

ACCC entitled to obtain privileged documents and information

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In an anxiously awaited decision, *ACCC v The Daniels Corporation International Pty Ltd*, the Full Federal Court has ruled that a person or company cannot refuse to answer notices issued by the Australian Competition and Consumer Commission ("the ACCC") under section 155 of the *Trade Practices Act* ("the Act") by relying on common law legal professional privilege.

Background

The ACCC began investigations into the activities of The Daniels Corporation International Pty Ltd (Daniels) to determine whether the company had contravened the Act. As part of the investigations, the ACCC issued notices to Daniels and its solicitors to produce documents and furnish other information.

The solicitors took the view that some of the documents were covered by legal professional privilege. The ACCC took the view that information and documents described in a section 155 notice were required to be supplied in response to the notice, whether or not they might be subject to a claim for legal professional privilege in other circumstances.

The parties were unable to reach any agreement about the disputed privilege claim, as a result of which the ACCC commenced proceedings in the Federal Court seeking declarations and orders to the effect that a person could not resist the production of documents in response to a notice issued under section 155 on the basis that the documents were the subject of a claim of legal professional privilege.

Due to the obvious importance of the issue and the likelihood of an appeal, an order was made that this question be determined as a preliminary legal issue by a Full Court rather than by a

single judge. Other issues between the parties have yet to be determined.

Whether legal professional privilege is excluded by section 155

The question before Justices Wilcox, Moore and Lindgren sitting as the Full Federal Court was whether common law legal professional privilege applies to section 155 notices issued by the ACCC.

There is no question that legal professional privilege is not limited in its application to judicial and quasi-judicial proceedings. The High Court has held that, subject to the terms of the legislation relevant to a particular case, it is also available as an answer to statutory investigations and proceedings (*Baker v Campbell*).

It is also well established that the common law rule of legal professional privilege is so important that it is not to be taken as abrogated in a particular case, except by clear words. This does not mean that it is necessary for the relevant legislation to refer expressly to legal professional privilege. It is sufficient if the legislature has used words that, in their natural and ordinary meaning, are inconsistent with the retention of the privilege in the particular case.

In this case, the Full Federal Court considered that the key to determining whether Parliament intended to exclude legal professional privilege lay in the meaning of the words in section 155(5)(a) of the Act, *to the extent that the person is capable of complying with it* (emphasis added).

Justices Wilcox, Moore and Lindgren all concluded that the natural meaning of the words is *capable of complying* in section 155 was inconsistent with the retention of legal professional privilege.

The result

A claim for legal professional privilege is not a valid answer to a section 155 notice.

It follows from this, that solicitors served with such a notice cannot refuse to comply on the ground that they owe their client a duty to attempt to protect the client's privilege. As Justice Lindgren said, *they can be in no better position than their client*.

Ramifications of the decision

The Chairman of the ACCC, Professor Fels, maintains that, despite the favourable decision, there will be no real change to the ACCC's enforcement activities. He claims that the ACCC *has rarely sought to override legal professional privilege to seek documents during the course of an investigation*. However, he says that *the decision means that the ACCC will be able to properly investigate alleged breaches of the Act and determine the seriousness of any breaches without relevant information, documents or evidence being withheld (sic) from it under the cloak of legal professional privilege* (ACCC Press Release, 16 March 2001).

Nonetheless, the decision clearly has far-reaching implications. It means that both **past and future legal communications are liable to investigation** by the ACCC in circumstances where section 155 notices can be issued.

In future, this could jeopardise open communications between lawyers and their clients in relation to possible breaches of the Act. The consequence of this may be that breaches continue for longer than might have been the case had people felt free to communicate frankly with their legal advisers. It could also result in solicitors being

more cautious about giving legal advice identifying possible breaches of the Act, particularly written advice. This means that clients may be deprived of the benefit of proper legal advice, based on full and frank disclosure. The free exchange of legal

advice about internal compliance programs designed to avoid breaches of the Act may also be inhibited.

However, because of the general importance of the issues raised, it is likely that this decision will be the

subject of an application for special leave to appeal to the High Court and that the application if made, would be granted.

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amendments to the *Trade Practices Act*

by Emma Cunliffe, Deacons

Federal Parliament passed amendments to the *Trade Practices Act* (The Act) on 19 June 2001. The amendments came into force on 26 July 2001 and affect the operation of a number of sections of the Act. The object of the amendments is to improve the protection offered to consumers and small businesses by the Act and to improve its enforceability. I have summarised the major amendments below.

1. Unconscionable conduct

The unconscionable conduct provisions prohibit unconscionable (unfair or unreasonable) conduct towards consumers and small businesses. The small business provisions apply to transactions worth up to \$3 million. This upper limit can be extended by regulation.

The power to increase the ceiling on transactions caught by the provisions was used last year to increase the old limit of \$1 million to \$3 million. The enactment of the \$3 million ceiling reinforces the government's intention that the provisions should apply to most small business transactions.

From 26 July 2001, consumers are also able to claim compensation under section 82 of the Act for loss or damages suffered because of unconscionable conduct. Previously, only small businesses could claim this compensation.

Finally, a section has been inserted into the Act to ensure that State and Territory legislation may be enacted in

relation to unconscionable conduct and will be valid to the extent that it is not inconsistent with the Act. This is a technical amendment necessitated by constitutional constraints upon State and Territory legislation.

2. Consumer protection

The maximum penalty available for a breach of the consumer protection provisions has been increased to \$1.1 million for corporations and \$220,000 for individuals. The consumer protection provisions regulate product safety and information standards and require manufacturers and sellers to guarantee that consumer products will be merchantable and fit for their purpose. The consumer protection provisions also include the prohibition against misleading or deceptive conduct and false or misleading advertising.

The new penalties will apply to conduct engaged in on or after 26 July 2001. Until that date, the maximum penalty is \$40,000 for an individual and \$200,000 for a corporation.

3. Enforcing the Act

Enforcement of the Act has been simplified and extended. Consumers and small businesses now have up to six years to bring an action for compensation for a breach of the Act. This provision will partly apply retrospectively, in that causes of action still within time on 26 July 2001 may be brought up to six years after the action accrued. Presently, the time limit is three years.

The range of orders that can be made in relation to someone found to have breached the Act has also broadened. The new orders are classified as "Non-punitive" (section 86C) and "Punitive" (section 86D).

Non-punitive orders include:

- **community service orders** requiring a corporation or individual found to have breached the Act to perform a service for the benefit of the community in order to redress the harm caused by the conduct (eg educating the community about advertising obligations);
- **probation orders** for a period of not more than three years, requiring the corporation or individual to alter its behaviour (eg by introducing a trade practices compliance program or training employees);
- **information disclosure orders** requiring a person to publish information in relation to a contravention of the Act in order to redress the harm caused by the contravention; and
- **advertisement orders** requiring a person to publish a corrective advertisement

The last two types of orders were previously available as remedies under section 80A of the Act.

The punitive order that may be made is an **adverse publicity order**, requiring a person to disclose information