

Dissenting Report by Senator Jim McKiernan

***Dissenting Report by Senator Jim McKiernan
Chapter Nine - Legal Professional Privilege***

A person would usually be able to resist providing documents to a court or an investigator where the document was prepared solely for the purpose of providing legal advice.

In the area of corporate investigations, the ASC is able to require a person to provide documents containing legal advice. The rationale for this is that an investigator of a corporation's transactions needs these documents to be able to determine whether there has been a breach of the law. It is considered that the nature of financial transactions are complex and that this information should be disclosed so that the ASC can come to a timely decision as to whether there is a need for further investigation.

It is also argued that investigations would be easily impeded in the corporate area by a person saying that they undertook a particular transaction on the advice of their lawyer where that advice could not be revealed to the ASC.

It should be noted that the ASC must have reason to suspect that there could be a breach of the law in order to initiate an investigation where it could require access to a person's legal advice.

I am advised that it has been Government's policy for more that 10 years, that the public interest in expediting investigations warrant the abrogation of a person's right to claim legal professional privilege.

Efficiency in investigation vs promotion of recourse to legal advice

The Law Council, in a submission to the Inquiry, argued that the current state of the law (a person cannot decline to provide legal advice obtained to the ASC) discourages open communications between lawyer and client and recourse to lawyers.

I disagree with this argument for the following reasons;

- Such an argument is more speculation than fact.
- Arguably, the current state of the law has made no practical difference to the business community.
- It could be said that the Law Council is arguing a case for its own constituents.
- It should be noted that accountants, who these days provide considerable advice to corporations on a variety of matters, could not restrict access by the ASC to their advice. They have no right to claim privilege.

Role of lawyers where ASC can compel disclosure of legal advice

The Law Council further argued that lawyers are turned into informers as the legal advice which is disclosed to the ASC would probably contain the proposal put forward by the client which may be in breach of the law.

- Whilst I do not agree with this, I do accept that this is a difficult area. Although it is not free from doubt, the ASC would only have access to legal advice provided in the course of events under investigation and would not have access to legal advice relating to the individual's liabilities under the law.

Encouragement of oral rather than written legal advice

I do not agree with the Law Council's argument that the current structure of the ASC Act would encourage clients to seek, and lawyers to give, oral advice in preference to written advice.

- This has not been borne out in practice. I believe that for reasons such as professional negligence, it is unlikely that important advice would be given orally.

Problem of ambit claims to legal professional privilege

It should be noted that there are guidelines for taxation investigations which were jointly developed by the ATO and the Law Council. I suggest that it may be worth pursuing this concept in relation to ASC investigations.

- If ASC requests were better defined, individuals could be encouraged by these guidelines to make less expansive claims for privilege.

Difficulties of preserving privilege for purposes outside scope of ASC investigation

The Law Council states that there is legal uncertainty as to whether information which has been compulsory disclosed to the ASC containing legal advice, can be kept from being accessed by third parties.

- It is my understanding that the Attorney General's Department and the ASC view of the law is that the production of a document under compulsion under the ASC Act, does not amount to a waiver of legal professional privilege, if the documents are sought for other purposes.

Background

The legal professional privilege protects the confidentiality of communications between lawyers and their clients from compulsory disclosure, except where there is a clear statutory provision abrogating the privilege. At common law, the privilege is available to both the client and the lawyer and, in some circumstances, third parties to resist disclosure.

The ASC Law provides that only a lawyer may claim the privilege against the disclosure of information or documents to the ASC. As the ASC Law does not expressly state that a client or third party may claim the privilege if the information is in his/her possession, the view has been taken by the ASC that the Parliament intended the privilege to be limited to the lawyer.

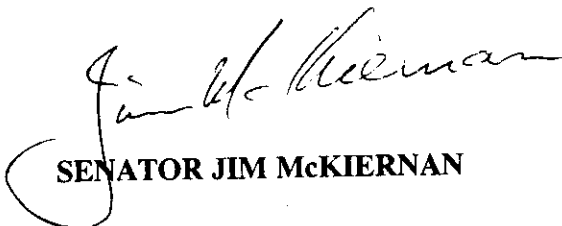
The High Court held, in *CAC (NSW) v Yuill* (1991) 65 ALJR 500, by a majority of three (*Brennan, Dawson and Toohey JJ*) to two (*Gaudron and McHugh JJ*) that a person, other than a legal representative, who is required to attend for an examination by a corporate affairs investigator and to produce documents, may not decline to answer questions or provide the documents on the grounds of legal professional privilege. The majority considered that the Companies Code (the forerunner of the ASC Act provision) evinced a legislative intention to abrogate the privilege. Although Yuill's case dealt with interpretation of the Companies Code provisions dealing with special investigations, in *ASC v Dalleagles* (1992) 8 ACSR 109 Federal Court held that the High Court's decision also had direct application to formal investigations under the ASC Law.

ASC and the DPP are of the view that there should be no amendment to the law as it currently stands to modify the operation of Yuill's case, as applied in *ASC v Dalleagles*. In effect, they argue that the continued abrogation of legal professional privilege in corporate investigations is required to enable efficient and cost effective investigations and timely enforcement action.

They argue that claims of legal professional privilege could result in major delays to the investigation and prosecution process for corporate offences and, in particular delay investigations of major cases for considerable periods of time. They consider that, given the nature of corporate investigations, access to legal communications is essential to obtain a proper understanding of complex commercial transactions and the liability of those involved in these transactions.

Privilege is not totally abrogated in that oral evidence which would otherwise have been privileged and is provided by way of examination is inadmissible in both civil and criminal proceedings. Further, oral evidence which is self incriminatory cannot be used in criminal proceedings or proceedings for impositions of penalty other than proceedings for false statements.

I dissent from recommendation 15 of the Committee's report.


SENATOR JIM MCKIERNAN