



interest” with the client in receiving the contents thereof; or

- (b) it has been made or brought into existence for the dominant purpose of use in or preparation for existing or anticipated litigation including the purpose of obtaining evidence or information for that litigation.”

After inspecting the documents His Honour rejected the privilege claims and made orders permitting inspection. He said that the documents did not take the form of legal advice or conveying

legal advice, even if their contents reflected such advice, but rather they were produced to request the Bank to conduct certain investigations (para 10). Furthermore the documents were not brought into existence for the dominant purpose of obtaining the Bank’s assistance with the defendant’s investigations of Price and Castagna. Although this was one purpose, the request for the Bank to investigate Castagna’s conduct was also made “because of the corporate governance issues raised” (para 11). **PL**

### **ACCC v Daniels [2001] FCA 244 (16 March 2001)**

The recent decision of *ACCC v Daniels* concerns the statutory right of the ACCC to request provision of documents pursuant to s 155 of the Trade Practices Act because it has a reasonable belief that an offence may have been committed. The decision means that a corporation cannot refuse to comply with s 155 compliance because the documents are subject to the privilege.

# Warnings to potential witnesses impede the course of justice

***Deacon v Australian Capital Territory* Supreme Court of the Australian Capital Territory (BC 2001 00156), 8/2/01 Higgins J. (unreported)**

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**P**ractitioners mindful of the non-disclosure provisions<sup>1</sup> of *Crimes Act 1914* (Cth) will be interested in this recent unreported decision of the Supreme Court of the Australian Capital Territory. This decision is intriguing as it sheds new light on the ambit of s 70 *Crimes Act*.<sup>2</sup>

The plaintiff, Deacon, a former employee of Canberra Hospital, brought an action against the defendant, seeking damages for personal injuries allegedly

sustained when pushing a hospital bed.

In the course of preparing their case, the plaintiff and his solicitor attended Canberra Hospital to view the surface of the floor at the site of the injury and to speak to potential witnesses. This excursion resulted in a series of communications from the ACT Government Solicitor.<sup>3</sup> Not only did the Government Solicitor take exception to the visit to the hospital, but they also advised that neither past nor present employees of the hospital could make ▶

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any statements to the plaintiff about a matter concerning the hospital.<sup>4</sup> Indeed, it was proposed that potential witness would be advised that they ought not provide any statement to the plaintiff or his solicitors without consent, or they may be in breach of the non-disclosure legislation.<sup>5</sup>

The plaintiff sought an order that the defendant's solicitors refrain from discouraging potential witnesses with such a warning. They contended that this conduct was essentially interfering with the course of justice.

The court agreed that the warning would serve as a deterrent for potential witnesses and that unless excused or sanctioned by an express legal rule, the warning constituted an intentional attempt to dissuade potential witnesses from giving truthful evidence.<sup>6</sup>

The question remaining was whether potential witnesses were under a duty not to disclose information to the plaintiff or his solicitors.

The court examined the pertinent non-disclosure legislation. In this case the employees of the hospital would constitute 'public employees' for the purposes of s 9 *Public Sector Management Act 1994* (ACT).<sup>7</sup> In comparing the provision to s 70 *Crimes Act*, Higgins J stated:

"Whether a duty of confidentiality arises so that s 70 *Crimes Act* can punish its breach will depend on the type of information, the circumstances in which it has been acquired and the interests of relevant parties in keeping it confidential. A consideration of the public interest must also be relevant. The duty to keep such information confidential may attach to information of any kind but it must be such and acquired in such circumstances that such a duty arises. It does not arise merely because the information is obtained by an officer in the course of his or her duties."

This position is in stark contrast to the traditional interpretation of s 70<sup>8</sup> as expressed by Bowen J in *Commissioner of Taxation v Swiss Aluminium Australia Ltd & Ors* where he stated:

"[T]he enactment of s 70 of the *Crimes Act* ... treats the nature or

kind of information disclosed as virtually irrelevant. It is the office occupied by the person and the character in which he obtained the information which imposes the obligation of secrecy upon him in the interests of orderly administration and discipline of the service."<sup>9</sup>

In *Deacon v ACT*, Higgins J reasoned that it could not be a breach of the *Crimes Act* for a public officer to report a colleague's unlawful conduct to the police simply because the 'first officer came by that information by virtue or in the course of his or her official duties'.<sup>10</sup> Equally, there could be no distinction between the 'disclosure of information relevant to a crime and information relevant to tortious conduct'.<sup>11</sup>

"To suggest otherwise is to make s 70 ... an instrument for the protection and concealment of wrongdoers rather than the protection of the public interest in preventing unfair commercial advantage, breaches of privacy or prejudice to the orderly administration of the executive government or protection of national security."<sup>12</sup>

It was decided that there was no legal impediment to the disclosure of information by employees of the hospital to the plaintiff or his legal advisors. Accordingly the court declared that the Government Solicitor would be impeding the course of justice if the warning were given to potential witnesses.

As sensible as this decision may be, it will certainly be interesting to see how future courts deal with this decision. **PL**

#### Footnotes:

<sup>1</sup> The non-disclosure provisions essentially forbid public servants from disclosing any information acquired in the course of their employment, without authority. These provisions are generally interpreted to prohibit the disclosure of any information regardless of its nature and the public interest in its disclosure. The penalty for breach is significant: 2 years imprisonment. See generally *Commissioner of Taxation v Swiss Aluminium Australia Ltd & Ors* (1986) 10 FCR 321 at 325; Discussion Paper No 20, Disclosure of Confidential Information (Sir Harry Gibbs, Chairman) (Attorney General's Department, Canberra, 1988), pp 21-22. Interestingly, *Deacon v ACT* was handed

down a time when the non-disclosure provisions were receiving significant media attention while the Australian Federal Police were interviewing ABC staff regarding the leak of an internal memorandum. See generally *The Australian*, 23 February 2001, p 3; *Sydney Morning Herald*, 23 February 2001, p 2; *The Australian Financial Review*, 23 February 2001, p 66; D Hardaker, 'Senate questions Shier over AFP's [sic] involvement in leaked document', 7.30 Report, television broadcast by ABC, Sydney, 22 February, 2001. [see <http://www.abc.net.au/7.30/s250500.htm>. (Accessed 24 February 2001.)]. Interview with D Hodgkinson, *Lateline*, television broadcast by ABC, Sydney, 16 February 2001. [see <http://www.abc.net.au/lateline/s247975.htm>. (Accessed 24 February 2001.)].

<sup>2</sup> The court also considered the non-disclosure provisions embodied in s 9 *Public Sector Management Act 1994* (ACT), and s 10 *Crimes (Offences Against the Government) Act 1989* (ACT).

<sup>3</sup> [2001] ACTSC 8 at [12].

<sup>4</sup> *Ibid* at [13].

<sup>5</sup> *Ibid* at [23].

<sup>6</sup> *Ibid* at [53].

<sup>7</sup> Section 9 provides that "a public employee shall, in performing his or her duties: not disclose, without lawful authority: - any information acquired by him or her as a consequence of his or her employment; or - any information acquired by him or her from any document to which he or she has access as a consequence of his or her employment; - not make a comment which he or she is not authorised to make where the comment may be expected to be taken to be an official comment.

Section 10, *Crimes (Offences Against the Government)* and s 70 *Crimes Act* essentially provide that a public employee must not disclose any information which he or she has a 'duty not to disclose'. The provisions apply to past and present employees.

<sup>8</sup> For a discussion of the traditional interpretation of s 70, see generally Discussion Paper No 20, Disclosure of Confidential Information (Sir Harry Gibbs, Chairman) (Attorney General's Department, Canberra, 1988), pp 11, 21-22.

<sup>9</sup> (1986) 10 FCR 321 at 325.

<sup>10</sup> [2001] ACTSC 8 at [88].

<sup>11</sup> *Ibid* at [89].

<sup>12</sup> *Id*.