

WHITHER THE COMMON LAW PRIVILEGES: VALE CLIENT PRIVILEGE IN TAX INVESTIGATIONS?

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Legal professional privilege is a long established common law doctrine serving to protect the confidentiality of certain communications between a client and legal adviser. Although there has always existed a degree of tension surrounding the conflict created by the privilege between competing public interests, conventional wisdom has suggested that abrogation of the privilege requires clear legislative direction, with no option for judicial abrogation of such a deeply entrenched doctrine.

While in the past courts have traditionally acted to preserve and even expand the scope of the doctrine, there has arguably been an emerging trend for courts to be more readily prepared to find an implied exclusion of professional privilege.

In taxation law, the wide access and information powers provided to the Commissioner have typically been seen as subject to professional privilege. However recent judicial comment has potentially created uncertainty as to the availability of professional privilege in tax bureaucratic investigations.

This article reviews the path taken in the development of professional privilege in Australia, and questions whether the trend for courts to find an implied exclusion of the privilege should potentially cause concern as to the future of professional privilege as a defence against administrative investigations.

I INTRODUCTION

In March 2001, Sundberg J handed down the decision in the Federal Court case of *ANZ Banking Group Ltd v Deputy Commissioner of Taxation*¹ concerning the validity of a s 264 notice issued by the Federal Commissioner of Taxation, a notice under s 264 essentially requiring a taxpayer to provide the Commissioner with information. While the decision itself may have been unremarkable, a notable point related to the obiter comments made by his Honour with respect to the availability of legal professional privilege which, until this time had been presumed to be available in relation to s 264 notices. His Honour suggested that, had the matter of legal professional privilege been argued before him, he would have found, following the reasoning in *ACCC v Daniels Corporation International*,² that s 264 notices were not subject to legal professional privilege.

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¹ (2001) 46 ATR 451.

² [2001] FCA 244 ('Daniels').

In the light of the potential for uncertainty created by these comments, the purpose of this paper is to examine the current standing of legal professional privilege as a bulwark against the encroaching investigatory powers of the administrative arm of the executive, as represented by the ATO in relation to tax investigations.

As a background to the main discussion, the first part of the paper outlines the nature and purpose accorded to legal professional privilege, and the circumstances which limit access to the privilege.

Some of the significant developments in the Australian common law history of the privilege are outlined, providing a potted history of the trends in the judicial determinations of the status and scope of professional privilege. The paper addresses the question of whether the strictures arguably being placed on professional privilege may amount to a judicial incursion in a legislative domain, albeit with legislative acquiescence. In particular, the decision in *Daniels* is examined in considering whether the Full Federal Court was compelled to the decision to deny professional privilege, or whether an alternate construct was available.

By way of a prelude to the examination of the application of professional privilege in taxation investigations, the scope of the investigatory powers available to the ATO is outlined. Given the reliance placed by Sundberg J in *ANZ Banking* on the reasoning in *Daniels*, the paper questions whether this reasoning should be imported to deny professional privilege as an answer to the investigatory powers granted under the tax statutes.

II NATURE AND DEVELOPMENT OF LEGAL PROFESSIONAL PRIVILEGE

Legal professional privilege is one of a number of common law privileges which permit the non-disclosure of information under certain limited circumstances. At its most basic, legal professional privilege may be seen as operating to keep confidential the communication between a lawyer and client in circumstances where that communication has occurred for reasons which are accepted as generating the requirement for confidentiality.

The privilege may be seen as being operable at two levels, firstly maintaining confidentiality of legal advice in relation to litigation or anticipated litigation (litigation privilege), and secondly encompassing a broader application whereby the privilege would protect all legal advice, whether or not in anticipation of litigation (advice privilege).

A recent authoritative statement of legal professional privilege casts it as

... the shorthand description for the doctrine that prevents the disclosure of confidential communications between a lawyer and client, confidential communications between a lawyer and third parties when they are made for the benefit of a client, and confidential material that records the work of a

lawyer carried out for the benefit of a client unless the client has consented to the disclosure.³

The crux of the privilege is that it applies to the communication between the lawyer and client, as observed by Kirby J in noting that '[i]t is not the documents, as such, which attract the privilege, still less the information within them. It is the communication to and by the lawyer.'⁴

In tracing the historical development of legal professional privilege, there are five broad incarnations that may be identified.

The doctrine, in its original form of a pledge, had its rationale in the professional obligation built on the oath and honour of the attorney, as a gentleman in the professional relationship with his client, to preserve the secrecy of the client's confidences.⁵

From these beginnings the doctrine became established by the Courts of Chancery '... by successive steps'.⁶ The principle underlying the privilege concerned the general preservation of confidentiality between lawyer and client, such confidentiality serving justice by encouraging the seeking and giving of legal advice and legal assistance in the conduct of affairs. This was the case regardless of whether the privileged advice was in regard to the particular legal proceedings for which the communication was made or, for that matter, any legal proceedings to which the person was a party.⁷

The doctrine was premised on the principle of serving the interests of justice as illustrated in the often quoted passage from Lord Brougham LC in *Greenough v. Gaskell*.⁸

... it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.

The significance attached to the doctrine was such that it overrode the requirement for full disclosure in the search for truth. That such was the case was highlighted by Lord Langdale MR, in suggesting that:

The unrestricted communication between parties and their professional advisers, has been considered to be of such importance as to make it advisable

³ *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 550 (McHugh J).

⁴ *Ibid* 585 (Kirby J).

⁵ See for example *Baker v Campbell* (1983) 153 CLR 52, 126-7 (Dawson J).

⁶ *Minet v Morgan* (1873) 8 Ch App 361, 366 quoted in *O'Reilly v The Commissioners of the State Bank of Victoria* (1982) 153 CLR 1, 22.

⁷ *Above n 5*, 114 (Deane J).

⁸ 1 My. & K. (1833), 103 in *Baker v Campbell n 5*, 77.

to protect it even by the concealment of matter without the discovery of which the truth of the case cannot be ascertained.⁹

Continuing its development by successive steps, the doctrine progressed from serving the interests of justice to take on the broader and more significant role of being in the public interest generally. This greater scope would seem to be predicated upon, and have grown from, the doctrine seeking to attest that the interests of justice and the greater public interest are co-existent and inextricable, and so by serving the one the doctrine automatically contributed to the other.

In the Australian context, this underlying principle of promoting the public interest was expressed in the case of *Grant v Downs*,¹⁰ with the judgement outlining the rationale for the manner in which the privilege served the public interest. The judgement suggested that legal professional privilege operated in the public interest as it assisted and enhanced the administration of justice by means of facilitating the representation of clients by legal advisers

...[t]he 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.¹¹

That the public interest was served by legal professional privilege was emphasised by Wilson J in the seminal High Court decision in *Baker v Campbell*¹² in suggesting that:

The multiplicity and complexity of the demands which the modern state makes upon its citizens underlines the continued relevance of the privilege to the public interest. The adequate protection according to law of the privacy and liberty of the individual is an essential mark of a free society and unless abrogated or abridged by statute the common law privilege attaching to the relationship of solicitor and client is an important element in that protection.

It is not only a matter of protection of the client. The freedom to consult one's legal adviser in the knowledge that confidential communications will be safeguarded will often make its own contribution to the general level of respect for and observance of the law within the community.¹³

These arguments suggested that the public interest was best served by a legal system which encouraged freedom of communication between client and legal adviser, with professional privilege acting to ensure that clients would be comfortable in making full disclosure to their legal advisers.

However a competing view suggested that the public interest would be better served by a requirement for full disclosure of all relevant information for the determination of a dispute, thus denying a role for professional privilege, as all

⁹ *Reece v Trye* (1846) 9 Beav 316, 319; quoted in *Baker v Campbell* n 5, 115.

¹⁰ (1976) 135 CLR 674.

¹¹ *Ibid* 685 (Stephen, Mason & Murphy JJ).

¹² *Above* n 5.

¹³ *Ibid* 95 (Wilson J).

relevant details would be a matter of public record. The suggestion had been proffered that legal professional privilege did little, if anything, to promote full and frank disclosure, and that the privilege made it more difficult to test the veracity of a party claiming privilege, with this view seeing legal professional privilege as little more than '... an impediment, not an inducement, to frank testimony, and it detracts from the fairness of the trial ...'.¹⁴

Arguments for this latter view raised doubt as to the extent to which professional privilege encouraged and promoted candour between clients and legal advisers. Even if professional privilege engendered such candour, the extent to which the privilege advanced the public interest, and whether the public interest served by full disclosure of a client to their legal adviser outweighed the competing public interest of determining litigation in the light of the full disclosure of relevant materials, had been questioned.¹⁵

Mason J (as he then was) cautioned against an expanded scope for the privilege, suggesting that '...it is by no means self-evident that the value of this public interest [candour by the client] is greater than the public interest in facilitating the availability of all relevant materials for production in litigious disputes.'¹⁶

The court recognised the existence of these competing public interests, but from an early stage accorded to legal professional privilege '... paramouncy ... 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.'¹⁷ The pre-eminence of legal professional privilege continued to be affirmed, with 'the public interest in the "perfect administration of justice" ... accorded paramouncy over the public interest that requires, in the interests of a fair trial, the admission in evidence of all relevant documentary evidence.'¹⁸

Despite the reservations, the principle seemingly continued to expand in scope and significance from the role of serving the interests of justice and thus the public interest, to adopting the mantle of a bastion for the individual against the excesses of government. As expressed by Deane J

. That general principle [of client 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 on the demand of any administrative officer with some general statutory authority to obtain information or seize documents.¹⁹

¹⁴ Above n 10, 686 (Stephen, Mason & Murphy JJ).

¹⁵ *O'Reilly & Ors v Commissioners of the State Bank of Victoria & Ors* (1982-1983) 153 CLR 1 26 (Mason J).

¹⁶ Above n 5, 74 (Mason J in dissent).

¹⁷ Above n 10, 685.

¹⁸ *Waterford v The Commonwealth* (1986 - 1987) 163 CLR 54, 64-5 (Mason & Wilson JJ).

¹⁹ Above n 5, 120 (Deane J).

From protecting citizens from an intrusive and pervasive state, one view would see legal professional privilege as having continued its evolution and having adopted the mantle of a fundamental human right. In other common law jurisdictions, client privilege has been described in terms of being 'a necessary corollary of fundamental, constitutional or human rights',²⁰ with the principle being based on 'a strong sense that any person charged or in peril of a charge has a fundamental human right to professional advice - which may not be effectively given if facts are withheld'.²¹

Whether the privilege in its role as a fundamental human right encompasses its operation in other than a judicial or quasi-judicial setting, extending to cover communications in an investigative circumstance, is not clear. It is suggested that there exists a stronger case for the privilege being accepted as a fundamental human right in circumstances involving legal proceedings, rather than in a situation involving investigative activities.

On this view, the evolutionary path of legal professional privilege under the common law has seen what initially developed from gentlemen retaining a confidence to blossom into nothing short of a fundamental human right. Given this evolutionary path, professional privilege carries a significance and weight which, in the absence of legislative protection, would suggest the requirement for a great degree of vigilance by the judiciary in preserving and protecting such a privilege.

III Limitations on the privilege

Despite the significance which may appear to have been attached to the privilege, its operation is not without limitation, and there are circumstances which fall outside the scope of professional privilege. The major exceptions to its operation arise in circumstances where the privilege can be shown to have been waived by the client, or where the legal advice sought or given had as its purpose the committing or furthering of a crime or fraud.²² Additionally the privilege may be abrogated entirely by legislative decree.

Because the privilege is that of the client, the privilege can be waived only by the client and not by the legal representative. Waiver by the client may be express or implied, with an implied waiver being evidenced by the direct disclosure of otherwise protected material, or where some conduct on the privilege holder's part would make it unfair to maintain the privilege.²³

The concept of waiver has been found to be 'a vague term, used in many senses ... that ... often requires further definition according to the context.'²⁴ Express

²⁰ *A M & S Europe v Ltd v Commission of the European Communities* [1983] QB, 941; quoted in *Baker v Campbell*, above n 5, 85 (Murphy J).

²¹ *Reg. v Uljee* [1982] 1 NZLR 561, 569; quoted in *Baker v Campbell*, above n 5, 85 (Murphy J).

²² See *Perron Investments Pty Ltd & Ors v DFCT* 89 ATC 5038, 5058.

²³ *Attorney General (NT) v Maurice* (1986) 161 CLR 475, 487-88 (Mason and Brennan JJ).

²⁴ *Mann v Carnell* [1999] HCA 66, para 28 (Gleeson CJ, Gaudron, Gummow and Callinan JJ).

waiver involves direct disclosure by the client or, with authority, the legal adviser.

Implied or imputed waiver is a more nebulous concept which has been the subject of judicial consideration. The test for implied waiver applied by the High Court in *AG(NT) v Maurice* looked to the concept of fairness, with a waiver implied when it would be unfair to withhold privileged material. However in *Mann v Carnell*, the majority found that while considerations of fairness could inform the decision as to whether there had been waiver, imputed waiver would arise where there had been inconsistency between client conduct and the maintenance of confidentiality under privilege. Accordingly, the test for imputed waiver would look to whether '... particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect ... not some overriding principle of fairness operating at large.'²⁵

When waiver has occurred, the consequence is not to render privileged communication unprivileged, but to make the client subject to normal disclosure requirements.²⁶

With the public interest lying at the heart of legal professional privilege, any communication made in furtherance of an illegal purpose²⁷ or fraud²⁸ will not be privileged, as the public interest is based on the proper administration of justice. If a client is engaged in fraudulent conduct, communication with their legal adviser in furtherance of the fraud cannot be privileged whether or not the solicitor is a party to the fraud, as 'the public interest is best served in extending the limitation on the reach of client legal privilege to cover cases of fraud by third parties.'²⁹

While termed exceptions to the doctrine, these latter circumstances may be seen as more in the nature of exclusions from the scope of legal professional privilege, being 'directed to circumstances in which the privilege does not attach, with the result that the particular communication or document is not protected by legal professional privilege at all.'³⁰

That this view is to be preferred is supported by having regard to the underlying rationale for the privilege. If it is accepted that the privilege exists to serve the interests of justice as part of the greater public interest, then there would be no scope for application of the privilege in circumstances which sought to undermine or circumvent the interests of justice. Given that communications in furtherance of an illegal purpose or for the purpose of fraud, by their very nature,

²⁵ Ibid para 29.

²⁶ *Re Stanhill Consolidated Ltd* [1967] VR 749, 750

²⁷ See *R v Bell; Ex parte Lees* (1980) 146 CLR 141.

²⁸ "fraud in this connection is not limited to the tort of deceit and includes all forms of fraud and dishonesty"; *Attorney General (NT) v Kearney* (1985) 158 CLR 500, 525 (Wilson J quoting Goff J in *Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd* [1972] Ch 553, 564-5). More recently, see North J in *Clements, Dunne & Bell Pty Ltd v Commissioner of Australian Federal Police* (2001) 48 ATR 650, finding that client privilege does not extend to documents brought into existence to further an illegal or improper purpose.

²⁹ *Clements, Dunne & Bell Pty Ltd v Commissioner of Australian Federal Police* (2001) 48 ATR 650, 698 (North J).

³⁰ *Carter v Managing Partner Northmore Hale Davy & Leake* (1994 - 1995) 183 CLR 121, 134-5 (Deane J).

act to undermine justice and the public interest, of necessity they must fall outside the purview of the privilege. On this basis, communications relating to such activities will not potentially attract the privilege and then become exceptions. Rather, they will, from the start, be excluded from the potential scope of the operation of professional privilege.

IV LEGISLATIVE ABROGATION OF THE PRIVILEGE

The legislature alone, and not the judiciary, has traditionally been vested with the power to abrogate legal professional privilege. Even Mason J (as he then was), who consistently maintained that the privilege should be closely confined and given only limited application, acknowledged that the privilege was entrenched in the legal milieu to such an extent that it could not be 'abolished by a flourish of the judicial pen'.³¹

The suggestion has always been that legislative abrogation of the privilege must be done clearly and unequivocally. In regard to such legislation, Deane J suggested that it had become a settled rule of construction that general provisions of a statute only be read as abrogating common law principles or rights to the extent made necessary by express words or necessary intentment, and '[i]t is to be presumed that if the Parliament intended to authorize the impairment or destruction of that confidentiality by administrative action it would frame the relevant statutory mandate in express and unambiguous terms'.³²

In a similar vein, Dawson J suggested that:

In the interpretation of statutes there is a presumption that there is no intention to interfere with basic common law doctrines unless the words of the statute expressly or necessarily require that result. ... Legal professional privilege ... is clearly a doctrine which falls within the presumption.³³

If there is a legislative intention to override legal professional privilege, the onus is on the legislature to clearly state this.

There can be little room for argument when a privilege is abrogated by express terms, the difficulty generally arising in the determination of whether abrogation is implied by legislation. However, because there have been limited examples of express legislative abrogation of a privilege, much judicial attention has been given to the principles of statutory interpretation in determining if there is implied abrogation of a privilege.

In the interpretation of a statute by the courts to decide whether the privilege is impliedly excluded, 'much depends on the language and character of the provision and the purpose which it is designed to achieve'.³⁴

³¹ Above n 15, 26 (Mason J).

³² Above n 5, 116-7 (Deane J).

³³ *Ibid* 123.

³⁴ *Pyneboard Pty Ltd v Trade Practices Commission; Dunlop Olympic v Trade Practices Commission* (1982-1983) 152 CLR 328, 341 ('Pyneboard').

In looking to the role of the judiciary in the interpretation of whether legislation abrogates legal professional privilege, the clear implication from a series of decisions has been that the privilege is not one to be lightly dismissed by the judiciary. The suggestion has been that '[a]s a head of privilege legal professional privilege is so firmly entrenched in the law that it is not to be exorcised by judicial discretion.'³⁵ This view was echoed in *Baker v Campbell* with Wilson J suggesting that 'it is for the legislature, not the courts, to curtail the operation of common law principles designed to serve the public interest.'³⁶

However, the use of statutory construction to determine the intention of the legislature has itself been questioned, being described as 'somewhat of a fiction',³⁷ with intention being seen as a 'very slippery phrase, which ... may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it.'³⁸

Given the significance accorded judicial interpretation in the face of legislative uncertainty as to abrogation of the privilege, the following discussion reviews some of the characteristics of legislation which create uncertainty, and some of the tenets of statutory interpretation to which the judiciary have recourse in applying this legislation.

A General terms in a statute

Some difficulty appears to arise as to whether there is an implied intent to abrogate privilege when legislation is drafted in general terms. There would appear to be two dichotomous views in approaching the interpretation of such provisions.

On one view, legislation would not be interpreted as abolishing basic common law rights and privileges unless the legislation displayed a clear contrary intention, and '[t]he application of this rule may require the reading down of the literal meaning of general words in an enactment.'³⁹ On this approach, unless there is a clear statement, the courts should be wary of finding implied intentions, and indeed the provision should be read down so as to avoid any such implication, the view being that 'if the legislature were to see the need to achieve that result [curtail the privilege] it could do so by express words, but the Court should not assist that result by reading that intention into the general words of the statute.'⁴⁰

The alternative construct would suggest that a common law privilege could be impliedly excluded if the investigative power providing for the requiring of answers, provision of information, or production of documents was expressed in

³⁵ Above n 10, 685.

³⁶ Above n 5, 96.

³⁷ *Mills v Meeking* (1989 - 1990) 169 CLR 214, 234 (Dawson J).

³⁸ *Salomon v Salomon & Co* [1897] AC 22, 38 quoted in *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 339 (Gaudron J).

³⁹ *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 346-7 (McHugh J).

⁴⁰ Above n 5, 123 (Dawson J).

general terms, and the character and purpose of the provision was such that the obligation was not intended to be subject to any qualification.⁴¹

On this view, the approach adopted would seem to suggest that if general words are used in a provision, rather than construing the provision to determine if there is an implied abrogation of a privilege, such implication will be presumed unless the overall purpose of the legislation was such that the investigatory power was subject to qualification. In the absence of any express or implied qualification on the power granted, that power would not be constrained by legal professional privilege.

B Ambiguity of statutory language

A second area of tension in determining whether a statute impliedly abrogates a privilege arises when the statute contains any ambiguity.

Abrogation of a privilege requires clear and unambiguous terminology, and if there is any ambiguity or doubt which may affect a fundamental privilege, the presumption must be that Parliament intended to give effect to the fundamental principle, rather than have the words of the statute given their widest meaning.⁴²

In support of this,

In the interpretation of statutes there is a presumption that there is no intention to interfere with basic common law doctrines unless the words of the statute expressly or necessarily require that result. ... Legal professional privilege ... is clearly a doctrine which falls within that presumption. The not dissimilar privilege against self-incrimination is not to be abrogated by statute except in the clearest terms⁴³.

C Investigatory power

The suggestion was noted earlier that there may be an implied exclusion of a privilege when a statute, expressed in general terms, imposes an obligation to provide information. Further, this would be so

...[W]hen the object of imposing the obligation is to ensure the full investigation in the public interest of matters involving the possible commission of offences which lie peculiarly within the knowledge of persons who cannot reasonably be expected to make their knowledge available otherwise than under a statutory obligation. ... notwithstanding that the answers given may be used in subsequent legal proceedings.⁴⁴

⁴¹ Above n 34, 341 (Mason ACJ, Wilson and Deane JJ)..

⁴² Above n 5, 104 (Brennan J).

⁴³ Ibid 123 (Dawson J).

⁴⁴ Above n 34, 341.

If an obligation to provide information impliedly abrogates legal professional privilege, the question arises as to whether the nature of the investigation has any bearing on this implied abrogation. In *Pyneboard*, it was considered in the joint judgement that:

if the object of imposing the obligation is to enable an authority or agency to ascertain whether an offence has been committed or a statutory provision has been contravened then it is reasonable to conclude that the privilege ... has been impliedly, if not expressly, excluded by the statute.⁴⁵

In the same case, Brennan J (as he then was) adopted what may appear to be a narrower approach, looking not to whether the privilege applied generally to a statutory obligation to furnish information or to produce documents in judicial proceedings, but to the more restrictive question of whether the privilege applied when the statute imposed an obligation to furnish information or to produce documents when required by a law enforcement agency 'in aid of an investigation by it into contraventions of the law.'⁴⁶

A significant underlying rationale for limiting the scope of legal professional privilege in the face of investigatory powers has been the belief that use of the privilege would act to hamper any investigation.⁴⁷

V DEVELOPMENT AND SCOPE OF PROFESSIONAL PRIVILEGE

It is not intended in this paper to chart in detail the development and application of legal professional privilege in the Australian context. Rather, significant steps in the evolution of the scope of legal professional privilege are highlighted so as to highlight any trends in the development of the doctrine in the Australian context.

The development of the common law in relation to legal professional privilege in Australia continues as a gradual process by 'successive steps.'⁴⁸ Development of case law in regard to the application of professional privilege in Australia over the last twenty-five years appears to demonstrate general judicial endorsement for the privilege, allowing it to serve the public interest and protect individuals. The application of the privilege would seem to have been enhanced, with a wider scope and more attainable threshold conditions. The path followed in this strengthened role for legal professional privilege is outlined below.

Of more recent times, however, there may be indications that the privilege has passed its zenith and is now on a path of decline, with later discussion considering whether this decline in legal professional privilege is more perceived than real.

⁴⁵ *Ibid*, 341.

⁴⁶ *Ibid* 355.

⁴⁷ Above n 39, 333 (Dawson J).

⁴⁸ Above n 6, 366.

A Purpose test

The broadening of the scope of the doctrine is illustrated by those cases which determined the threshold qualifying test to attract the privilege. In *Grant v Downs*⁴⁹ a majority of the High Court determined that the threshold test for legal professional privilege was the sole purpose test, the view being that:

[U]nless the law confines legal professional privilege to those documents which are brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings the privilege will travel beyond the underlying rationale to which it is intended to give expression.⁵⁰

Of note in this case is the dissenting judgement of Barwick CJ, who envisaged the need for a lower threshold to attract the operation of the doctrine, finding that the creation of a document for a dominant purpose of obtaining legal advice, or for use in the conduct of litigation, should be sufficient to attract the privilege.

The sole purpose test created a heavy onus, and it may be that in recognition of this burden, some following decisions appear to seek to ameliorate the effects of the test while still endorsing it. In their judgement in *Waterford v The Commonwealth*⁵¹, Mason J (as he then was) and Wilson J applied the sole purpose test, but went on to propose that the sole purpose test would still be met even if the legal advice subject to the claim for privilege contained extraneous matter. While it may have been thought that the presence of extraneous matter in a document may tend to suggest some additional purpose other than the sole purpose, the judgement concluded 'that is simply a question of fact to be determined by the Tribunal and its decision on such a question is final.'⁵²

The onerous burden imposed by the sole purpose test survived for twenty-three years before the dissenting judgement of Barwick CJ in *Grant v Downs* gained ascendancy in *Esso Australia Resources Ltd v Federal Commissioner of Taxation*⁵³ when the sole purpose test was replaced by the dominant purpose test. The majority found that the sole purpose test had an 'apparent absoluteness and rigidity',⁵⁴ and the dominant purpose test was to be preferred as 'it strikes a just balance ...and it brings the common law of Australia into conformity with other common law jurisdictions.'⁵⁵

The finding also brought into alignment the common law test and statutory test in Australia, as the *Evidence Act 1995* (Cth) provided that evidence could not be adduced if that evidence would disclose confidential communication between a client and lawyer which had a dominant purpose of providing legal advice to the client.⁵⁶

⁴⁹ Above n 10.

⁵⁰ Above n 10, 688.

⁵¹ Above n 18.

⁵² Above n 18, 66.

⁵³ (1999) 43 ATR 506.

⁵⁴ *Ibid* 521.

⁵⁵ *Ibid*.

⁵⁶ Sections 118 & 119.

The preference for a sole purpose test or a dominant purpose test would appear to be largely a function of the view taken as to which of the competing public interests discussed earlier should take primacy. If the view is taken that the public interest is better served by full disclosure of all relevant material in determining a dispute, the sole purpose test would be preferred, as this test is the more stringent in its requirements and would more readily deny a claim for professional privilege.

The alternative view that the greater public interest is served by maintaining confidentiality of adviser-client communication, in the interests of encouraging recourse to legal advice, supports an argument for the dominant purpose test. The expectation would be that a dominant purpose, with a lower threshold requirement, would be more readily demonstrated than a sole purpose, thus facilitating more claims for professional privilege.

Given that the current Australian orthodoxy favours the latter view of maintaining confidentiality of advice, the better view must be that the dominant purpose test is to be preferred, as it is more in accord with this view of the public interest. With a lower threshold to satisfy, the dominant purpose test allows for legal professional privilege to be more readily available, as the communications attracting the privilege can have purposes other than providing advice. Further, with the privilege being more readily available, it provides a stronger buttress in protecting confidential communications between lawyer and client.

B Nature of proceedings

One of the questions at issue in *O'Reilly v State Bank of Victoria Commissioners*⁵⁷ was the scope of material potentially subject to legal professional privilege, and in particular whether professional privilege was limited to judicial and quasi-judicial proceedings. In finding that the privilege should be confined to judicial and quasi-judicial proceedings, Mason J (as he then was) suggested that the privilege acted as 'an obstacle to the investigation of the truth...(and) ought to be strictly confined within the narrowest possible limits,⁵⁸ and that the policy underlying the doctrine, being to enhance the administration of justice by encouraging freedom of communication between client and solicitor, would not support an extension beyond this.

This strictly confined operation for legal professional privilege lasted less than twelve months, with the decision being reversed in *Baker v Campbell*. In a narrow 4:3 majority, the High Court extended the scope of legal professional privilege beyond the constraints of judicial proceedings to include within its ambit quasi-judicial proceedings. Further, the court suggested that there were

⁵⁷ Above n 15.

⁵⁸ Above n 15, 25 (Mason J quoting Wigmore vol viii, para 2291, 554).

[a]rguments in favour of the view that the privilege should be extended to cases where documents are sought under the authority of a search warrant, or under statutory authority such as that conferred by s 264 of the *Income Tax Assessment Act*, so that the confidentiality which the privilege is designed to protect should be effectively preserved.⁵⁹

Indeed in regard to such documents, the Chief Justice went further, suggesting that the legislature should guarantee privilege in such cases, since 'the time is ripe for Parliament to give consideration to such sections as s 10 of the *Crimes Act* and s 264 of the *Income Tax Assessment Act* with the purpose of at once extending the doctrine of privilege to documents sought under such provisions.'⁶⁰

Also noted was that a denial of privilege at the investigation stage potentially made redundant any claim for privilege in judicial and quasi-judicial proceedings, with Wilson J noting that:

[T]o deny the relevance of a valid claim to legal professional privilege in the face of a search warrant would effectively deny the availability of the privilege in any prosecution that followed. The same is probably true in the case of other forms of legislation which provide statutory authority to extra-judicial measures requiring compulsory disclosure. The very existence of the privilege as providing any significant protection and thereby making its contribution to the public welfare must be threatened unless as a matter of principle the protection extends to all forms of compulsory disclosure.⁶¹

This strong endorsement of professional privilege as a constraint on administrative investigations is particularly relevant in relation to tax investigations discussed later.

C Legal advisers

A further issue for determination by the courts concerned which legal advices would be subject to the privilege, and in particular whether advice from salaried and government solicitors was subject to the privilege.

In determining this issue, regard was had to the view of Lord Denning MR in stating that:

The law relating to discovery was developed by the Chancery Courts in the first half of the 19th century. At that time nearly all legal advisers were in independent practice on their own account. Nowadays it is very different. Many barristers and solicitors are employed as legal advisers, whole time, by a single employer. Sometimes the employer is a great commercial concern. At other times it is a government department or a local authority. It may even be the government itself, like the Treasury Solicitor and his staff. In every case

⁵⁹ Above n 5, 66-7 (Gibbs J).

⁶⁰ *Ibid* 71-2.

⁶¹ *Ibid* 95-6 (Wilson J).

these legal advisers do legal work for their employer and for no one else. They are paid, not by fees for each piece of work, but by a fixed annual salary. They are, no doubt, servants or agents of their employer.... They are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privileges.⁶²

In finding that legal professional privilege extended to salaried and government solicitors, Mason J (as he then was) and Wilson J found no reason to deny legal officers in government employment access to the privilege, it being in the public interest that government decision makers have free and ready confidential access to their legal advisers.⁶³

However, for privilege to be available, the relationship 'must be a professional relationship which secures to the advice an independent character notwithstanding the employment.'⁶⁴

Functions within the ambit of legal professional privilege would include administrative functions of government, as

[t]he growing complexity of the legal framework within which government must be carried on renders the rationale of the privilege ... increasingly compelling when applied to decision makers in the public sector. The wisdom of the centuries is that the existence of the privilege encourages resort to those skilled in the law and this makes for a better legal system.⁶⁵

A restriction imposed by Deane J limited the availability of the privilege to persons who, in addition to any academic or practical qualifications, were listed on a roll of current practitioners, held a current practising certificate, or worked under the supervision of such a person.⁶⁶

From the above discussion the impression would be that the scope of legal professional privilege was being constantly broadened, with the privilege reaching something of a high-water mark in the late 1990s. However, in other cases courts were showing a willingness to find an implied statutory intent to exclude other common law privileges, and the consequences of these decisions had the potential to impact upon the status accorded professional privilege. An early significant decision denying a common law privilege was that in *Pyneboard*.

⁶² *Alfred Crompton Amusement Machines Ltd v Customs & Excise Commisioners [No 2]* [1972] 2 QB 102, 120 quoted in *Waterford* above n 18, 60-61.

⁶³ Above n 18, 62.

⁶⁴ *Ibid*.

⁶⁵ *Ibid* 64.

⁶⁶ *Ibid* 81-2.

VI DECLINE OF COMMON LAW PRIVILEGES

At issue in the case of *Pyneboard* was whether the express legislative abrogation of the privilege against self-incrimination by the relevant section of the *Trade Practices Act* (TPA) carried with it the implied abrogation of the related privilege against exposure to the imposition of a civil penalty.

The availability of a privilege, or its implied abrogation, was considered by Mason ACJ, Wilson and Dawson JJ, when they proposed that there would be a stronger reason for applying the privilege in the case of an examination on oath before a judicial officer, preliminary to committal for trial or for summary prosecution, than in the ordinary case where a statute imposes an obligation to answer questions, provide information or produce documents. However, where the obligation allowed an authority or agency to investigate a potential offence or breach of a statutory provision, the privilege would be impliedly, if not expressly, excluded by the statute.⁶⁷

The determination of whether a statute impliedly excluded a privilege would depend on the language and character of the provision and its purpose. Their Honours took the view that an obligation expressed in general terms without qualification would suggest a conclusion that the privilege would be impliedly excluded. The rationale for this lay in the public interest of a full investigation into matters involving the possible commission of offences 'which lie peculiarly within the knowledge of persons who cannot reasonably be expected to make their knowledge available otherwise than under a statutory obligation.'⁶⁸

It should be noted that their Honours found that this implied exclusion applied for potential offences or breaches of statute. What was not considered was whether the implied exclusion extended to include 'fishing expeditions' where there may have been no suspected breach, but rather a wide ranging enquiry carried on more in hope than expectation.

In looking to the interpretation of s 155 of the *Trade Practices Act*, their Honours observed that:

It is significant that sub-s. (5) makes it an offence for a person to refuse or fail to comply with a notice under sub-s.(1) "to the extent that the person is capable of complying with it" for these words in themselves are 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.⁶⁹

Given that this decision concerned the privilege against self-incrimination, the question arises as to its relevance in relation to legal professional privilege.

Professional privilege and self-incrimination privilege are both rules of

⁶⁷ Above n 34, 341.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, 343 (Mason ACJ, Wilson & Dawson JJ).

substantive law, and not mere rules of evidence.⁷⁰ If the '[p]rivilege against self incrimination and legal professional privilege rest upon different, although not wholly unrelated foundations,⁷¹ then it may be that the abolition of the one weakens the foundation of, and creates pressure on the continued availability of, the other.

It was noted in *Yuill* that the privileges against self-incrimination and legal professional privilege are the leading exceptions to the rule of compulsion in relation to evidence, with the suggestion being made that it would seem unlikely that the legislature would deny the privilege of self-incrimination and at the same time preserve legal professional privilege, when a claim of legal professional privilege could hamper an investigation to the same or a greater extent than a claim of privilege against self-incrimination.⁷²

However it may be arguable that the privileges relating to self-incrimination and professional privilege, while both being exceptions to compulsion in evidence, have different aims and serve different purposes. The privilege against self-incrimination acts at the individual level by serving to protect the individual from exposure to the risk of punishment or penalty which may follow as a consequence of information provided. It is suggested here that, as identified earlier, professional privilege acts at a much broader social level, its purpose being to serve the public interest by providing a justice system which encourages freedom of communication between legal adviser and client.

If this latter view is accepted that '(l)egal professional privilege stands well apart from the privilege against self-incrimination ... There is, therefore, a strong reason for treating the privilege against self-incrimination differently'.⁷³ On this basis, it would be argued that if a statute impliedly excludes the privilege against self-incrimination, it does not follow as a natural consequence that it should also exclude professional privilege.

Accordingly it is suggested that decisions as to the abrogation of the privilege of self-incrimination should not be seen as readily transportable as a matter of course to be equally applicable in denying legal professional privilege. It is suggested that this would particularly be the case when the privilege against self-incrimination was found to be impliedly excluded by general terms in a statute. If it is accepted that professional privilege serves the greater public interest, then arguably exclusion of the privilege should face a higher threshold, and require clear and unequivocal statutory language.

A The Daniels decision

In contrast with this view, the principles which had been considered and applied in relation to self-incrimination were the same matters raised when the

⁷⁰ Ibid

⁷¹ Above n 39, 332 (Dawson J).

⁷² Ibid 335.

⁷³ Above n 5, 80-1 (Mason J).

availability of professional privilege was at issue before the Full Federal Court in *Daniels*. The Court in this case determined that legal professional privilege was not available⁷⁴ in relation to a notice issued pursuant to s 155 of the *Trade Practices Act*, the same section under which the claim for self-incrimination privilege had been previously denied in *Pyneboard*.

In finding that the provision impliedly abolished legal professional privilege, their Honours had regard to the wording of the provision, in particular the phrase 'to the extent that the person is capable of complying with it'. All judges found no role for legal professional privilege, broadly on two bases. Firstly, they considered that the natural meaning of the term 'capable' referred to what a person was able to physically do, regardless of entitlement, so if there was no physical impediment to complying, this of necessity excluded a claim for professional privilege. The second argument was posited on the policy ground that legal professional privilege may act to impede investigations by government authorities.

In the light of the importance of the privilege and the strength of the language required to override it, the question is raised as to whether the court may have too readily surrendered professional privilege, when it was not under any threat from the legislature. The following discussion raises concerns as to some aspects of the decision in *Daniels*, relating to whether professional privilege has been sufficiently protected.

B Statutory provision

The relevant section upon which the decision was based was s 155 of the *Trade Practices Act* 1974, which provides in relevant part:

(1) Subject to subsection (2A), if the Commission, the Chairperson or the Deputy Chairperson has reason to believe that a person is capable of furnishing information, producing documents or giving evidence relating to a matter that constitutes, or may constitute, a contravention of this Act, or is relevant to a telecommunications matter (as defined by subsection (9)) or is relevant to the making of a decision by the Commission under subsection 93(3) or (3A), a member of the Commission may, by notice in writing served on that person, require that person:

- (a) to furnish to the Commission, by writing signed by that person or, in the case of a body corporate, by a competent officer of the body corporate, within the time and the manner specified in the notice, any such information;*
- (b) to produce to the Commission, or to a person specified in the notice acting on its behalf, in accordance with the notice, any such documents; or*
- (c) to appear before the Commission at a time and place specified in the notice*

⁷⁴ The High Court granted leave to appeal in *Daniels* case in February 2002, so it may be that these issues raised are not yet finally resolved.

to give any such evidence, either orally or in writing, and produce any such documents.

(2) ...

(2A) ...

(3) The Commission may require the evidence referred to in paragraph (1)(c) to be given on oath or affirmation and for that purpose any member of the Commission may administer an oath or affirmation.

(4) ...

(5) A person shall not:

(a) refuse or fail to comply with a notice under this section to the extent that the person is capable of complying with it;

(b) in purported compliance with such a notice, knowingly furnish information or give evidence that is false or misleading; or

(c) obstruct or hinder an authorised officer acting in pursuance of subsection (2).

(6) ...

(6A) A person who contravenes subsection (5) or (6) is guilty of an offence punishable on conviction:

(a) in the case of a person not being a body corporate - by a fine not exceeding \$2,000 or imprisonment for 12 months; or

(b) in the case of a person being a body corporate - by a fine not exceeding \$10,000.

(7) A person is not excused from furnishing information or producing or permitting the inspection of a document in pursuance of this section on the ground that the information or document may tend to incriminate the person, but the answer by a person to any question asked in a notice under this section or the furnishing by a person of any information in pursuance of such a notice, or any document produced in pursuance of such a notice or made available to an authorised officer for inspection, is not admissible in evidence against the person:

(a) in the case of a person not being a body corporate - in any criminal proceedings other than proceedings under this section;
or

(b) in the case of a body corporate - in any criminal proceedings other than proceedings under this Act.

(7A) ...

(8) ...

(9) ...

In reaching the decision the judgements concentrated on subsections 155(1) and 155(5). Little attention seems to have been paid to subsection 155(7), which specifically and in clear unequivocal language abrogates the privilege against self-incrimination. It would seem to be arguable that if the legislature was able, in express terms, to evince an intention to exclude the privilege against self-incrimination, then it would have been equally capable of using express language to exclude the availability of professional privilege, should such have been the intent. On this basis, it may be argued that the clear language excluding the privilege against self-incrimination, and the lack of an equivalent express exclusion of professional privilege, provides evidence that there was no legislative intent to exclude the latter.

C Distinguished from Pyneboard

Much was made in the decision in *Daniels*⁷⁵ of the joint judgement of Mason ACJ, Wilson and Dawson JJ in *Pyneboard*, where their Honours considered the phrase 'to the extent that the person is capable of complying with it', concluding that '... these words in themselves are 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.'⁷⁶ Wilcox J essentially found the use of the term 'or otherwise' to be at large and cover any other privilege.

However in *Pyneboard* there was express exclusion of the privilege against self-incrimination, and the question at issue was whether this extended to an implied exclusion of the privilege against exposure to a civil penalty. The privileges under consideration both involved penalties, and as discussed earlier, it may be that privileges involving penalties should be delineated from a privilege such as professional privilege, which is accepted as protecting the public interest. On this basis it may be that the significance attached to the term 'or otherwise' in *Daniels* exceeded the scope which had been intended in *Pyneboard*, as there is arguably nothing in *Pyneboard* to suggest that their Honours intended the phrase 'or otherwise' to extend to deny professional privilege.

D Statutory interpretation

Of critical significance to the court in *Daniels* was whether the terms of the statute requiring compliance 'to the extent that the person is capable of complying with it' carried an implied abrogation of legal professional privilege.

Two potential issues may be identified.

Firstly, the provision requires that a belief be formed that the person was capable of providing information. It may be arguable that if the information sought was subject to professional privilege, it would not be reasonable to form a belief that the person was capable of complying, within the terms of s 155(1), since there

⁷⁵ See for example the judgement of Wilcox J at paragraph 52.

⁷⁶ Above n 34, 343.

was an impediment to compliance, the impediment being the confidentiality imposed by professional privilege.

The second potential issue also concerns the ability to comply. In considering the impact of these words, Wilcox J was of the view that the term 'to the extent that the person is capable' referred to what a person was able to do, regardless of legal restriction.⁷⁷ Lindgren J was in accord with this view, seeing 'capable' as importing an immediate physical ability or capability.⁷⁸ On this basis the court was able to determine that if a person could physically comply, professional privilege should not be an impediment to the provision.

Earlier discussion highlighted the comparative roles of the legislature and the judiciary in excluding professional privilege, the weight of opinion being that it was for the legislature to abrogate professional privilege if such was the desired outcome, this not being a role for the judiciary. Further, the High Court pronouncements as to the express language or strength and degree of certainty required in the legislation ousting legal professional privilege have been outlined, with judges taking a cautious approach in the interpretation of statutes to determine an implied abrogation of a privilege with such a critical place in the judicial system and the public interest.

Given the strength of statutory certainty required to abrogate a privilege, principles of statutory interpretation require that if a construct is available to allow preservation of the privilege, that interpretation should be preferred. The question arising is whether the court could have identified an alternative meaning for 'capable' which would have preserved the privilege, as if such an alternative was available, it should have been preferred.

It is suggested that in the *Daniels* case, an alternative possibility may have been available, in that rather than looking to physical capability, the statute may have been interpreted as looking to legal capacity. Such a view might proceed on the basis that the obligation flowing from the statute is a legal requirement, and in meeting this requirement there must be a legal capability to comply.

On this view, then, it may be arguable that the legal capability is not present in circumstances where the legal representative is in possession of confidential communications which meet the threshold conditions to attract legal professional privilege, and there has been no waiver by the client of this privilege, as the privilege is then automatically invoked. Without client waiver, the legal representative is not able to divulge the privileged communications, thus not being legally capable of complying with the notice.

Given the strong cautions sounded by the High Court in *Baker v Campbell* against the judiciary too lightly abrogating legal professional privilege, such an alternative interpretation may raise the question as to whether the statute was sufficiently clear in its intention to abrogate the common law privilege.

⁷⁷ Above n 2, para 56.

⁷⁸ *Ibid* para 90.

E Parliamentary intent

A further question may be raised as to whether the statute under consideration in *Daniels* carried any intent to abrogate legal professional privilege. As noted earlier, Deane J in *Baker v Campbell* looked to s 10 of the *Crimes Act*, and could not only find no express words relating to communications between a person and their legal adviser, but could find no indication that Parliament had even directed its attention to the matter of abrogating or modifying legal professional privilege. Without such evidence, the ordinary principles of construction suggested that things not included would be protected by legal professional privilege.

It is suggested that a similar observation could be made in relation to *Daniels*, there being no clear evidence that Parliament had directed its attention to professional privilege in framing the relevant provisions.

That the legislature is capable, when they so desire, of expressly modifying or removing a privilege is evidenced by the provisions at issue in *Yuill*, whereby the privilege against self-incrimination was denied by specific statutory provision. Given that Parliament has demonstrated that it can clearly express its intent when wanting to limit access to common law privileges, the question arises, when there is no clear expression of the abrogation of the privilege, as to just how far the judiciary are required to 'rectify' the operation of legislation, on the presumption that Parliament was unable to expressly state its intent of denying access to a privilege.

F Policy imperatives

Much has already been said concerning the balance between the competing public interests represented by client confidentiality and full disclosure.

The decisions in *Pyneboard* and *Daniels* raise the question of the extent to which the judiciary may have been attempting to reflect, or even arguably fashion, a shift in the balance between the competing public interests of client confidentiality and full disclosure.

Moore J in *Daniels* noted that allowing a claim for legal professional privilege would hamper the investigative power conferred and present a practical impediment to any investigation. While these concerns had always existed, they had generally previously been seen as subordinate to the greater public interest served by professional privilege. It may be that the balance between these competing public interests has been changing, and the swing in the judicial pendulum towards finding an implied intention to abrogate legal professional privilege is a reflection of this change in public attitude.

On this construct, rather than occupying the lofty heights of a right in the public interest, if not a basic human right, legal professional privilege becomes little more than an administrative inconvenience serving only to impede the efficiency of a bureaucratic investigation. Seen in this light, it is little wonder that the privilege would have to give way to a greater public good.

A further factor suggesting a change by the courts may appear in the approaches taken in statutory interpretation.

When faced with general language in a statute granting investigatory power, the courts now appear to be inclining towards the view that general language is to be taken as an indication that the legislature intended no qualification on the investigatory power. This appears to be contrary to the strong view of the High Court in *Baker v Campbell* that to curtail a privilege required express legislative statement, and the courts should not read intentions into general terms.

Further, in *Baker v Campbell* the view was expressed that the privilege should extend to all forms of compulsory disclosure, and if ambiguity arose in a statute the presumption should be that the privilege was intended to be available. In looking to the more recent decisions involving interpretation of statutes, the tendency of the courts may appear to be that even when the terms of a statute may arguably be seen as ambiguous, the courts have been willing to find an implied abrogation of the privilege.

VII APPLICATION IN TAX INVESTIGATIONS

The focus in this part of the paper narrows to consider the application of legal professional privilege in relation to tax investigations. The discussion proceeds on the basis that the reasoning in *Daniels* is accepted as being a correct statement of the status of professional privilege, and on this basis examines whether this reasoning should be imported into interpretation of tax statutes granting investigative powers.

As a prelude to this analysis the investigative powers themselves are outlined. It is in the interpretation of these legislative provisions that statutory interpretation principles raised above will be applied.

A Commissioner's access powers

Critical weapons in the arsenal of the ATO in performing the tasks of ensuring compliance under the self-assessment regime, and investigating suspected breaches of the taxation legislative regime, are the Commissioner's powers to access the records of taxpayers, and to require taxpayers to produce documents and answer questions. It is outside the scope of this paper to discuss the access powers in detail, but rather the access powers and their extent are briefly outlined to provide a background to the later discussion.

Access powers are granted to the Commissioner by s 263 Income Tax Assessment Act 1936 in terms such that:

The Commissioner, or any officer authorised by him in that behalf, shall at all times have full and free access to all buildings, places, books, documents and other papers for the purposes of this Act, and for that purpose may make extracts from or copies of any such books, documents or papers.⁷⁹

⁷⁹ *Income Tax Assessment Act* 1936 (Cth) (ITAA 1936) s 263(1).

This is supported by provisions dealing with production of authority by officers for access, and the assistance to be provided to officers.⁸⁰

In addition to access powers, further power for information gathering is provided by s 264, in that:

The Commissioner may by notice in writing require any person, whether a taxpayer or not, ...

- (a) to furnish him with such information as he may require; and
- (b) to attend and give evidence before him ... concerning (the taxpayer's) or any other person's income or assessment, and may require him to produce all books, documents and other papers whatever in his custody or under his control relating thereto.⁸¹

These provisions grant wide information gathering powers to the Commissioner, both in terms of access to taxpayers' premises, and requiring taxpayers to attend and answer questions.

The consequences of failure to comply with the access and information gathering powers of the Commissioner are contained in the *Tax Administration Act* ('TAA') which provided at the time of the *ANZ Banking* decision in the relevant parts of s 8C:

A person who refuses or fails, when and as required under or pursuant to a taxation law to do so - ...

- (aa) to give information to the Commissioner in the manner in which it is required under a taxation law to be given; or ...
- (e) to produce a book, paper, record or other document to the Commissioner or another person; or
- (f) to attend before the Commissioner or another person; or ... to the extent that the person is capable of doing so is guilty of an offence.⁸²

Further, s 8D(1) provided at the time of the *ANZ Banking* decision that:

A person who, when attending before the Commissioner or another person pursuant to a taxation law, refuses or fails, when and as required pursuant to a taxation law to do so -

- (a) to answer a question asked of the person; or
- (b) to produce a book, paper, record or other document, to the extent that the person is capable of doing so is guilty of an offence.⁸³

⁸⁰ ITAA 1936 ss 263(2) & (3).

⁸¹ ITAA 1936 s 264(1).

⁸² *Taxation Administration Act* 1953 (Cth) (TAA) s 8C.

⁸³ TAA s 8D(1).

In regard to the scope of the access provisions, 'it is clear that the rights conferred by s 263 are wide and not readily amenable to implied restrictions.'⁸⁴ In looking to the terms used in the provision

The concept of 'full access' prima facie conveys that the availability of entry or examination extends to all parts of the relevant place or building and to the whole of the relevant ... documents and other papers. 'Free' conveys an absence of physical obstruction.⁸⁵

The operation of the provisions is not dependent upon there existing any dispute between the taxpayer and the Commissioner,⁸⁶ and the right of access is not limited to records which relate to the income of the person who is in possession of the records.⁸⁷ Additionally, the sections do not preclude 'fishing expeditions' by the Commissioner,⁸⁸ with the power under s 264 enabling the Commissioner to undertake a 'roving enquiry and a fishing expedition into the income or assessment of taxpayers.'⁸⁹

However, the power must be exercised for the purpose of enabling the Commissioner to perform his functions under the Act,⁹⁰ and it must be exercised bona fide for the purposes for which it was conferred, and the exercise of the power under the provisions must not be excessive.⁹¹

The wide scope of the access powers under s 264 has recently been confirmed by the Federal Court decision in *McCormack & Ors v DCT*,⁹² where Sackville J confirmed that the only constraint on the power under s 264(1)(a) was that it be used for the purpose of enabling the Commissioner to perform his functions under the Act. His Honour noted that the power under s 264(1)(a) could be used to conduct a 'fishing expedition', and that the power could be exercised whether or not a dispute had arisen between the taxpayer and Commissioner.

Sections 263 and 264 are independent of each other, and there is no requirement that the availability of one be exhausted before recourse be had to the other. A notice under s 264 is required to specify with reasonable particularity the documents required and the taxpayer to whose income the documents relate,⁹³ with reasonable time granted for compliance. However

[a] notice under s 264 is required to do no more than make it clear that the evidence to be given concerns the income or assessment of a person or persons. It is not necessary that the notice specify particular topics. Nor is it

⁸⁴ *FCT v Citibank* (1989) 20 ATR 292, 313 (French J).

⁸⁵ *Ibid.*

⁸⁶ *FCT v Australia and New Zealand Banking Group Ltd; Smorgon v FCT* (1979) 9 ATR 483, 498 (Mason J).

⁸⁷ *Ibid* 496-7.

⁸⁸ *Above n* 84, 313.

⁸⁹ *Deloitte Touch Tomatsu v DFCT* (1998) 40 ATR 435, 451 (Goldberg J).

⁹⁰ *Ibid.*

⁹¹ *Clyne v DFCT* (1985) 8 FCR 130.

⁹² (2001) 48 ATR 608.

⁹³ *Smorgon v FCT* (1976) 134 CLR 475.

necessary that it explicitly limits the period of time as to which evidence is required...⁹⁴

Despite the wide ambit of the provisions, '... there is a restriction on the operation of s 263. The power of the Commissioner to search and make copies of documents should be read as not referring to documents to which legal professional privilege attaches.'⁹⁵

In relation to s 264 notices, there has been an absence of argument concerning the availability of professional privilege, the apparent assumption being that the privilege would be available. Despite the absence of argument, Lockhart J in *Fieldhouse v Commissioner of Taxation*⁹⁶ found professional privilege to be an available response to a s 264 notice, and the Full Federal Court in *Commissioner of Taxation v Coombes*,⁹⁷ without reasons or authority, stated that s 264 was subject to legal professional privilege.

B Interpretation of tax statutes

Some of the more significant tax decisions where professional privilege has been in issue are outlined below with a view to ascertaining whether the apparent judicial trend towards a limitation in the scope of professional privilege has permeated into the tax arena.

For many years the scope of the investigatory powers of the Commissioner produced little in the way of litigation, and it is only of more recent times that the courts have been called upon to adjudicate on these powers, although in some notable cases.

Sitting as a single judge in the Federal Court, Pincus J in *Allen Allen & Hemsley v DCT (NSW) and Ors*⁹⁸ noted the dilemma facing the judiciary in legal professional privilege cases, where a choice had to be made between the desirability of protecting the access of a citizen to legal advice 'untrammelled by State interference ...',⁹⁹ and the desirability of ascertaining tax liabilities where these may be dependent on transactions effected through solicitors. At issue in this case was the extent to which the s 263 access power was subject to legal professional privilege. On appeal to the Full Federal Court,¹⁰⁰ a joint decision of Bowen CJ and Fisher J¹⁰¹ found that in circumstances where no litigation was pending, the scope for claiming legal professional privilege would be closely confined.

In the case of *Stergis v Boucher*,¹⁰² at issue before Hill J was whether the s 264 information gathering powers, when read in conjunction with s 8C TAA, would

⁹⁴ Above n 1 455.

⁹⁵ Above n 84, 301 (Bowen CJ and Fisher J)..

⁹⁶ (1989) 25 FCR 187, 191

⁹⁷ (1999) 92 FCR 240.

⁹⁸ (1988) 19 ATR 1462.

⁹⁹ Ibid 1470.

¹⁰⁰ (1989) 20 ATR 321.

¹⁰¹ French J agreed with the decision.

¹⁰² (1989) 20 ATR 591.

abrogate the common law privilege against self-incrimination. His Honour noted the statements from *Sorby v The Commonwealth of Australia*¹⁰³ that the privilege was deeply ingrained in the common law, and any legislative intent to remove the privilege must clearly emerge. It was also noted that the authorities required that finding a necessary implication in a statute to abrogate a privilege imported a high degree of certainty as to the legislative intent, particularly as an abrogation of the privilege would leave a statutory requirement to provide information in an administrative investigation.

Nevertheless, having regard to the decision in *Pyneboard* his Honour was able to determine that the words in s 8C 'to the extent that the person is capable of doing so ...' evidenced a '... deliberate attempt on the part of the legislature to make it clear that the privilege of self-incrimination was in fact abrogated ...'.¹⁰⁴ His Honour considered that, given the '... legislative policy of giving wide power to the Commissioner ... under ss 263 and 264 ...',¹⁰⁵ not to abrogate the privilege would frustrate this policy.

In the Full Federal Court decision in *Perron Investments*, handed down only six months later, Hill J, along with Lockhart and Burchett JJ, was again asked to consider the interaction of the information gathering power under s 264, and the enforcement power in s 8C TAA. Lockhart J concluded that while s 264 required compulsory disclosure of information, there was no basis for interpreting the section as abrogating legal professional privilege, and indeed the 'reasoning of the majority of the High Court in *Baker v Campbell* leads to the conclusion the sec. 264, upon its proper interpretation, does not abrogate legal professional privilege.'¹⁰⁶

As in *Stergis v Boucher*, Hill J considered the interaction of the investigatory power in s 264 and the enforcement power in s 8C TAA, particularly the phrase 'to the extent that the person is capable of doing so.' However, perhaps somewhat surprisingly, his Honour on this occasion did not find that this term evidenced a legislative intent to abrogate a privilege. Rather, while suggesting that the s 264 power would override any contractual obligation of a legal practitioner to preserve confidentiality, it '... does not, it would seem, abrogate a claim for legal professional privilege.'¹⁰⁷

It is significant that the Commissioner had not sought to argue that s 264 abrogated legal professional privilege, and in that regard Hill J considered that '... having regard to the decisions of the High Court in *O'Reilly and Baker v Campbell* the Commissioner's concession in this regard was, in my opinion, rightly made.'¹⁰⁸

¹⁰³ (1983) 152 CLR 281, 309 (Mason, Wilson & Dawson JJ).

¹⁰⁴ Above n 102, 606.

¹⁰⁵ *Ibid* 605.

¹⁰⁶ Above n 22, 5046 (Lockhart J).

¹⁰⁷ *Ibid* 5053 (Hill J).

¹⁰⁸ *Ibid* 5057.

The outcome of the judicial considerations at this stage, then, saw the wording of s 8C TAA evidence an implied legislative intent to abrogate the privilege against self-incrimination in relation to a s 264 notice, but no legislative intent in the same provisions to abrogate legal professional privilege. It is suggested that this outcome serves to confirm the distinction made earlier with respect to professional privilege requiring a higher threshold than self-incrimination privilege before there can be a finding of an implied legislative abrogation.

The case of *FCT v Citibank Ltd* was the inevitable outcome from a raid by the ATO, armed with s 263 notices, on the Citibank premises. The Full Federal Court affirmed the decision of Lockhart J in finding that legal professional privilege acted to restrict the operation of s 263. Bowen CJ and Fisher J highlighted the public interest involved in maintaining legal professional privilege, which had been emphasised by Wilson and Deane JJ in *Baker v Campbell*.

In particular, their Honours had regard to the views of Deane J, who in reviewing s 10 of the Crimes Act (the section at issue in *Baker v Campbell*), noted that the section contained no express reference to communication between a person and their legal adviser, and the section, and indeed the Act, contained nothing to indicate that Parliament had directed its attention to the issue of abrogating the privilege. Deane J concluded that on the basis of the ordinary principles of construction, the section should be construed as not including within its ambit those documents which would be protected by legal professional privilege.¹⁰⁹

Bowen CJ and Fisher J expressed the view that like reasoning applied to s 263, leading to the conclusion that the '... power of the Commissioner to search and make copies of documents should be read as not referring to documents to which legal professional privilege attaches.'¹¹⁰ The conclusion arose as s 263 was expressed in the most general of terms, and general terms should '... not be construed as granting an unrestricted power of search and entry but are subject to the right to claim legal professional privilege in respect of the documents to which the Commissioner seeks access.'¹¹¹

In what may yet prove to be one of the last high points of the common law privileges, in finding the s 263 investigatory power of the ATO subject to legal professional privilege, French J commented that:

Australia is a liberal democracy with a broad tradition of at least nominal resistance to encroachment upon established rights and freedoms. That view is reinforced by its adherence to the International Covenant on Civil and Political Rights, which relevantly provides in Art. 17, inter alia, that:

'No-one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence ...'

The nature of this society and its tradition of respect for individual freedoms will support an approach to construction which requires close scrutiny and a

¹⁰⁹ Above n 5.

¹¹⁰ Above n 84, 301.

¹¹¹ *Ibid.*

strict reading of statutes which would otherwise remove or encroach upon those freedoms.¹¹²

If, after such a strong endorsement of the application of legal professional privilege in tax investigations, taxpayers and their advisers felt confident that legal professional privilege would protect communications made for the purposes of tax advice, the decision in *Grofam Pty Ltd v Australia and New Zealand Banking Group Ltd*¹¹³ must have given the ATO equal comfort. Heerey J of the Federal Court found that the ATO was in the position of a client of the Director of Public Prosecutions (DPP). As such the legal advice from the DPP would be subject to the privilege extended to government solicitors by the decision in *Waterford*, the relationship of the ATO and DPP being an extension of the situation in *Waterford*.

The decision in *May v DFCT*¹¹⁴ was concerned more with the validity of a s 264 notice than the application of legal professional privilege. What emerged from the facts of the case, however, was the ATO concession stated in the advice accompanying the notice that it considered that a s 264 notice did not override legal professional privilege. This recognition by the ATO would be understandable, given that up to that time there had been no suggestion in any of the decisions that a s 264 notice would be other than subject to legal professional privilege. Rather, decisions such as *Baker v Campbell* had strongly endorsed the view that the Commissioner's investigatory powers would be subject to client privilege.

Interestingly, following the Federal Court decision in *Daniels*, the wording in covering letters accompanying s 264 notices issued by the Commissioner has been amended, with the ATO advising that the stance will change should High Court authority in the *Daniels* appeal exclude privilege in tax investigations.

VIII APPLICATION OF DANIELS IN ANZ BANKING

Despite all that had gone before, Sundberg J suggested, in obiter, that in his view the reasoning from the *Daniels* decision would preclude the operation of legal professional privilege in respect of a s 264 notice in relation to tax investigations. His Honour based his comments on the meaning attached to the words 'to the extent that the person is capable of complying', and on the policy consideration of not wishing to hamper an investigation.

In regard to the words in the section, his Honour considered that as ss 8C and 8D TAA employed substantially the same language as s 155(5)(a) TPA, and as the reasoning in *Daniels* found the privilege excluded by the words of s 155(5)(a), then the wording from s 8C would preclude legal professional privilege in relation to s 264. While not part of the ratio, this nevertheless has the potential to

¹¹² Ibid 316.

¹¹³ (1993) 26 ATR 174.

¹¹⁴ 98 ATC 4960.

create an environment of uncertainty for taxpayers subjected to the investigatory provisions.

The remaining issue explored is whether the reasoning in *Daniels*, based on the TPA, should have automatic application in the interpretation of tax provisions, the suggestion being that there may be differences sufficient to make tax cases stand apart. The potential areas that distinguish tax cases such as *ANZ Banking* from the *Daniels* decision are examined in the following discussion.

A Nature of the power

It is suggested that a significant area of difference between the ACCC investigations and tax investigations derives from the nature of the assessment power available to the Commissioner. It would be expected that an ACCC investigation could generally only proceed when relevant information sought became available. If access to information is denied, then it may be that the investigation is compromised to the extent that it cannot proceed.

By contrast, if the information sought in the course of a tax investigation cannot be accessed, the Commissioner has power under s 167 ITAA 1936 to issue a default assessment '... of the amount upon which in his judgement income tax ought to be levied.' If a taxpayer wishes to dispute the default assessment, the onus of the burden of proof to prove the assessment is excessive lies with the taxpayer, and this may involve the provision of information otherwise privileged. If the taxpayer produces otherwise privileged information, the privilege is waived. Thus the Commissioner has the power to 'flush out' information to which access may have been denied by privilege.

On this basis it is argued that the availability of privilege in tax investigations should be distinguished from other cases, as professional privilege ultimately may not necessarily hamper or impede the function of the Commissioner, with other avenues being available to achieve the result sought without denying privilege.

B Nature of investigations

It has been noted earlier that the powers conferred on the Commissioner under s 264 are not subject to narrow interpretation, and indeed the powers allow for the Commissioner to engage in a 'fishing expedition' as part of roving and wide ranging enquiries. The investigatory powers are not predicated upon there existing any dispute between the Commissioner and taxpayer or other person, so the s 264 powers are not limited to investigations into contraventions of the law.

The question raised is whether an investigation should be directed towards some identified offence or breach before the abrogation of legal professional privilege, rather than being a wide ranging investigation at large.

The decision in *Pyneboard*, in finding a common law privilege impliedly abrogated by statute, suggested that the public interest permitted abrogation of a privilege for the purpose of investigation of the possible commission of

offences.¹¹⁵ It has been noted above that Brennan J (as he then was) appeared to consider the requirement to be more restrictive, looking to whether the enforcement agency sought the information as part of an investigation into contraventions of the law, rather than conducting a fishing expedition.¹¹⁶

Application of these principles appears to suggest that in circumstances where the Commissioner is merely engaging in a fishing expedition, rather than pursuing contraventions of the law, the implication that the statute should abrogate the privilege may be less readily apparent. This becomes of even greater concern given that s 264 provides for information gathering not only from the taxpayer, but from 'any person'.

The difficulty with such a proposition arises in that the distinction between a fishing expedition and investigating a contravention of the law becomes a matter of degree between these extremes, making it difficult to start delineating the demarcation between circumstances which cannot be so starkly contrasted.

C Statutory distinction

The TPA provision creates an offence where a person does not comply to the extent to which they are capable of complying. Notably, the statute provides that this offence is only created in relation to a person when it is reasonable to believe that the person is capable of providing information sought. This suggests an expectation that the person has information which is specifically relevant to a contravention, and the withholding of this information under professional privilege would adversely affect the prosecution of the contravention.

By contrast, the TAA provisions in sections 8C and 8D created offences for a failure to comply with taxation requirements generally, rather than applying to a person where it was reasonable to believe the person was capable of providing information. Limitation of the privilege in these circumstances would potentially allow the bureaucracy to use the access powers to access information unrelated to the current investigation, but which was sought by the bureaucracy for other purposes. This could arise if there was no reason to believe the person had information relating to the current investigation, but it was suspected they may have information sought in relation to other matters, and this information could otherwise not be accessed. This acts to make the scope of the provision much wider, as a person may be subject to the provisions whether or not it is reasonable to believe that they can provide the information.

While it may be argued that a general provision without qualification evinces an intention to exclude privilege, it is also suggested that judicial caution should be exercised in endorsing such a power at large and without limitation. Exercise of such a wide power without restraint may provide scope for bureaucratic excesses which had not been intended.

¹¹⁵ Above n 34 (Mason, Wilson & Deane JJ).

¹¹⁶ *Ibid* 355.

D Legislative intent

It may be arguable that the lack of legislative intent to modify or abrogate the privilege is evidenced by the acceptance by the ATO in the later tax cases outlined above that legal professional privilege was available in relation to s 264 notices. If there had been a legislative intent to limit the availability of the privilege in relation to ss 263 or 264 notices, it would be presumed that the Commissioner would have been involved in, or at the least have been aware of, such intent. In these circumstances it is unlikely that the Commissioner would have willingly curtailed investigatory power by conceding in writing that a s 264 notice would be subject to a claim for legal professional privilege.

It is also worthy of note that, while the privilege is only available for advice from legal advisers, the Commissioner has been prepared, on a purely concessional basis, to extend the practical operation of the privilege to some advices from accountants.¹¹⁷ It would seem incongruous for the ATO to be granting a wider operation of the privilege if there existed a legislative intent to limit its operation.

A further guide to legislative intent may be available from the Explanatory Memoranda accompanying the introduction of ss 8C and 8D TAA which were current at the time of the *ANZ Banking* decision.¹¹⁸ In relation to both sections, the *EM* suggests that the intention would be that self-incrimination would not be a defence to a charge.¹¹⁹ By denying a defence of self-incrimination, the inference is arguably left open that professional privilege would not also be denied, as if the intent had been to deny professional privilege, it could also have been specifically mentioned as being excluded.

E Inequitable approach

While the ATO access powers are provided by statute, there are no such specific tax provisions granting access to taxpayer information held by the ATO, with taxpayers seeking details generally having to rely on the general administrative law provisions such as the *Freedom of Information* (FOI) legislation. This imbalance in access to information may be seen as creating an inequity in favour of the bureaucracy.

This inequity is arguably compounded when it is considered that the ATO is still able to rely on professional privilege to protect confidential advice, this position being affirmed by the decision in *Grofam*. If professional privilege is to be denied to taxpayers in protecting their legal advices, but remains available to the ATO, the resulting imbalance between taxpayer and bureaucracy is only exacerbated. It is suggested that such an inequity is not one that should be sought by the legislature nor perpetuated by the courts.

¹¹⁷ "Guidelines for the exercise of access powers in relation to Professional Accounting Advisors' Papers" *ATP Rulings and Guidelines* OG 69.

¹¹⁸ Introduced by the *Taxation Laws Amendment Bill* 1984.

¹¹⁹ *EM* at 55.

IX DIRECTIONS FOR THE FUTURE

In *Hollis v Vabu Pty Ltd*,¹²⁰ McHugh J commented on the value to be accorded to the evolving nature of common law, suggesting that ' the genius of the common law is that the first statement of a common law rule or principle is not its final statement.'¹²¹ This evolving nature of the common law would appear to be evidenced not least in the standing accorded to the common law privileges, including legal professional privilege. The final matter considered in this paper addresses the imperatives that may lie behind the apparent gradual diminution and erosion of legal professional privilege.

Despite the high ideals expressed in the rationale for legal professional privilege, it cannot be expected that there would be uniform acceptance of its scope, and indeed there is support for restricting its ambit. While Kirby J recognised that:

It is true that there is an inescapable tension between the interests of justice in the free communication of an individual with a legal adviser and in the making of decisions (especially judicial decisions) based on all relevant and reasonably available evidence

his Honour went on to suggest that:

The integrity of the judicial branch of government and its ability to perform its constitutional functions requires the imposition of necessary limitations on the excessive expansion of the privilege. To the extent that it expands, it has the potential to undermine the discharge by the independent courts of their vital role.¹²²

Alternatively, the arguable diminution of the privilege has brought its own warnings, with the observation that

(A)t stake is more than an evidentiary privilege; the relationship of attorney and client, based on trust, is not so strong that it can withstand the gradual erosion of public confidence that would necessarily accompany an increase in government intrusions.¹²³

In this light there must surely be a concern about the fate of the Earl of Halsbury's '... perfect administration of justice...'¹²⁴ which was an object of the public policy underlying legal professional privilege. Perhaps now more than ever the words of Gibbs CJ in *Baker v Campbell*¹²⁵ have proved prophetic, and there is the need for the legislature to clearly define the scope for the common law privileges in the face of the growing investigative powers of government instrumentalities, as 'it is

¹²⁰ (2001) 47 ATR 559.

¹²¹ *Ibid*, 579 (McHugh J, dissenting).

¹²² Above n 54, 4061.

¹²³ Above n 5, at 89 (Murphy J quoting "Commentary - Search of the Lawyer's Office - Court Sanctioned Threat to Confidential Communications" *Alabama Law Review* vol 32 (1980) at 134).

¹²⁴ *Bullivant v Attorney-General* (Vic) [1901] AC 196,200-1; quoted in *Baker v Campbell*, above n 5, 94 (Wilson J).

¹²⁵ See above n 5 71-2 where Gibbs CJ suggested Parliament extend privilege to documents sought under investigative provisions, including s 264.

for the legislature, not the courts, to curtail the operation of common law principles designed to serve the public interest.¹²⁶ After all,

the protection which is unquestionably afforded by legal professional privilege in judicial proceedings ... would be set at nought if by executive or administrative processes revelation of professional confidences could be compelled ...¹²⁷

However the judiciary cannot be expected to accept that the failure of the legislature to enact legislation should prevent judicial action and the evolution of common law, since '... (i)t is one thing to say ... that the common law may develop by analogy to the enacted law. It is another proposition that the common law should stand still because the legislature has not moved.'¹²⁸

X CONCLUDING REMARKS

The foregoing discussion has examined the nature and scope of professional privilege, and has tracked its broad development in Australian common law, by way of a precursor to the analysis of the current standing of the privilege in tax investigations. The discussion has sought to highlight the potential for uncertainty in relation to claims for legal professional privilege by taxpayers in response to the tax investigatory powers under ss 263 and 264.

However, while uncertainty may have arisen as to the boundaries of professional privilege by taxpayers in the face of the ATO investigatory powers, the decision in *Grofam* demonstrates that the privilege remains operational and unchallenged in protecting communications for government authorities such as the ATO. On this basis, it may be that while the scope for taxpayers to claim legal professional privilege has diminished, the same cannot be said in relation to the investigatory bodies, which in itself creates a paradox.

¹²⁶ Above n 5, 96 (Wilson J).

¹²⁷ Ibid 130 (Dawson J).

¹²⁸ Above n 121, 575-6 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ)