

CHAPTER 9

LEGAL PROFESSIONAL PRIVILEGE

The Availability of Legal Professional Privilege at Compulsory Examinations

9.1 At a compulsory oral examination under section 19 of the ASC Law neither the privilege against self incrimination, nor legal professional privilege, can be relied upon as an excuse for failing to answer a question. Subsection 68(1) and Part 3 Division 2 (sections 19-27) of the ASC Law contain a series of provisions relating to the conduct of examinations which appear to provide extensive protection for the rights of the examinee.

9.2 The abrogation of legal professional privilege was a major issue during the Committee's inquiry. An examination of the policy issue requires a brief outline of the common law relating to legal professional privilege, and a short discussion of the nature of the solicitor-client relationship.

The Solicitor-Client Relationship

9.3 The relationship between a solicitor and his or her client is a

fiduciary one, imposing special obligations on the solicitor.¹⁷⁰ One aspect of the relationship is the duty of a solicitor not to disclose to third parties certain information confidentially revealed to him or her in his or her capacity as a solicitor, and that duty continues after the relationship of solicitor and client has ceased.¹⁷¹

Legal Professional Privilege

9.4 The leading Australian cases on legal professional privilege are the decisions of the High Court in *Grant v Downs*¹⁷² and *Baker v Campbell*¹⁷³. Mr. Justice Murphy who was one of the majority in *Baker v Campbell* described the features of legal professional privilege in the following terms:

Scope of the Privilege.

Under common law as recently declared for Australia, client's legal privilege protects from disclosure any oral or written statement, or other material, which has been created solely for the purpose of advice, or for the purpose of use in existing or anticipated litigation (*Grant v Downs* (83); see also *National Employers' Mutual General Insurance Association Ltd v Waind* (84)). This defines the scope of the privilege more narrowly than elsewhere. In the United Kingdom it is enough if the dominant purpose for coming into existence of the material is legal advice or litigation (*Waugh v British Railways Board* (85)).

The privilege does not attach to documents which constitute or evidence transactions (such as contracts, conveyances, declarations of trust, offers or receipts) even if they are delivered to a solicitor or counsel for advice or for use in litigation. It is not available if a client seeks legal advice in order to facilitate the commission of crime or fraud or civil offence (whether the adviser knows or does not know of the unlawful purpose) (see *Reg v Cos and Railton* (86); *Bullivant v Attorney-General (Vict.)*(87); *R v Smith* (88)); but is of course available where legal advice or assistance is sought in respect of past

¹⁷⁰ *Nocton v Ashburton* [1914] AC 932 at 952.

¹⁷¹ *Ott v Fleishman* [1983] 5 WWR 721, BC.

¹⁷² (1976) 135 CLR 674; 11 ALR 577.

¹⁷³ (1983) 153 CLR 52.

crime, fraud or civil offence. Hence the subject matter of the privilege is closely confined; in brief it extends only to oral or other material brought into existence for the sole and innocent purpose of obtaining legal advice or assistance.¹⁷⁴

9.5 Dawson J, who, like Murphy J, was part of the majority in *Baker v Campbell*, said at p 132:

To view legal professional privilege as being no more than a rule of evidence would, in my view, be to inhibit the policy which supports the doctrine. Indeed, now that there appears to be a tendency to compel the disclosure of evidence as an adjunct to modern administrative procedure (see, e.g. *Commissioners of Customs and Excise v Harz (83)*), it may well be necessary to emphasise the policy lest it be effectively undermined. For there can be no doubt that freedom of communication between a legal adviser and his client may be greatly diminished by a requirement that the information might eventually be used in some action against the client, whether in administrative or judicial proceedings.

In my view, the doctrine of legal professional privilege is, in the absence of some legislative provision restricting its application, applicable to all forms of compulsory disclosure of evidence.

The Dominant Purpose Test

9.6 Legal professional privilege protects the disclosure of communications between a client and his or her legal adviser which are confidential and which are brought into being for the *dominant purpose* of enabling the client to obtain, or the legal adviser to give, legal advice for use in legal proceedings. The privilege derives from the principle that a citizen, before committing himself or herself to any course of action, should be able to know in advance what are the legal consequences that will flow from it.¹⁷⁵

¹⁷⁴ (1983) 153 CLR 52 at 86.

¹⁷⁵ *Balck-Clawson Ltd v Papierwerke AG* [1975] AC 591 at 638 per Lord Diplock.

9.7 The *dominant purpose* test was introduced by the Commonwealth *Evidence Act* 1995. In all proceedings in a federal court or a court of the Australian Capital Territory the applicable test will be whether the document or advice was created with the *dominant purpose* of obtaining legal advice or for the *dominant purpose* of the client being provided with professional legal services relating to an Australian or overseas proceeding or an anticipated proceeding in which the client may or was or might have been a party.¹⁷⁶

Elements of Legal Professional Privilege

9.8 The privilege belongs to, and is for the protection of, the client. It protects him or her from the disclosure of privileged communications, either in testimony or by the production of documents for inspection. It also protects the client from the disclosure of such communications by his or her legal adviser without the client's consent. It is for the person claiming the privilege to establish the facts giving rise to it.¹⁷⁷ The privilege is available (unless excluded) not only in judicial and quasi-judicial proceedings, but whenever the exercise of a statutory power would trespass upon the confidentiality of the communications which the privilege protects (eg in response to a search warrant or a notice to produce documents or at a compulsory oral examination).¹⁷⁸

¹⁷⁶ *Evidence Act 1994* subsection 118(c).

¹⁷⁷ *Grant v Downs* per Stephen, Mason and Murphy JJ Op.Cit. at p 689. See also *NCA v S* (1991) 100 ALR 151 at 158-159 (per Lockhart J).

¹⁷⁸ *Baker v Campbell*, (1983) 153 CLR 52; See also *CAC (NSW) v Yuill* (1991) 65 ALJR 500 at 501 per Brennan J.

9.9 The privilege may be excluded by either express words or necessary intendment in legislation. However, in the absence of any express exclusion, an implied exclusion must be a necessary requirement, because 'legal professional privilege is a doctrine of a fundamental kind which is not to be abrogated except in the clearest terms.'¹⁷⁹

In the absence of language which expressly excludes the privilege, indicia of legislative intention can be found in the nature of the statutory power, the prescribed manner of its exercise and the purpose which its exercise is designed to achieve: *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385 at 396.¹⁸⁰

9.10 Commonwealth Attorney-General's Department summarised the common law on legal professional privilege by saying that it protects from disclosure the contents of all oral and written communications between a lawyer and his or her client which exhibit the following characteristics:

- they are referable to the lawyer/client relationship;
- they are confidential in character; and
- they are brought into existence for the necessary *sole* purpose of:
 - enabling the client to obtain, or the lawyer to give, legal advice or assistance; or

¹⁷⁹ *CAC (NSW) v Yuill* Op. Cit. at 505 per Dawson J, citing as authority *Baker v Campbell* Op. Cit. at 123; *Sorby v The Commonwealth* (1983) 152 CLR 281 at 289, 309-310 and 316; and *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625.

¹⁸⁰ *CAC (NSW) v Yuill* Op. Cit. at 501-502 per Brennan J.

- use in litigation that is current, pending or within the reasonable contemplation or apprehension of the client: *Grant v Downs* (1976) 11 ALR 577 and *Baker v Campbell* (1983) 153 CLR 52.¹⁸¹

Arguments in Support of the Privilege

9.11 The following summary arguments are made in support of the privilege:

- it is conducive to justice for clients to be assured that communications between them and their solicitors will remain confidential, or at least to be disclosed beyond the implied authority given to the solicitor by them;
- our system of law requires solicitors to refrain from making judgments impugning the veracity of what their clients tell them, unless they have reason to make further inquiry of the client. Requiring solicitors to inform authorities of their personal suspicions about the conduct of clients is wholly incapable of being reconciled with this fundamental principle of our legal system;
- solicitors are, for the purposes of the solicitor-client relationship, agents of their client and are thus not free to act beyond the scope of their authority;
- the client privilege flowing from the solicitor-client relationship is subject to a number of restraints imposed by the common law and express legislative dictate, such as:
 - the sole purpose test;¹⁸²

¹⁸¹ *Submissions*, no. 100 (Commonwealth Attorney-General's Department) para 96.

¹⁸² *Grant v Downs* (1976) 135 CLR 674. This has now been changed to a 'dominant purpose' test by the Commonwealth Evidence Act 1995.

- the rule that privilege does not extend to communications in furtherance of a crime or fraud;¹⁸³
- the rule that privilege can be abrogated by Act of Parliament, etc.¹⁸⁴

9.12 As Murphy J said in the passage quoted at paragraph [9.4], the privilege is limited. *Allen Allen & Hemsley v Deputy Commissioner of Taxation* considered the position of a taxation auditor who sought access to the trust account ledgers of a firm of solicitors. The auditor was acting under an authorisation from the Commissioner of Taxation under section 263 of the *Income Tax Assessment Act 1936*. The firm declined to give access, claiming that legal professional privilege attached to entries in the ledgers. The Court held that while the doctrine of legal privilege was not excluded by section 263, only in the most exceptional circumstances can an entry in a solicitor's trust account be privileged as disclosing the contents of communication between solicitor and client.¹⁸⁵

The ASC Law Provisions

9.13 Section 69 of the ASC Law expressly preserves a lawyer's right to claim legal professional privilege unless his or her client consents to the lawyer giving the information which reveals the privileged

¹⁸³ *R v Cox and Railton* (1884) 14 QBD 153

¹⁸⁴ *Corporate Affairs Commission of NSW v Yuill* (1991) 172 CLR 319

¹⁸⁵ *Allen Allen & Hemsley v Deputy Commissioner of Taxation* (1989) FCR 576. See also *Nickmar Pty Ltd & Anor v. Perservatrice Skandia Insurance Ltd* (1985) 3NSWLR p. 44 for further discussion about the limit of the privilege.

information. However, the ASC Law makes no reference to the right of the client to claim legal professional privilege in the face of a requirement to give information or to produce books (such as a question at a compulsory oral examination, or in response to a notice to produce documents).

9.14 In *CAC (NSW) v Yuill*¹⁸⁶ a majority of the High Court found in the Companies (NSW) Code a statutory intention to abrogate the entitlement of a client to claim legal professional privilege, and held that a client could not claim the privilege to refuse to produce documents or answer questions at an oral examination under the then provisions of the Companies Code. The Code provisions were in similar terms to the present provisions of the ASC Law. The High Court decision in *Yuill* has been applied to investigations initiated by the ASC under Part 3 of the ASC Law: *ASC v Dalleagles* (1992) 8 ACSR 109.

ASC Defence of the Decision in Yuill's Case

9.15 The decisions in *Yuill* and *Dalleagles* have been the subject of considerable criticism. The Law Council of Australia has made unsuccessful representations to the Attorney-General recommending that the ASC Law be amended to reverse the decisions.¹⁸⁷ In response to the wave of criticism in journals and by professional associations, the ASC published a copy of its submission of February 1993 to the Attorney-General in the *ASC Digest* (Legislation/Law Reform Section, pp 225-

¹⁸⁶ (1991) 4 ACSR 624.

¹⁸⁷ *Submissions*, no. 90 (Law Council of Australia), para 9.1.

260). A copy of that submission is appended to this report at Appendix 4.

9.16 The ASC submission recommended that the ASC Law not be amended to reverse the *Yuill* decision. The key arguments made by the ASC in defence of the decision are as follows:

- (a) the continued application of *Yuill's* case is required for efficient and cost effective investigations and timely enforcement action. Substantial ambit claims of legal professional privilege can delay investigations of major cases for several months or even years;
- (b) access to material ordinarily subject to legal professional privilege can have the effect of exculpating subjects of investigations and avoiding costly and time consuming tangents;
- (c) lawyers are not being put in the position of informers given that they need only identify a privileged communication and the name of the client (section 69 of the ASC Law);
- (d) with the unique and complex nature of many of the transactions being investigated, access to legal communications is vital to obtain a proper understanding of the transactions and any liability of those involved. ASC investigators are frequently met with the explanation that witnesses 'acted on legal advice', and unless the ASC has the ability to review that advice, it is often impossible to take the investigation further. As well, the complexity of the

transactions means legal advice is necessarily sought in most transactions, avoiding the concern that any abrogation of the privilege would mean that clients would avoid lawyers;

- (e) the privilege is not totally abrogated:
 - (i) oral evidence taken by way of examination which is properly the subject of a claim of legal professional privilege cannot be admitted in evidence (paragraph 76(1)(d) of the ASC Law); and
 - (ii) oral evidence which is self incriminatory cannot be used in criminal proceedings or proceedings for the imposition of a penalty (other than proceedings for false statements) (subsection 68(3) and paragraph 76(1)(a) of the ASC Law);

- (f) an ability to make claims of legal professional privilege would result in:
 - (i) undue delays in investigation and reluctance by prosecuting authorities to prosecute, even when the documents in respect of which the claim is made are not useful, since the investigator and prosecutor cannot know that until they see the document;
 - (ii) delays which would permit potential defendants to leave the jurisdiction or destroy documents;
 - (iii) undermining the ability to take effective interim or preservative action;
 - (iv) ambit claims of privilege where a significant body of material, not properly the subject of the claim, is included in the claim; and

- (v) significant expense and delays in pursuing unnecessary avenues of investigation and in litigating claims for the privilege.

The Law Council of Australia Response

9.17 The Law Council of Australia responded to a number of these arguments in its submission to the Committee. The responses to the ASC arguments set out in the preceding paragraph may be summarised as follows:

- (a) the continued application of *Yuill's* case is required for efficient and cost effective investigations and timely enforcement action. Substantial ambit claims of legal professional privilege can delay investigations of major cases for several months or even years.

Law Council Response:

'If the result of Yuill's case, in the long run, is to discourage open and uninhibited communication between lawyer and client and to encourage the conduct of transactions without recourse to lawyers, then the result achieved will be the opposite of that intended by the ASC. In the Companies Committee's [of the Law Council] opinion, the primary avenue for law enforcement is voluntary compliance, and it is not feasible for the ASC or any other authority to compel compliance by enforcement action in more than a small number of cases.'¹⁸⁸

- (c) lawyers are not being put in the position of informers given that they need only identify a privileged communication and the name of the client (section 69 of the ASC Law).

Law Council Response:

¹⁸⁸

Submissions, no. 90 (Law Council of Australia), para 9.3.

The ASC submission rejects the suggestion that the Yuill doctrine turns lawyers into informers on the basis that, having regard to section 69 of the ASC Law, it is the clients rather than the lawyers who are required to disclose the legal advice. If, however, the legal advice contains a statement of the client's factual instructions (as will commonly be the case) as well as an indication of the advice received, then, if it is used by the ASC in evidence against the client, its use will be objectionable. It will amount to a use against the client of the professional work done by the lawyer in stating the relevant facts and law, notwithstanding that this was done on a confidential basis for the client's use alone. In the view of the Companies Committee [of the Law Council], the use of legal advices in this manner infringes the well-known legal principle that evidence should not be admitted where the public policy considerations in favour of bringing a wrongdoer to justice are outweighed by the legal policy of opposing unfair or unlawful conduct in the obtaining of the evidence; see, for instance, Bunning v Cross (1977-78) 141 CLR 54, R v Ireland (1970) 126 CLR 321 and Van der Meer v R (1988) 62 ALJR 656.¹⁸⁹

- (d) with the unique and complex nature of many of the transactions being investigated, access to legal communications is vital to obtain a proper understanding of the transactions and any liability of those involved. ASC investigators are frequently met with the explanation that witnesses 'acted on legal advice', and unless the ASC has the ability to review that advice, it is often impossible to take the investigation further. As well, the complexity of the transactions means legal advice is necessarily sought in most transactions, avoiding the concern that any abrogation of the privilege would mean that clients would avoid lawyers.

Law Council Response:

As a matter of evidence, such an explanation [a claim that the witness was acting on legal advice] will not be regarded as convincing, unless the legal advice is, voluntarily, disclosed. In practice, there will be a substantial incentive for any client who wishes to invoke '*legal advice*' as an explanation for actions, to disclose the substance of the legal advice. There is, the Companies

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Submissions, no. 90 (Law Council of Australia) para 9.3.

Committee [of the Law Council] considers, no injustice in this, because the client has elected to invoke legal advice as an explanation. This occurred, for instance, in the civil proceedings concerning directors in *Advance Bank Australia Ltd v FAI Insurances Ltd* (1987) 9 NSWLR 464.¹⁹⁰

- (e) the privilege is not totally abrogated:
- (i) oral evidence taken by way of examination which is properly the subject of a claim of legal professional privilege cannot be admitted in evidence (paragraph 76(1)(d) of the ASC Law); and
 - (ii) oral evidence which is self incriminatory cannot be used in criminal proceedings or proceedings for the imposition of a penalty (other than proceedings for false statements) (subsection 68(3) and paragraph 76(1)(a) of the ASC Law).

Law Council Response:

The unsatisfactory state of the law in this area is illustrated by the availability of a statutory exemption from further use of matter the subject of legal professional privilege where the legal advice is disclosed at an oral exemption under section 19 but not in other situations; under section 76(1)(d) of the ASC Law, such material is protected from further use. There is no equivalent protection for documentary material - ie written legal opinions - that are compulsorily disclosed pursuant to a notice under sections 28 to 34. The Companies Committee [of the Law Council] can see no reason for this variation. This incentive to give advice in oral form is not in the public interest, as oral advice is obviously open to greater misunderstanding and less precision than a formal written opinion.¹⁹¹

- (f) an ability to make claims of legal professional privilege would result in:

¹⁹⁰ *Ibid*, para 9.3.

¹⁹¹ *Ibid* para 9.3.

- (i)
- (ii)
- (iii)
- (iv) ambit claims of privilege where a significant body of material, not properly the subject of the claim, is included in the claim; and
- (v)

Law Council Response:

In many instances a tendency to make '*ambit claims*' will be encouraged by the approach of the ASC in issuing excessively broad and onerous notices allowing limited time for compliance. Nevertheless, the examples quoted by the ASC in its submission¹⁹² indicate that there is a need for urgent and disciplined procedures for determining when a claim to legal professional privilege is properly available.

Guidelines to achieve this in the taxation investigation area have been established between the Australian Taxation Office and the Law Council of Australia. The Companies Committee [of the Law Council] favours similar guidelines in the area of corporate investigations by the ASC and, if necessary, the institution of a summary form of legal procedure (whether in a court or a tribunal) to resolve disputed privilege claims, in the interests of expedition in investigations. ... The procedural issue raised by the ASC concerning '*ambit claims*' does not, in the Companies Committee's [of the Law Council] submission, justify complete abandonment of the right to withhold compulsory disclosure of privileged material.¹⁹³

9.18 The ASC commented favourably on the suggestion that guidelines be developed. At the Committee's public hearing in Sydney Mr Tanzer (the ASC Regional General Counsel in Brisbane) commented that 'the ASC is happy to entertain this and we suggest that it might be

¹⁹² See Appendix 4 paragraphs 43-54.

¹⁹³ *Ibid* para 9.3.

something that we can move forward nationally.¹⁹⁴

9.19 At the Committee's public hearing in Sydney the Law Council gave further evidence on the matter. The Law Council argued strongly that the limitation on legal professional privilege was damaging to the desirable aim of promoting compliance with the law:

Mr Korner--If I could come in on that point for a moment, I think there is a general agreement around the table that promoting a climate of compliance with the law is desirable. But in the vast majority of situations of the kind of which Dr Austin speaks, if the client is told that he should not do something he will not do it in my experience, certainly in the large majority of cases.

Dr Austin--Our clients!

Mr Korner--Our clients, that is right. That being so, the best means of promoting compliance with the law is actually to encourage people to go to their lawyers all the time, regularly. The instances that Mr Menzies speaks of are the instances where the clients do not follow the advice and I daresay that has happened to us all, if rarely.

That being so, however, you have to work out whether those isolated instances are so important and the pursuit of truth is so important in those instances as to outweigh all the public benefits of the free and frank flow of information in a disciplined way, as Dr Austin has described, if the process is promoted. I believe that compliance with the law will be much greater furthered that way because at the end of the day the ASC really cannot investigate every situation.

I believe it is a matter of judgment, and minds differ on it, but I do believe very strongly that if clients feel that the advice may possibly be used against them then they would generally be discouraged from seeking it. It will also give rise to the difficulties as to the form and clarity of the advice that Dr Austin has spoken of.¹⁹⁵

¹⁹⁴ *Evidence*, p 334 (Mr G Tanzer).

¹⁹⁵ *Evidence* p 344 (Mr N Korner and Dr R Austin).

Comment in the Evidence on Legal Professional Privilege

9.20 The limitation on legal professional privilege was described as 'a substantial erosion of a traditional and well founded liberty' by Split-Cycle Technology Limited.¹⁹⁶

9.21 Mr Norman O'Bryan, a Melbourne barrister, noted that it is highly desirable that a citizen should know his or her rights, and that, traditionally, the common law has protected the legitimate obtaining and receiving of legal advice from disclosure:

Legal professional privilege is at the heart of our legal process, indeed a basic civil right, because it is considered essential that citizens feel free and unconstrained in giving instructions to their lawyers and receiving legal advice. The right is fundamental and the policy which underlies it equally important. It is to be hoped that the ASC recognises that the circumstances in which the privilege should be abrogated are very special and very rare and does not regard the decisions in *Yuill* and *Dalleagles* as giving it carte blanche to destroy the confidentiality which ought to attach to legitimate lawyer-client communications. Otherwise there is a risk that the policy underlying the privilege will be subverted and greater harm than good will come from that subversion.¹⁹⁷

9.22 The ASC responded to Mr O'Bryan's remarks by stating that it 'is sensitive to that issue and refrains from seeking current communications between those who are subject to investigation and their lawyers, concentrating instead on material which evidences or explains the conduct under investigation.'¹⁹⁸

9.23 The Law Council of Australia was critical of the limitation on the availability of legal professional privilege following the decisions in *Yuill* and *Dalleagles*. The Law Council felt that the 'compulsory

¹⁹⁶ *Submissions*, no. 13 (*Split-Cycle Technology Limited*) p6.

¹⁹⁷ *Submissions*, no. 87 (*Mr N O'Bryan*), p9.

¹⁹⁸ *Submissions*, no. 129 (*ASC Supplementary Submission*) p 67.

disclosure of legal advice will, over a period of time, undermine community respect for the rule of law, because it will discourage and limit recourse to lawyers.¹⁹⁹ A detailed discussion of the views of the Law Council appears earlier in this chapter.

9.24 Price Waterhouse provided a submission which firmly expressed the view that correspondence between a person or firm and its legal representatives must in the interests of natural justice be subject to legal professional privilege. It was argued that:

[i]f a firm can not in strict confidence instruct its solicitor, confer with its solicitor and counsel and receive advice for the purpose of representation, the value of the right to representation is seriously impaired.²⁰⁰

9.25 The Law Society of NSW expressed concern at the decision in Yuill, which was described as 'fundamentally wrong, and inconsistent with the promotion of a climate of genuine respect for, and compliance with the law²⁰¹.

9.26 Coudert Brothers, International Attorneys, noted the difference between US law and Australian law on this point. It was pointed out that in the United States the SEC has no power to force disclosure of information which is protected by attorney/client privilege.²⁰² The ASC acknowledged that the powers of the ASC and

¹⁹⁹ *Submissions*, no. 90 (Law Council of Australia), p 17.

²⁰⁰ *Submissions*, no. 93 (Price Waterhouse) p6.

²⁰¹ *Submissions*, no. 94 (Law Society of New South Wales) p1.

²⁰² *Submissions*, no. 97 (Coudert Brothers), p 11.

of the SEC are different with respect to legal professional privilege (and also with respect to the privilege against self incrimination) but referred to its arguments in favour of limiting the privilege.²⁰³

9.27 The Institute of Company Directors pointed out that in *Yuill* the High Court was concerned with a special investigation under Part VII of the Companies Code. (Such special investigations required the approval of the Minister or of the intergovernmental Ministerial Council for their commencement. Special investigations attracted a wider range of intrusive powers for the NCSC.)

The ASC Law, however, does not now maintain the distinction between special and other investigations. This means if the *Dalleagles* decision is followed legal professional privilege is not simply eroded for certain limited 'special investigations', instead the privilege is removed across the whole spectrum of ASC investigations requiring the production of documents. It is suggested this much wider abrogation of legal professional privilege was never intended by the High Court in *Yuill*.²⁰⁴

9.28 The Institute of Chartered Accountants proposed that the right to claim legal professional privilege in relation to communications with the firms' solicitors should be preserved 'as a fundamental legal right'.²⁰⁵

²⁰³ *Submissions*, no. 129 (ASC Supplementary Submission), p 3.

²⁰⁴ *Submissions*, no. 98 (Australian Institute of Company Directors), para 2.4.

²⁰⁵ *Submissions*, no. 113 (Institute of Chartered Accountants in Australia) para 4.

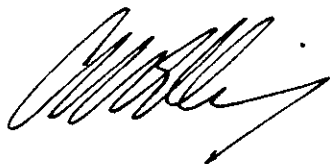
Conclusion

9.29 The Committee believes that, on balance, the inroads made on the availability of legal professional privilege by the decision in *Yuill* have had a negative effect upon corporate regulation in Australia. The limitation upon the privilege has been inimical to a constructive relationship between the ASC and the business community. It is also not conducive to the building of a climate of voluntary compliance with the law.

9.30 Importantly, the fact that the decision in *Yuill* may prompt some company officers to act without legal advice, or on the basis of possibly imperfectly understood oral advice, cannot be good for the public interest in the sound and lawful management and administration of corporations.

Recommendation

Recommendation 15: The majority of the Committee recommends that the ASC Law be amended with a view to ensuring the availability of legal professional privilege to all parties in investigations under the ASC Law.



Senator Chris Ellison

Chairman