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Brief

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WAIVER OF PRIVILEGE: McCABE AND THE FAIRNESS TEST

Anyone with a passing interest in product liability will be aware of the decision of the Supreme Court of *McCabe v British American Tobacco Australia Services Limited*,¹ following which for the first time in Australia a smoker was awarded damages in a claim against a tobacco company. The decision was overturned by the Court of Appeal on appeal.² The Court of Appeal decision is itself the subject of appeal.

Yet the claim was never judged on its merits, rather British American Tobacco's ('BAT') defence was struck out after it became apparent that BAT had engaged in a process of destruction of documents pursuant to a 'document retention policy' which Eames J considered so prejudiced the plaintiff's ability to have a fair trial that the only option was to strike out the defence.

McCabe raised two important issues relating to document management:

1. The legitimacy of document retention policies, when those policies are used to destroy documents relevant to litigation that has not yet commenced but is anticipated, including the consideration of whether a separate tort might exist based on deliberate destruction of documents; and
2. The mechanism by which the Court became aware of the controversy surrounding the development of BAT's document retention policy: a waiver of privilege.

This paper will deal with the second of these two issues.

PRIVILEGE

Legal professional privilege is a substantive principle of the common law that acts to protect from disclosure

confidential communications between a lawyer and a client made for the dominant purpose of obtaining or giving legal advice, and communications between a lawyer, the client and third parties made for the dominant purpose of use in or in relation to litigation which is either pending or in contemplation.³

The significance of the doctrine is well described in the following statement of Deane J:

'That general principle is of great importance to the protection and preservation of the rights, dignity and freedom of the ordinary citizen under the law and to the administration of justice and law in that it advances and safeguards the availability of full and unreserved communication between the citizen and his or her lawyer and in that it is a precondition of the informed and competent representation of the interests of the ordinary person before the courts and tribunals of the land. Its efficacy as a bulwark against tyranny and oppression depends upon the confidence of the community that it will in fact be enforced. That being so, it is not to be sacrificed even to promote the search for justice or truth in the individual case or matter.'⁴

WAIVER OF PRIVILEGE

Waiver of privilege over a communication will occur 'where the party entitled to privilege performs an act which is inconsistent with the confidence preserved by it'.⁵ Only the client may waive the privilege, however the client's legal adviser will usually have ostensible authority to waive the privilege in the conduct of litigation.⁶

The difficulty lies in identifying and classifying the circumstances in which an act takes place that is so

¹ *McCabe v British American Tobacco Australia Services Ltd* [No 2] [2002] VSC 112 (Unreported, Eames J, 6 February 2002) (BC200201641) and [No 1] [2002] VSC 73 (Unreported, Eames J, 22 March 2002) (BC200201564).

² *British American Tobacco Australia Services Ltd v Cowell* [2002] VSCA 197 (Unreported, Phillips, Batt and Buchanan JJA, 6 December 2002) (BC200207341).

³ The dominant purpose test was re-established by the High Court in *Esso Australia Resources Limited v FC T* (1999) 201 CLR 49 per Gleeson CJ, Gaudron, Gummow and Callinan JJ, McHugh and Kirby JJ dissenting.

⁴ *Attorney-General for the Northern Territory v Maurice* (1986) 161 CLR 475 at 490.

⁵ D Byrne and JD Heydon, *Cross on Evidence* (Butterworths, Sydney, 1996) vol 1, par 25010.

⁶ See *Great Atlantic Insurance Co v Home Insurance Co* [1981] 2 All ER 453.

inconsistent with privilege as to destroy it. In some circumstances, best described as 'express waiver', the waiver will occur consequent on an intentional disclosure of protected information, for example, the voluntary production of privileged documents before a taxing officer of the court,⁷ reading out a privileged document in court⁸ or tendering a privileged document at an interlocutory proceeding in an action.⁹

Implied waiver and the fairness test

(a) The majority view

Implied or imputed waiver may occur where there is no subjective intention to perform an act inconsistent with the privilege. Questions of implied waiver commonly arise when part of a privileged communication is used or disclosed, as regards disclosure of the remainder, or where part of a series of communications is disclosed, as regards disclosure of associated material. Implied waiver may also arise where a privileged communication is disclosed to a third party.

Professor Wigmore¹⁰ gave the following explanation of the general principle:

'A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final.'

Professor Wigmore's formulation was quoted with approval by the High Court in *Attorney General of the Northern Territory v Maurice*.¹¹ In that case, the Court was asked to determine whether waiver of privilege had occurred in relation to source materials used for a Claim Book compiled, served and used in proceedings

relating to an Aboriginal land claim. The Claim Book was somewhat analogous to a pleading, but contained greater detail, including historical and anthropological information. The source materials in dispute consisted of field notes and work records used in the compilation of the Claim Book, but neither specifically referred to nor reproduced in it.

While the Court considered that privilege in the Claim Book itself had been expressly waived once copies were distributed amongst the parties, the Court held unanimously that no such express waiver had occurred in relation to the source materials associated with it.

Each member of the Court approved a test of fairness to determine whether waiver ought be implied. Gibbs CJ phrased the test as follows:

'In a case where there is no intentional waiver the question whether a waiver should be implied depends on whether it would be unfair or misleading to allow a party to refer to or use material and yet assert that that material, or material associated with it, is privileged from production.'¹²

Both Gibbs CJ and Dawson J noted that where a document deals with a single subject matter it would be unfair to allow a party to use part of it, so that privilege over the remainder must then be lost. Gibbs CJ considered that the same test would apply to determine whether use of one document impliedly waived privilege over associated material.¹³

(b) Application of the test where there is disclosure to a third party

The High Court examined waiver of privilege in a different context in *Goldberg v Ng*,¹⁴ in which it was asked to determine whether the disclosure by a solicitor of his own privileged statement to a third party, the Law Society of New South Wales, in response to a complaint of professional conduct made by a former client, constituted a waiver of privilege for the purposes of a

⁷ *Giannarelli v Wraith* [No 2] (1991) 171 CLR 592.

⁸ *Great Atlantic Insurance Co v Home Insurance Co* [1981] 2 All ER 485.

⁹ *Richards v Estate of Bailey* (Unreported, Supreme Court of NSW, 24 September 1996).

¹⁰ Wigmore, *Evidence in Trials at Common Law*, (McNaughton rev 1961) Vol VIII, para 2327, 636.

¹¹ (1986) 161 CLR 475.

¹² *Ibid* at 481.

¹³ *Ibid* at 482 per Gibbs CJ, at 497-498 per Dawson J.

¹⁴ (1995) 185 CLR 83.

related civil claim brought by the client. The majority of the Court used the fairness test to determine whether disclosure to the Law Society constituted waiver, saying that the question ‘falls to be resolved by reference to the requirements of fairness in all the circumstances of the particular case’.¹⁵

The Court held that although the Law Society had powers of compulsion and a failure to adequately respond to the complaint could itself constitute professional misconduct, the solicitor had produced his statement voluntarily, for the ‘calculated purpose of demonstrating the reliability of his denial’¹⁶ of the complaint. While it was his express intention that privilege be maintained, the interconnection of the two proceedings and the use made by the solicitor of the privileged documents in one of them made it unfair that the client not have access to them in the other.¹⁷

In *Mann v Carnell*,¹⁸ the High Court considered whether privilege subsisted in legal opinions disclosed by the Chief Minister of the ACT to a Member of the ACT Legislature. The disclosure was made after the Member raised with the Chief Minister a complaint made by a constituent regarding the waste of public money occasioned by the proceeding. The disclosure was made on a confidential basis to enable the Member to consider the reasons for the Chief Minister’s conduct.

The majority of the Court used the fairness test to determine whether waiver should be imputed. However, they limited and refined the test as follows:

‘What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and

maintenance of the privilege, not some overriding principle of fairness operating at large.’¹⁹

Ultimately, it was held that no waiver had occurred because, the purpose of the privilege being to protect the ACT from subsequent disclosure of the legal advice, ‘there was nothing inconsistent with that purpose in the Chief Minister conveying the terms of that advice, on a confidential basis, to a member of the Legislative Assembly who wished to consider the reasonableness of the conduct of the Territory’.²⁰

McHugh J, in dissent criticised the fairness test, concluding that it produces a ‘legal category of indeterminate reference’.²¹

(c) Waiver for a limited and specific purpose

In the decision of the New South Wales Court of Appeal in *Goldberg v Ng*,²² Kirby P (in dissent) proposed that the disclosure of documents to the Law Society had constituted a limited waiver only. His Honour approved authorities of the English Court of Appeal, including *British Coal Corporation v Dennis Rye Ltd* [No 2] and *Goldman v Hesper*²³ which he said had held that:

‘Where communications, the subject of legal professional privilege, are disclosed to a third party by the holder of legal professional privilege for a limited and specific purpose, legal professional privilege is only waived for that limited and specific purpose as against the third party and not as against the privilege holder’s opposing litigant.’²⁴

In the High Court, Kirby P’s view found favour with Toohey and Gummow JJ. The majority made only oblique references to the potential doctrine, however

¹⁵ Ibid at 96 per Deane, Dawson and Gaudron JJ.

¹⁶ Ibid at 100.

¹⁷ Ibid at 102.

¹⁸ (1999) 201 CLR 1.

¹⁹ Ibid at 13.

²⁰ Ibid at 15.

²¹ Ibid at 40, quoting from R. Desiatnik, *Legal Professional Privilege in Australia* (Sydney, Prospect Media 1999) p122.

²² *Goldberg v Ng* (1994) 33 NSWLR 639.

²³ [1988] 3 All ER 816 and [1988] 3 All ER 97 The former case involved disclosure of documents to police to assist with a criminal investigation; the latter dealt with disclosure of documents to a court officer during taxation proceedings.

²⁴ (1994) 33 NSWLR 639 at 651.

they did state in the form of a footnote that the concept of limited waiver was a ‘possibility’.²⁵

Earlier, in *Giannarelli v Wraith* [No 2],²⁶ McHugh J strongly criticised the notion of waiver for a limited purpose, saying ‘a party either waives the privilege entirely... or asserts the privilege and maintains the confidentiality of his documents. This is the only acceptable view.’²⁷

(d) Current position of the test

The prevailing ratio of the High Court is that the fairness test applies to determine whether implied or unintentional waiver has occurred, whether the situation before the Court involves:

- a partial disclosure of a privileged document;
- a disclosure over one document where associated documents exist; or
- a disclosure to a third party, in related proceedings and potentially outside those proceedings.

The formulation of the test has been somewhat elastic, moving from a test of fairness in the sense of misleading or unfair use in *Maurice*, to a wider test of fairness ‘in all the circumstances’ in *Goldberg v Ng*. In *Mann v Carnell*, the Court moved back to the general proposition that waiver results from inconsistency between the use made of the material and the privilege, and thus allowed a far more narrow role for considerations of fairness. The test in *Mann v Carnell* appears more consistent with the type of unfairness that the High Court in *Maurice* contemplated would result in waiver, while the test in *Goldberg v Ng* has the potential to be of broad and uncertain application.

(e) Extent of waiver

Goldberg v Ng and *Mann v Carnell* each dealt with the use made of discrete documents, so that it was not necessary for the Court to consider the possible extent of the implied waiver. In the only case before the High Court to have dealt with waiver over associated materials, *Maurice*, the Court gave little guidance as to how wide the waiver over associated material might extend, leaving lower courts without an adequate

framework to determine cases which would inevitably involve associated material of potentially indeterminate scope.

The uncertainty and potential subjectivity of the fairness test is exacerbated by the fact that it often falls to be used by inferior courts in interlocutory proceedings. It is no wonder then that courts in jurisdictions across Australia have made wildly inconsistent decisions in application of the test. The different faces that fairness may adopt are well seen in the well-publicised Victorian Supreme Court case *McCabe v British American Tobacco Australia Services Ltd*.

WAIVER OF PRIVILEGE IN *McCABE*

In *McCabe*, the plaintiff made a claim for personal injury as a result of alleged long term use of the defendant, BAT’s cigarettes. The proceeding was expedited as a ‘speedy trial’ due to the plaintiff’s deteriorating health. In early 2002, the plaintiff made an interlocutory application before Eames J seeking to have the defence struck out. The strike out application ultimately proceeded on the allegation that BAT had engaged in deliberate destruction of documents relevant to the claim, prior to the claim being issued but at a time when BAT was well aware that a ‘smoking’ claim by a consumer such as the plaintiff was inevitable. In particular, a large volume of documents discovered in an earlier smoking claim, the ‘Cremona litigation’, were said to have been destroyed in 1998.

In opposition to the application, BAT filed an affidavit, in which an employee, Maher, asserted that BAT had a document retention policy and that destruction of certain categories of documents had been carried out in accordance with that policy and following receipt of legal advice that there was no impediment to BAT doing so. The affidavit annexed various exhibits, including a legal advice that BAT had obtained in March 1998 regarding the policy and its application (the ‘1998 advice’), and the letter from BAT to its solicitors in which it had requested the 1998 advice (the ‘letter of instruction’). The letter of instruction exhibited in the affidavit itself contained annexures, including an earlier legal advice BAT had obtained in July 1992 (‘the 1992 advice’). Maher also gave oral evidence regarding the affidavit.

²⁵ (1995) 185 CLR 83 at 95.

²⁶ (1991) 171 CLR 592.

²⁷ *Ibid* at 607.

The plaintiff then issued a Notice to Produce and Subpoenae for the production of all related documents that had come into existence since 1985 regarding BAT's obligations of discovery in smoking claims, the destruction of documents which may be the subject of discovery in such claims and the destruction of documents following the Cremona litigation. BAT and its solicitors objected to production of a range of documents over which privilege was claimed. The plaintiff argued that if privilege attached to the documents, it had been impliedly waived by BAT's conduct in annexing the 1992 and 1998 advices and the letter of instruction to the affidavit.

His Honour concluded that the affidavit and oral evidence of BAT had made use of the 1992 and 1998 advices in order to establish or advance the propositions that:

- (a) BAT had a long-standing document retention policy regulating the maintenance and disposal of documents;
- (b) BAT acted on legal advice in cancelling a 'hold order' prohibiting disposal of documents, which had been in place during the Cremona litigation;
- (c) The destruction of documents that occurred consequently was performed as a routine application of an appropriate document handling process, and not with a primary intention of destroying documentation that might be damaging in litigation; and
- (d) Legal advice had been obtained, which was consistent with previous legal advice, so that the destruction of documents in 1998 was merely the continuation of a long term approach to document management.²⁸

His Honour cited Gibbs CJ's comments in *Maurice*²⁹ as authority for the proposition that the waiver

'might extend to related topics or to material which is associated with the identified topics'³⁰ and *Goldberg v Ng* as authority that the question of fairness 'must be judged in the light of all the circumstances of the case'.³¹

Using this approach, he concluded that the use of the documents over which privilege has been expressly waived by BAT encompassed a period from 1990 to 1998, and related to the issues labelled (a) to (d) above which he had specifically identified. Relying on the authority of *R v Young*,³² he held that the waiver would also extend to:

'Such related documents as might be indirectly relevant, in that they might provide insight into the content, circumstances and consistency of the advice which was requested and received at other times on these topics.'³³

Applying the concept of 'fairness', His Honour concluded that the plaintiff should be granted access to other advices and documents relevant to advice obtained by BAT, or relating to advice sought, and other documents that might bear upon such other advice. He considered that the selective use of the two legal advices led to a requirement that:

The plaintiff's advisers, in fairness, should be able to examine such other advices and documents on those topics (and requests for advice) as might disclose whether the... [1998] advice was not, in fact, relied on, but was merely used to disguise the true purpose for the implementation of the program.³⁴

The decision led to the disclosure of a large volume of legal advices and associated documents. Eames J's subsequent analysis of many of the documents thus produced ultimately led to the defence being struck out.³⁵ In his judgment on the strike out application, His Honour referred specifically to the contents of many of the documents produced as a result of the

²⁸ [2002] VSC 112 at para 11-16.

²⁹ (1986) 161 CLR 475 at 481 - 483.

³⁰ [2002] VSC 112 at para 20.

³¹ *Ibid* at para 20.

³² (1999) 46 NSWLR 681.

³³ [2002] VSC 112 at para 21.

³⁴ *Ibid* at para 32.

³⁵ *McCabe v British American Tobacco Australia Services Ltd [No 1]* [2002] VSC 73 (Unreported, Eames J, 22 March 2002) (BC 200201564).

waiver, and made heavy criticism of the conduct of both BAT and various solicitors whom had advised it.³⁶

The reasoning of Eames J in relation to waiver of privilege was comprehensively rejected by the Court of Appeal, on BAT's appeal against the decision to strike out the defence.³⁷ Phillips, Batt and Buchanan JJA agreed that privilege had been expressly waived in relation to the 1998 advice and the letter of instruction, by reason of the exhibition of those documents to an affidavit.³⁸ However, they saw nothing in those documents that would carry with it the waiver of other documents. Although the 1992 advice itself referred to earlier legal advices that had been obtained as far back as December 1985, the Court of Appeal considered that:

'A reference in one letter of advice to an earlier letter of advice does not expose the latter to scrutiny by the other party to litigation merely because legal professional privilege is waived in relation to the former: implied waiver is not so generous a doctrine. As we apprehend it, where legal professional privilege is waived in relation to one piece (or part) of advice, the privilege is impliedly waived in relation to another if, and only if, that other is necessary to a proper understanding of the first.'³⁹

Stating that the test in such cases is 'whether it would be inconsistent for a party to rely upon, and so to waive legal professional privilege in respect of, the one without also being taken to have waived privilege in the other', the Court of Appeal determined that the 1992 advice was 'complete in itself and there was no need to make reference to the earlier advice in order to properly understand it'.⁴⁰ Similarly, in order to understand the letter of instruction there was no need to scrutinise the earlier advices that the letter and its enclosures mentioned. The request for advice in the letter of instruction was to review earlier advice and determine whether it was still correct and accurate: the accuracy

or otherwise of the letter's description of that advice was not of immediate concern.⁴¹

In relation to the 1998 advice, the Court of Appeal reached a similar conclusion. It held that a reference within that advice to advice previously obtained was no more than a re-iteration of the letter of instruction, which did not serve to waive, by implication or otherwise, privilege over the earlier advice.⁴²

The Court of Appeal noted that Eames J had been concerned at the use made of the two legal advices by BAT. However, it did not consider that BAT's assertion that the document retention policy was longstanding required waiver of privilege in relation to advice given at that earlier point, either in relation to establishment or review of the policy. BAT's claim was that it had acted on legal advice in destroying documents, and that claim was 'patently substantiated' by the 1992 and 1998 advices. If the plaintiff sought to challenge other matters, such as whether the legal advice had been bona fide, then that was a matter for her to pursue by reference to the documents in her possession or those that she could compel.⁴³

The Court of Appeal made further criticisms of Eames J's finding. It noted that if the plaintiff's contention that the legal advice had been sought to 'dress' up the destruction of the documents had any basis, then BAT's claim of privilege over and consequent failure to produce documents that could potentially show legitimate legal advice might be the subject of adverse inference.

Further, their Honours noted that in relying on *R v Young*, Eames J had erroneously used a decision dealing with the question of relevance, rather than a question of waiver of privilege, to determine that waiver of privilege extended to 'related documents that might be indirectly relevant'.

³⁶ Ibid. See, for example, paras 18, 40-44, 157-160, 215, 235, 266 and 289.

³⁷ [2002] VSCA 197.

³⁸ Ibid at para 118.

³⁹ Ibid at para 121.

⁴⁰ Ibid.

⁴¹ Ibid at para 122.

⁴² Ibid at para 123.

⁴³ Ibid at para 126.

It was at this point that the concept of fairness used by Eames J diverged from that to which the Court of Appeal had reference. While Eames J considered that there had been waiver as to certain issues and that 'as a matter of fairness' the plaintiff ought have access to related documents, as the Court of Appeal saw it, fairness should only be used in so far as it would inform 'curial ascertainment of consistency'.⁴⁴ They quoted with approval the High Court in *Mann v Carnell*:

'What brings about the waiver is the inconsistency which the courts, where necessary informed by the consideration of fairness, perceive, between the conduct of the client and maintenance of the privilege, not some overriding principle of fairness operating at large.'⁴⁵ (Writer's emphasis.)

Simply because BAT had put into issue the legitimacy of its purpose in destroying the documents (and the fact that it did so relying on legal advice) it did not follow that considerations of fairness required that BAT must waive privilege over documents relating to that issue so that the Court might fairly assess the matter. Eames J, the Court of Appeal considered, was in error in considering the relevance that the documents might have in determining the legitimacy of BAT's conduct and the insight that they might provide because, relevant though the documents might be, 'it did not mean that privilege had been waived'.⁴⁶

The Court of Appeal's decision is one which glimpses at considerations of fairness only to the extent necessary to ensure that a misleading perception is not created of a privileged communication - where the communication was capable of standing alone, the Court was reluctant to look behind it, instead considering that in the event of a failure to volunteer further waiver of related relevant documents, fairness could be achieved by the drawing of inferences adverse to the party unwilling to provide further disclosure. This approach sits more comfortably with the reasoning of the High Court in *Maurice* and *Mann v Carnell* than that of Eames J, in which, ultimately, the relevance of the documents and the assistance that they would provide to the Court

in determining whether the documents had been destroyed for a legitimate purpose was given a primary importance, such that it overrode the longstanding protection afforded to privileged documents.

McCABE: IMPLIED UNDERTAKING

On 28 April 2003, a further decision was handed down by the Court of Appeal in a related application in *McCabe*.⁴⁷ Following Eames J's well publicised decision, the ACCC and the US Department of Justice had each requested the plaintiff to provide to them documents relating to the proceeding, presumably with a view to investigating BAT's conduct. The plaintiff brought an application seeking to be released from her implied undertaking not to use for a collateral purpose the various documents exchanged during the proceeding, so that she might release the documents. Byrne J ruled in May 2002⁴⁸ that the implied undertaking had come to an end on the admission of the documents into evidence and that the plaintiff could then use them for such lawful purposes as she wished.

BAT appealed against the decision. The appeal was argued at the same time as the principal appeal. In relation to those documents which it had earlier ruled remained privileged, the Court of Appeal said that any waiver of privilege relating to them would have been for the limited purpose of the strike out application.

Beyond that application, it would be as if no waiver had occurred at all. The Court of Appeal accordingly adopted the view of Kirby J that waiver for a specific and limited purpose may be available.

In relation to the implied undertaking, the Court of Appeal confirmed that as between the parties, it subsisted to prevent the plaintiff from using documents produced by BAT under compulsion of the Court processes for any collateral or ulterior purpose, notwithstanding that the documents or their contents may have come partially into the public arena, through, for example, being read out in court or referred to in

⁴⁴ *Ibid* at para 129.

⁴⁵ (1999) 201 CLR 1 at 13.

⁴⁶ [2002] VSCA 197 at para 130.

⁴⁷ *British American Tobacco Australia Services Ltd v Cowell* [2003] VSCA 43 (Unreported, Phillips, Batt and Buchanan JJA, 28 April 2003).

⁴⁸ *McCabe v British American Tobacco Australia Services Ltd* [No 3] [2002] VSC 150 (Unreported, Byrne K, 7 May 2002) (BC 200202143) and [No 4] [2002] VSC 172 150 (Unreported, Byrne J, 15 May 2002) (BC 200202384).

a judgment. The Court of Appeal drew a distinction between the issue of confidentiality of the documents and the obligation owed by the parties to the Court pursuant to the implied undertaking. It said that simply because third parties may become aware of the contents of the documents and be free to make what use of them they wished, does not mean that the parties are released from their own undertaking to the Court.

The Court of Appeal did consider that the position might be different in relation to two of the documents under consideration, BAT's answers to interrogatories and a witness statement. In relation to these documents, the undertaking would cease once the documents had been put into evidence at trial, as 'once put into evidence at trial, everyone, parties and members of the public alike, are free to make whatever use they choose of the contents of such documents'.⁴⁹ However, in the case before them, in which those documents had been put into evidence by the plaintiff in an interlocutory application for a different purpose, the undertaking had not ceased.

McCABE: APPLICATION FOR SPECIAL LEAVE

The plaintiff's estate has sought special leave to appeal to the High Court.⁵⁰ The application for special leave contains a ground, amongst others, that the Court of Appeal was in error in holding that fairness did not require implied waiver of privilege over all legal advice relating to the document retention policy from 1990 onwards. In support of the special leave application,⁵¹ the plaintiff's estate argues that:

- (a) The purpose of Maher's affidavit was to advance a defence that the destruction of documents was merely an application of a long standing policy in accordance with legal advice;
- (b) The governing consideration for waiver of privilege is whether fairness 'in all the circumstances' requires that the privilege cease;
- (c) This may require waiver over related material where it would be misleading or unfair to allow

some material to be used but related material to be withheld;

- (d) Fairness requires that a party putting in issue a matter which cannot be assessed by the Court without examination of privileged material must have either consented to the use of the material or waived privilege over it;
- (e) Even using the narrower 'fairness' test used in *Mann v Carnell* or reverting to the 'inconsistency' test, the position advanced by BAT was inconsistent with maintenance of privilege over documents on which the proposition relied; and
- (f) It does not suffice to rely on an adverse inference if privileged material that could help explain a matter is not produced, because the courts do not allow an adverse inference to be drawn where a claim for privilege is made.

In its summary of argument,⁵² BAT relies primarily on a number of procedural arguments. In relation to the issue of waiver, BAT argues that the plaintiff's special leave application merely involved a question of the proper application of the principle in *Mann v Carnell*, and is therefore not an issue of public importance that requires the High Court's consideration.

In reply to BAT's summary of argument, the plaintiff's estate contends⁵³ that the approach taken by the Court of Appeal does give rise to a broader question: that of how the general principles enunciated in *Mann v Carnell* operate in the circumstances. It notes that *Mann v Carnell* merely expresses in the most general terms the rationale for implied waiver, but does not enunciate any concrete legal principle or test that may be adapted to each possible category of waiver. It argues 'the development of concrete legal principles to guide parties involved in litigation is necessary for the proper administration of justice'.

If the High Court grants special leave to the plaintiff's estate to argue the waiver point, it would have the opportunity to comprehensively review and clarify the fairness test, particularly as regards waiver over related documents. Given the present uncertainty inherent in

⁴⁹ [2003] VSCA 43 at para 50.

⁵⁰ Special leave application M3 of 2003, filed on 2 January 2003.

⁵¹ Applicant's summary of argument, dated 30 January 2003, in M3 of 2003.

⁵² Respondent's summary of argument, dated 20 February 2003, in M3 of 2003.

⁵³ Applicant's reply, dated 27 February 2003, in M3 of 2003.

the fairness test, such clarification may well be desirable. However, it remains to be seen whether the High Court will consider that McCabe represents an appropriate vehicle for that objective.

If the High Court hears the appeal, it appears unlikely that it would adopt a test that would result in a waiver so broad as that acknowledged by Eames J. While some members of the High Court have recently cautioned against the expansion of legal professional privilege,⁵⁴ the importance of the doctrine has been consistently highlighted by the Court. Using the test of relevance to determine the scope of a waiver, as proposed by Eames J, would represent such a significant incursion on legal professional privilege as to potentially render it meaningless, and would override the caution expressed by Deane J, that legal professional privilege ‘is not to be sacrificed even to promote the search for truth and justice in the individual case or matter’.⁵⁵

PROTECTING PRIVILEGE

Unless the High Court uses the opportunity of McCabe to clarify the naming and application of the ‘fairness’ test, the uncertainty of the current test is likely to remain. Uncertainty is likely to lead to unpredictable application of the test, especially as decisions as to waiver will usually be made by lower courts in interlocutory applications.

For individuals or companies who hold or produce documents that are potentially discoverable in litigated matters, the only answer to the uncertainty is to exercise caution in using privileged documents in ways that might be potentially inconsistent with the privilege. Take, for consideration, the following scenarios:

- Clearly, a use of part of a privileged document in a non-privileged way (for example, quoting from it in non-privileged correspondence) is likely to lead to a waiver of privilege over the entire document.
- Likewise, use of a privileged document in a non-privileged way might lead to imputed waiver over any related documents, if the document expressly used does not ‘stand alone’, in the sense that the second document is necessary to properly

understand the first. Waiver in this sense might occur when a decision is made to release one of a series of investigation reports or expert reports created by a single person, but not to release the remainder of the series.

- It cannot presently be assumed that express waiver of privilege over a document that is capable of standing alone will not lead to a finding that privilege is waived by implication over other related documents, or even documents as to the same or similar subject matter.
- It cannot presently be assumed that express waiver of privilege for a specific and limited purpose will not mean that privilege is lost over the document for all purposes.

Litigants must carefully scrutinise any documents that they wish to use in a potentially non-privileged manner to consider whether the use may result in a waiver of privilege, not only in relation to the document itself, but in relation to other privileged documents.

Jennifer Cowen
Minter Ellison



⁵⁴ Most notably, McHugh J in *Mann v Carnell*, as discussed above, and both McHugh and Kirby J in *Esso Australia Resources Ltd v FCT* (1999) 201 CLR 49.

⁵⁵ See note 5 above.

LEGAL PROFESSIONAL PRIVILEGE: A FUNDAMENTAL IMMUNITY BUT WHAT DOES IT PROTECT?

In the last six months, two judgments have been handed down with important implications for the scope, application and maintenance of legal professional privilege. These decisions have ramifications in relation to how legal advice is sought and obtained for every industry sector. In particular, these decisions provide clarification of the law in relation to three important areas of the privilege:

- whether communications between legal advisors and their clients may be accessed by certain federal investigative and prosecutorial bodies such as the ACCC, ASIC and the ATO;
- what communications fall within the scope of the privilege; and
- the circumstances in which the privilege may be waived.

THE DANIELS DECISION

The *Daniels* case

The first of the decisions discussed in this paper, *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*¹ (*Daniels*), decided on 7 November 2002, concerned an alleged breach of the TPA (price fixing) by *The Daniels Corporation International Pty Ltd* (the Company) and the ACCC's investigation of that alleged breach. In order to assist its investigation, the ACCC served notices under section 155(1) of the TPA on *Meerkin & Apel*, the Company's lawyers, requiring them to produce all relevant documents including communications between the Company and its lawyers. *Meerkin & Apel* and the Company claimed that some of the documents the subject of the notice were subject to legal professional privilege and refused to produce those documents. The ACCC subsequently commenced proceedings in the Federal Court against the Company and *Meerkin & Apel* seeking a declaration that they

were not entitled to refuse to produce documents the subject of a notice issued under s155 of the TPA on the ground of legal professional privilege and an order that those documents be produced.

While the ACCC won its case at first instance in the Full Federal Court, on appeal to the High Court it was found that the ACCC was not able to require the production and inspection of documents subject to legal professional privilege under section 155 of the TPA.

A fundamental and substantive rule of law

The *Daniels* decision has received a great deal of attention as an authoritative reinforcement of legal professional privilege as a fundamental privilege or immunity. Following sentiments expressed by the Court some 20 years ago, the High Court underscored the importance at common law of the notion that:

'a person should be entitled to seek and obtain legal advice without the apprehension of being prejudiced by subsequent disclosure of confidential communications.'²

Indeed, Justice Kirby considered this to be a 'human right', stating that legal professional privilege has been recognised by the High Court as being:³

'... a basic doctrine of the law and 'a practical guarantee of fundamental rights', not simply a rule of evidence law applicable to judicial or quasi-judicial proceedings. It has been increasingly accepted that legal professional privilege is an important civil right to be safeguarded by the law. Of course, derogations appropriate to the needs of a democratic society may be contemplated. However, vigilance is required against accidental and unintended erosions of the right. (footnotes omitted).'

On the basis of this primary tenet, the Court reasoned that the immunity should only be understood to be removed by legislation by express language or necessary implication from the text of the statute.

¹ [2002] HCA 49.

² *Baker v Campbell* (1983) 152 CLR 52, Deane J at [115]-[116].

³ At [85]-[86].

All members of the Court stated that legal professional privilege is a rule of substantive law rather than merely a rule of evidence. Thus, legal professional privilege may be relied upon not only in a proceeding that has already commenced (such as in discovery, inspection and giving evidence), but also where the ACCC and other bodies are conducting preliminary investigations.

Can the ACCC still investigate properly?

The Daniels case was an important case for the ACCC as it related to some of its primary investigative powers. Indeed, the ACCC based much of its case on this point, arguing that section 155 of the TPA is one of the most powerful investigative tools given to the ACCC, and is central to the body's ability to investigate effectively breaches of, and enforce, the TPA. The ACCC submitted that the ability of corporations to refuse to produce documents in response to notices issued under section 155 of the TPA on the basis of legal professional privilege would significantly diminish the ACCC's investigative powers.

The High Court rejected this assertion by the ACCC. The Court considered that documents that are the subject of legal professional privilege make up a small proportion of relevant documents and, therefore, the ACCC's ability to investigate breaches of the TPA would not be unduly hindered by not having access to such documents. In particular, the members of the Court referred to the fact that:

- privilege does not attach to communications made for the purposes of seeking help to evade the law; and
- until recently the ACCC, under its investigation policies, did not press for privileged documents,

as supporting the conclusions that there was no necessity for such documents to be accessed by the ACCC.

How the legal principles apply to s155 of the TPA

While the High Court's decision reinforces the importance of legal professional privilege as a common law immunity, it was the application of these principles to the text of section 155 of the TPA that was

ultimately determinative of the issue before the Court. Thus, the construction of section 155 of the TPA was crucial. Of note is that section 155:

- allows the ACCC to enter a premises, seize and copy documents (155(2));
- creates an offence to fail to comply with a notice to disclose to the extent a person is 'capable of complying with' the request (s155(5)(a));
- abrogates the immunity from self-incrimination; and
- provides an express immunity for documents relating to Cabinet meetings of a State or Territory.

The High Court considered that the authority of the ACCC to enter premises to seize and copy documents conferred by section 155(2) of the TPA is akin to the search warrant power conferred by section 10 of the Crimes Act 1914 (Cth), which has been construed as not authorising the inspection and copying of documents subject to legal professional privilege. Their Honours considered that section 155(2) of the TPA should be similarly construed as not abrogating legal professional privilege. In such circumstances, their Honours considered it would be incongruous for section 155(1) of the TPA to be construed differently.

In addition, one of the ACCC's submissions was that section 155(5) of the TPA, which creates an offence to fail to comply with an ACCC notice to disclose to the extent a person is 'capable of complying with' the request, means that a person can only refuse to supply documents when they are not physically capable of complying with the notice. The Court disagreed, considering that the phrase 'capable of complying with' does not only refer to physical capacity, but may include other reasons for failure to comply, such as legal professional privilege.

Justice Kirby also considered that the presence of a specific provision within section 155 abrogating privilege against self-incrimination showed that there was no intention to remove legal professional privilege. His Honour considered that the fact that the drafters of the TPA had turned their mind to common law privilege (by referring explicitly to one category), indicated that the drafters had also deliberately decided not to exclude legal professional privilege.⁴

⁴ However, it should be noted that s155(7A) specifically saves a person from disclosing information related to Cabinet meetings of a State or Territory. This subsection within s155 seems to weaken Kirby J's logic somewhat, because the drafters chose not to specifically save legal professional privilege either.

Ultimately, the High Court was unanimous in holding that there was no ‘necessary implication’ in the words of the statute that legal privilege was to be abrogated. In the absence of express words, such a necessary implication was a prerequisite to the statute being construed as removing that fundamental immunity. The express preservation of the privilege attaching to Cabinet documents and deliberations was not in itself sufficient to create a necessary implication that legal professional privilege was abrogated.

Importance for other investigative bodies

The reasoning of the High Court in Daniels warrants careful consideration, not only because it is the highest authority regarding the proper interpretation of section 155 of the TPA (and the ACCC’s investigative powers under this provision), but also because it sets out the proper manner of construing other similar statutory provisions. In particular, the reasoning in Daniels has profound implications for other investigative bodies, such as ASIC and the ATO, because it has shifted the proper interpretation of those bodies’ empowering statutes towards the maintenance of legal professional privilege in the absence of express words or necessary implication.

In relation to the investigative powers of ASIC, the High Court’s decision in Daniels appears to directly contradict a previous High Court decision (in *Corporate Affairs Commission v Yuill*⁵) which allowed ASIC to require the production of documents subject to legal professional privilege. While the statutory framework relating to ASIC has changed since that case was decided (the Companies Code has been replaced by the Corporations Act 2001 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth)), following Daniels it now seems unlikely that ASIC is empowered to require production of documents subject to legal professional privilege.

Similarly, Daniels reinforces the current understanding that the ATO does not have blanket powers to inspect all documents relating to a taxation investigation, including those that are subject to legal professional

privilege.⁶ It should be noted that following the Full Federal Court’s decision in Daniels (which found that legal professional privilege did not offer a protection from production) the ATO considered that it may now be understood to have the power to require the production of privileged documents.⁷ Presumably, since the High Court’s decision in Daniels, the ATO has reverted back to its former understanding of its empowering statute.

Thus, the decision has obvious implications for the obligations of manufacturers and their advisors in respect of manufacturers’ obligations to produce documents in response to notices issued by the ACCC in the course of investigations of potential trade practices issues, as well as notices issued by other regulatory bodies. The protection legal professional privilege can offer, highlights the importance of manufacturers and their advisors carefully planning the creation and management of documents, so as to maximise the manufacturer’s ability to claim legal professional privilege.

THE PRATT HOLDINGS CASE

The decision in Daniels recognises the importance of the ability of lawyers and their clients to communicate without an apprehension of subsequent prejudice, and protects against unintended erosion of that immunity. However, legal professional privilege does not attach to all communications in respect of the provision of legal advice. In the recent decision of the Federal Court in *Commissioner of Taxation v Pratt Holdings Pty Ltd*⁸ (Pratt Holdings), the boundaries of legal professional privilege were considered and restated in relation to two important areas:

- The scope of the privilege in relation to legal advice when communicating with a third party; and
- Waiver of the privilege by revealing confidential documents to a third party.

The facts

In this case, Pratt Holdings engaged PricewaterhouseCooper (PwC) to conduct an

⁵ (1991) 172 CLR 319.

⁶ Under sections 263 and 264 of the Income Tax Assessment Act 1936 (Cth).

⁷ Cited in Richard Travers, ‘Confidentiality of legal advice after Australian Competition and Consumer Commission v Daniels Corporation’ [2002] 9 Competition & Consumer Law Journal 289; at 289.

⁸ [2003] FCA 6.

independent evaluation of certain matters relating to taxation, as suggested by its lawyers. All instructions to PwC and discussions of their retainer were conducted between Pratt Holdings and PwC. The information gathered by PwC, and provided to Pratt Holdings, was to be used to provide facts which were to be relied on for the provision of legal advice to Pratt Holdings. Pratt Holdings maintained control of all communications with its lawyers and PwC, providing its lawyers with selected information from PwC and, similarly, providing PwC with selected correspondence from its lawyers. Subsequently, Pratt Holdings was investigated by the Commissioner of Taxation and PwC was served with a notice to supply certain types of documents to the Commissioner, including communications between Pratt Holdings and its lawyers and Pratt Holdings and PwC.

Pratt Holdings and PwC claimed that various communications between Pratt Holdings and PwC, and between Pratt Holdings and its lawyers, were subject to legal professional privilege because they were made for the dominant purpose of obtaining legal advice, and refused to supply the Commission with those documents. The Commission sought to compel the production of those documents.

The Commissioner argued legal professional privilege did not attach to any of the documents to which access was sought and, therefore, s263 of Income Tax Assessment Act 1936 (Cth) (ITAA) empowered the Commissioner to require that the ATO be given 'full and free' access to all the documents they had requested be supplied. The Commissioner argued that legal professional privilege did not attach to the documents sought because the documents were either:

- communications in relation to legal advice between the client and a third party, where the third party had no contact with the lawyers and was not their agent; and
- even if legal professional privilege did attach to certain documents, such as those between Pratt Holdings and its lawyers, Pratt Holdings had waived its rights to immunity from production by disclosing those communications to PwC.

Justice Kenny held that most of the communications in question did not attract legal professional privilege.

Categories of legal professional privilege

What is significant about Justice Kenny's decision is that her Honour underscored the important distinction between legal professional privilege as it applies to the provision of legal advice on the one hand, and communications relating to litigation on the other. Her Honour emphasised that:

- in the context of legal advice privilege, the privilege only applies where there are confidential client/lawyer (and their agents) communications for the dominant purpose⁹ of giving legal advice; whereas
- in the context of litigation privilege, the privilege applies to confidential client/lawyer communications and confidential communications with third parties when made for the dominant purpose of anticipated or actual litigation.

A third party must be an agent

Justice Kenny stated that legal professional privilege, in the context of the provision of legal advice, may apply to communications with a third party where that third party is an agent of the client for the purpose of communicating with the lawyer to obtain or receive the advice.

After considering the authorities, Justice Kenny concluded that in order for third party communications to be subject to the privilege, the following conditions must be satisfied:

- the third party is an agent of the client for the purposes of communicating with the legal advisor;
- the communication is confidential;
- the communication is made directly to the legal advisor in his professional capacity; and
- the communication is for the purpose of providing legal advice to the client.

Applying these principles, Justice Kenny found it impossible to conclude that the PwC documents and correspondence between Pratt Holdings and PwC was privileged as there had been no direct contact between Pratt Holdings' lawyers and PwC, and PwC could therefore not be understood to be acting as Pratt

⁹Justice Kenny relied on the 'dominant purpose' test as laid down in *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49, which requires that the communications are made for the dominant purpose of obtaining legal advice or relating to anticipated or actual litigation.

Holdings' agents for the purpose of making or receiving communications with Pratt Holdings' legal advisors.

Thus, while a third party may be retained for the sole purpose of providing information to enable a person's legal advisors to provide legal advice, communications with, and documents of, that third party will not attract legal advice privilege unless that third party is the client's agent for the purpose of communicating with the legal advisors. The notion of agency in this context is rather narrowly defined, and it would be advisable to establish an unambiguous agency relationship to avoid this distinction being drawn.

Waiving professional legal privilege

In relation to the status of the documents between Pratt Holdings and their lawyers which were prima facie subject to legal professional privilege, but which Pratt Holdings had supplied to PwC, Justice Kenny relied on the High Court authority of *Mann v Carnell*¹⁰ relating to waiver of privilege. In *Mann v Carnell*, the High Court articulated the principles that only the client may relinquish the confidentiality of communications between a client and its lawyers and that legal professional privilege exists for the client's protection. Waiver of that privilege occurs when the client acts inconsistently with the maintenance of the confidentiality of the communications. Justice Kenny relied on this notion to find that even though Pratt Holdings had revealed certain confidential communications between itself and its lawyers to PwC, it did so on the basis that the communications would remain confidential. In these circumstances Justice Kenny held that privilege continued to attach to such documents.

Implications

Pratt Holdings is the most recent examination of the scope and endurance of legal advice privilege. Justice Kenny's conclusions in this case serve as a reminder of the distinction between communications that are made for legal advice purposes and those created for the purpose of anticipated or actual litigation, in particular that legal advice privilege applies to a much narrower class of communications and documents than litigation privilege. The restrictive and technical approach to agency relationships in this

context also means that if a third party is to be involved in the production of legal advice, there must be clear evidence of an agency relationship for the purpose of communicating with the lawyers' advisors.

PRACTICAL IMPLICATIONS

The High Court's decision in *Daniels* is an important reminder of the valuable protection afforded by legal professional privilege. However, Pratt Holdings reminds us of the boundaries of that fundamental immunity.

Manufacturers and their advisors should carefully consider and plan the circumstances in which documents are created, and how those documents are subsequently managed, to ensure that all legitimate claims for legal professional privilege are available in the event that the manufacturer is required to produce documents in response to a notice issued by the ACCC or some other regulatory body, or during the course of litigation.

In particular, in the context of the provision of legal advice, consider whether:

- it is necessary to involve a third party in the provision of legal advice;
- if it is necessary to retain the third party, structure the relationship so as to provide a basis to argue that the third party is acting as the client's agent for the purpose of communicating with the legal advisors;
- require the third party to undertake to preserve the confidentiality of any documents provided to him or her; and
- limit the documents provided to the third party to those documents the third party actually requires.

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¹⁰ (1999) 201 CLR 1.

VICTORIAN INSURANCE REFORMS

In June 2003, the Victorian Government assented to the controversial but widely anticipated Wrongs and Limitation of Actions Acts (Insurance Reform) Act (the Act) as part of a package of reforms aimed at addressing the spiralling costs of medical indemnity and public liability insurance.

The key objectives of the Act are:

- to amend the Wrongs Act 1958 in order to provide thresholds for the recovery of damages for non-economic loss, limit damages that may be awarded for gratuitous attendant care services, and provide for proportionate liability in claims for economic loss; and
- to amend the Limitation of Actions Act 1958 to provide for new limitation periods for specified civil proceedings for damages relating to death or personal injury.

AMENDMENTS TO THE *WRONGS ACT*

The threshold

The Act inserts a new Part VBA into the Wrongs Act 1958 in relation to thresholds for the recovery of damages for non-economic loss, which has been the subject of much of the recent controversy.

Significant injury

Section 28LE provides that a person is not entitled to recover damages for non-economic loss unless the person has suffered significant injury. Section 28LF defines significant injury and, in particular, refers to a threshold level of more than 5% of impairment for non-psychiatric injury and more than 10% for psychiatric injury. Both the loss of a foetus and loss of a breast are separately defined as significant injuries for the purposes of Part VBA.

Assessment

The assessment of the degree of impairment resulting from injury must be made by an approved medical practitioner in line with the criteria set out by the American Medical Association Impairment Guidelines (AMA4) (sections 28LG and 28LH). The medical practitioner will then provide the injured person with

a certificate stating that the threshold level has been met. This certificate is then served on the respondent. Notably, the AMA4 Guidelines are currently being used in the Victorian TAC and WorkCover schemes by expert panels assessing injuries.

Section 28LI provides that assessment of psychiatric impairment is to be undertaken by using specified clinical guidelines prepared by the Medical Panel (Psychiatry) Melbourne. Impairment relating to hearing loss is to be assessed in accordance with procedures published by the National Acoustic Laboratory.

All impairments resulting from injuries arising from the one incident are to be assessed together, with reference to the combination tables of the AMA4 Guidelines.

Gratuitous attendant care services

In line with the recommendation of the Ipp Report, the Act has also set limits on the recovery of damages for gratuitous attendant care services, which are defined as either services of a domestic nature, nursing or those aimed to alleviate the consequences of an injury.

A court will not award damages for such services unless it is satisfied that there has been a reasonable need for the services arising solely because of the injury, which would not have been provided to the claimant but for the injury (section 28IA(1)). In addition, damages will not be awarded for such services where they are provided for less than six hours per week and for less than six months (section 28IA(2)).

Proportionate liability

Also following the Ipp Report recommendations, Part IV AA of the Act introduces proportionate liability for claims involving economic loss or damage to property in an action for damages, as well as for damages for contravention of s9 of the Fair Trading Act 1999. The Act applies to concurrent defendants who have caused damage or loss either independently of each other or jointly, although defendants will only be responsible for that portion of loss or damages for which the court finds that they are responsible. This part of the Act has yet to be proclaimed and is therefore, at present, not in operation.

AMENDMENTS TO THE *LIMITATION OF ACTIONS ACT*

Part B of the Act introduces significant amendments to the Limitation of Actions Act in order to reduce the period available for making claims for personal injury. These amendments once again follow the recommendations of the Ipp Report.

In particular, the Act now limits the period for which adults can make claims for personal injury from six years to three years from the date the damage is discoverable to the plaintiff (section 27D(1)). In addition, the Ipp Report's recommended 'long stop period' is also adopted, setting a maximum 12 year period for bringing a claim, regardless of when it was discovered (section 27D(1)).

Having said that, the Act includes (section 27K) provisions allowing a person to apply to a court for the extension of the limitation period. Factors that a court will consider in determining such applications, include the length of and reasons for the plaintiff's delay, and the extent to which there is likely to be prejudice to the defendant. The Act therefore allows the court to use its judicial discretion, where appropriate, to extend the limitation period. It is anticipated that the court will most likely use this discretion for asbestosis and tobacco related injury claims.

CLAIMS ALREADY IN EXISTENCE

Personal injury claimants who were injured prior to 21 May 2003 will have until 30 September 2003 to claim compensation under the previous system.

THE 'FOR' AND 'AGAINST'

The Victorian Government's introduction of the Act has polarised viewpoints within the community particularly in relation to the introduction of thresholds. In his public announcement of 20 May 2003, Premier Steve Bracks stated that:

'The thresholds represent a fair and reasonable balance between the legitimate needs of people injured through negligence, and the needs of responsibly managed businesses, individuals and community groups to have access to affordable insurance.'

Clearly the underlying intention of the reforms is to reduce the number and total cost of personal injury

claims, which will hopefully reduce the costs of medical indemnity and public liability insurance.

Notwithstanding, labour lawyers, civil libertarians and trade unions have almost uniformly and strongly criticised the new legislation. Their criticisms have focused on the following issues:

- the establishment of a threshold and the low level at which it has been set;
- the inadequacy of the AMA4 Guidelines, which were originally established to determine the fitness of US Army recruits and potentially take little account of individual circumstances or the future effects of progressive diseases;
- the possible erosion of the civil rights of injured people and in particular the more vulnerable in society; and
- the critical involvement of, and discretion which could be exercised by, a Medical Panel in determining the level of the claimant's impairment. This is particularly so given that no appeal on the merits may be made to a court from an assessment or determination of a Medical Panel.

On the other hand, businesses, tourism operators, local government and doctors' groups have widely welcomed the reforms. It is hoped that the proposed reforms will result in improved access to adequate insurance coverage, stabilise insurance premiums, and bring much-needed certainty for insurers and defendants. In addition, it has been argued that the reforms will have positive flow effects in the medical sector, including stemming the problem of shortages in doctor numbers particularly in high risk areas such as obstetrics.

POTENTIAL IMPACTS

The proposed legislative changes are likely to have significant and far-reaching impacts, although the nature of such impacts remains uncertain.

By restricting the law of negligence with the threshold requirement, it has been argued that the proposed changes will reduce the number of claims and enable insurance companies to cut costs and attract insurers back to the market. In turn, this will increase the accessibility and affordability of insurance for consumers. The Ipp Report notes that the 'effect of

the threshold in practice will be to cut out of the compensation system cases where the injuries sustained are relatively minor and where the economic loss, if any, is relatively insignificant'. Nonetheless, there is no guarantee that a rise in profit for insurance companies will lead to a corresponding fall in insurance premiums.

Introducing the threshold for significant injury may severely limit some claimants pursuing a legitimate personal injury claim. For example, injuries such as scarring of the face, loss of smell, or amputation of a toe or finger may fall below the threshold. Furthermore, there is nothing in the legislation to indicate what remedies are available to individuals in this position, for example, whether they are completely locked out of a claim or whether there are other avenues for them to pursue.

Nonetheless, it is important to remember that there is no threshold test for other types of damages, including claims for economic loss, which will still be widely available. The threshold only acts as a gateway for the court to determine whether damages for non-economic loss can be awarded to a plaintiff. Further, the amount of damages awarded for the plaintiff's loss still remains at the discretion of the court, subject only to a cap.

Restriction of the limitation periods appears likely to have practical benefits for both plaintiffs and defendants. Plaintiffs will still have sufficient time to appreciate that they have a claim, investigate the claim and initiate proceedings while still allowing defendants to ensure that relevant evidence is not lost. This will allow potential defendants the ability to organise their affairs on the assumption that claims cannot be brought against them past a certain date.

The concept of discoverability may limit those with latent diseases or conditions, due to the 12 year 'long-stop' bar on claims. However, the Government argues that, ultimately, the concept of setting a limitation period based on discoverability is fair for both the defendant and the plaintiff, as well as promoting consistency. By providing the long-stop limitation period, the period of discoverability is prevented from running indefinitely, and provides doctors with some certainty that a claim will not proceed against them at a much later time. Furthermore, in the interests of justice, the courts still retain their discretion to extend this limitation period based on a range of factors. Likely cases where this

will occur is in relation to dust-related conditions or tobacco-related disease. In addition, claims for sexual abuse have not been limited.

NEXT STEPS

The Act is likely to be the subject of much debate in the community, given the divergence and strength of viewpoints on the issue, and the inherent complexities of any solution. Furthermore, its success will be a litmus test for accompanying reforms to follow, with the Government foreshadowing the introduction of further legislation in the spring which will attempt to define the scope of negligence in the exercise of professional or trade skills.

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Clayton Utz



PRODUCT LIABILITY REFORM - AN UPDATE

JOHNATHON MORLEY OF AAR UPDATES THE TABLE OF PRODUCT LIABILITY REFORM IN THE EASTERN STATES FIRST PUBLISHED IN *BRIEF* DECEMBER 2002

	Ipp Recommendations	NSW	Victoria	Queensland
Professional Negligence	Bolam principle should be reinstated, with proviso that the court consider the opinion was rational.	A professional is not negligent if he/she acted in a manner widely accepted by peer professional opinion as competent professional practice. (Civil Liability Amendment (Personal Responsibility) Act 2003 (Personal Responsibility Act))	Not addressed.	A professional is not negligent if he/she acted in a manner widely accepted by peer professional opinion as competent professional practice. (Civil Liability Act 2003)
Non Profit Organisations (NPOs)/Volunteers/Recreational Activities	NPOs should not be liable for personal injury or death of a voluntary participant in recreational activity as a result of an obvious risk.	Volunteers will not be liable for their good faith acts. (Personal Responsibility Act) No duty owed to participants in recreational activities if warned, nor in respect of obvious risks. Warning can be general. Participants can waive rights. (Personal Responsibility Act)	Volunteers not liable for good faith actions for community organisations, unless acting outside scope or contrary to instructions. Excludes volunteer's criminal conduct or conscious/flagrant indifference to the rights or safety of the plaintiff. Liability transferred to community organisation. Sellers of recreational services may limit the liability for personal injury or death claims, using prescribed form. Participants can waive rights. (Wrongs and Other Acts (Public Liability Insurance Reform) Act)	Volunteers not liable for good faith actions for community organisations, unless acting outside scope or contrary to instructions. Excludes volunteer's criminal conduct and liabilities that are required by law to be insured against. No liability for personal injury suffered from obvious risk of dangerous recreational activity. (Civil Liability Act 2003)

	Ipp Recommendations	NSW	Victoria	Queensland
Limitation of Actions	<p>Jurisdictional uniformity.</p> <p>3 years, with 12 year long stop (with discretion, and minors).</p> <p>From 'Date of Discoverability'</p> <ul style="list-style-type: none"> • When plaintiff knew/ ought to have known injury had occurred and attributable to defendant and significant enough to warrant proceedings. 	Not addressed.	<p>3 years for adults to make personal injury claims (from the date on which the damage is discoverable), with 12 year long stop (with discretion, and minors).</p> <p>(Wrongs and Limitation of Actions Acts (Insurance Reform) Bill (Insurance Reform Bill))</p>	Not addressed.
Foreseeability/ Standard of care/ Remoteness of damage	<p>Wyong SC v Shirt gives too much emphasis to 'far fetched and fanciful' as the test for existence of duty – should be whether a reasonable person would take precautions.</p> <p>Should limit liability where risk of harm is 'not insignificant'.</p> <p>Consider:</p> <ul style="list-style-type: none"> • Probability of harm • Severity of harm • Burden of preventing harm • Social ability of activity <p>Replace 'But For' test with 'material contribution to harm/ risk of harm'.</p>	<p>A possibility does not have to be far fetched or fanciful before it is not reasonably foreseeable.</p> <p>No civil liability to take reasonable care, or warn, of an inherent or obvious risk (a matter of common knowledge).</p> <p>(Personal Responsibility Act)</p>	Not addressed.	<p>No civil liability to take reasonable care, or warn, of an obvious risk (a matter of common knowledge), or take reasonable care of an inherent risk (which can not be avoided by reasonable care and skill.)</p> <p>(Civil Liability Act 2003)</p>

	Ipp Recommendations	NSW	Victoria	Queensland
Contributory negligence and Voluntary Assumption of Risk	Contributory negligence on same principles as defendant's negligence. Contributory negligence available in death claims. Plaintiff should be presumed to be aware of obvious risk. Not necessarily the actual risk.	Contributory negligence extended to Compensation to Relatives Claims. (Civil Liability Act 2002)	Provides for self-assumption of risk by participants in inherently risky activities. (Insurance Reform Act)	Contributory negligence on same principles as defendant's negligence. (Civil Liability Act 2003)
Mental Harm Claims	An expert panel for assessing mental harm claims. Limit to where defendant should foresee mental harm, and limit the circumstances.	Nervous shock recovery limited to victims, those present or a family member with a demonstrable psychological injury beyond grief.	Not addressed.	Not addressed.
Proportionate Liability	No change.	For economic loss claims, or property damage in non-personal injury claims – person only liable to the extent of their proportionate responsibility. (Personal Responsibility Act)	For economic loss claims, or property damage in non-personal injury claims – person only liable to the extent of their proportionate responsibility. (Insurance Reform Bill)	For economic loss claims, or property damage in non-personal injury claims (not less than \$500,000) – person only liable to the extent of their proportionate responsibility. (Civil Liability Act 2003)
Intoxication, Good Samaritans, Self defence and other limitations on liability	Not addressed.	Ability to recover damages limited where: <ul style="list-style-type: none"> • Plaintiff intoxicated • Plaintiff committing criminal offence • Defendant acting in self defence Defendant acting in good faith as a Good Samaritan, if exercising reasonable care. (Personal Responsibility Act)	Must consider plaintiff's intoxication or illegal activity when evaluating existence and breach of duty. Good Samaritans not liable for good faith acts. (Insurance Reform Act)	Good Samaritans not liable for good faith acts. Ability to recover damages limited where: <ul style="list-style-type: none"> • Plaintiff intoxicated • Plaintiff committing criminal offence. (Personal Injuries Proceedings Act 2003 (PIP Act))

	Ipp Recommendations	NSW	Victoria	Queensland
Apologies/Waiver of Fees	Not addressed.	Apologies do not constitute admissions. (Personal Responsibility Act)	Apologies and waiver of fees do not (of themselves) constitute admissions. (Insurance Reform Act)	Apologies/expressions of regret do not constitute admissions. (PIP Act)
Damages	Overcome the Planet Fisheries case, ie courts may refer to other cases.	Not addressed.	Threshold for the recovery of damages for non-economic loss: more than 5% for non-psychiatric injury and more than 10% for psychiatric injury. (Insurance Reform Bill)	Not addressed.
	Threshold for general damages – 15% of a most extreme case. Cap general damages at \$250,000.	Threshold for general damages – 15% of a most extreme case. Cap general damages at \$350,000 (for most extreme case). Table of specified damages.	Cap general damages at \$371,380, indexed.	Considering caps and thresholds on general damages as part of a later set of reforms.
	Cap loss of earnings at calculations based on twice the average full time adult ordinary time earnings (FTOTE). Discount rate of 3% on future loss.	Cap economic loss at calculation based on 3 times average weekly earnings. Court must state assumptions on which calculation is founded. Discount rate to be prescribed.	Cap economic loss at calculation based on 3 times average weekly earnings. Discount rate 5% (or varied by regulation).	Cap economic loss at calculation based on 3 times average weekly earnings. Discount rate 5%. (PIP Act)
Exemplary/Punitive/Aggravated Damages	Abolished for negligence claims.	Abolished for negligence claims.	Not addressed.	Abolished for negligence claims. (PIP Act)

	Ipp Recommendations	NSW	Victoria	Queensland
Gratuitous Services Damages	Gratuitous Services Damages should only be allowed when provided for more than 6 hours per week for more than 6 months – at an hourly rate linked to FTOTE.	Limited to where there is a reasonable need and services would not otherwise be provided. No allowance if less than 6 hours a week for less than 6 months. (Personal Responsibility Act)	Gratuitous Services Damages should only be allowed when provided for more than 6 hours per week for more than 6 months. (Insurance Reform Bill)	Limited to where the services are necessary and arise solely from the injury and the incident in question. No allowance if less than 6 hours per week and for less than 6 months. (PIP Act)
Legal costs	Legal costs should be limited – no costs on claims of less than \$30,000, limited to \$2,500 on claims between \$30,000 and \$50,000.	Legal costs capped on claims under \$100,000 to whatever is the greater of \$10,000 on 20% of the amount recovered (plaintiffs and defendants, barristers and solicitors' fees) unless a costs agreement in place. Potential to limit unnecessary costs and unmeritorious claims. Solicitors must hold a reasonable belief in the reasonable prospects of success of the claim or defence. (Legal Profession Act)	Legal costs capped on small claims. Costs penalties for proceedings commenced in the Supreme or County Courts, where an award of damages does not meet the threshold specified by the legislation in relation to the relevant Court. Costs penalties to discourage the commencement of proceedings without full preparation for resolution of the claim. (Proposed in the Personal Injuries Procedures Bill, which lapsed on the dissolution of the Legislative Assembly on 5 November 2002).	Legal costs capped for small claims (under \$50 000). (PIP Act)