned an application by the appellant, under the *Freedom of Information Act 1982* (VIC) for access to certain documents in the possession of the Department of Justice of the Victorian Government. The documents had been prepared by lawyers and departmental officials and contained advice about a request by the appellant (who had been convicted of murder) that she be granted an executive pardon. Access to most of the documents was refused by the department on the basis that they were exempt from disclosure by reason of s 30, relating to internal working documents, and s 32, relating to legal professional privilege.

One of the issues before the High Court was whether privilege in one particular document had been waived as a result of a press release issued by the Attorney-General. The press release said:

On July 5, 1999, Mrs Osland submitted a petition for mercy to the then Attorney General Jan Wade. That petition set out 6 grounds on which the petition should be granted.

Following consultation with the State opposition, I appointed a panel of 3 senior counsel, Susan Crennan QC, Jack Rush QC and Paul Holdenton QC, to consider Mrs Osland's petition.

This week I received a Memorandum of Joint Advice from the panel in relation to the petition. The Joint Advice recommends on every ground that the petition should be denied.

After carefully considering the Joint Advice, I have recommended to the Premier and the Governor that the Governor be advised to deny the petition.

The Governor has accepted this advice and denied the petition<sup>6</sup>.

The issue before the Court was whether by reason of this statement, the Attorney-General had waived privilege in the advice referred to in the press release.

Chief Justice Gleeson and Justices Gummow, Heydon and Kiefel delivered a joint majority judgment. It had been accepted before them that the applicable principles

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<sup>6</sup> At [15].

were those outlined in *Mann v Carnell* (1999) 201 CLR 1. The majority also affirmed the applicability of considering whether the conduct of the party entitled to the privilege is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect.<sup>7</sup> However the Court also observed:<sup>8</sup>

Such a judgment is to be made in the context and circumstances of the case, and in light of any considerations of fairness arising from that context or those circumstances.

The Court went on to observe:

The conduct of the Attorney-General in issuing the press release and including in it certain information about the joint legal advice is to be considered in context, which includes the nature of the matter in respect of which the advice was received, the evident purpose of the Attorney-General in making the disclosure that was made, and the legal and practical consequences of limited rather than complete disclosure.

In considering those aspects of the matter before them, the Court noted that it was an established practice of the Victorian Government not to give reasons for decisions in relation to requests for executive pardons and noted that this practice formed part of the context in which the Attorney-General had acted. The Court also noted that if the appellant had a legal right to seek review of the Governor's decision, or to obtain the reasons for that decision, those rights were not effected by the assertion of privilege or the Court's decision in relation to it. They also noted that 'the evident purpose of what was said in the press release was to satisfy the public that due process had been followed in the consideration of the petition, and that the decision was not based on political considerations'.

Having had regard to these considerations, the majority concluded:<sup>9</sup>

The Attorney-General was seeking to give the fullest information as to the process that had been followed, no doubt in order to deflect any criticism, while at the same time following the long standing practice of not giving the reasons for the decision. This did not involve inconsistency; and it involved no unfairness to the appellant.

Particularly against the background of the decisions referred to above, a striking feature of this decision is the fact that the Attorney General, through the issue of the press release, squarely upon the content of the advice he had received, and disclosed the substance of that advice. Significantly however, he did not do so in the context of litigation or in circumstances which the Court considered created any unfairness to the appellant. This decision serves to illustrate that the circumstances of reliance upon legal advice can be as important as than the nature of that reliance. It also suggests that reliance in the context of litigation, with the possibility of some

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<sup>7</sup> At [45].

<sup>8</sup> At [45].

<sup>9</sup> At [48].

advantage accruing as a result of that reliance, is more likely to result in waiver than reliance on or disclosure of an advice outside the context of litigation.<sup>10</sup>

### **What follows from these cases?**

The decisions in *Rio Tinto* and *Council for Civil Liberties* have further clarified that a mere reference in a statement of reasons or similar document to the fact of advice having been obtained will not give rise to a waiver. However, if an assertion in the document puts in issue the contents of advice, this may give rise to a waiver of privilege, particularly in the context of litigation.

As the decision in *Osland* illustrates however, questions of fairness are highly relevant to waiver and where no unfairness arises from partial disclosure of the content of an advice, privilege may be upheld.

The finding of waiver in *Rio Tinto* also emphasises the care that needs to be taken in describing how advice which is relied on has been taken into account.

### **3. LPP AND S 37 AAT ACT**

The third part of the paper deals with legal advice obtained by decision-makers whose decisions are subject to review in the Administrative Appeals Tribunal.

#### **The provisions**

Under section 37(1)(a) of the *Administrative Appeals Tribunal Act* a decision-maker is required to lodge with the Tribunal a statement of reasons. Section 37(1)(b) requires the decision-maker also to lodge 'every other document or part of a document that is in the person's possession or under the person's control and is relevant to the review of the decision by the Tribunal'.

That is the form of section 37(1)(b) since its amendment in May 2005. Prior to that, what was required was the lodgement of documents which *the decision-maker considered* were relevant to the review of the decision. In other words, the test was formerly a subjective test, but now is an objective test.

Subsection 37(3) provides that section 37 has effect 'notwithstanding any rule of law relating to privilege or the public interest in relation to production of documents'.

Section 37(1AE) requires the documents lodged under s 37(1)(b) to be given to the other parties.

Section 37(1AF) provides that if a decision-maker applies for a confidentiality order pursuant to s 35(2) of the Act, the obligation to lodge documents under s 37(1)(b) is suspended pending the Tribunal's determination of the confidentiality claim.

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<sup>10</sup> That point is reinforced by the subsequent decision of Justice Bennett in *Apotex Pty Ltd v Les Laboratories Servier* (2008) FCA 1466.

## Producing privileged documents under s 37

There has long been controversy over the extent to which section 37 requires the production of legal advice. On the one hand, cases like *re Thomas Cook Australia Pty Ltd and Collector of Customs* [1994] 34 ALD 301 held that documents required to be provided under section 37(1)(b) must necessarily be factual in nature with the result in that case, that the legal opinion in question, not being a document which recorded any facts relevant to the making of the decision, was not required to be produced.

On the other hand, cases such as *re Fay & Psychologists Board of the ACT* [1996] 44 ALD 394, *re Forsythe and Federal Privacy Commissioner and ACT Government Solicitor* [2004] 80 ALD 489 and *re Spicer Axle Structural Components Australia Pty Ltd and Secretary Department Industry Tourism Resources* [2005] 83 ALD 104 all held that the requirement to lodge documents under section 37(1)(b) of the AAT Act was not limited to documents of a factual nature, but depended on whether the documents in question were relevant to the decision under review. It may be noted that all of these cases considered section 37 as it was before amendment in May 2005.

As a result of this line of cases, the approach which generally had been adopted was to produce advices which may be relevant, but seek an order for confidentiality under section 35(2) so that they are not disclosed to an applicant.

It is relatively easy to understand why the Tribunal has generally taken the view that legal opinions received by a primary decision-maker should be produced. As the Tribunal stands in the shoes of the decision-maker, there is an obvious logic in the Tribunal being given access to the same advices that were available to the primary decision-maker.

Further, it must be acknowledged that since the amendment to section 37(1)(b) and the introduction of an objective test, it is necessarily more difficult to sustain an argument that a legal opinion which was taken into account by a decision-maker is not relevant, in a broader sense, to the decision under review.

These issues were considered by Deputy President Forgie in *Re VBN and Australian Prudential Regulation Authority* [2005] AATA 1060, a decision handed down in late 2005 and which subsequently went by way of judicial review before Justice Ryan in the Federal Court *Australian Prudential Regulation Authority v VBN* (2005) 88 ALD 403.

## APRA v VBN

The applicant, VBN, had sought review in the AAT of a decision by APRA to disqualify VBN from being a trustee, investment manager, or custodian of a superannuation entity. During the proceedings before the Tribunal, VBN sought an order requiring APRA to produce 10 categories of documents, including all legal

advices and other documents which might be subject to legal professional privilege whether obtained before or after the making of the decision.

The starting point for the issues that arose in the VBN matter is that APRA included in the documents lodged pursuant to section 37(1)(b) a copy of advice from counsel which, apparently, related to the interpretation of the relevant law (the *Superannuation Industry (Supervision) Act*). That advice referred to other legal advices relating to the procedures or processes to be followed by APRA as well as to a draft statement of reasons provided to counsel and what was termed a discussion draft statement of reasons which had been prepared by Counsel. Based on the references to these documents, the applicant sought an order for production of all such advices and documents.

Deputy President Forgie ordered that APRA must lodge and give to the Applicant any legal advice, and instructions given about that legal advice, that related to the interpretation and application of the law relating to the decision under review and which it had in its possession at the time it lodged its documents under s 37(1)(b).

The Deputy President further concluded that APRA was required to lodge copies of any legal advice or relevant instructions that came into its possession or control after that day, although it was not obliged to give them to the applicant.

In her reasons for decision, the Deputy President drew a distinction between the obligations that arise under section 37(1)(b) and section 37(2) of the Act. The Deputy President said in respect of documents lodged under section 37(1) that the obligation under section 37(1AE) is that they must also be provided to the other parties to the proceedings unless, having regard to section 37(1AF), application is made for a confidentiality order under section 35(2).

On the other hand, the Deputy President concluded that where the Tribunal itself ordered the production of documents under section 37(2) such as could occur with advices coming into APRA's possession after it had lodged documents pursuant to section 37(1), there was no similar requirement for such documents to be provided to the other parties.

Having drawn this distinction, the Deputy President went on to conclude that in respect of documents lodged under section 37(1), the Tribunal would not, as a *matter of course*, make a confidentiality order on the basis only that documents were subject to legal professional privilege as to do so would run counter to the express requirements of section 37(1)(b), section 37(1AE) and section 37(3).

On the other hand, if a claim for confidentiality was made in respect of documents lodged pursuant to a direction under section 37(2), the Tribunal may not ignore a claim for legal professional privilege. So that if such a claim was made out, the Tribunal may not order disclosure to any party to the proceeding, other than to the decision-maker.

In the proceedings before Justice Ryan, APRA challenged the distinction drawn by the Deputy President between the obligations arising under section 37(1)(b) and section 37(2) in relation to the obligation to provide documents to another party. APRA submitted that the only source of power for the Tribunal to compel production was under section 37(2) which highlighted the incongruity in the Tribunal deciding not to make a section 35(2) order in respect of the documents which should have been produced under section 37(1), but making such an order in respect of documents to be produced pursuant to section 37(2).

Ryan J agreed with this submission and concluded that the Tribunal had erred in requiring APRA to disclose the advices to be provided under section 37(1)(b) to the other parties without APRA having an opportunity to first invoke section 35(2). Ryan J pointed to the incongruity in the differential approach adopted by the Tribunal when there was no suggestion that the different classes of opinion were any more or less confidential than the other.

APRA also submitted that expressions of legal opinion on question of law are not 'relevant' to a review and so need not be produced. In effect, APRA urged that the Federal Court should reject the reasoning in cases such as *re Fahey*, *re Forsyth* and *re Spicer Axle*. Alternatively, APRA submitted that only legal advice which was 'before' the decision-maker was required to be lodged.

In answer to these submissions, Justice Ryan concluded that he was prepared to assume that legal advice relating to the interpretation of the law which bears on one of the issues which the decision-maker has to resolve and which was considered by the decision-maker is relevant and this will be so whether the decision-maker acted on, or adopted, the advice or opinion or rejected it.

Importantly however, his Honour concluded that the reach of section 37 does not extend to expressions of legal opinion or advice which may have been available to a decision-maker, but which were not considered in the course of arriving at the challenged decision. His Honour noted that to hold otherwise would oblige a decision-maker to search out copies of every document containing a pertinent expression of legal opinion in the decision-maker's possession or power, even if the existence of the document had not been present to the mind of the decision-maker when making the decision under review. To demonstrate the point, his Honour noted that if the obligation to produce went so wide as expressed by the Tribunal, it would extend to legal texts or journals which had been available to the decision-maker but not consulted by him or her.

It may be noted that Justice Ryan did not extend his description of legal opinions which may be relevant for the purposes of section 37 to include opinions obtained after the primary decision was made. Further, the orders which his Honour made had the result of sending the matter back to the Tribunal for the directions to be re-made, and in doing so, his Honour observed that there would be an opportunity for

the Tribunal to re-cast the directions so that they would catch only advices which were provided in connection with the making of the decision.

## **Conclusion**

### ***What follows from this decision?***

Justice Ryan was prepared to accept that legal advices which bear on an issue which a decision-maker had to resolve in making a decision, and which were considered by the decision-maker, are relevant for the purposes of section 37. Although his Honour's remarks in this regard were not expressed in definitive terms, they carry considerable persuasive weight and should not be ignored.

It would appear that legal opinions which were not provided in connection with the making of a decision, in the sense of being before, and considered by, the decision-maker, are not required to be produced.

The sole source of power for the Tribunal to compel production pursuant to section 37 is found in section 37(2). One consequence of this is that irrespective of whether a legal opinion is produced pursuant to section 37(1)(b) or in answer to a direction made under section 37(2), the decision-maker may seek a confidentiality order pursuant to section 35(2) to prevent disclosure to another party.

In considering whether to make such an order, the Tribunal must take into account any claims for legal professional privilege.

Documents, including legal advices, which relate to the process followed by a decision-maker will not normally be considered 'relevant' to the merit review process engaged in by the Tribunal, and so will not normally need to be produced pursuant to section 37. On this basis, documents such as draft statements of reasons, including discussion drafts prepared by legal advisers, may not be relevant to the Tribunal's task of undertaking merits of review. One important qualification to this is that to the extent that such documents contain legal advice as to the law to be applied or followed, such advice may be relevant and so will need to be produced.

## **4. LITIGATION PRIVILEGE IN THE AAT**

The final part of this paper concerns some recent decisions which discuss whether so-called 'litigation privilege' is available in the AAT.

### **Ingot Capital Investments**

The issue of whether litigation privilege applies in the AAT was considered, rather surprisingly, in the Supreme Court of New South Wales in *Ingot Capital Investments Pty Limited and Ors v Macquarie Equity Capital Markets Limited and Ors* [2006] 67 NSWLR 91.

The background to this decision is an action brought by a sub-underwriter for the issue of convertible notes by a reinsurance company which subsequently failed. Some way into the proceedings, one of the defendants sought an order for access to documents produced on subpoena by an expert who had been retained by former executives of another reinsurance company in the context of AAT proceedings brought by those executives to seek review of a decision by APRA to disqualify them as directors or senior managers of a general insurance company.

The former executives asserted privilege over the material produced by the expert on the basis that they were communications between the executives' lawyers and a third party, being an expert, for the dominant purpose of providing legal advice to the executives in relation to the AAT proceedings. Importantly, only litigation privilege was claimed over the documents, although at least in respect of some of the categories, it is possible that advice privilege may have applied.

Justice Bergin found that as the laws of evidence do not apply in the AAT, such proceedings are not 'proceedings' for the purposes of the client legal privilege provisions of the New South Wales *Evidence Act*. Accordingly, the question was whether common law litigation privilege applied to AAT proceedings.

Justice Bergin concluded that the fact that AAT proceedings contemplate legal representation is not, taken alone, sufficient to attract litigation privilege.

Secondly, her Honour accepted that the AAT had statutory authority to determine issues in a legally binding way, but noted that there were many other bodies empowered to make decisions that are legally binding on individuals, such as the Australian Taxation Office. Accordingly, her Honour said that this criterion alone was not a proper basis upon which litigation privilege should be extended to AAT proceedings.

Her Honour noted that the fact that legal representation is contemplated in the AAT does not mean that the proceedings are adversarial and that it was important to consider the functions and powers of the AAT in determining whether proceedings before it are adversarial. Her Honour then referred to the very well known passages from the decisions in *McDonald v Director-General of Social Security* (1984) 1 FCR 354 and *Bushell v Repatriation Commission* (1992) 175 CLR 408 to the effect that although there was the outward appearance of the adversary system applying to the AAT, in truth the notion of onus of proof, which plays so important a part in fact finding in adversarial proceedings, plays no part in proceedings before the AAT.

Her Honour concluded that these observations were at odds with Dawson J's observations in *Waterford*. Her Honour pointed out that *Waterford* was decided only shortly after the establishment of the AAT and concluded that the observations in *McDonald* and in *Bushell* were more persuasive as to the nature of proceedings before the Tribunal. Her Honour concluded that proceedings in the AAT are not adversarial.

Her Honour said she was further bolstered in this conclusion by reference to the recently inserted s.33(1AA) of the *AAT Act* (which is a statutory recognition of the obligation of a decision-maker to assist the Tribunal). Her Honour found further support in the notion that the AAT stands in the shoes of the decision-maker and can inform itself as it deems fit and can go beyond submissions put to it by those appearing before it and otherwise inquire into matters as it sees fit.

On this basis, her Honour concluded that the common law litigation privilege should not be extended to AAT proceedings.

### **Farnaby and Military Rehabilitation and Compensation Commission**

Approximately a year later however, the Tribunal itself grappled with this question in *Farnaby and Military Rehabilitation and Compensation Commission* (2007) 97 ALD 788, a decision of President Downes and Deputy President Groom.

The substantive application before the Tribunal involved a claim for compensation under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) arising out of the applicant's service in the Royal Australian Navy. The issue the subject of the Tribunal's decision however arose when the respondent sought access to correspondence between the applicant's solicitors and a medical practitioner. In legal terms therefore, the issue before the Tribunal was whether proceedings before the Tribunal attract common law litigation privilege.

In determining that question, the Tribunal had regard to a number of practical and legal considerations, as well as the nature of proceedings in the AAT, the relevant authorities and the rationale for legal professional privilege. The Tribunal noted that, if litigation privilege did not apply in the Tribunal, some anomalies would result. For example, the Tribunal noted that:

Tax payers may elect to challenge a taxation assessment in the Federal Court of Australia or in the Tribunal. Litigation privilege will apply to an application for review in the Federal Court. If litigation privilege does not apply in the Tribunal, the question of whether the privilege arises would depend upon which alternative is chosen. Even worse, because litigation privilege applies to anticipated proceedings, if a tax payer elected to appeal to the Tribunal, privilege would be attracted by correspondence relating to whether and to which body the tax payer might appeal, but not to the appeal itself<sup>11</sup>.

The Tribunal also expressly referred to the reasoning of Bergin J in *Ingot*. However it commented that it did not find some aspects of Her Honour's analysis particularly useful. In particular, the Tribunal observed that attempts to characterise Tribunal proceedings as either 'inquisitorial' or 'adversarial' were of limited assistance, stating:

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<sup>11</sup> At [11].

We think it more useful to look at the proceedings themselves and enquire whether they carry features that warrant the recognition of privilege, rather than to strive for a label and then to attribute consequences to the label. That process runs the risk of promoting form over substance<sup>12</sup>.

The Tribunal went on to conclude that the most important feature to be considered was the fact that the Tribunal makes decisions which affect people's rights<sup>13</sup>. The Tribunal also referred to a number of aspects of Tribunal proceedings which parallel litigation in courts.

The Tribunal also referred in some detail to the decision of the High Court in *Waterford*. The Tribunal placed particular reliance upon the statement of Dawson J (at CLR 101):

The concept of litigation for the purpose of the doctrine of legal professional privilege is, I think, wide enough to embrace the proceedings before the Tribunal which were conducted upon adversary lines and contemplated legal representation. Communications for the purpose of giving and receiving legal advice in relation to those proceedings fell, in my view, within the privilege. For the reasons which I have already given, the fact that advice of that kind was given by salaried employees did not preclude reliance upon the privilege.

They also placed reliance upon aspects of the judgment of Mason and Wilson JJ, concluding that, in their view, the comments of the Court went beyond advice privilege and had the effect of endorsing the existence of litigation privilege in the context of proceedings in the AAT.

The Tribunal concluded accordingly that they were bound by *Waterford* to conclude that litigation privilege applies in the Tribunal. They also stated however that they would independently have come to that conclusion, if the issue had not been the subject of binding authority. In reaching that conclusion, the Tribunal also made reference to the rationale for legal privilege noting that 'the principle appears to be found in wider considerations such as the public interest in enhancing the administration of justice and in protecting freedom of communication'. Accordingly, 'it does not depend upon a narrow characterisation of the proceeding with respect to which a document was prepared'.

### **Comcare v Foster**

Also relevant in this context is the decision of Justice Greenwood of the Federal Court in *Comcare v Foster* (2006) 150 FCR 301, which involved an appeal from an AAT decision in relation to a request under the *Freedom of Information Act 1982* (*Cth*). The documents the subject of the decision included documents over which Comcare claimed advice privilege and/or litigation privilege. Although his Honour did not expressly address the issue, his decision proceeded on the basis that litigation

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<sup>12</sup> At [16].

<sup>13</sup> At [20].

privilege does apply in the AAT. Interestingly, this decision was not referred to in either *Ingot* or *Farnaby*.

## Conclusion

### ***What are the implications of these cases?***

At least for the purpose of proceedings in the Tribunal, the Tribunal's decision in *Farnaby* has restored the position which was generally understood to exist prior to *Ingot*, that is, that litigation privilege does apply in the Tribunal. That position is reinforced by the Federal Court's decision in *Foster*. As observed by other commentators however, at present it appears that a claim for privilege over material relating to an AAT proceeding could not be maintained in the Supreme Court of NSW<sup>14</sup>.

Section 33(1AA) of the AAT Act also raises a further issue in the case of documents held by Commonwealth parties. Section 33(1AA) obliges decision makers to assist the Tribunal. While s 33(1AA) does not explicitly override legal professional privilege, the AAT has apparently taken the view that s 33(1AA) abrogates the privilege by necessary implication. The recently issued AAT Guide to the Workers' Compensation Jurisdiction, which took effect from 30 April 2007, states, at paragraph 2.3, that:

The Tribunal is required to make the correct or preferable decision in relation to an application. It will be assisted in this task by having all relevant material available to it. Consistently with subsection 33(1AA) of the *Administrative Appeals Tribunal Act 1975*, the respondent must lodge with the Tribunal all reports that it has obtained whether or not they are favourable to the applicant.

The AAT Guide to the Social Security Jurisdiction, which took effect on 19 May 2008, contains an almost identical paragraph, at section 3.3 of the Guide.

This suggests that even if legal advice privilege does attach to an expert report obtained by a Commonwealth respondent, the Tribunal could compel its production. However that proposition sits somewhat uncomfortably with the Tribunal's comments on abrogation in *Farnaby*. There, the Tribunal stated (at [36]):

We recognise that the legislature can abrogate the privilege by clear terms in a statute. Dawson J referred to this in *Baker v Campbell* (1983) 153 CLR 52 at 122 ; 49 ALR 385 at 438 as follows:

*And if the privilege does extend beyond judicial proceedings to administrative inquiries, the question is not whether the legislature has power to abrogate the privilege by appropriate legislation; clearly it has ... It is merely whether the legislature has done so, having regard to the rule which requires the general words of statutes to be construed, if possible, so as not to effect an alteration of common law doctrines or a denial of common law rights.*

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<sup>14</sup> Anthony Le Surdo and David Richardson in *Australian Banking and Finance Law Bulletin*, Vol 24, No 1, May 2008, at p.12.

Kirby J has said any abrogation of legal professional privilege has to be 'made plain because of the high public interest which the privilege defends': *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 502 ; 141 ALR 545 at 546–7 ; [1997] HCA 3. See also *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 553, 562, 576, 591 562 and 576 ; 192 ALR 561 at 565, 572–3, 583–4, 595–6 ; 43 ACSR 189 at 93, 200–1, 212, 223–4 ; [2002] HCA 49.

There would appear to be a reasonable argument available that s 33(1AA) does not 'abrogate the privilege by clear terms'.

It remains to be seen whether this view of s 33(1AA) will prevail if challenged. In any event, agencies should certainly consider the obligation contained in s 33(1AA) in determining whether to claim privilege over an unserved expert's report.

## **CONCLUSION**

The cases discussed in this paper lead to the following position:

Implied waiver of privilege in an advice given to a decision maker is more likely to arise if the *contents* rather than the *fact* of advice are placed in issue. Even where the contents of an advice are put in issue however, where no unfairness results from this, privilege may be upheld.

Advice which is relevant to the meaning and application of the relevant law may need to be produced under s 37 AAT Act if it was considered by the decision maker. Advice which was available to the decision-maker but not considered need not be produced. Generally, advice as to the procedure to be followed by the decision maker need not be produced.

At least for the purposes of proceedings in the AAT, litigation privilege applies. Whether and to what extent this is abrogated by s 33 (1AA) of the *AAT Act* remains unclear.

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