This Report reflects the law, and the policies of federal bodies, as at 1 December 2007.

ISBN: 978-0-9804153-1-5

Commission Reference: ALRC 107 (Final Report)

The Australian Law Reform Commission was established on 1 January 1975 by the *Law Reform Commission Act 1973* (Cth) and reconstituted by the *Australian Law Reform Commission Act 199*6 (Cth). The office of the ALRC is at Level 25, 135 King Street, Sydney, NSW, 2000, Australia.

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Printed by Paragon Australasia Group

Australian Government
Australian Law Reform Commission

The Hon Robert McClelland MP
Attorney-General of Australia
Parliament House
Canberra ACT 2600

21 December 2007

Dear Attorney-General

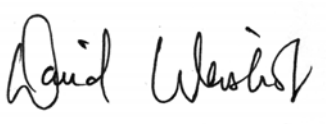
A Review of Legal Professional Privilege and Federal Investigatory Bodies

On 29 November 2007, the then Attorney-General, the Hon Philip Ruddock MP, issued terms of reference for the Commission to undertake a review of legal professional privilege and Commonwealth investigatory bodies.

Those terms of reference were amended by your letter dated 6 December 2007, to extend the reporting date to 24 December 2007, in order to facilitate further community consultation.

On behalf of the Members of the Commission involved in this Inquiry, including Justice Robert French, Justice Susan Kenny, Justice Susan Kiefel (until September 2007) and Justice Berna Collier (from October 2007), and in accordance with the *Australian Law Reform Commission Act 1996*, we are pleased to present you with the final report in this reference, *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (ALRC 107, 2007).

Yours sincerely



Professor David Weisbrot AM
President

Professor Rosalind Croucher
Commissioner in Charge

Professor Les McCrimmon
Commissioner

Contents

Terms of Reference

Legal professional privilege and Commonwealth investigatory bodies

I, Philip Ruddock, Attorney-General of Australia, having regard to:

- the fact that legal professional privilege is a common law privilege
- the fact that legal professional privilege, like other common law rights, can be modified or abrogated by legislation in cases where the legislature affords a competing public interest consideration a higher relative priority
- the fact that questions of legal professional privilege commonly arise in relation to the exercise of coercive information gathering powers by Commonwealth bodies
- the many different forms of Commonwealth statutory provisions affecting the question of legal professional privilege in that context, and
- the provisions of the *Evidence Act 1995* dealing with client legal privilege

refer to the Australian Law Reform Commission ('the Commission') for inquiry and report, pursuant to subsection 20(1) of the *Australian Law Reform Commission Act 1996*, matters relating to the application of legal professional privilege to the coercive information gathering powers of Commonwealth bodies.

1. In performing its functions in relation to this reference, the Commission will:

(a) consider the investigatory or associated functions of Commonwealth bodies that have coercive information gathering or associated powers including the Australian Federal Police, Australian Crime Commission, Australian Competition and Consumer Commission, Australian Prudential Regulation Authority, Australian Securities and Investments Commission, Australian Taxation Office, Australian Communications and Media Authority, Centrelink, Medicare Australia, Commonwealth royal commissions, Commonwealth Director of Public Prosecutions, and any other relevant Commonwealth bodies, and

(b) consider the following questions:

(i) would further modification or abrogation of legal professional privilege in some areas be desirable in order to achieve more effective performance of Commonwealth investigatory functions?

(ii) would it be desirable to clarify existing provisions for the modification or abrogation of legal professional privilege, with a view to harmonising them across the Commonwealth statute book?

(iii) would it be desirable to introduce or clarify other statutory safeguards where legal professional privilege is modified or abrogated, with a view to harmonising them across the Commonwealth statute book? and

(iv) any related matter.

2. The Commission will identify and consult with relevant stakeholders.

3. The Commission is to report no later than 3 December 2007.*

Dated: 29th November 2006

Philip Ruddock

Attorney-General

* In a letter dated 6 December 2007, Attorney-General Robert McClelland MP agreed to extend the reporting date for the Inquiry to 24 December 2007.

List of Participants

Australian Law Reform Commission

Division

The Division of the ALRC constituted under the *Australian Law Reform Commission Act 1996* (Cth) for the purposes of this Inquiry comprises the following:

Professor David Weisbrot (President)
Professor Rosalind Croucher (Commissioner in Charge)
Professor Les McCrimmon (Commissioner)
Justice Berna Collier (from October 2007)
Justice Robert French (part-time Commissioner)
Justice Susan Kenny (part-time Commissioner)
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Mr Tony D'Aloisio, Australian Securities and Investments Commission
Mr James Faulkner PSM, Legal Services and Native Title Division, Attorney-General's Department
Mr Will Irving, Telstra Corporation Limited
Dr Sue McNicol, Joan Rosanove Chambers
Dr Christine Parker, University of Melbourne
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List of Recommendations

5. Client Legal Privilege in Federal Investigations

Recommendation 5–1 The Australian Parliament should enact legislation of general application to cover various aspects of the law and procedure governing client legal privilege claims in federal investigations (hereafter referred to as federal client legal privilege legislation) in accordance with the recommendations in this Report.

Recommendation 5–2 Federal client legal privilege legislation should provide that, in the absence of any clear, express statutory statement to the contrary, client legal privilege applies to the coercive information-gathering powers of federal bodies.

Recommendation 5–3 The Australian Government should ensure that any legislative scheme which seeks to abrogate or modify client legal privilege does so by express reference to the particular sections or divisions within that scheme that confer coercive information-gathering powers which abrogate or modify the privilege.

Recommendation 5–4 To promote national harmonisation, the Attorney-General of Australia should lead a process through the Standing Committee of Attorneys-General to encourage the states and territories to adopt the Commonwealth model proposed in Recommendations 5–1 to 5–3 above.

6. Modification or Abrogation of Privilege?

Recommendation 6–1 In accordance with Recommendation 5–2, in the absence of any clear, express statutory statement to the contrary, client legal privilege should apply to the coercive information-gathering powers of federal bodies. However, where the Australian Parliament believes that exceptional circumstances exist to warrant a departure from the standard position, it can legislate to abrogate client legal privilege in relation to a particular investigation undertaken by a federal investigatory body, or a particular power of a federal investigatory body.

Any such legislative provision should take into account the following factors in determining whether client legal privilege may be abrogated:

(a) the subject of the investigation, including whether the inquiry concerns a matter (or matters) of major public importance that has (or have) a significant impact on the community in general or on a section of the community, or is a covert investigation;

(b) whether the information sought can be obtained in a timely and complete way by using alternative means that do not require abrogation of client legal privilege; and especially

(c) the degree to which a lack of access to the privileged information will hamper or frustrate the operation of the investigation and, in particular, whether the legal advice itself is central to the issues being considered by the investigation.

Recommendation 6–2 In accordance with Recommendation 5–2, in the absence of any clear, express statutory statement to the contrary, client legal privilege should apply to the coercive information-gathering powers of federal bodies. However, the Australian Parliament should amend the *Royal Commissions Act 1902* (Cth) to allow that, in exceptional circumstances, the Governor-General may, as part of the Letters Patent establishing the Royal Commission, state that it is not a reasonable excuse for the purposes of subsection 3(2B) or (5) of the Act for a person to refuse or fail to produce a document on the basis that the document is subject to client legal privilege.

The following factors should be taken into account in deciding whether client legal privilege may be abrogated:

(a) the subject of the Royal Commission of inquiry, including whether the inquiry concerns a matter (or matters) of major public importance that has (or have) a significant impact on the community in general or on a section of the community;

(b) whether the information sought can be obtained in a timely and complete way by using alternative means that do not require abrogation of client legal privilege; and especially

(c) the degree to which a lack of access to the privileged information will hamper or frustrate the operation of the Royal Commission and, in particular, whether the legal advice itself is central to the issues being considered by the Commission.

Recommendation 6–3 The Australian Parliament should amend the *Inspector-General of Intelligence and Security Act 1986* (Cth), the *Ombudsman Act 1976* (Cth) and the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) to state that where client legal privilege cannot be claimed over legal advice given to a Minister, an agency or an authority of the Commonwealth, this abrogation applies to litigation privilege as well as advice privilege.

Recommendation 6–4 Federal client legal privilege legislation should provide that, five years after it comes into force, a review is to be conducted of the effectiveness of its provisions relating to the procedures for making and resolving privilege claims in federal investigations.

Recommendation 6–5 The *Royal Commissions Act 1902* (Cth) should provide that, where client legal privilege has been abrogated or modified in a Royal Commission, the Commissioner must include within the report consideration of the degree to which the abrogation or modification has facilitated the effectiveness of the Royal Commission.

Recommendation 6–6 Federal client legal privilege legislation should provide that a person who is required to disclose information under a coercive information-gathering power of the Commissioner of Taxation is not required to disclose a document that is a tax advice document prepared for that person.

A 'tax advice document' should be defined as a confidential document created by an independent professional accounting adviser for the dominant purpose of providing that person with advice about the operation and effect of tax laws.

A 'tax advice document' does not include 'source documents', such as documents which record transactions or arrangements entered into by a person (for example, formal books of account or ledgers). Source documents, even where given to a tax agent for the purpose of obtaining tax advice, will not be protected by the privilege.

An independent professional accounting adviser must be a registered 'tax agent' for the purpose of s 251A of the *Income Tax Assessment Act 1936* (Cth) or a nominee or employee of a registered tax agent, who is a qualified tax accountant.

No privilege should apply to 'tax contextual information' given for the purpose of providing tax advice. 'Tax contextual information' is information about:

(a) a fact or assumption that has occurred or is postulated by the person creating the tax advice document;

(b) a description of a step involved in the performance of a transaction that has occurred or is postulated by the person creating the tax advice document;

(c) advice that does not concern the operation and effect of tax laws.

No privilege should apply where a tax advice document is created in relation to the commission of a fraud or offence or the commission of an act that renders a person liable to a civil penalty; or where the person or the accounting adviser knew or ought reasonably to have known that the document was prepared in furtherance of a deliberate abuse of power.

Claims that a document is a tax advice document must be made in accordance with the procedures set out in Recommendations 8–3 to 8–5. Resolution of claims should be in accordance with the procedures set out in Recommendations 8–6, 8–7, 8–11 and 8–14.

Claims that a document is a tax advice document may be required to be certified by a lawyer in accordance with the procedures set out in Recommendation 8–3.

7. Safeguards

Recommendation 7–1 Federal client legal privilege legislation should provide that, if another federal statute expressly abrogates or modifies client legal privilege, such abrogation or modification does not extend to legal advice that relates to the investigation itself, or to the representation of the client in the investigation.

Recommendation 7–2 Federal client legal privilege legislation should provide that, in the absence of any express statutory statement concerning the use to which otherwise privileged information can be put (for example, provisions conferring use immunity or derivative use immunity or authorising unrestricted use of otherwise privileged information), where federal legislation abrogates the application of client legal privilege to the exercise of a federal coercive information-gathering power the following default provision should apply:

(a) a federal body that seeks to rely on otherwise privileged information as evidence in any court proceedings must apply to the court for permission to do so;

(b) there should be a presumption against use of the evidence which is able to be displaced in the court's discretion, having regard to the following factors:

  (i) the public interest in limiting the effects of the abrogation of an important common law right;

  (ii) whether the otherwise privileged information was obtained pursuant to the exercise of a covert investigatory power; and

  (iii) the probative value of the otherwise privileged evidence, including whether it reveals matters tending to constitute serious misconduct or conduct which has a serious adverse impact on the community in general or on a section of the community; and

(c) a federal body is precluded from using otherwise privileged information against the holder of client legal privilege in any administrative penalty proceedings.

Recommendation 7–3 Federal client legal privilege legislation should provide that where client legal privilege has been abrogated or modified in respect of any federal coercive information-gathering power, federal bodies should be required to notify persons the subject of such powers, as well as those who produce information on a voluntary basis, about whether any safeguards apply to the use of otherwise privileged information in subsequent proceedings.

Recommendation 7–4 If Recommendation 6–2 is adopted, the *Royal Commissions Act 1902* (Cth) should be amended to provide that a relevant factor to be considered by a Royal Commissioner in making an order that evidence be disclosed in camera or be subject to a non-publication order is that the evidence may or will disclose communications subject to client legal privilege.

Recommendation 7–5 Federal client legal privilege legislation should provide that, in the absence of an express statutory statement to the contrary, where federal legislation abrogates or modifies client legal privilege in federal investigations that abrogation or modification does not affect the holder of the privilege from maintaining privilege against a third party.

Recommendation 7–6 The Commonwealth Director of Public Prosecutions (CDPP) should amend its *Statement on Prosecution Disclosure* to make it clear that the exception of disclosing unused privileged information to the defence applies irrespective of whether the privilege holder is the federal investigatory body that refers the matter to the CDPP, or a party that produced information to that federal investigatory body in the course of its investigation.

Recommendation 7–7 If client legal privilege is abrogated or modified in respect of any federal body with coercive information-gathering powers, that federal body should:

(a) implement appropriate document management systems to ensure that documents the subject of a client legal privilege claim are:

  (i) clearly identified or recorded as such;

  (ii) stored and managed appropriately, including restricting access to persons in the federal body involved in the relevant investigation; and

  (iii) returned, as soon as practicable, to the person who produced them; and

(b) publish its policies and procedures in this regard.

8. Practice and Procedure

Recommendation 8–1 Federal client legal privilege legislation should require federal bodies with coercive information-gathering powers—the exercise of which raise, or are likely to raise, the issue of the application of the privilege—to notify persons the subject of those powers, as well as those who provide information on a voluntary basis, whether or not client legal privilege applies to:

(a) the exercise of a particular power; and

(b) the voluntary production of information.

Recommendation 8–2 Federal bodies with coercive information-gathering powers—the exercise of which raise, or are likely to raise, the issue of the application of client legal privilege—should develop and publish policies and procedures in relation to the manner of notifying persons the subject of those powers whether the privilege applies to the exercise of such information-gathering powers and to the voluntary production of information.

Recommendation 8–3 Federal client legal privilege legislation should provide a mechanism for the making of privilege claims in federal investigations. Those provisions should include a requirement that persons be given a reasonable opportunity to claim privilege, and if a federal body requests particulars of privileged communications not produced pursuant to a coercive information-gathering power, that:

(a) the person specify:

(1) the grounds on which client legal privilege is claimed; and

(2) the facts relied upon as giving rise to the claim;

(b) where claims are made in respect of communications contained in documents:

(1) the person making the claim describes the documents or in the case of a bundle of documents of the same or similar nature, describe each bundle, sufficiently to enable the document or bundle to be identified including details of the following:

(i) date of the document;

(ii) the nature of the document and the type of communication (for example tax advice documents, defined in Recommendation 6–6, prepared by a professional accounting adviser should be indicated); and

(iii) the names and positions of the authors and recipients of the communications (for example, X—partner in Y Law Firm; B—in-house counsel for C Limited);

(2) if a federal body so requests:

(i) the particulars of the privileged documents and the basis for the claims are to be verified on oath or affirmation by the person making the claim; and/or

(ii) where the person is legally represented in the federal investigation or has otherwise received legal advice in relation to making a claim for privilege, the person's lawyer is to certify that having reviewed the documents the subject of a privilege claim, that in his or her opinion, based on the client's instructions, there are reasonable grounds for the making of the claim. A federal body may request such certification by a lawyer in the absence of requesting particularisation of the communications over which privilege is claimed; and

(c) where the claims are made in respect of oral communications, the person making the claim should provide details of the date, time, parties to, location and means by which the communication took place.

Recommendation 8–4 Federal client legal privilege legislation should specify that providing a description of the documents or bundle of documents in accordance with legislative requirements of itself will not amount to waiver of the privilege.

Recommendation 8–5 Federal client legal privilege legislation should specify where a federal body has requested particulars of documents subject to a claim for privilege, or the verification or certification of privilege claims, those particulars, verification or certification are to be provided to the federal body within the time frame defined by that body, which must be reasonable having regard to the circumstances of each particular request. The types of factors that may be relevant include:

(a) the number of documents that a claimant is required to review;

(b) the need to access and identify electronically-stored documents;

(c) whether the information is required pursuant to the exercise of a search warrant (or a search without warrant);

(d) the urgency and seriousness of the investigation being conducted by the federal body;

(e) the time frame for production of documents pursuant to the coercive power; and

(f) any adverse effect on the claimant and the claimant's resources in responding urgently.

Recommendation 8–6 Federal client legal privilege legislation should provide that where a person fails to comply with a federal body's request to provide particulars of communications in respect of which privilege is claimed or to verify such claims the federal body may apply for a declaration that privilege is not maintainable unless

particulars or verification of the claims are provided to the court forthwith or within a designated time determined at the discretion of the court.

Recommendation 8–7 Federal client legal privilege legislation should provide that where a federal body requests that any claims for client legal privilege made by a person be certified by his or her lawyer (in the terms set out in Recommendation 8–3), and the lawyer fails to certify any or all of the privilege claims made by that person, if the federal body wishes to pursue the issue, the following steps apply:

(a) the federal body, if it is aware of the identity of the person's lawyer, should notify the lawyer that it intends to inform the person of the lawyer's failure to notify;

(b) the federal body should inform the person that the lawyer has not certified some or all of the claims (if it appears that the person may not be aware of this fact) and of the consequences of failure to certify (as set out below);

(c) the federal body may apply to the court for a declaration that, unless the court otherwise orders, if certification is not made within the time provided by the court, the claim for privilege is not maintainable; and

(d) the person may apply to the court for a declaration that privilege applies despite the lack of certification.

If the federal body does not wish to press the issue of failure to certify, it can invoke the dispute resolution processes set out in Recommendation 8–11.

Recommendation 8–8 Federal bodies with coercive information-gathering powers—the exercise of which raise, or are likely to raise, the issue of the application of client legal privilege—should develop and publish their policies and procedures for addressing apparent unintentional disclosures by unrepresented persons of material likely to be subject to a claim of client legal privilege, particularly the circumstances in which they recognise such persons should be given an opportunity to seek legal advice about whether to claim or waive the privilege.

Recommendation 8–9 Federal client legal privilege legislation should provide that, where a federal body receives apparently privileged information from a person other than the privilege holder (the notice recipient) or the privilege holder's lawyer, pursuant to the exercise of a coercive power that does not abrogate client legal privilege the federal body should take steps that are reasonable in the circumstances to give the privilege holder an opportunity to establish that privilege had not been waived by the privilege holder's provision of the information to the notice recipient. The legislation should recognise that there may be circumstances where it would be reasonable for a federal body to take no steps. Relevant factors to be included in this regard include:

(a) the nature of the investigation, in particular whether or not it is covert;

(b) whether the privilege holder is a covert target of the investigation; and

(c) whether the federal body considers, on reasonable grounds, that notifying the privilege holder to allow such an opportunity would be likely to prejudice the investigation.

Recommendation 8–10 The Federal Court and the Supreme Court of each state and territory should have appropriate arrangements in place to cater for hearing applications on short notice concerning disputes about client legal privilege claims in federal investigations.

Recommendation 8–11 Federal client legal privilege legislation should provide that, where a federal body (other than a Royal Commission) disputes a privilege claim (after having received particulars of the documents in respect of which a claim of privilege is made in answer to the exercise of a coercive power):

- The federal body should be required to give written notification of the fact that it disputes the claim.

- The federal body, in its discretion, may decide to offer the claimant an opportunity to agree to an independent review mechanism. If the federal body so decides, it should notify the claimant that it has 14 days (or such other time agreed to by the parties) either to:

  (a) agree to an independent review process; or

  (b) commence proceedings in a superior court seeking

    (i) a declaration that the disputed material is subject to client legal privilege; or

    (ii) an order concerning the time within which the substantive proceedings determining the claim should be commenced by the claimant.

- Where the federal body decides not to offer the claimant an opportunity to agree to an independent review mechanism, it should notify the claimant that the claimant has 14 days (or such other time agreed to by the parties) to commence proceedings in a superior court seeking:

  (a) a declaration that the disputed material is subject to client legal privilege; or

(b) an order concerning the time within which the substantive proceedings determining the claim should be commenced by the claimant.

- The federal body may also commence proceedings within 14 days or such other period ordered by the court but the onus of establishing client legal privilege is on the claimant.

- If the claimant

  (a) does not agree to an independent review mechanism when offered and fails to commence proceedings; or

  (b) is not offered an opportunity to agree to an independent review mechanism and fails to commence proceedings;

  the federal body will be entitled to regard the claim as having been waived, in the absence of special circumstances that negate this inference.

Recommendation 8–12 Federal bodies (other than Royal Commissions) with coercive information-gathering powers—the exercise of which raise, or are likely to raise, the issue of the application of client legal privilege—should develop and publish procedures in relation to the resolution of disputed privilege claims. Such procedures should, as far as practicable, be uniform. (See Recommendations 8–13 and 8–14).

Recommendation 8–13 The Attorney-General's Department in consultation with federal bodies with coercive information-gathering powers—the exercise of which raise, or are likely to raise, the issue of the application of client legal privilege—should establish a model procedure for resolving disputed privilege claims in federal investigations.

Recommendation 8–14 Where a federal body disputes a privilege claim, the model procedure for resolving the claim (referred to in Recommendation 8–13) should include the following features:

(a) A federal body should have a discretion to offer the claimant an opportunity to agree to an independent review process to resolve the dispute.

(b) Where the federal body does not offer the claimant an opportunity to agree to an independent review process, the procedures set out in Recommendation 8–11 are to apply.

(c) Where the federal body decides to offer the claimant an opportunity to agree to an independent review process, it should notify the claimant of the availability and features of the process, and of the statutory time period of 14 days (or such

other time agreed to by the parties) for indicating agreement to submit to the review process (see Recommendation 8–11).

(d) The claimant may agree to the engagement of a mutually acceptable independent reviewer or reviewers (with appropriate legal qualifications) to make a non-binding assessment of the claim, although the claimant and federal body may agree to accept the assessment as binding.

(e) Upon signing a confidentiality undertaking, those conducting the independent review should be given access to the documents containing the communications in dispute and should make an assessment of each in one of the following categories:

(i) privileged;

(ii) not privileged;

(iii) partly privileged; or

(iv) unable to make an assessment.

(f) The claimant may provide the independent review with access to privileged communications not in dispute in order to assist in establishing that a communication in dispute is privileged. This may be done on the claimant's initiative or otherwise voluntarily at the request of those conducting the independent review. In these circumstances, the disclosure of the non-disputed privileged communications does not constitute waiver.

(g) Upon receiving the assessment of the independent review, where the parties have not agreed to accept the assessment as binding, either party may within seven days (or another period agreed to by the parties) commence proceedings seeking declarations from a superior court in relation to whether the documents are privileged.

(h) If the independent review's assessment is that a document is privileged, the claimant is entitled to retain possession of the document unless the federal body, having sought declaratory relief within the required time frame, obtains a declaration that the document is not privileged.

(i) If the independent review's assessment is that a document is partly privileged, the claimant should mask those parts that are assessed to be privileged and produce the remainder of the document to the federal body, unless the claimant seeks declaratory relief within the required time frame. A federal body may also

seek a declaration, within the required time frame, that the parts of the document assessed to be partly privileged are not privileged.

(j) If the independent review's assessment is that a document is not privileged, the claimant should produce the document to the federal body, unless the claimant seeks declaratory relief within the required time frame.

(k) If an independent review process takes place, the parties may agree on who is to pay the costs of the reviewers but the ordinary presumption is that the costs will be shared equally. A federal body may, in its discretion, agree to meet the entire costs or a higher proportion of the costs. The independent reviewer may make a non-binding recommendation about how costs should be distributed.

(l) Liability for costs for any court proceedings are to be determined by courts in accordance with their rules.

Recommendation 8–15 Federal client legal privilege legislation should enable superior courts to authorise the extension of a limitation period where a federal body intends to challenge a privilege claim, if granting the extension is in the interests of justice.

Recommendation 8–16 Federal client legal privilege legislation should provide that where information which may be subject to a claim for client legal privilege is stored on the same electronic medium as non-privileged information that falls within the scope of a Commonwealth search warrant:

(a) the executing officer is not precluded from copying or imaging that medium and causing the copy or image to be removed from the premises; and

(b) such copying or imaging does not amount to a waiver of privilege.

Recommendation 8–17 There is a need for guidelines addressing the resolution of client legal privilege claims made in response to search and seizure powers in respect of electronically-stored information (ESI Guidelines). The Law Council of Australia, the Australian Federal Police, the Commonwealth Director of Public Prosecutions, and relevant accounting professional bodies in consultation with (a) federal bodies that possess search and seizure powers and (b) computer forensic experts, should devise the ESI guidelines. The ESI Guidelines should be adaptable for use at searches of premises of lawyers and accountants, other premises and searches of the person, and should be provided to persons at the time a Commonwealth search warrant is executed. The ESI Guidelines should be consistent with the processes for dealing with the resolution of privilege claims in respect of information in paper form.

Recommendation 8–18 Federal bodies with coercive information-gathering powers—the exercise of which raise, or are likely to raise, the issue of the application of client legal privilege—should develop and publish policies and procedures in

relation to managing and resolving claims for privilege in respect of electronically-stored information. The policies and procedures should be consistent with the processes for dealing with the resolution of privilege claims in respect of information in paper form.

Recommendation 8–19 The Australian Federal Police and the Law Council of Australia should revise the *General Guidelines between the Australian Federal Police and the Law Council of Australia as to the Execution of Search Warrants on a Lawyers' Premises, Law Societies and Like Institutions in Circumstances where a Claim of Legal Professional Privilege is Made* to:

(a) refer to the proposed method of making a claim, as set out in the proposed federal client legal privilege legislation (see Recommendation 8–3);

(b) refer to the model procedure for resolving a claim in circumstances where the federal body decides to offer the claimant an opportunity to agree to an independent review process. The process to be adopted should meet the minimum requirements set out in Recommendation 8–14;

(c) state that, where the claimant is not offered the opportunity, or does not agree, to participate in an independent review process, the claimant is to be given 14 days (or such other time agreed to by the parties) to either commence proceedings in a superior court to (i) establish the claim or (ii) seek an order concerning the time within which the substantive proceedings determining the claim should be commenced by the claimant;

(d) refer to the procedures for making and resolving claims in respect of electronically-stored information (see Recommendation 8–17); and

(e) state that the Guidelines apply to any part of non-legal premises that contain the work space of in-house counsel.

Recommendation 8–20 The Commonwealth Director of Public Prosecutions, in consultation with relevant federal bodies that possess search warrant powers, should amend the following documents which are attached to Commonwealth search warrants: *Claims for Legal Professional Privilege: Premises other than those of Lawyer, Law Society or Like Institution* (Non-Legal Premises Notice) and *Claims for Legal Professional Privilege: Searches of the Person*, to include the matters referred to in Recommendation 8–19(a)–(d) above.

Recommendation 8–21 The Australian Federal Police, the Australian Taxation Office and legal and accounting professional bodies should negotiate guidelines concerning the execution of search warrants on the premises of professional accounting advisers in circumstances where a claim of client legal privilege is made. The

guidelines should include the matters referred to in Recommendation 8–19(a)–(d) above.

Recommendation 8–22 Federal bodies with coercive information-gathering powers—the exercise of which raise, or are likely to raise, the issue of the application of client legal privilege—should develop and publish their policies and procedures in relation to:

(a) notifying persons that they may wish to seek independent legal advice concerning their response to a coercive power or, if applicable, seek legal representation; and

(b) making claims for privilege—which should be consistent with the proposed legislative procedures.

9. Ensuring Professional Integrity—Education and Accountability

Recommendation 9–1 State and territory legal professional associations should ensure that their professional conduct rules provide specific guidance about a lawyer's ethical duties with respect to making and maintaining a claim of client legal privilege.

Recommendation 9–2 State and territory legal professional associations should clarify their professional conduct rules to provide that examples of conduct that contravenes the relevant rules may include:

(a) a certification that there are reasonable grounds for making a privilege claim—in line with Recommendation 8–3—without reasonable grounds; or

(b) a failure to certify a privilege claim, without reasonable grounds.

Recommendation 9–3 University and other legal education programs on legal ethics and professional responsibility that are accepted for admission purposes should include specific consideration of the ethical responsibility of lawyers in relation to making and maintaining a claim of client legal privilege.

Recommendation 9–4 The study of legal ethics requirement found in state and territory rules and Uniform Admission Rules governing admission to practice as a lawyer should include the responsibility of lawyers in relation to making and maintaining a claim of client legal privilege.

Recommendation 9–5 Continuing legal education programs (including those required for the maintenance of a current practising certificate) should include a regular review of the law and responsibilities in relation to the making and maintaining of a claim of client legal privilege.

Recommendation 9–6 Legal professional associations should issue to their members 'best practice' notes from time to time, about the law and responsibilities in relation to making and maintaining a claim of client legal privilege.

Executive Summary

Contents

Background

The focus of this Inquiry is on the application of client legal privilege in the context of federal investigations and Royal Commissions of inquiry. The ALRC was asked to undertake this Inquiry in an environment in which the number of federal bodies with coercive information-gathering powers has grown significantly in recent decades. These bodies now include traditional law enforcement bodies—such as the Australian Federal Police (AFP); bodies concerned with taxation and the administration of public funds—such as the Australian Taxation Office (ATO) and Centrelink; corporate and financial regulators—such as the Australian Securities and Investments Commission (ASIC) and the Australian Competition and Consumer Commission (ACCC); and regulators with a focus on a specific industry—such as the Australian Fisheries Management Authority (AFMA).

During the course of this Inquiry, the ALRC identified 41 federal bodies with coercive investigatory powers, as well as Royal Commissions of inquiry that may be established from time to time under the *Royal Commissions Act 1902* (Cth).[1]

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1 There have been a number of high profile federal Royal Commissions in recent years, including those into the Australian Wheat Board; HIH Insurance; and the building and construction industry: T Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (2006); N Owen, *Report of the HIH Royal Commission* (2003); and T Cole, *Royal Commission into the Building and Construction Industry* (2003).

The problems

There are many more than 41 pieces of legislation that address the powers of the federal bodies identified in this Inquiry, and some bodies are covered in multiple pieces of legislation. Unfortunately, there are few instances in which this legislation specifically addresses the application of privilege within the investigatory context; and, where privilege is addressed, there is inconsistency in terminology and scope.

Several recent developments have highlighted the need for clarification of the application of privilege in the context of federal investigations. In *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (*Daniels*),[2] a case concerning the ACCC's coercive power under s 155 of the *Trade Practices Act 1974* (Cth) (TPA), the High Court of Australia held that client legal privilege only could be abrogated expressly or by necessary implication. While this decision clarified the principles that apply when considering whether privilege has been abrogated, it also created considerable uncertainty in relation to the powers of many federal investigatory bodies under their own particular legislation—uncertainty that presently only can be resolved through litigation. In this Inquiry, the ALRC heard from stakeholders that policies and practices vary considerably amongst federal bodies. For example, ASIC's approach until very recently was based on a view that the principles enunciated in *Daniels* did not apply to some of its coercive powers.

Within several years of the *Daniels* decision, the Hon Terence Cole QC was faced with extensive claims to privilege during the Royal Commission investigating the conduct of the Australian Wheat Board in relation to the United Nations 'Oil-for-Food' programme (the AWB Royal Commission). Those claims delayed the Commission for over a year, causing great frustration to the Royal Commissioner. AWB Ltd also challenged Commissioner Cole's capacity to determine privilege claims. In the result, Young J of the Federal Court agreed with Commissioner Cole that a document in question was not subject to privilege,[3] and also held that the Commissioner had power in the circumstances of that case to form an opinion as to whether the document was subject to privilege. However, Young J's decision cast doubt on the ability of a Royal Commissioner to inspect a document in respect of which client legal privilege has been claimed to determine whether the claim is made out—although he stated that it was inappropriate for him to grant declaratory relief on this issue. The *Royal Commissions Act 1902* (Cth) was amended in consequence, to facilitate the resolution of such claims by a Royal Commissioner in a position like Commissioner Cole. (See Chapter 5.)

Cole's concerns are also being played out in the slow, ongoing progress of the resolution of privilege claims in the 'Project Wickenby' investigations, which resulted from the taskforce set up in 2004 to investigate internationally promoted tax arrangements that allegedly involve tax avoidance or tax evasion, and money

2 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

3 *AWB Ltd v Cole* (2006) 152 FCR 382.

laundering. This complex investigation has involved a number of federal bodies, including the ATO, the Australian Crime Commission (ACC), the AFP, ASIC and the Commonwealth Director of Public Prosecutions (CDPP).

When a body has search and seizure powers, the scale of the operation can be considerable. The ALRC heard concerns about the impact of timing—the perception of 'raids' requiring an immediate (or quick) response and having to characterise potentially many thousands of documents, files and electronic records to advise on what should be produced, or claimed as privileged. Any uncertainty about what must be produced puts enormous pressure on all concerned—and uncertainty can frustrate investigations and end up in protracted and costly litigation to resolve any contested issues.

In approaching this Inquiry, the ALRC has sought to examine the rationale for privilege in the modern context; to consider whether there are any common principles that should apply regardless of the agency involved; to identify the types of circumstances—if any—in which privilege might be modified or abrogated; to identify improvements to the processes for making and handling claims of privilege; and to increase the accountability of lawyers maintaining such claims on behalf of clients.

Rationale—a principled approach

The ALRC put the spotlight squarely upon rationale and considered arguments for and against client legal privilege so that the recommendations are founded on a clearly principled basis. (See Chapter 2 of the Report.)

From the outset of this Inquiry, the ALRC signalled that the 'privilege' should not be viewed as some peculiar entitlement of lawyers, but rather as an important right of clients. The ALRC described the doctrine not as '*legal professional* privilege' but '*client* legal privilege',[4] reflecting the terminology of the uniform Evidence Acts and expressing the privilege as based in the *relationship* of a client with his or her lawyer.

In *Daniels*, the High Court described client legal privilege as 'not merely a rule of substantive law', but rather 'an important common law right, or perhaps, more

4 'The privilege is commonly described as legal professional privilege, which is unfortunate, because it suggests that the privilege is that of the members of the legal profession, which it is not. It is the client's privilege, so that it may be waived by the client, but not by the lawyer': *Baker v Campbell* (1983) 153 CLR 52, 85 (Murphy J). The phrase 'client legal privilege' was adopted in the uniform Evidence Acts after the ALRC's 1985 and 1988 Reports on evidence: Australian Law Reform Commission, *Evidence*, ALRC 26 (1985); Australian Law Reform Commission, *Evidence*, ALRC 38 (1987).

accurately, an important common law immunity'.[5] It was even described as a '*human* right'.[6]

Client legal privilege is a principle that is not just confined to common law jurisprudence. A doctrine protecting the confidential communications of clients with their lawyers is also accepted today as a basic principle of European Community law. (See Chapter 3 of the Report.) The confidentiality of communications between lawyer and client is seen as promoting the proper administration of justice and the right to a fair trial, regardless of the system of justice that applies. Thus, apart from protecting the interests of individual litigants, client legal privilege plays an important role in the administration of justice more broadly.

Focus of the recommendations

The ALRC's challenge in this Inquiry was to clarify areas of existing uncertainty and to develop procedures for making and resolving client legal privilege claims. The challenge also was to balance the competing public interests: namely, the public interest in effective and efficient investigations by federal bodies; and the public interest in the active compliance that privilege is understood to promote.

Following the High Court in *Daniels*, the central premise in the recommendations is that client legal privilege is a doctrine of fundamental importance in the common law—and only should be abrogated or modified in exceptional circumstances.

A key theme in submissions and consultations was that, to the extent that there is a problem in relation to client legal privilege in the context of federal investigatory bodies, it mainly lay in the domain of practice and procedure. Consequently, if there were greater transparency, clearer guidelines and procedures, many of the present problems could be solved—and a greater framework of cooperation and trust could be generated, while still respecting the fundamental principle of client legal privilege. Many stakeholders argued that remedying the problems in relation to practice and procedure—on both sides, client (lawyer) and federal body—would result in most of the other concerns being addressed.

Complementing the recommendations in relation to procedure are those that focus upon the ethical responsibilities of lawyers in the making and maintaining of claims, by ensuring thorough consideration of client legal privilege in initial training, admission requirements, continuing education and ongoing professional accountability.

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5 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [11].

6 Ibid, [86] (Kirby J).

Key recommendations

The key recommendations in this Inquiry include: (a) the enactment of a statute of general application to cover aspects of the law and procedure governing client legal privilege claims in federal investigations; (b) the setting out of procedures with respect to the making and resolution of client legal privilege claims; and (c) the extension of privilege, in defined circumstances, to include tax advice—the tax advice privilege.

Federal client legal privilege legislation

In Chapter 5, the ALRC recommends the enactment of federal client legal privilege legislation to clarify the existing scattered federal provisions on the application of privilege to federal coercive information-gathering powers and to inject greater consistency with respect to procedures for privilege claims. The statute also would make it clear that the default position in relation to coercive information-gathering powers in federal investigations is that client legal privilege applies in the absence of express abrogation—reflecting the fundamental importance of the doctrine of privilege as discussed in Chapters 2 and 3.

There was strong support in submissions and consultations for clarification of the application of client legal privilege to the coercive information-gathering powers of federal bodies through the enactment of a single specific federal statute, rather than the amendment of each of the federal statutes containing coercive information-gathering powers. The ALRC considers that such legislation also would avoid the problem of leaving the resolution of uncertainties to the slow and expensive processes of the common law.

The ALRC recommends that any legislative scheme which seeks to abrogate or modify client legal privilege must do so by express reference to the particular sections or divisions within that scheme that confer coercive information-gathering powers which abrogate or modify the privilege. Further, the Attorney-General should lead a process through the Standing Committee of Attorneys-General to encourage the states and territories to harmonise the law by adopting the proposed model in their respective jurisdictions.

Making and resolving claims—practice and procedure

Chapter 8 considers the respective obligations of federal bodies exercising coercive information-gathering powers, and the persons subject to those powers. The strong theme in submissions and consultations was that the key to addressing the problems identified in relation to claims of client legal privilege in federal investigations was to focus upon practice and procedure.

Submissions and consultations made it clear that there are issues and problems concerning the making of privilege claims, including:

- a lack of consistency in the manner in which claims are made;
- a lack of transparency in claims;
- the need to address blanket claims of privilege;
- over-claiming of privilege;
- over-use of masking of documents;
- 'warehousing'—placing prejudicial documents in the hands of third parties and beyond the power of a party to litigation;
- 'privileging'—placing prejudicial documents in the hands of lawyers under cover of spurious requests for legal advice so as to permit a claim for privilege;
- concerns about inadvertent waiver of privilege in the process of making a claim.

The ALRC also heard that federal bodies experience difficulties in testing privilege claims because the persons the subject of coercive powers sometimes do not alert the federal body of the existence of a claim or, when claims are made, insufficient details are provided; and that there is an enormous disparity in the approaches taken by persons subject to federal coercive powers to justify their claims of privilege.

To deal with such problems and difficulties, the ALRC recommends that federal client legal privilege legislation include a range of requirements with respect to claims, concerning:

- the notification that federal bodies should give about the application of privilege to their coercive information-gathering powers;
- provision of a reasonable opportunity to claim privilege;
- the details of claims that should be provided, if requested by a federal body; and
- the certification of the claim by a lawyer, if requested by a federal body.

The ALRC recommends that there be a model scheme for resolving privilege disputes which is to include a number of specified features, one of which is to allow a federal body the discretion to offer a claimant an opportunity to agree to an independent review process.

As the ALRC makes recommendations for significant changes with respect to practice and procedure, it is also recommended (Chapter 6) that the federal client legal privilege legislation should provide that, five years after it comes into force, a review is to be conducted of the effectiveness of its provisions relating to the procedures for making and resolving privilege claims in federal investigations. If significant issues related to the operation of client legal privilege claims still exist, the ALRC considers that thought should be given to whether there is a need for abrogation of the privilege to be reconsidered. A complementary proposal in relation to Royal Commissions is that where client legal privilege has been abrogated or modified in a Royal Commission, the Commissioner must include within the report consideration of the degree to which the abrogation or modification has facilitated the effectiveness of the Royal Commission.

Tax advice privilege

The ALRC recommends the creation of a 'tax advice privilege' to protect the confidentiality of tax advice given by independent professional accounting advisers from the information-gathering powers of the Commissioner of Taxation. The recommendation is underpinned by the compliance rationale of privilege—that, in order to promote compliance, clients ought to be protected fully in their communications in relation to tax law in the same way they are in other areas of the law. This does not necessarily mean that privilege is extended to tax advisers, but rather that the client's confidential communications in the nature of tax advice will be protected. If a federal body so requests, the claim that the tax advice is privileged must be certified by a lawyer. The ALRC noted in particular the comparative precedents—especially that in New Zealand, which includes a specific 'client-accountant privilege'—and the administrative practice currently adopted by the ATO ('the accountants' concession'). The ALRC's recommendations in relation to the tax advice privilege are discussed in detail in Chapter 6.

Other key recommendations

The ALRC makes a number of important recommendations complementing the clarification of the law and procedure in relation to client legal privilege claims. These include recommendations about the circumstances in which it may be appropriate to abrogate privilege in federal investigations; the safeguards that should apply when privilege is abrogated; and improvements to the ways in which lawyers handle claims of client legal privilege through better education and, if necessary, by enforcing professional discipline.

When abrogation may be appropriate

Client legal privilege may be modified or abrogated by legislation if the Parliament chooses to give higher priority to the interests of investigatory agencies in accessing information than to the interests served by maintaining privilege—as, for example, in

the *James Hardie (Investigations and Proceedings) Act 2004* (Cth) that abrogated client legal privilege in relation to certain material, allowing its use in investigations of the James Hardie Group and any related proceedings; and the *Royal Commissions Act 1923* (NSW).

While a case can be made that client legal privilege claims do frustrate and delay investigations—as in the AWB Royal Commission—the ALRC considers that federal bodies could achieve greater efficiency and effectiveness in relation to claims of client legal privilege by addressing the significant issues and problems associated with the practices and procedures for making and resolving claims in federal investigations. These matters are addressed in Chapter 8.

Chapter 6 focuses on whether it is desirable to modify or abrogate client legal privilege in order to achieve a more effective performance of federal investigatory functions. The chapter considers some of the problems that arise from the application of client legal privilege to federal investigations and outlines arguments for and against modification or abrogation of the privilege as a means of addressing these problems.

The ALRC's recommendation is that abrogation only should be considered in exceptional circumstances. The ALRC considers that, in the course of ordinary enforcement and investigatory activities, the importance of the privilege in encouraging compliance overrides the benefits of abrogation to the regulator. As such, the ALRC does not support any wholesale abrogation of the privilege in relation to federal investigations.

The ALRC has identified three examples where a higher public interest may warrant abrogation of the privilege: major investigations which fit specified criteria; some Royal Commissions; and the oversight of public sector agencies. The recommended factors to be considered when determining whether to abrogate privilege in relation to major investigations and Royal Commissions are: (a) that the subject of the investigation or inquiry concerns a matter (or matters) of major public importance that has (or have) a significant impact on the community in general or on a section of the community, or is a covert investigation; (b) whether the information sought can be obtained in a timely and complete way by using alternative means that do not require abrogation of client legal privilege; and especially (c) the degree to which a lack of access to the privileged information will hamper or frustrate the operation of the investigation and, in particular, whether the legal advice itself is central to the issues being considered by the investigation. In relation to public sector agencies that focus on the accountability of government, the ALRC recommends clarification of the extent to which privilege is abrogated.

Safeguards—limitations on use where privilege is abrogated

An important issue in relation to client legal privilege is determining, if privilege were to be abrogated or modified, what a federal investigatory body can do with otherwise privileged information that it obtains through the use of coercive powers.

In Chapter 7, the ALRC recommends the introduction of a default safeguard provision into federal client legal privilege legislation providing that a federal body, that seeks to rely on otherwise privileged information as evidence in any court proceedings, must apply to the court for permission to do so. Further, there should be a presumption against use of the evidence which is able to be displaced in the court's discretion, having regard only to: (a) the public interest in limiting the effects of the abrogation of an important common law right; (b) whether the otherwise privileged information was obtained pursuant to the exercise of a covert investigatory power; and (c) the probative value of the otherwise privileged evidence, including whether it reveals matters tending to constitute serious misconduct or conduct which has a serious adverse impact on the community in general or on a section of the community.

As the recommended provision is a general default position, it can be displaced by specific existing and subsequent legislation—but only by express words conveying a contrary approach. This ensures that an appropriate degree of flexibility is retained with respect to the application of safeguards, recognising the exigencies of different investigatory contexts and specific circumstances.

Lawyers, ethics and accountability

The recommendations also seek to ensure professional integrity in relation to claims of client legal privilege, focusing, in particular, on the role of professional disciplinary proceedings and legal ethics education. (See Chapter 9.) It is necessary to complement the recommendations for a more transparent and expeditious framework for the making and resolving of claims with better education of lawyers in this area in order to inculcate a far greater understanding of the nature of, and responsibilities in relation to, the making of privilege claims.

The ALRC acknowledges that identifying when the assertion of a claim of client legal privilege amounts to 'abuse' may be problematic. As pointed out in submissions and consultations, where a lawyer is testing the boundaries of the doctrine of privilege with an arguable case, this is different from maintaining a hopeless claim as a tactic in order to frustrate or delay an investigation. While there is no clear evidence of chronic abuse of claims of client legal privilege, there are some cases that cause concern, and also evident distrust on the part of federal investigatory bodies that claims are not being made legitimately in every case.

There is considerable scope for improving the various levels of legal education to identify client legal privilege issues more particularly—both prior to and after admission to practice—to ensure a better understanding of the obligations of lawyers in relation to privilege claims within the context of a lawyer's overall ethical responsibilities to the court. This emphasis should be reflected in criteria for admission, practical legal training, continuing legal education and best practice advice notes issued by legal professional associations.

The ALRC's view is that the best strategies for addressing alleged instances of misuse or abuse of claims of client legal privilege are to clarify and enhance the existing disciplinary frameworks that apply to lawyers. The aim should be to ensure that cases of actual abuse are detected and punished, rather than introducing specific penalty provisions concerning client legal privilege.

Net effect of the recommendations

The net effect of the recommendations in this Report is to affirm the importance of client legal privilege as a fundamental principle of the common law that only may be abrogated in exceptional circumstances, and to provide, through federal client legal privilege legislation, a confirmation of the default principles in relation to privilege and a framework for making and resolving claims of client legal privilege in federal investigations. Complementing these recommendations are others which focus on educating lawyers on an ongoing basis with respect to their ethical responsibilities in relation to privilege claims.

1. Introduction to the Inquiry

Contents

Background to the Inquiry

1.1 On 29 November 2006, the then Attorney-General of Australia, the Hon Philip Ruddock MP, asked the Australian Law Reform Commission (ALRC) to inquire into the application of legal professional privilege[1] to the coercive information-gathering powers of Commonwealth bodies—such as the Australian Federal Police (AFP), the Australian Crime Commission (ACC), the Australian Securities and Investments Commission (ASIC) and federal Royal Commissions of inquiry.

1.2 Coercive information-gathering powers include the power to compel the production of documents, the answering of questions, and the entering of premises under warrant to search and seize records. To date, the proliferation of bodies with coercive information-gathering powers has presented a challenge to the common law doctrine of client legal privilege. Was the doctrine limited to curial proceedings, or did it have wider application? If it did have wider application, what was the reason for it? In what circumstances should privilege not apply at all?

1.3 The ALRC has been directed to consider the investigatory functions of Commonwealth bodies, and whether it is desirable to modify or abrogate client legal

1 Hereafter called 'client legal privilege'—see section on 'Terminology' below.

privilege in order to achieve a more effective performance of those functions in the public interest. The ALRC also has been asked to consider whether it is desirable to clarify all existing federal provisions that modify or remove client legal privilege, with a view to harmonisation.

1.4 The ALRC considered client legal privilege in the investigatory context in its 2002 Report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95).[2] The ALRC noted the significant inconsistencies in the availability of the privilege across regulatory statutes and recommended that a review be undertaken of federal investigatory powers that compel the disclosure of information and the operation of client legal privilege in that context, with a view to providing greater certainty and consistency.

1.5 More recently, the ALRC, the New South Wales Law Reform Commission (NSWLRC) and the Victorian Law Reform Commission (VLRC) considered client legal privilege in the evidentiary context in the 2005 Report, *Uniform Evidence Law* (ALRC 102).[3] The Commissions considered that 'a dual system of client legal privilege operating in any one jurisdiction is undesirable' and recommended that:

> The client legal privilege provisions of the uniform Evidence Acts should apply to any compulsory process for disclosure, such as pre-trial discovery and the production of documents in response to a subpoena and in non-curial contexts including search warrants and notices to produce documents, as well as court proceedings.[4]

1.6 The application of client legal privilege in the context of Royal Commissions arose as an issue of some contention in 2006 in the inquiry undertaken by Commissioner Terence Cole QC into the Australian Wheat Board (AWB) and the Oil-for-Food Programme (the AWB Royal Commission). Extensive claims for privilege were asserted by AWB, generating what Commissioner Cole identified as a conflict

> between the public interest in discovery of the truth which is a prime function of a Royal Commission, and the fundamental right of persons to obtain legal advice under conditions of confidentiality.[5]

1.7 Commissioner Cole recommended that consideration be given to amending the *Royal Commissions Act 1902* (Cth) to permit the Governor-General in Council by Letters Patent to determine that, in relation to the whole or a particular aspect of the matters the subject of inquiry, client legal privilege should not apply.[6]

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2 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002).

3 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005).

4 Ibid, Rec 14–1.

5 T Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (2006), [7.66].

6 Ibid, rec 4.

Scope of the Inquiry

Terms of Reference

1.8 In relation to the application of client legal privilege to federal bodies with coercive information-gathering powers, the Terms of Reference require the ALRC to consider whether it would be desirable to:

- modify or abrogate the privilege in some areas in order to achieve more effective performance of Commonwealth investigatory functions;
- clarify existing provisions for the modification or abrogation of the privilege, with a view to harmonising them across the Commonwealth statute book; and
- introduce or clarify other statutory safeguards where the privilege is modified or abrogated, with a view to harmonising them across the Commonwealth statute book.

1.9 The Terms of Reference also direct the ALRC to consider 'any related matter'. This provides an opportunity—to a limited extent—to consider issues of a broader nature than those specifically enumerated.

1.10 While the Inquiry is focused on client legal privilege in the context of federal agencies with coercive powers, any modification or abrogation of the doctrine in this context will have wider implications because of the potential flow-on effects in the domain of legal advice. That is, at the point in time when a person is seeking legal advice it will usually not be known whether, at some possible future time, that advice may be subject to a coercive investigatory power. Wider implications also stem from the fact that many coercive powers are exercisable against persons who are not necessarily suspected of any wrongdoing, but are believed to have information that may assist an agency in its investigation.

1.11 The exercise of coercive information-gathering powers can generate complex questions in particular investigations. There may be multiple and parallel regulatory or investigatory proceedings. The transactions leading to the collapse of the HIH Insurance group, for example, were subject to investigation or inquiry by ASIC, the Australian Prudential Regulation Authority (APRA) and eventually a Royal Commission.[7]

1.12 One particular matter that was raised in the Issues Paper in this Inquiry, *Client Legal Privilege and Federal Investigatory Bodies* (IP 33), concerned whether client legal privilege should arise in the context of advice on taxation law provided by

7 See Ch 4.

accountants. This prompted a number of responses—considered in detail in the Discussion Paper, *Client Legal Privilege and Federal Investigatory Bodies* (DP 73)[8]—and a further discussion of the application of privilege to patent attorneys and others, which is considered further in this Report.[9]

Matters outside the Inquiry

1.13 In this Inquiry, the ALRC is not conducting an evaluation of the appropriateness or otherwise of federal coercive information-gathering powers of themselves.[10]

1.14 The Terms of Reference limit the ALRC's Inquiry to the application of client legal privilege in federal investigations and do not extend to client legal privilege in court proceedings,[11] which was considered in ALRC 102. In July 2007, the Standing Committee of Attorneys-General (SCAG) endorsed a Model Uniform Evidence Bill, which is based on the *Evidence Act 1995* (NSW) and *Evidence Act 1995* (Cth) with amendments as recommended in ALRC 102.[12] The New South Wales (NSW) Parliament passed the relevant amendments to the *Evidence Act 1995* (NSW) in late 2007.[13] At the time of writing, amendments to the *Evidence Act 1995* (Cth) had not been introduced into Parliament.[14]

1.15 Consideration of client legal privilege in the context of federal investigations, however, does naturally prompt a consideration of the privilege in its wider jurisprudential context. This was evident in a number of submissions, where comments were made about the way the doctrine operated more generally—for example the extent to which copies of documents are considered to be privileged;[15] whether privilege should apply to an auditor's assessment of contingent liabilities under the *Corporations Act 2001* (Cth);[16] and the application of the Uniform Evidence Act provisions to the Administrative Appeals Tribunal.[17] Where such comments were made, they are noted at relevant points in this Report.

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8 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), [6.188]–[6.237] and Rec 6–3.

9 See Ch 6.

10 At the time of writing, the coercive information-gathering powers of federal bodies was being considered by the Administrative Review Council (ARC) and a draft report had been prepared: Administrative Review Council, *Government Agency Coercive Information-Gathering Powers [Draft Report]* (2007).

11 Although in formulating recommendations relating to the practice of making claims of client legal privilege in federal investigations the ALRC draws, by analogy, on the practices of making claims in the context of discovery in litigation.

12 The Uniform Evidence Bill may be viewed at <www.pco.nsw.gov.au/uniform_legislation.htm> at 30 November 2007.

13 The Evidence Amendment Bill 2007 was passed on 24 October 2007. At the time of writing, the Act was yet to be proclaimed.

14 See 'Case Study: Uniform Evidence Law (ALRC102, 2005)', Australian Law Reform Commission, *Annual Report 2006–07*, for a report on the progress of implementation of the recommendations.

15 Prompted by the decision in *Australian Federal Police v Propend Finance* (1997) 188 CLR 501.

16 Prompted by the decision in *Westpac Banking Corporation v 789TEN Pty Ltd* [2005] NSWCA 321.

17 Prompted by the decision in *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* (2006) 67 NSWLR 91.

Terminology

Client legal privilege

1.16 Although the Terms of Reference use the phrase 'legal professional privilege', the ALRC has used the term 'client legal privilege' throughout the Inquiry. This is the manner in which this privilege is described in the *Evidence Act 1995* (Cth)[18] and reflects the nature of the privilege as one belonging to the client, rather than the lawyer.

> The privilege is commonly described as legal professional privilege, which is unfortunate, because it suggests that the privilege is that of the members of the legal profession, which it is not. It is the client's privilege, so that it may be waived by the client, but not by the lawyer.[19]

1.17 In *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (*Daniels*),[20] Kirby J quoted the words of Advocate-General Slynn in the European Court of Justice, which reiterated the concept of the privilege as one focusing upon the client:

> Whether it be described as the right of the client or the duty of the lawyer, this principle has nothing to do with the protection or privilege of the lawyer.[21]

Lawyer

1.18 When client legal privilege is discussed, both in judgments and in scholarly literature, various terms are used in relation to the kind of 'legal' relationships that invoke the privilege—such as those involving barristers, solicitors, attorneys, legal practitioners, and so on. Section 117 of the uniform Evidence Acts uses the expression 'lawyer', which is defined as including a barrister or solicitor.

1.19 In ALRC 102, the ALRC, NSWLRC and VLRC rejected the holding of a practising certificate as a pre-condition to qualify for the privilege,[22] consistently with the decision in the ACT Court of Appeal in *Commonwealth v Vance*.[23] The term 'lawyer' is used for the purposes of this Inquiry—including, unless specifically stated, lawyers with or without current practising certificates.

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18 *Evidence Act 1995* (Cth) pt 3.10, div 1. The term was also adopted in the uniform Evidence Acts after the ALRC's 1985 and 1988 Reports on evidence: Australian Law Reform Commission, *Evidence*, ALRC 26 (1985); Australian Law Reform Commission, *Evidence*, ALRC 38 (1987).

19 *Baker v Campbell* (1983) 153 CLR 52, 85 (Murphy J).

20 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

21 *AM & S Europe Ltd v Commission of the European Communities* [1983] 1 QB 878, 913, cited by Kirby J in *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [87].

22 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005), [14.82]–[14.100]. See further Ch 2.

23 *Vance v McCormack* (2004) 154 ACTR 12.

Law reform processes

Time frame for the Inquiry

1.20 The Terms of Reference were given to the ALRC on 29 November 2006 and initially stipulated a reporting date of 3 December 2007. In order to ensure that the views of key stakeholders could be considered, the ALRC requested and the Attorney-General granted a short extension until 24 December 2007.[24]

1.21 The time frame for the Inquiry—just over 12 months—meant that for each stage of the consultative process there were tight deadlines for making submissions. The ALRC acknowledges the considerable amount of work undertaken by those who contributed to the consultative process throughout this Inquiry.

Advisory Committee

1.22 A key aspect of ALRC procedures is the establishment of an expert Advisory Committee, or 'reference group', to assist with the conduct of ALRC inquiries.

1.23 Advisory Committees provide advice and assistance to the ALRC, and have particular value in helping the ALRC to identify the key issues and determine priorities, providing quality assurance in the research, writing and consultation processes, and assisting with the development of proposals and recommendations for reform. Ultimate responsibility for the Report and recommendations, however, remains with the Commissioners of the ALRC.

1.24 The membership of the Advisory Committee for this Inquiry included judicial officers from a number of federal and state courts, corporate counsel, regulators, legal practitioners and academics with expertise in the area. The full membership is detailed in the List of Participants at the front of this publication.

1.25 The Advisory Committee met for the first time on 15 March 2007, to consider the questions to be included in the Issues Paper. The Advisory Committee met for the second time on 26 July 2007, to consider the draft proposals for the Discussion Paper. A third (and final) meeting was held on 15 November 2007 to consider the draft recommendations for reform. Members of the Advisory Committee also were given access to draft chapters of each of the documents produced in this Inquiry for comment.

1.26 The ALRC derived enormous assistance from the Advisory Committee throughout this Inquiry and extends its gratitude to the members of the Committee in voluntarily providing their time and expertise.

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24 Attorney-General Robert McClelland MP, Letter to the ALRC, 6 December 2007.

Community consultation

1.27 One of the most important features of ALRC inquiries is the commitment to widespread community consultation.[25] The ALRC maintains an active program of direct consultation with stakeholders and other interested parties throughout every inquiry. The nature and extent of this engagement are normally determined by the subject matter of each reference. While some areas may be seen to be narrow and technical, and of interest mainly to experts, other ALRC inquiries involve a significant level of interest and involvement from the general public and the media.

1.28 The Terms of Reference for this Inquiry direct that the ALRC 'will identify and consult with relevant stakeholders'. In addition, under the provisions of the *Australian Law Reform Commission Act 1996* (Cth), the ALRC 'may inform itself in any way it thinks fit' for the purposes of reviewing or considering anything that is the subject of an inquiry.[26]

1.29 The ALRC developed a consultation strategy for this Inquiry that encouraged participation and input from a wide spectrum of stakeholders. The ALRC conducted 51 consultation meetings (most of them involving a number of participants) including former Royal Commissioners, judges, lawyers, community legal centres, representative bodies of lawyers and tax advisers, federal investigatory bodies, and academics. In respect of some major stakeholders, consultation meetings took place more than once during the course of the Inquiry. A full list of consultations is set out in Appendix 3.

1.30 The ALRC's commitment to widespread community consultation also has a geographic dimension. Although the ALRC is based in Sydney, in recognition of the national character of the Commission, consultations have been conducted in other states and territories during the Inquiry.

Community consultation documents

1.31 The ALRC's standard operating procedure is to produce two community consultation documents—an Issues Paper and a Discussion Paper—before proceeding to a final report with recommendations for reform. Each document invites submissions in relation to specific questions—in IP 33; and proposals—in DP 73.

1.32 To facilitate access to the community consultation documents and to encourage participation in the Inquiry both consultation documents are available free of charge in hard copy or on CD, and can be downloaded free of charge from the ALRC's website: www.alrc.gov.au.

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25 B Opeskin, 'Engaging the Public: Community Participation in the Genetic Information Inquiry' (2002) 80 *Reform* 53.

26 *Australian Law Reform Commission Act 1996* (Cth) s 38.

1.33 For this Inquiry, IP 33 was released on 23 April 2007 to commence the community consultation process on an informed basis. It was organised into seven chapters and asked 31 questions that the ALRC identified as arising out of the Terms of Reference. DP 73 was released on 26 September 2007. It contained nine chapters and 42 proposals for reform.

1.34 IP 33 and DP 73 contained a significant amount of background and historical material, including a review of the current state of federal law in relation to coercive information-gathering powers of federal investigatory bodies (including Royal Commissions) as well as a review of the over 40 investigatory bodies themselves.

1.35 Five hundred hard copies and 56 CD copies of IP 33, and 600 hard copies and 35 CD copies of DP 73, were distributed during the course of the Inquiry.

Written submissions

1.36 This Inquiry has strongly encouraged interested persons and organisations to make written submissions to help advance the process of developing recommendations. The ALRC received 116 written submissions—76 in response to IP 33 and an additional 40 in response to DP 73. Lists of the submissions are set out in Appendix 2.

1.37 The submissions addressed the issues and questions raised in IP 33 and the proposals in DP 73 and, in the case of federal investigatory bodies, also responded to questions specifically put to them by the ALRC concerning their use of their particular coercive information-gathering powers and their approach to privilege issues. Only three submissions have been designated as confidential, although some agencies indicated that parts of their submissions should be treated as confidential.

1.38 Submissions were received from: federal investigatory bodies; individual lawyers; groups of companies or persons affected by the exercise of coercive information-gathering powers—for example, QBE Insurance Group and the Australian Institute of Company Directors; groups representative of persons affected by the exercise of coercive information-gathering powers—such as community legal centres and legal aid bodies; bodies representing particular groups of lawyers—such as the Australian Corporate Lawyers Association and the Insolvency Practitioners Association; bodies representative of professional groups of lawyers and accountants—such as the Law Council of Australia, the NSW Bar Association, NSW Young Lawyers, the Law Society of NSW, the Taxation Institute of Australia and the Institute of Chartered Accountants; academics and law students.

1.39 In response to DP 73, submissions also were received from bodies representing non-lawyers which had occasion to encounter privilege issues: two union groups—the Construction, Forestry, Mining and Energy Union (CFMEU) and the Australian Council of Trade Unions (ACTU)—in relation to industrial advocates; the Intellectual Property Research Institute of Australia (IPRIA)—in relation to patent attorneys; and the Australasian Compliance Institute—in relation to compliance reports.

1.40 The nature of submissions varied considerably, from short contributions singling out specific areas of the law or practice for comment, to long expository submissions prepared on behalf of representative bodies—for example those of the Law Council of Australia, the Institute of Chartered Accountants and the NSW Bar Association. Three submissions were from teams of pairs of law students who were selected as the 2007 finalists for the Kirby Cup Law Reform competition, which this year focused on the topic of client legal privilege.[27] A number of individuals, groups and federal bodies also made submissions both to IP 33 and DP 73.

Implementation

1.41 Once tabled in the Australian Parliament, this Report becomes a public document.[28]

1.42 ALRC Reports are not self-executing documents. The ALRC is an advisory body and provides recommendations about the best way to proceed—but implementation is a matter for others.[29]

1.43 As in other recent reports, the ALRC's approach to law reform has involved a mix of strategies, including legislation and subordinate regulations; official standards and codes of practice; industry and professional guidelines; education and training programs; and so on. Although the final Report is presented to the Attorney-General, some of its recommendations are directed to other government agencies, professional associations and institutions, for action or consideration.

1.44 Finally, it should be noted that, in the past, the ALRC often drafted legislation as the focus of its law reform effort. The ALRC's practice has since changed, and it does not produce draft legislation unless specifically asked to do so in the Terms of Reference for a particular inquiry. This is partly because drafting is a specialised function better left to the parliamentary experts and partly because the ALRC's time and resources are better directed towards determining the policy that will shape any resulting legislation. The ALRC has not been asked to produce draft legislation in this Inquiry, but its final recommendations specify the nature of any desired legislative change.

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27 Information on the Kirby Cup is found at http://www.alrc.gov.au/events/events/kirbycup/guidelines.htm.

28 The Attorney-General must table the Report within 15 sitting days of receiving it: *Australian Law Reform Commission Act 1996* (Cth) s 23.

29 However, the ALRC has a strong record of having its advice followed. About 59% of the Commission's previous reports have been fully or substantially implemented, about 29% of reports have been partially implemented, 4% of reports are under consideration and 8% have had no implementation to date: Australian Law Reform Commission, *Annual Report 2005–06*, 38.

Overview of this Report

1.45 This Report reflects the law and the policies of federal bodies as at 1 December 2007. However, just before the completion of the Report, the ALRC learned that, from 3 December 2007, ASIC's policy is that people who are subject to its compulsory powers will be explicitly notified that they are not required to provide documents or information that are subject to a valid claim for client legal privilege. People who make such a claim are requested to provide specific details of the material over which the claim is made and the basis of the claim.[30]

1.46 This Report is organised into nine chapters. Recommendations for reform are not spread evenly throughout. Some chapters provide mainly contextual or background material. Other chapters are focused more on the technical aspects of the law and practice and procedure—it is in these chapters that the reform recommendations are mainly found.

1.47 Chapter 2 considers the two limbs of client legal privilege—the advice limb and the litigation limb—in light of the rationales that have been advanced for them. The chapter concludes that both limbs have an overarching rationale in the administration of justice and that the right to confidentiality in legal communications may be seen as part of the broader right of access to justice, and a protection of citizens against the state. The chapter also affirms that the doctrine of client legal privilege remains a fundamental principle of the common law and that insofar as problems have occurred in relation to claims of client legal privilege, the problem lies broadly in the area of practice and procedure—and not rationale.

1.48 Chapter 3 describes the historical origins of the doctrine of client legal privilege and provides an overview of the current doctrine under the common law and the *Evidence Act 1995* (Cth)—when it can be claimed; when it cannot; and when it may be waived or abrogated. The chapter also includes a consideration of similar doctrines in a comparative and international context. The chapter then considers the operation of the common law fraud and crime exception to the privilege and the application of the privilege to corporations.

1.49 Chapter 4 provides an overview of the investigatory and associated functions of many federal bodies that have coercive information-gathering or related powers, and the nature of those powers. The bodies discussed include those nominated in the Terms of Reference as well as a number of other federal agencies and departments.[31] Where the information is available, the chapter addresses the frequency with which federal bodies use coercive powers and their policies in this regard.

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30 Australian Securities and Investments Commission, *Correspondence*, 11 December 2007; Australian Securities and Investments Commission, *Correspondence*, 12 December 2007.

31 The name of departments and agencies used in this Report were current as at 1 December 2007 prior to the issue of the *Administrative Arrangements Order* on 3 December 2007.

1.50 Chapter 5 considers the law on client legal privilege in the specific context of federal investigations. Legislative provisions that abrogate, modify or preserve the privilege, and significant cases dealing with the application of the privilege in federal investigations, are discussed. This chapter contains recommendations aimed at achieving greater clarity in the law on the application of privilege to federal coercive information-gathering powers. It also considers the issue of whether there needs to be greater consistency in the law on the application of privilege to those powers. A key recommendation in this chapter is that a statute of general application be enacted to cover various aspects of the law and procedure governing client legal privilege claims in federal investigations.

1.51 Chapter 6 focuses on whether it is desirable to modify or abrogate client legal privilege in order to achieve a more effective performance of federal investigatory functions. The chapter considers some of the problems that arise from the application of client legal privilege to federal investigations and outlines arguments for and against modification or abrogation of the privilege as a means of addressing these problems. The chapter recommends a limited set of exceptional circumstances in which abrogation of the privilege is appropriate, these being Royal Commissions and investigations where there is a greater public interest in having all material available, and especially where legal advice is central to the issues under consideration. Chapter 6 also considers the availability of otherwise privileged material to government 'watchdog' bodies. Finally, the chapter considers whether privilege should be extended to non-lawyers who provide legal advice to clients and recommends the creation of a tax advice privilege which would protect the confidentially of tax advice given by independent professional accounting advisers, in a limited set of circumstances.

1.52 Chapter 7 discusses the safeguards that ought to be put in place if client legal privilege is abrogated or modified. It considers restrictions on the use of otherwise privileged information obtained by compulsion, including use immunity and derivative use immunity provisions. A key recommendation in Chapter 7 is that there should be a default provision in federal client legal privilege legislation regulating the use of otherwise privileged information, which is to apply where a statute abrogating privilege is silent on the use of privileged information. The provision should contain a presumption against use which can be displaced in the court's discretion having regard to specified factors. Chapter 7 also contains recommendations concerning the preservation of privilege against third parties, and the establishment of appropriate document management systems to handle documents subject to a privilege claim.

1.53 Chapter 8 discusses the practice and procedure for making and resolving client legal privilege claims in federal investigations, including consideration of particular issues pertaining to electronic material and the execution of search warrants. The chapter considers the respective obligations of federal bodies exercising coercive information-gathering powers, and the persons subject to those powers. The ALRC recommends that federal bodies should notify persons about whether or not client legal

privilege applies to the exercise of a particular power. A key recommendation is for the establishment of a procedure for the making of privilege claims. This would give federal bodies legislative authority to seek particulars of privileged communications withheld from production. Other recommendations also seek to achieve transparency, clarity and uniformity in procedures, as well as reducing delay. In particular, the ALRC recommends that there be a model scheme for resolving privilege disputes which is to include a number of specified features; one of which is to allow a federal body the discretion to offer a claimant an opportunity to agree to an independent review process.

1.54 Finally, Chapter 9 raises issues concerning ensuring professional integrity in relation to claims of client legal privilege focusing, in particular, on the role of professional disciplinary proceedings, legal ethics and education. The chapter concludes that alleged abuses of claims of client legal privilege are best considered within existing disciplinary frameworks—rather than a specific penalty regime—and recommends that professional conduct rules provide specific guidance about making and maintaining claims of client legal privilege. The chapter also recommends enhancing the legal ethics requirements in rules for admission to practise as a lawyer and legal continuing education programs to provide specific consideration of the lawyer's responsibility in relation to claims of client legal privilege.

2. Rationale of Client Legal Privilege

Contents

The need to identify rationale

2.1 As the Inquiry considers the application of client legal privilege in the context of federal bodies—and questions of abrogation and modification—it necessarily touches on the underlying justifications of the doctrine itself. The ALRC agrees with Dr Sue McNicol that, in this Inquiry, 'the rationale should provide the foundation, the justification and the explanation for the privilege'.[1] This should result in 'a happy marriage between the privilege and its rationale',

> so that when the privilege is looking to be delimited or extended by the courts, the rationale can be resorted to as a solid foundation against which to test the proposed delimitation or extension. If consistency cannot be achieved between the proposed delimitation or extension of the privilege on the one hand and the enshrined rationale on the other, then a strong case should be made out before the scope of the privilege is altered.[2]

2.2 The challenge of connecting underlying rationale to contemporary doctrine is a significant one, as the consequences of a successful claim of client legal privilege can be profound. To quote McNicol again:

> The effect of a successful claim to privilege is often that information which may be vital and relevant to the proper administration of justice is suppressed. Hence it is

1 S McNicol, 'Implications of the Human Right Rationale for Legal Professional Privilege—The Demise of Implied Statutory Abrogation?' in P Mirfield and R Smith (eds), *Essays for Colin Tapper* (2003) 48, 65.

2 Ibid, 65.

> important to ascertain whether there are worthwhile rationales behind each head of privilege such that each privilege can be defended against the valid competing claims of the proper administration of justice. It may be that an exploration of the rationales behind each of the existing privileges leads to the conclusion that the law has gone too far in protecting certain interests against interference from the legal process. On the other hand, it may be decided that the law has not gone far enough in that there are other legitimate interests which the law has failed to protect under the head of privilege. Many of the conclusions reached will depend upon where one strikes the balance between the utilitarian philosophy that all relevant information should be available to legal officials in order to achieve justice properly and fairly and the libertarian philosophy that individual rights and interests should be protected against undue interference from the law.[3]

2.3 Identifying the relevant rationale for privilege in each particular set of circumstances may assist in meeting the complementary concerns that, on the one hand, client legal privilege is 'travelling beyond the underlying rationale to which it is intended to give expression';[4] and, on the other, that 'the underlying rationale is travelling beyond the necessary application of the privilege'.[5]

2.4 Questioning rationale also assists the consideration of any reform and the shape it might take. As Professor Andrew Paizes commented:

> How do you apply a legal concept that is the product of an outmoded rationale and a flawed philosophy to situations which are the product of new socio-political realities? Do you adapt the concept to meet the demands of a changing world by adding patches to its worn and faded fabric, stretching and stitching it in ways unimagined by its original designer? Or do you fashion the material anew, tailoring it precisely to fit the exigencies of fresh demands?[6]

A range of rationales

2.5 A range of rationales has been offered for client legal privilege, all within an overarching justification of 'public interest', variously expressed. Interwoven in the 'public interest' arguments is the element of the private interest of clients in being assured of the confidentiality of their communications with legal advisers. The threads of rationale often intertwine and interlock; different aspects of rationale may be seen to support claims of client legal privilege in relation to the particular materials and communications under consideration at any given time.[7]

2.6 Chapter 1 of the Issues Paper, *Client Legal Privilege and Federal Investigatory Bodies* (IP 33), considered arguments for and against client legal privilege within the

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3 S McNicol, *Law of Privilege* (1992), 1.

4 *Grant v Downs* (1976) 135 CLR 674, 688.

5 S McNicol, 'Implications of the Human Right Rationale for Legal Professional Privilege—The Demise of Implied Statutory Abrogation?' in P Mirfield and R Smith (eds), *Essays for Colin Tapper* (2003) 48, 64.

6 A Paizes, 'Towards a Broader Balancing of Interests: Exploring the Theoretical Foundations of the Legal Professional Privilege' (1989) 106 *South African Law Journal* 109, 128.

7 Australian Law Reform Commission, *Evidence*, ALRC 26 (1985), [877].

broad context of public interest.[8] As the majority of submissions and consultations—considered further below—strongly endorsed the retention of the doctrine in the context of federal investigations, this section explores the arguments in favour of the doctrine in more detail.

2.7 Client legal privilege has two distinct limbs: 'advice privilege' and 'litigation privilege'. These are considered in detail in Chapter 3. While the limbs have different origins, the arguments in support have drawn increasingly together. Arguments in favour of client legal privilege can be grouped broadly under two separate headings—'instrumental rationales' and 'rights-based rationales'.

Instrumental rationales

2.8 Instrumental rationales focus upon the outcome served by the particular doctrine in question. In the context of client legal privilege, the broadest instrumental argument is that client legal privilege is a necessary aspect of the administration of justice.[9] The High Court in *Grant v Downs* expressed it as follows:

> The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available.[10]

2.9 The instrumental rationale of the administration of justice is reflected in a number of sub-themes, principally:

- encouraging full and frank disclosure;
- encouraging compliance;
- discouraging litigation and encouraging settlement; and
- promoting the efficient operation of the adversarial system.

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8 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies,* IP 33 (2007).

9 J Auburn, *Legal Professional Privilege: Law and Theory* (2000), 1; S McNicol, 'Implications of the Human Right Rationale for Legal Professional Privilege—The Demise of Implied Statutory Abrogation?' in P Mirfield and R Smith (eds), *Essays for Colin Tapper* (2003) 48, 48.

10 *Grant v Downs* (1976) 135 CLR 674, 685.

Encouraging full and frank disclosure

2.10 The protection of the communications between a client and his or her lawyer is said to foster a candid relationship. Hence a client would be discouraged from making full and frank disclosure of all relevant facts unless the confidential nature of the communication were assured. This was expressed in 1833 by Lord Brougham in *Greenough v Gaskell* in this way:

> It is out of regard to the interests of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If a privilege did not exist at all, everyone would be thrown on his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.[11]

2.11 In the High Court of Australia case of *Attorney-General (NT) v Maurice,* Mason and Brennan JJ commented similarly that:

> The raison d'être of legal professional privilege is the furtherance of the administration of justice through the fostering of trust and candour in the relationship between lawyer and client.[12]

2.12 This rationale suggests, therefore, that by protecting lawyer-client communications, the value and integrity of those communications is ensured. This is a predominant theme in discussions of the instrumental rationale of client legal privilege.[13]

Encouraging compliance

2.13 As clients can obtain the fullest legal advice only where the lawyer is in possession of all relevant facts, the protection of communications is said to encourage greater compliance with the law, as the client is in the best position to be informed as to what amounts to complying conduct. In *Baker v Campbell*, Wilson J stated that:

> It is not only a matter of protection of the client. The freedom to consult one's legal adviser in the knowledge that confidential communications will be safeguarded will often make its own contribution to the general level of respect for and observance of the law within the community.[14]

2.14 The argument is that where clients feel secure that their communications with their lawyers will be kept confidential, it is likely to promote the disclosure of all relevant information and thus permit lawyers to provide legal advice that encourages

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11 *Greenough v Gaskell* (1833) 39 ER 618, 621.

12 *Attorney-General for the Northern Territory v Maurice* (1986) 161 CLR 475, 487.

13 S McNicol, 'Implications of the Human Right Rationale for Legal Professional Privilege—The Demise of Implied Statutory Abrogation?' in P Mirfield and R Smith (eds), *Essays for Colin Tapper* (2003) 48, 48; J Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd ed, 1940), 542–545.

14 *Baker v Campbell* (1983) 153 CLR 52, 95. See also *Carter v Northmore Hale Davey & Leake* (1995) 183 CLR 121, 127–128.

the greatest compliance with the law. Dr Jonathan Auburn notes the broader social impact of the doctrine in stating that:

> The rationale is concerned with many benefits beyond those accruing to the client. Society benefits through, for example, increased compliance with the law, greater efficiency for attorneys in the adversary system, an easing of the burden on courts and, arguably, greater accuracy of fact-finding.[15]

Discouraging litigation or encouraging settlement

2.15 It is sometimes suggested that litigation is avoided if all facts are placed before the legal adviser. Conversely, litigation is increased if the client 'cautiously avoids any statement except that which he thinks will support his cause'.[16]

2.16 In suggesting that the object of fostering the administration of justice was a wider notion than the demands of the adversarial system in judicial and quasi-judicial proceedings, Wilson J in *Baker v Campbell*, stated that:

> The perfect administration of justice is not confined to legal proceedings. The object and indeed the result of consulting a solicitor will often be the settlement of a dispute which otherwise may have had to be fought out in court. The fostering of a professional relationship which obviates recourse to litigation is very much in the public interest.[17]

2.17 The settlement of disputes is dependent on successful negotiations, requiring 'a fully briefed lawyer who can give the client a frank assessment of his or her prospects in court'.[18]

Promoting the efficient operation of the adversarial system

2.18 While the first limb of client legal privilege—the advice limb—has emphasised the 'trust and candour' argument, the litigation limb has emphasised the 'protection of the brief', ensuring the confidentiality of the information (brief) of each party from disclosure to the other side.[19] This is considered fundamental to the effective operation

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15 J Auburn, *Legal Professional Privilege: Law and Theory* (2000), 13–14 (notes omitted). Reinforcing responsible corporate practice through a culture of compliance has also been identified by Professor R Baxt in the context of an assessment of penalties for breach of continuous disclosure obligations: R Baxt, 'Compliance Will Reduce Penalties for Non-Disclosure' (2006) 2(5) *Baxt Report* 6; and see *Australian Securities and Investments Commission; Re Chemeq Ltd v Chemeq Ltd* (2006) 234 ALR 511.

16 M Radin, 'The Privilege of Confidential Communication Between Lawyer and Client' (1927–1928) 16 *California Law Review* 487, 491. Radin maintains that this is Wigmore's view.

17 *Baker v Campbell* (1983) 153 CLR 52, 94.

18 J Hunter, C Cameron and T Henning, *Litigation I—Civil Procedure* (7th ed, 2005), [8.10].

19 McNicol links client legal privilege with the privilege against self-incrimination and without prejudice privilege as fundamentally connected with the accusatorial system itself, hence being described at times as 'litigation-based' privileges: S McNicol, *Law of Privilege* (1992), 2, also citing M Aronson, J Hunter and M Weinberg, *Litigation: Evidence and Procedure* (4th ed, 1988), 281. See Australian Law Reform Commission, *Evidence*, ALRC 26 (1985), 495–6.

of the accusatorial or adversarial system itself.[20] As Roskill LJ explained in *Causton v Mann Egerton (Johnsons) Ltd*:

> So long as there is an adversary system, a party is entitled not to produce documents which are properly protected by privilege if it is not to his advantage to produce them, and even though their production might assist his adversary if his adversary or his solicitor were aware of their contents, or might lead the court to a different conclusion from that to which the court would come in ignorance of their existence.[21]

2.19 This logic is also reflected in the 'work-product' aspect of the privilege doctrine in the United States. This was referred to by the New South Wales Court of Appeal in *Woods (t/as Turner Freeman) v Hanoldt*:

> During the hearing Handley JA referred to a passage in an article on 'Discovery of Documents' … [where it was said that] 'If a party's solicitor can secure useful material, not by his own efforts, but simply by raiding that secured by the solicitor for the opposing party, then neither will have much incentive to individual diligence in gathering together such material, at least before the trial. As Maguire once said '…we must not let the drones sponge upon the busy bees. Otherwise it would not be long before all lawyers became drones.': JM McGuire *Evidence: Common Sense and Common Law* Chicago, Foundation Press, 1947 at 91.'
>
> That is entirely apt and while it expresses no principle of law it is good sense. Solicitors should not, as a general rule, be permitted to secure by subpoena the fruits of the labour of other solicitors, thereby avoiding the necessity to undertake for themselves the burden of securing evidence for presentation at trial, particularly where there is a readily available source which involves the invasion of no-one's rights.[22]

2.20 The privilege has been extended beyond the communications between the lawyer and the client to cover third party communications obtained as 'part of the brief',[23] or 'the brief in action',[24] and connected to litigation. It was considered 'necessary' to prepare the brief properly; were it otherwise, 'it would be impossible to employ a solicitor to obtain the evidence and information necessary to support a case'.[25]

An overarching rationale

2.21 While there are particular arguments for each of the two limbs of privilege, there are common elements of justification that may be seen to comprise one overarching rationale. In *Carter v The Managing Partner, Northmore Hale Davy and Leake*

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20 S McNicol, *Law of Privilege* (1992), 1.

21 *Causton v Mann Egerton (Johnsons) Ltd* [1974] 1 All ER 453, 460. See also S McNicol, *Law of Privilege* (1992), 2.

22 *Woods (t/as Turner Freeman) v Hanoldt* (1995) 11 NSW CCR 161, 171–172.

23 N Williams, 'Discovery of Civil Litigation Trial Preparation in Canada' (1980) 58(1) *The Canadian Bar Review* 1, 44; J Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd ed, 1940), [2294].

24 *Wheeler v Le Marchant* (1881) 17 Ch D 675, 685.

25 *Re Thomas Holloway* (1887) 12 PD 167, 170.

(*Carter*), for example, Brennan CJ expressed the 'the basic justification for allowing the privilege', as 'the public interest in facilitating the application of the rule of law'.[26]

2.22 As McNicol notes, the arguments in support of each limb have been increasingly conflated, with the result that

> one is left with a broad rationale which furthers and promotes both the administration of justice and an effective adversary system of litigation. Legal professional privilege is said to achieve both these objectives by, first fostering candour and trust in the lawyer-client relationship, and secondly, protecting the information of each party from disclosure to the other side.[27]

2.23 This conflation or blurring of the distinction between the limbs is evident in *Pratt Holdings Pty Ltd v Commissioner of Taxation* (*Pratt*) where Stone J indicated that the advice limb of privilege could extend to third party communications.

> If … the policy implicit in the rationale for legal professional privilege is not to be subverted, the dominant purpose criterion must be applied recognising that the situations in which people need legal advice are increasingly complex and that the client may need the assistance of third party experts if he or she is to be able to instruct the legal adviser appropriately.[28]

Distinguishing the limbs

2.24 Notwithstanding this blurring of the rationales for each limb under a broad instrumental justification, arguments still arise that express the limbs in distinct terms—particularly in the consideration of third party communications. As Pincus J explained in *Dingle v Commonwealth Development Bank of Australia*—decided before *Pratt*—if the rationale of client legal privilege is the preservation of confidentiality of communications between clients and their lawyers, then there are difficulties in justifying the protection of third party communications:

> The difficulty about this body of doctrine, in so far as it protects communications other than between solicitor and client, is simply that it is not defensible as preserving the confidentiality of communications between solicitor and client. For that reason, the relevant rules may, in the end, be held to be more soundly based on a separate and narrower principle, namely that a party is not in general bound to reveal to the court statements taken from witnesses and the like for the purposes of litigation. … That principle was expressed by James LJ in *Anderson v Bank of British Columbia* (1876) 2 Ch D 644 at 656: '… that as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for the brief'.[29]

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26 *Carter v Northmore Hale Davey & Leake* (1995) 183 CLR 121, 129.

27 S McNicol, *Law of Privilege* (1992), 48–49; and S McNicol, 'Implications of the Human Right Rationale for Legal Professional Privilege—The Demise of Implied Statutory Abrogation?' in P Mirfield and R Smith (eds), *Essays for Colin Tapper* (2003) 48.

28 *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217, [87]. See Ch 3.

29 *Dingle v Commonwealth Development Bank of Australia* (1989) 91 ALR 239, 242.

2.25 Statements such as these suggest separate rationales for the two limbs of the doctrine, rather than one blended rationale and that client legal privilege 'properly so called' should be distinguished from the question of protecting communications that have come into existence for the purpose of litigation.[30]

2.26 In *Public Transport Authority of Western Australia v Leighton Contractors Pty Ltd*,[31] the Court of Appeal of Western Australia considered whether the two limbs of privilege expressed different rationales.

2.27 The issue arose in the context of litigation over a contract for the construction of a railway by Leighton Contractors Pty Ltd. The Public Transport Authority (PTA) engaged the Australian Bureau of Statistics (ABS) to produce a table that was relevant to a 'rise and fall' provision. The PTA's solicitors obtained witness statements from ABS employees. The relevant documents sought through discovery concerned communications between the PTA's solicitors and the ABS or its solicitors and internal communications between ABS employees for the purpose of preparing witness statements for the proceedings. The claim for privilege related to draft statements of witnesses and communications concerning them.

2.28 A central issue was whether such documents lay outside the scope of client legal privilege. The PTA submitted that the rationale for the two categories of privilege was different and, in consequence, that confidentiality was not a necessary condition of litigation privilege.

2.29 In considering this submission, the Court of Appeal noted that 'the High Court has yet to make clear whether litigation privilege has an existence and rationale distinct from advice privilege'.[32]

2.30 While there was prior authority in Western Australia that suggested that litigation privilege did not require that communications between an independent witness and the lawyer be confidential,[33] the Court of Appeal referred to the 'numerous general statements' which were 'to the effect that the privilege only attached to confidential communications'.[34]

2.31 In reviewing the arguments in the case, the Court of Appeal commented on the question of rationale, saying that 'litigation privilege is recognised in this jurisdiction

30 Ibid, 242.
31 *Public Transport Authority of Western Australia v Leighton Contractors Pty Ltd* [2007] WASCA 151.
32 Ibid, [20].
33 *Southern Equities Corporation Ltd v West Australian Government Holdings Ltd* (1993) 10 WAR 1.
34 Ibid, [22].

as a separate category of legal professional privilege with a different rationale to that of advice privilege'.[35]

2.32 The Court referred to two Canadian cases that had quoted with approval comments from a lecture by RJ Sharpe on claiming privilege in the discovery process, distinguishing the two limbs of privilege:

> … the rationale for solicitor-client privilege is very different from that which underlies litigation privilege …
>
> Litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).[36]

2.33 In support of the width of litigation privilege, the Court of Appeal referred to the 'lawyer's brief' rule, protecting the lawyer's preparation of a client's case, linking the 'reason for the rule' to the adversarial proceeding. This 'reason' was described as the 'rationale'.[37]

2.34 Considering each limb of client legal privilege as against its particular background may provide a useful basis for comparison of the doctrine in its common law form with similar or analogous doctrines in the civil law. This is considered further in Chapter 3.

Rights-based rationales

2.35 The language of 'rights' has appeared increasingly in discussions, both judicial and academic, concerning client legal privilege. This arises both in terms of privacy rights and rights of access to justice.

Protecting privacy

2.36 One thread in discussions of rationale places emphasis on the privacy of the client against intrusion by, for example, the state. This can be seen in the judgment of Murphy J in *Baker v Campbell*:

> The client's legal privilege is essential for the orderly and dignified conduct of individual affairs in a social atmosphere which is being poisoned by official and unofficial eavesdropping and other invasions of privacy. The individual should be

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35 *Public Transport Authority of Western Australia v Leighton Contractors Pty Ltd* [2007] WASCA 151, [13], referring to *Southern Equities Corporation Ltd v West Australian Government Holdings Ltd* (1993) 10 WAR 1.

36 In particular, *Solosky v The Queen* (1979) 105 DLR (3d) 745; *Descôteaux v Mierzwinski* (1982) 141 DLR (3d) 590: *Public Transport Authority of Western Australia v Leighton Contractors Pty Ltd* [2007] WASCA 151, [16]; and citing R Sharpe, 'Claiming Privilege in the Discovery Process' in *Law in Transition: Evidence*, LSUC Special Lectures (1984), 164–165.

37 *Public Transport Authority of Western Australia v Leighton Contractors Pty Ltd* [2007] WASCA 151, [13].

> able to seek and obtain legal advice and legal assistance for innocent purposes, without the fear that what has been prepared solely for that advice or assistance may be searched or seized under warrant. Denying the privilege against a search warrant would have a minimal effect in securing convictions but a major damaging effect on the relationship between the legal profession and its clients. It would engender an atmosphere in which citizens feel that their private papers are insecure and that relationships they previously thought confidential are no longer safe from police intrusion. As Douglas J stated in *Couch v United States*, 'The constitutional fences of law are being broken down by an ever-increasingly powerful Government that seeks to reduce every person to a digit'.[38]

2.37 A focus on the importance of client legal privilege in protecting the privacy of the individual is similarly reflected in the comment of Wilson J in *Baker v Campbell*, that 'the adequate protection according to law of the privacy and liberty of the individual is an essential mark of a free society'.[39]

2.38 The concern for privacy goes beyond the protection of the confidential relationship of lawyer and client to protecting the individual from intrusion from state agencies. As Deane J commented in *Baker v Campbell*:

> [The principle of client legal privilege] represents some protection of the citizen—particularly the weak, the unintelligent and the ill-informed citizen—against the leviathan of the modern state. Without it, there can be no assurance that those in need of independent legal advice to cope with the demands and intricacies of modern law will be able to obtain it without the risk of prejudice and damage by subsequent compulsory disclosure on the demand of any administrative officer with some general statutory authority to obtain information or seize documents.[40]

2.39 The protection of the privacy of the lawyer also was identified in *Woods (t/as Turner Freeman) v Hanoldt*, where the New South Wales Court of Appeal cited a passage from the United States case of *Hickman v Taylor*,[41] that:

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests.[42]

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38 *Baker v Campbell* (1983) 153 CLR 52, 89.

39 Ibid, 95. See Australian Law Reform Commission, *Evidence*, ALRC 26 (1985), [877] and Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005), [14.44].

40 *Baker v Campbell* (1983) 153 CLR 52, 120.

41 *Hickman v Taylor* (1946) 329 US 495, 510. The decision was described as 'the seminal decision' of the Supreme Court in its development of the work product doctrine: C Tapper, 'Discovery of Documents' (1991) 107 *Law Quarterly Review* 370, 372.

42 *Woods (t/as Turner Freeman) v Hanoldt* (1995) 11 NSW CCR 161, 172.

Protecting access to justice

2.40 The decision in *Baker v Campbell*[43] clearly signalled that the doctrine of client legal privilege in Australia was not confined to judicial and quasi-judicial proceedings—and hence was more than 'a mere rule of evidence'.[44] Since then, the trend in Australian cases has been to include the language of 'rights' in speaking of the rationale of client legal privilege.

2.41 In *Baker v Campbell*, for example, Deane J commented that:

> the general and substantive principle underlying legal professional privilege is of fundamental importance to the protection and preservation of the rights, dignity and equality of the ordinary citizen under the law in that it is a precondition of full and unreserved communication with his lawyer.[45]

2.42 In *Carter*, Deane J echoed this in describing client legal privilege as 'not a mere rule of evidence but … a substantive and fundamental common law principle'.[46]

2.43 The common thread in such judgments is that client legal privilege plays a role in enforcing rights, rather than being a right in itself. In this way it is facilitative of rights, or as Toohey J commented in the *Carter* case, 'of fundamental importance to the protection and preservation of the right, dignity and equality of the ordinary citizen under the law'.[47] Such statements are also echoed in comments of Commissioner Cole in the AWB Royal Commission, in describing 'the fundamental right of persons to obtain legal advice under conditions of confidentiality'.[48]

2.44 The statement in the European Court of Justice case, *AM & S Europe Ltd v Commission of the European Communities* (*AM & S Europe*), that privilege may be seen as 'a practical guarantee of fundamental, constitutional or human rights',[49] is often cited in discussions of rationale.[50] The manner in which privilege acts as such a guarantee is explained in the judgment of Toulson J in *General Mediterranean Holdings v Patel*:

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43 *Baker v Campbell* (1983) 153 CLR 52.

44 *Carter v Northmore Hale Davey & Leake* (1995) 183 CLR 121, 132. Auburn criticises the use of 'evidence' here, saying that the rule *is* a rule of evidence, 'albeit a strong one with a broad reach beyond the doors of the courtroom': J Auburn, *Legal Professional Privilege: Law and Theory* (2000), 31–32.

45 *Baker v Campbell* (1983) 153 CLR 52, 118.

46 *Carter v Northmore Hale Davey & Leake* (1995) 183 CLR 121, 132.

47 Ibid, 145.

48 T Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (2006), [7.66].

49 *AM & S Europe Ltd v Commission of the European Communities* [1983] 1 QB 878, 941.

50 For example, *Carter v Northmore Hale Davey & Leake* (1995) 183 CLR 121, 161 (McHugh J); *Goldberg v Ng* (1995) 185 CLR 83, 121 (Gummow J); *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [84] (Kirby J).

> In summary, the common law (1) recognises the right to legal confidentiality which arises as between a person and his legal adviser (save where the client is trying to use the relationship for an unlawful purpose) as a matter of substantive law, and (2) regards it as a right of great constitutional importance, because it is seen as a necessary bulwark of the citizen's right of access to justice whether as a claimant or defendant. Legal professional privilege is an attribute or manifestation of that right. It is also, as Lord Taylor CJ said in *R v Derby Magistrates' Court, ex p B* [1995] 4 All ER 526, [1996] AC 487 much more than an ordinary rule of evidence, being considered a fundamental condition on which the administration of justice rests.[51]

2.45 The analysis of client legal privilege in terms of a right of access to justice de-emphasises the distinction between the advice and litigation limbs of the common law doctrine. For example, in *Carter*, in searching for a rationale that linked both limbs of the doctrine, McHugh J commented that:

> By protecting the confidentiality of communications between lawyer and client, the doctrine protects the rights and privacy of persons including corporations by ensuring unreserved freedom of communication with professional lawyers who can advise them of their rights under the law and, where necessary, take action on their behalf to defend or enforce those rights. The doctrine is a natural, if not necessary, corollary of the rule of law and a potent force for ensuring that the equal protection of the law is a reality.[52]

2.46 In *Daniels*, the High Court used the term 'right' but explained it in the sense of an 'immunity', as evident in the joint judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ:

> Legal professional privilege is not merely a rule of substantive law. It is an important common law right or, perhaps, more accurately, an important common law immunity. It is now well settled that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect.[53]

2.47 Similarly, McHugh J noted that:

> Legal professional privilege describes a person's immunity from compulsion to produce documents that evidence confidential communications about legal matters made between a lawyer and client or between a lawyer and a third party for the benefit of the client. The immunity also protects the disclosure of documents that record legal work carried out by the lawyer for the benefit of a client, such as research memoranda. The immunity embodies a substantive legal right.[54]

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51 *General Mediterranean Holdings v Patel* [1999] 3 All ER 673, 688.

52 *Carter v Northmore Hale Davey & Leake* (1995) 183 CLR 121, 161. McHugh J drew upon, inter alia, Canadian cases such as *Solosky v The Queen* (1979) 105 DLR (3d) 745 and *Descôteaux v Mierzwinski* (1982) 141 DLR (3d) 590. Auburn argues that *Solosky* has been misread and that it does not support a rights-based rationale, rather merely shifting the time at which the privilege can be asserted: J Auburn, *Legal Professional Privilege: Law and Theory* (2000), 20.

53 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

54 Ibid, [44].

A right in itself

2.48 In *Daniels*, Kirby J progressed from speaking of client legal privilege as a doctrine that was protective of rights (as in *AM & S Europe*)[55] to describing it in terms of a right in and of itself:

> In so far as this Court has dealt with the topic of legal professional privilege, save for *Yuill*, it has consistently emphasised the importance of the privilege as 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.
>
> Legal professional privilege is also an important human right deserving of special protection for that reason.[56]

2.49 Similarly, in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* (*Morgan Grenfell*) Lord Hoffman spoke in terms of 'human rights', describing client legal privilege as 'a fundamental human right long established in the common law'.[57]

2.50 International law may provide an avenue for analysis in terms of human rights. Article 14 the *International Covenant on Civil and Political Rights* provides for basic minimum rights to an accused; and articles 6 and 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* provide for the right to a fair trial and the right to respect for private and family life.[58]

2.51 Some common law jurisdictions also have superimposed Bills or Charters of Rights upon the common law. These may provide an avenue for rights-based analyses of client legal privilege, directly or indirectly. So, for example, s10(b) of the Canadian *Charter of Rights and Freedoms* grants the right 'on arrest or detention … to retain and instruct counsel'.[59] Similarly, the New Zealand *Bill of Rights Act 1990* provides the right of access to a lawyer and the right to representation; and in Hong Kong, client legal privilege is protected as a constitutional right under the *Basic Law*.[60] In Victoria,

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55 *AM & S Europe Ltd v Commission of the European Communities* [1983] 1 QB 878; see above, [2.44].

56 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [85]–[86] (Kirby J).

57 *R (Morgan Grenfell) v Special Commissioner of Income Tax* [2003] 1 AC 563, [7].

58 See the discussion of these articles in, eg, J Auburn, *Legal Professional Privilege: Law and Theory* (2000), ch 3, 'Privilege under the European Convention on Human Rights'.

59 *Canadian Charter of Rights and Freedoms*, ss 7, 8, 10(b), 11(c) and 11(d) protect the right to full answer and defence, the right to counsel, the right against self-incrimination, the presumption of innocence and the right not to be subject to unreasonable search and seizure. See the consideration of these provisions in *Jones v Smith* (1999) 169 DLR (4th) 385.

60 *Basic Law of the Hong Kong Special Administrative Region*, art 35. See the consideration of this article in J Chan, 'Legal Privilege: Is It Absolute?' (2006) 36 *Hong Kong Law Journal* 461.

the *Charter of Human Rights and Responsibilities 2006* provides that a person has the right not to have his or her privacy or correspondence unlawfully or arbitrarily interfered with;[61] and a right to a fair hearing and to communicate with his or her lawyer in criminal proceedings.[62]

Consequences of rights analysis

2.52 Characterising client legal privilege as a doctrine fundamental to the common law, using the language of 'rights', has two consequences: first, its application is not restricted to court proceedings; and, second, it cannot be overridden except by the clear language of parliament to that effect. This was the essence of the Australian decisions in *Baker v Campbell*[63] and then in *Daniels,*[64]—but it has the potential to go much further.[65]

2.53 Where client legal privilege is seen as a principle or tenet of the common law, it is, as such, amenable to re-interpretation, modification and abrogation by statute. Where it is seen as a civil or human right, there is, as McNicol argues, potentially a radical shift in thinking towards a 'rights-based' rationale.[66]

2.54 The rights analysis may have particularly significant consequences in relation to questions of abrogation.[67] Once Lord Hoffmann in *Morgan Grenfell* described client legal privilege as a human right, McNicol considered that he had 'locked himself in' to the view that client legal privilege is 'virtually immutable or untouchable'.[68] When a court has to consider the issue of abrogation, it therefore has 'a stark choice':

> It could start with a concentration on the common law human right that is now said to be the basis of legal professional privilege or it could start with a focus on the words of the statute and the overall purpose of the legislation. … [However] this latter task … is both redundant and artificial if the court has started with the proposition that legal professional privilege is a fundamental human right.[69]

2.55 A human rights approach also raises the issue of the application of the doctrine to corporations. As McNicol argues,

> if the instrumental rationale of encouraging candour and trust in the lawyer-client relationship is the favoured rationale, then … clearly corporations should be entitled to the benefit of legal professional privilege … If, however, the human right rationale

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61 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13(a).
62 Ibid ss 24, 25(2)(b).
63 *Baker v Campbell* (1983) 153 CLR 52.
64 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.
65 S McNicol, 'Implications of the Human Right Rationale for Legal Professional Privilege—The Demise of Implied Statutory Abrogation?' in P Mirfield and R Smith (eds), *Essays for Colin Tapper* (2003) 48.
66 See Ibid.
67 See Ch 6.
68 S McNicol, 'Implications of the Human Right Rationale for Legal Professional Privilege—The Demise of Implied Statutory Abrogation?' in P Mirfield and R Smith (eds), *Essays for Colin Tapper* (2003) 48, 61.
69 Ibid, 62.

> for privilege is treated as the predominant rationale, it is less clear that corporations should be entitled to the benefit of the privilege.[70]

2.56 The introduction of 'rights' language into the discussion of the rationale for client legal privilege has not gone uncriticised. For example, in *Carter*, Brennan CJ expressly rejected aspects of the use of rights terminology, saying 'I do not subscribe to the view that legal professional privilege is a fundamental human right which sterilises the operation of any law which infringes it'.[71]

2.57 In his study of the law and theory of client legal privilege, Auburn distinguishes between situations where client legal privilege has been entrenched through an instrument; and where it is a matter of common law doctrine. Of the former, he states:

> Where a human rights instrument expressly provides for, or has been interpreted as providing for, a right to legal professional privilege, or some other form of professional secrecy which is capable of overriding compulsion by a court or agency of the executive, then the privilege may rest on a constitutional or statutorily entrenched right, and the scope of this constitutional or statutory protection may be determined largely by reference to the provision establishing the right and its associated jurisprudence.[72]

2.58 In contrast, where there is no constitutional or statutory basis for the protection of confidential communications between a client and his or her lawyer, the nature, scope and rationale of the privilege are found in the common law.

2.59 Auburn argues that the use of a rights analysis in the common law cases is not particularly convincing:

> The stated approach in cases which decided the extra-curial applicability of the privilege was to look first to the privilege's underlying rationale, and then apply the rationale to the novel fact situation. However in reality the exercise was conducted the other way round. Courts decided that the privilege should apply to search warrants, and then fashioned a new rationale to justify this extension. The implicit logic advanced is that once the privilege applied beyond the threat of disclosure in court, then it must be a common law right.[73]

2.60 Further, Auburn maintains that rights-based reasoning is unnecessary to achieve the expansion of the doctrine and that simply emphasising the importance of the rule as a common law doctrine is enough.[74] This is supported by statements to the effect that,

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70 Ibid, 63. The application of client legal privilege to corporations is considered in Ch 3.
71 *Carter v Northmore Hale Davey & Leake* (1995) 183 CLR 121, 129.
72 J Auburn, *Legal Professional Privilege: Law and Theory* (2000), 16.
73 Ibid, 29.
74 Ibid, 18.

irrespective of statutory human rights provisions, the common law privilege has, in any event, developed into a substantive common law right.[75]

2.61 Auburn suggests that the relationship between human rights legislation and the common law privilege is far from clear and 'the way in which the common law privilege doctrine fits within [the] new rights framework has never been adequately settled'.[76] The elevation of common law doctrine into the constitutional, or rights, arena, arguably makes issues of abrogation more complex and difficult.[77]

Submissions and consultations

Questions posed

2.62 In IP 33, the ALRC posed a number of questions in relation to the rationale for client legal privilege in Australia today. It sought comment on the following:

- What are the best contemporary rationales for the doctrine of client legal privilege?
- Does client legal privilege serve broad 'public interests'? What is/are they? Does client legal privilege essentially amount to a private right?
- Do the underlying rationales accord with actual current practice?
- Is there a different rationale for particular contexts such as the context of Commonwealth investigatory bodies, including Royal Commissions?[78]

2.63 Following submissions and consultations in relation to these questions, the ALRC expressed the view in DP 73 that the doctrine of client legal privilege is a fundamental principle of the common law providing an essential protection to clients, enabling them to communicate fully and frankly with their lawyers and those who may lawfully provide 'legal advice'. The protection of the confidentiality of such communications facilitates compliance with the law and access to a fair hearing in curial and non-curial contexts, thereby serving the broad public interest in the effective administration of justice.[79]

2.64 The comments in submissions and consultations clustered around the following broad areas: support for the continuation of the doctrine as serving the administration

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75 *General Mediterranean Holdings v Patel* [1999] 3 All ER 673.

76 J Auburn, *Legal Professional Privilege: Law and Theory* (2000), 17.

77 S McNicol, 'Implications of the Human Right Rationale for Legal Professional Privilege—The Demise of Implied Statutory Abrogation?' in P Mirfield and R Smith (eds), *Essays for Colin Tapper* (2003) 48.

78 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies,* IP 33 (2007), Questions 1–1–1–4.

79 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), [2.99].

of justice; a rights analysis of the doctrine; the question of abolition; and identifying where the real problems lie.

Support for continuation

2.65 The overwhelming thrust of submissions and consultations was in favour of the continuation of client legal privilege on the basis that it provides an essential plank in the administration of justice—protecting the confidentiality of particular communications with lawyers and others, thereby facilitating full and frank disclosure, driving compliance with the law and encouraging settlement of disputes.[80]

2.66 Support for retention of the doctrine came from many different groups, representing a wide range of those involved in matters that may give rise to issues of client legal privilege.

Protecting the citizen

2.67 Strong support for the retention of client legal privilege was presented in submissions from community legal centres and legal aid groups. A key aspect of such support was the role of the doctrine in protecting the citizen against the state.

2.68 In its submission, Victoria Legal Aid presented a range of arguments in support of the doctrine:

> **Access to justice**
>
> (a) Enabling people to seek legal help

80 Submissions included: J Hannaford, *Submission LPP 114,* 19 November 2007; Law Council of Australia, *Submission LPP 94,* 1 November 2007; Construction Forestry Mining and Energy Union (Construction and General Division), *Submission LPP 90,* 1 November 2007; Australian Corporate Lawyers Association, *Submission LPP 83,* 31 October 2007; Institute of Chartered Accountants in Australia, *Submission LPP 82,* 31 October 2007 QBE Insurance Group, *Submission LPP 58,* 18 June 2007; K Kendall, *Submission LPP 57,* 31 May 2007; Victoria Legal Aid, *Submission LPP 55,* 14 June 2007; National Legal Aid, *Submission LPP 52,* 13 June 2007; Taxation Institute of Australia, *Submission LPP 54,* 15 June 2007; Australian Government Solicitor, *Submission LPP 50,* 13 June 2007; NSW Young Lawyers, *Submission LPP 49,* 12 June 2007; Australian Institute of Company Directors, *Submission LPP 43,* 8 June 2007; New South Wales Bar Association, *Submission LPP 41,* 5 June 2007; Law Society of New South Wales, *Submission LPP 40,* 1 June 2007; Federation of Community Legal Centres (Vic) Inc, *Submission LPP 38,* 5 June 2007; Corporate Tax Association, *Submission LPP 32,* 4 June 2007; Fitzroy Legal Service, *Submission LPP 29,* 4 June 2007; Human Rights and Equal Opportunity Commission, *Submission LPP 28,* 4 June 2007; Law Council of Australia, *Submission LPP 26,* 4 June 2007; Institute of Chartered Accountants in Australia, *Submission LPP 25,* 4 June 2007; R Desiatnik, *Submission LPP 24,* 1 June 2007; Inspector-General of Intelligence and Security, *Submission LPP 22,* 1 June 2007; Sussex Street Community Law Service Inc, *Submission LPP 15,* 30 May 2007; A Evans, *Submission LPP 4,* 27 March 2007. Consultations included: New South Wales Bar Association, *Consultation LPP 50*, Sydney, 4 December 2007; Allens Arthur Robinson, *Consultation LPP 43*, Sydney, 24 October 2007; Justice T Gray and D Gray, *Consultation LPP 39*, Adelaide, 18 October 2007; Members of the South Australian Bar Association, *Consultation LPP 38*, Adelaide, 17 October 2007.

[Client legal privilege] serves the public interest in access to justice by enabling people to seek legal advice or representation. The High Court has acknowledged that the relationship between lawyer and client has special significance because it is part of the functioning of the law itself. If [client legal privilege] did not exist, people might litigate without the benefit of legal advice or representation. It is generally acknowledged that it is more difficult for an unrepresented person to access justice. In some circumstances, the law acknowledges that an unrepresented litigant is unable to get a fair hearing.

(b) Fostering a candid lawyer client relationship

[Client legal privilege] facilitates access to justice by fostering a candid relationship between lawyer and client. If [client legal privilege] did not exist, clients may not make full and frank disclosure of all relevant facts to their lawyers. Alternatively, lawyers may refrain from asking relevant questions, taking proper file notes or providing written legal advice. As a result, clients may not receive appropriate legal advice or adequate representation.

The Victorian Legal Aid Act recognises the fundamental importance of fostering a candid lawyer client relationship—by preserving [client legal privilege] even where information is disclosed for the purposes of getting a grant of assistance.

(c) Supporting the adversarial system

[Client legal privilege] facilitates access to justice by supporting the adversarial system. The system is based on a series of interlocking checks and balances that ensure all litigants receive a fair hearing. [Client legal privilege] helps to redress any power imbalance between the litigants (eg. between the state and an individual) by allowing the 'weaker' party to get help from a lawyer without damaging their legal position.

Administration of justice

(a) Facilitating compliance with the law

[Client legal privilege] serves the public interest in the efficient administration of justice by enabling people to obtain legal advice before proceedings are issued. Lawyers have an ethical obligation to encourage compliance with the law. Facilitating compliance with the law may reduce the likelihood of future litigation.

(b) Facilitating early settlement

[Client legal privilege] also assists the administration of justice by facilitating early settlement. Cases are more likely to settle when the client is represented by a fully briefed lawyer. This allows the lawyer to give the client a frank assessment of their prospects and advise them about negotiating an appropriate resolution.

(c) Minimising unrepresented litigants

> [Client legal privilege] facilitates the administration of justice by enabling people to obtain legal representation for court hearings. This generally results in hearings that are fairer and are conducted more efficiently.[81]

2.69 Such arguments were also supported in the submission from National Legal Aid, which warned that 'any change to current protections would undermine our ability to assure clients that their information will be protected'.[82]

2.70 Submissions from community legal centres were also strongly in support of client legal privilege, particularly in relation to the kinds of clients served by such centres. The Federation of Community Legal Centres (Vic) Inc, for example, stated that:

> The Federation believes that the client-legal privilege is absolutely essential to clients obtaining and receiving accurate legal advice … Client legal privilege is particularly important given the client base of Federation members. Community Legal Centres have expertise in working with excluded and disadvantaged communities and people from culturally and linguistically diverse backgrounds. We provide a bridge between disadvantaged and marginalised communities and the justice system. We work with the communities of which we are a part. We listen, we learn, and we provide the infrastructure necessary for our communities' knowledge and experiences to be heard.
>
> In this framework, it is essential that our clients are prepared to seek advice from a lawyer and to speak openly and honestly to their lawyer. If clients feel that what is discussed may not remain confidential (unless of course disclosure is authorised by the client) this may reduce a client's willingness to speak openly. In turn, this will affect the quality and accuracy of legal advice that lawyers can provide.[83]

2.71 Similarly, Sussex Street Community Law Service commented that:

> As a nation with very limited constitutional rights it is important for us to respect the rights we do have, which provide protection to the Australian public.
>
> Client legal privilege has a preventative and curative effect. It allows for more effective legal advice which would prevent clients from straying beyond the limits of the law, creating a more law-abiding society. It also allows for legal advisers to provide a competent defence in the case of legal proceedings, the right to a defence being an essential aspect of our legal system.[84]

2.72 Others also commented on the important role of client legal privilege in protecting the citizen and the impact that further erosion of the doctrine might have in the federal regulatory context. The New South Wales (NSW) Bar Association, for example, submitted that:

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81 Victoria Legal Aid, *Submission LPP 55,* 14 June 2007.
82 National Legal Aid, *Submission LPP 52,* 13 June 2007.
83 Federation of Community Legal Centres (Vic) Inc, *Submission LPP 38,* 5 June 2007.
84 Sussex Street Community Law Service Inc, *Submission LPP 15,* 30 May 2007.

> One of the rationales for the privilege is to maintain some parity between the individual *qua* citizen and the state *qua* prosecutor. The proposal to qualify the privilege only in respect of the coercive information-gathering powers of Commonwealth investigatory bodies directly undercuts this rationale. We submit that so direct a challenge to an established basis of the privilege must discharge a substantial justificatory onus; in particular in respect of the issue of why Commonwealth investigatory bodies should be the sole beneficiaries of the loosening of the immunity when they typically enjoy uniquely broad enforcement resources and machinery.[85]

2.73 Dr Keith Thompson also argued that the 'interests of justice' are best served by regarding client legal privilege as 'premised at its most fundamental level in concepts of fairness and equality' which protect the individual citizen.[86]

2.74 In supporting the ALRC's 'broad view on client legal privilege' in DP 73, the Australian Council of Trade Unions (ACTU) observed that the ALRC's conclusion had 'consonance with Murphy J's views in *Baker*' and submitted that the ACTU and the ALRC 'are fundamentally ad idem'.[87]

2.75 The Law Council of Australia (Law Council) regards client legal privilege as 'a fundamental protection and pillar of the Australian legal system':

> Client legal privilege ensures full and frank discussions between legal advisers and their clients, which promotes the administration of justice and encourages compliance with the law. Client legal privilege also protects the rights of individuals, corporations and other entities against oppression by the State in legal proceedings and investigations.[88]

2.76 In consequence, the Law Council submitted, client legal privilege 'must not be abrogated in any circumstance':

> Incursions against privilege have a deleterious impact on the lawyer-client relationship, by impairing the trust and confidence a client would otherwise have that their legal adviser will not be forced to disclose the information they provide to enable a full understanding of their rights and responsibilities under Australia's complex and ever-changing system of laws.[89]

Corporate compliance

2.77 The key role of client legal privilege in facilitating compliance with the law was a particular aspect of the doctrine emphasised in relation to corporate clients. The Law Council highlighted

> the important role lawyers play in encouraging compliance with the law. Since lawyers owe a paramount duty to the court and the administration of justice, they are

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85 New South Wales Bar Association, *Submission LPP 41,* 5 June 2007.
86 K Thompson, *Submission LPP 76,* 7 September 2007.
87 Australian Council of Trade Unions, *Submission LPP 88,* 1 November 2007.
88 Law Council of Australia, *Submission LPP 94,* 1 November 2007.
89 Ibid.

> required to encourage their clients to obey the law. One aspect of this work, within the corporate sphere, is assisting the client to comply with relevant legal regulatory regimes, by ensuring that the client understands the legal constraints within which it operates. Most corporations genuinely attempt to fulfil their legal obligations. Lawyers play an important role in enabling them to do this by advising on relevant obligations, and helping to detect and address potential and actual breaches.[90]

2.78 The QBE Insurance Group emphasised the role that client legal privilege plays in relation to 'the smooth functioning of the business community':

> Corporations must have confidence that they can engage with their legal advisers in an ethical, but also candid and informed, manner to assess their legal rights and obligations …
>
> We acknowledge that some corporations have been found to have misused Privilege. However it is important to recognise that the vast majority of corporations are responsible citizens of the business community and should not be penalised for the actions of a small minority.[91]

2.79 The submission of National Australia Bank Limited and others also stressed the importance of the doctrine, in saying that 'the retention of [client legal privilege], in principle, is absolutely essential for the effective operation of Australian law'.[92]

2.80 The Australian Corporate Lawyers Association (ACLA) argued for the particular role of in-house lawyers in fostering corporate compliance:

> In-house lawyers, by dint of their role as providers of legal services to their own organisation on a dedicated basis, carry out a particular and important role in promoting corporate compliance with legal and regulatory requirements. They are in a position, as integrated members of a management team, to keep themselves informed and to influence corporate behaviour on a continuing basis.[93]

2.81 The Australian Institute of Company Directors suggested that the wrong question was posed in IP 33 about finding contemporary rationales for the doctrine:

> The issue is whether the doctrine is sound in principle. There are a number of fundamental legal principles which remain sound and incontrovertible, no matter what the circumstances. These include the presumption of innocence, the burden of proof, the right to a fair trial and client legal privilege.[94]

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90 Law Council of Australia, *Submission LPP 26,* 4 June 2007.

91 QBE Insurance Group, *Submission LPP 58,* 18 June 2007. The potential impact of abrogation in Australia on international business dealings was also noted in a consultation: Regulatory lawyers of Clayton Utz, *Consultation LPP 13*, Sydney, 15 May 2007.

92 National Australia Bank Limited and others, *Submission LPP 30,* 4 June 2007.

93 Australian Corporate Lawyers Association, *Submission LPP 83,* 31 October 2007.

94 Australian Institute of Company Directors, *Submission LPP 43,* 8 June 2007.

Expanding regulatory context

2.82 The protection provided by client legal privilege was seen to be all the more important in the context of the expanding powers of investigatory bodies. As Sussex Street Community Law Service commented:

> Client legal privilege strengthens the adversarial system under which all Commonwealth investigatory bodies operate. For our clients, the adversarial system has the consequence of setting powerful government bodies against weaker individuals and it is the legal rights such as client legal privilege that prevent these individuals from being mistreated. Client legal privilege has the effect of balancing the advantages between parties of contrasting power, and providing a fairer judicial system.[95]

2.83 To similar effect is the submission of the Fitzroy Legal Service that

> the doctrine of client legal privilege is vital to the administration of justice in the sense of introducing some measure of equality into the relationship between the state and individuals through the free dissemination of information and confidential support of the individual by the legal practitioner.
>
> The excessive use of power by investigating and prosecuting authorities where such protections are absent in our view runs contrary to the rule of law and administration of justice and should not be abrogated in relation to individuals.[96]

2.84 The argument that the expansion of regulation increases the need to retain client legal privilege to foster compliance with the law was also evident in the submissions of bodies representing different groups of lawyers. For example, the NSW Bar Association commented that:

> If anything, there is a stronger case for retaining the privilege in the current legal environment. There is such a proliferation of statutes and laws that a citizen (whether corporate or natural person) more than ever needs to be able to get advice in confidence as to his, her or its legal rights, whether before committing to some course of action or after an issue has arisen. The community also has an interest in the citizen being able to get that advice: a citizen fully informed of legal rights is more likely to obey the law or to understand where he, she or it may have breached the law, reducing the need for enquiries by investigative agencies and ultimately reducing the number, length and cost of cases required to be decided before Courts.[97]

2.85 The Corporate Tax Association drew attention to the particular complexity of taxation law in relation to the need to obtain proper advice to ensure compliance with the law.[98]

2.86 The Law Council also commented that:

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95 Sussex Street Community Law Service Inc, *Submission LPP 15,* 30 May 2007.
96 Fitzroy Legal Service, *Submission LPP 29,* 4 June 2007.
97 New South Wales Bar Association, *Submission LPP 41,* 5 June 2007.
98 Corporate Tax Association, *Submission LPP 32,* 4 June 2007. See also Taxation Institute of Australia, *Submission LPP 54,* 15 June 2007.

> It is obviously important that a corporate client's officers feel no constraints about raising compliance issues with the corporation's lawyers. Abrogation of [client legal privilege] would have a chilling effect on officer/lawyer communications and so render much more difficult the corporation's task of compliance with the huge amount of regulation now governing corporate behaviour. This result would not, of course, be in the interests of either good corporate governance, or the administration of justice.[99]

Perspective of federal bodies

2.87 A number of the federal investigatory bodies themselves endorsed the retention of client legal privilege. For example, the Inspector-General of Intelligence and Security (IGIS) commented that:

> There are cogent reasons for generally maintaining client legal privilege. While some of the rationales for privilege given in the first chapter of Issues Paper 33 are debatable, it is difficult to put aside the rationales of full and frank disclosure, encouraging compliance and protecting the fairness of the adversarial system.[100]

2.88 The Australian Securities and Investments Commission (ASIC), while submitting that there may be particular contexts in which client legal privilege may be overreached, nonetheless acknowledged the importance of the doctrine:

> Although client legal privilege embodies a private 'right', its principal rationale is that it serves the public interest by promoting the effective administration of justice by encouraging clients to seek legal advice and communicate fully and frankly with their lawyers. Doing so promotes compliance with the law, reduces the incidence of and encourages earlier and more effective resolution of legal disputes.[101]

2.89 The Human Rights and Equal Opportunity Commission (HREOC) strongly endorsed the doctrine as an aspect of the right to a fair trial as set out in article 14(1) of the *International Covenant on Civil and Political Rights*:

> HREOC submits that LPP is fundamental to a client's right to a fair trial. Removing this protection is likely to undermine the confidential nature of the communication between lawyers and their clients and, accordingly, may impact upon the information provided by a client and the quality of advice and/or representation they receive.[102]

2.90 The Commonwealth Director of Public Prosecutions (CDPP) noted that 'compliance with the law, the facilitation of the administration of justice and the right to a fair trial (which is part of the administration of justice)' were 'important public interests' and accordingly was supportive of laws 'that best achieve these public interests'. The submission therefore asked 'to what extent client legal privilege serves

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99 Law Council of Australia, *Submission LPP 26,* 4 June 2007. See also Law Council of Australia, *Submission LPP 94,* 1 November 2007; and National Australia Bank Limited and others, *Submission LPP 30,* 4 June 2007.

100 Inspector-General of Intelligence and Security, *Submission LPP 22,* 1 June 2007.

101 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007.

102 Human Rights and Equal Opportunity Commission, *Submission LPP 28,* 4 June 2007.

these public interests'. Questions of modification or abrogation were also to be considered through a similar lens.[103]

2.91 The CDPP considered that, using this approach, the two limbs of privilege warranted separate consideration. In relation to the argument that the availability of privilege to legal advice drives compliance with the law, the CDPP commented that:

> This rationale assumes that the client wishes to comply with the law, and is limited to that extent. Further, to the extent that client legal privilege puts what would otherwise be evidence out of the reach of investigators and courts, avoiding the deterrent effect that flows from punishment, client legal privilege is often problematic in successfully countering breaches of the law. Therefore it works for and against compliance.

2.92 Rather than litigation privilege facilitating the administration of justice through full disclosure, sound advice and greater settlement of disputes, the CDPP submitted that client legal privilege can undermine the administration of justice by concealing evidence that would reveal the truth.[104] Such comments reflect concerns that go to the question of when it is appropriate to abrogate or modify the application of client legal privilege in relation to federal investigations. This is considered in Chapter 6.

Rights analysis

2.93 There were mixed responses to the use of rights terminology with respect to client legal privilege. For example, the Law Council considered that:

> the difference between defining [client legal privilege] as a fundamental human, ie *civil*, right (applicable to corporations) and defining [client legal privilege] as a fundamental *common law* right is largely a semantic one, and is evidence of the convergence of common law and international law concepts and terminology. The Law Council considers that there is a strong line of authority for [client legal privilege] as a fundamental common law right and it is to this authority that the ALRC should have regard.[105]

2.94 However, the Law Council also commented that:

> to view [client legal privilege] as a 'private right' is to mistake the nature and purpose of the privilege. The chief purpose of [client legal privilege] is not to confer a right for the benefit of the client, but to facilitate the administration of justice.[106]

2.95 NSW Young Lawyers submitted that 'while it is accepted that client legal privilege is a common law and statutory right, the extent to which it is a basic human right would appear to be taking it much further than required'.[107]

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103 Commonwealth Director of Public Prosecutions, *Submission LPP 101,* 2 November 2007.
104 Ibid.
105 Law Council of Australia, *Submission LPP 26,* 4 June 2007.
106 Ibid.
107 NSW Young Lawyers, *Submission LPP 49,* 12 June 2007.

2.96 The NSW Bar Association commented that the 'orthodoxy in the jurisprudence of the High Court' was that client legal privilege is 'a fundamental citizen's right vested in the client':

> As such, it is a crucial predicate of openness and honesty in the practitioner-client relationship; and hence throughout the entire legal system.[108]

2.97 HREOC endorsed a 'human rights' approach to client legal privilege, arguing that:

> Recognition of [client legal privilege] is important for the protection of the following human rights:
>
> - the right to a fair hearing; and
> - the right to defend oneself through legal assistance of one's own choosing in the determination of criminal charges.
>
> In protecting these rights, it is also relevant to refer to the following principles:
>
> - the need to protect confidentiality in all communications between a lawyer and their client; and
> - the need to ensure effective access to legal services.[109]

2.98 The Office of the Privacy Commissioner emphasised the privacy aspect of the privilege:

> The doctrine of legal professional privilege serves a broad public interest in protecting the privacy of the client against intrusion and should only be modified or abrogated in exceptional circumstances.[110]

2.99 Dr Keith Thompson made a connection between a rights analysis and perceptions of fairness:

> My sense is that Lord Brougham [in *Greenough v Gaskell* (1833) 39 ER 618] was … prefiguring a modern human rights rationale for [client legal privilege] when he said [it] was necessary in the interests of justice. Human rights are of course premised in the notion that all human beings are or ought to be equal before the law. It has always been considered difficult for an impecunious or unknown litigant to succeed before a judicial tribunal. That was true in the days of the ordeal; in trial by battle; under the alternative medieval compurgation system; and under the jury trial system both before and after jurors became independent. …
>
> Courts ever since have necessarily kept an eye on their own credibility. The law has no majesty if it is not credible. The public perception of the fairness of a judicial system makes a marked contribution to its success. Thus where Lord Brougham spoke

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108 New South Wales Bar Association, *Submission LPP 41,* 5 June 2007.
109 Human Rights and Equal Opportunity Commission, *Submission LPP 28,* 4 June 2007.
110 Australian Government Office of the Privacy Commissioner, *Submission LPP 71,* 29 June 2007.

> of 'the interests of justice', he was pointing at a generalised need for a public perception of fairness from the judicial system. …
>
> In essence the most important question is—will the legal system be perceived as less fair if [client legal privilege] is abrogated completely or adjusted in certain proposed ways?[111]

2.100 Civil Liberties Australia (ACT) Inc (Civil Liberties Australia) commented in relation to 'the status of the privilege as a fundamental human right'.[112] It agreed with the analysis of the ALRC in DP 73[113] and considered that 'Australian law should now reflect the status of legal professional privilege as an important human right', offering a number of grounds in support.

2.101 In the first place, the submission emphasised the importance of international conventions:

> Australia has signed and ratified the Universal Declaration on Human Rights in 1948 and the International Covenant on Civil and Political Rights in 1980, and in so doing has agreed to be bound by the terms of those instruments. Australia, therefore, has a moral and ethical duty, and a legal duty at international law, to ensure that its domestic laws are consistent with the terms of the two instruments.[114]

2.102 Relying on such international conventions, the submission referred to the European jurisprudence that had arisen in relation to client legal privilege. One example cited was *R v Derby Magistrates Court ex parte B,* in which Lord Taylor CJ, after analysing the development of the doctrine of privilege, commented:

> It is a fundamental condition on which the administration of justice as a whole rests … Nobody doubts that legal professional privilege could be modified, or even abrogated, by statute, subject always to the objection that legal professional privilege is a fundamental human right protected by the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1953) ...[115]

2.103 The submission also pointed to the strength of the privilege in the context of a right to a fair trial:

> CLA submits that the European case law shows legal professional privilege to be an important right and integral to the right to a fair trial, and the right to privacy. Moreover, the fact that any abrogation of the privilege is ordinarily a violation of Articles 6 and 8 of the European Convention on Human Rights provides strong authority for the proposition that any abrogation would similarly entail a violation of Articles 10 and 12 of the Universal Declaration of Human Rights. As such, CLA argues that any abrogation of the privilege in Australian law would amount to a

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111 K Thompson, *Submission LPP 76,* 7 September 2007.
112 Civil Liberties Australia (ACT) Inc, *Submission LPP 86,* 1 November 2007.
113 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), [2.99].
114 Civil Liberties Australia (ACT) Inc, *Submission LPP 86,* 1 November 2007.
115 *R v Derby Magistrates Court ex parte B* [1996] AC 487, 507.

> breach of Australia's human rights obligations under the Universal Declaration of Human Rights, and hence its obligations under international law.[116]

2.104 The connection between the doctrine of privilege and the right to a fair trial under international conventions also was emphasised in the submission from HREOC.[117]

Abolition

2.105 Two submissions recommended the abolition of advice privilege. I Turnbull and A Evans argued that the rationale of privilege was the proper functioning of the adversarial system, which did not, therefore, require the advice limb in addition to the litigation limb of privilege.[118]

2.106 Another submission suggested that, while the concept 'remains important to the criminal law arena', 'its use-by-date has been reached in respect of its wholesale application to commercial transactions'.[119]

> The ethical legitimacy of the concept, allied as it is to confidence is too important to the privacy of communication. Nevertheless, it seems to me that one reform possibility involves *separation* of the concept: privilege could be retained for the purpose of advice and for 'general' criminal, quasi-criminal, family and administrative law representation, but this might be balanced by its *prima facie* abrogation for commercial litigation and for prosecutions by nominated Federal agencies, subject to a right of 're-instatement' upon application to a judge.
>
> The onus could shift to the corporation seeking to justify privilege rather than the Federal agency seeking to dislodge it. If such a change were affected, it would affirm a communal view of justice over liberal rights-based ethics, that is, of some responsibilities to disclose over every conceivable right to keep secret.[120]

2.107 A lone submission advocated 'the removal of the concept of client legal privilege entirely from all Australian law and related practice' on the grounds that:

> It appears to be the only logical way of providing more certainty and information for everybody faced with an otherwise opaque, fragmented, conflicted, increasingly complex and therefore increasingly ignorant, slow and costly legal environment.[121]

2.108 Some federal agencies argued for abolition of privilege in relation to their activities. This is considered in Chapter 6.

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116 Civil Liberties Australia (ACT) Inc, *Submission LPP 86,* 1 November 2007.
117 Human Rights and Equal Opportunity Commission, *Submission LPP 28,* 4 June 2007.
118 I Turnbull, *Submission LPP 18,* 3 June 2007; M Wyles, *Submission LPP 27,* 4 June 2007.
119 A Evans, *Submission LPP 4,* 27 March 2007.
120 Ibid.
121 C O'Donnell, *Submission LPP 80,* 26 October 2007. See also C O'Donnell, *Submission LPP 10,* 16 May 2007.

2.109 Many submissions also acknowledged that Royal Commissions may require different considerations from the everyday operation of coercive information-gathering powers in other federal investigatory bodies. This is considered in Chapter 6.

2.110 While not arguing directly for the abolition of privilege, Civil Liberties Australia submitted that there was a difference in considering privilege when raised *by agencies* compared with raising privilege *against agencies*. It argued that privilege issues should be considered subject to the 'general democratic principle' that 'government should always act in an open and transparent manner'.

> The notion that privilege is necessary to promote the confidential disclosure of damaging material to a solicitor is not applicable to government because if they were genuinely committed to acting in an open transparent manner, as they should be, they would not be disposed to hiding or concealing information that may cause embarrassment in the first place. …
>
> It follows that, if government agencies should not ordinarily have confidential private interests, then one of the principal rationales for the privilege, being the protection of private interests through the confidential nature of the privilege, ceases to apply. The justification for extending the privilege to government departments and agencies therefore becomes far more tenuous.[122]

2.111 Also raising concerns about the application of client legal privilege in relation to federal investigatory bodies was the Construction Forestry Mining and Energy Union (Construction and General Division):

> It should not simply be assumed that the rationale for client legal privilege applies with equal force to these agencies as it does to private citizens or even that the interests or actions of such agencies will at all times be consonant with the public interest. It may well serve the interests of justice and the administration of justice that the investigative process itself be more open and that federal agencies not be given a wide opportunity to withhold material gathered in that process which does not assist their case, by use of a claim for client legal privilege. Such agencies are not always above the kind of obstructionist or self-serving tactics identified in the Discussion Paper.[123]

2.112 Comments to similar effect also were made by Whistleblowers Australia:

> CLP in public administration does not embrace the human rights issues that normally underpin the principles of CLP. CLP in public administration serves a different function which has little to do with any effect on human rights or private interests. Legal advice in matters of public administration seldom has anything to do with the bureaucrats who are seeking advice. In public administration, the purpose of CLP is to ensure that matters are dealt with according to law and to ensure that information which may harm good government is not made public. …
>
> [We recommend that] CLP in public administration must be confined within a narrow and well defined framework of matters, and applied only for the sole purpose of

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122 Civil Liberties Australia (ACT) Inc, *Submission LPP 86,* 1 November 2007.

123 Construction Forestry Mining and Energy Union (Construction and General Division), *Submission LPP 90,* 1 November 2007.

> ensuring the maintenance of good government and the safety and well-being of the community.[124]

2.113 Concerns such as these may be better considered in the context of the role of watchdog bodies such as the IGIS. This is considered in Chapter 6. The issues of abrogation and modification more generally are also considered in this chapter.

Identifying the real problem

2.114 A common thread in many submissions and consultations was that the problem does not lie directly with the doctrine itself, but rather in the arena of practice and procedure—that problems of delay, lack of transparency, lack of information are not intrinsically about privilege, but how claims are raised and managed. This is considered further in Chapter 8.

2.115 It was also suggested that the 'high profile' cases, like the AWB Royal Commission, are not typical of the overall workings of the doctrine. For instance, the National Australia Bank Limited and others submitted that examples like the AWB Royal Commission and the James Hardie matter, where specific legislation concerning client legal privilege was enacted,[125] are

> extreme cases and do not justify the view that the public interest in the due enforcement of federal laws is being detrimentally affected in a material manner by the misuse of [client legal privilege]. Whilst they do raise matters that cannot be easily discounted, they are extreme cases. [We] suggest that the more appropriate approach is to find a mechanism to deal with what are in essence unwarranted, unprincipled and mischievous uses of claims of [client legal privilege].[126]

2.116 The NSW Bar Association commented similarly that:

> The concerns identified by Commissioner Cole [in the AWB Royal Commission] do not reflect either a problem conceptually intrinsic to the privilege *per se* or a pervasive practical misuse of the privilege sufficient to justify its substantial curtailment or abolition. Rather, the issues arise from isolated overambitious claims, which are more effectively addressed through education and procedural amendment to the manner in which claims are made.[127]

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124 Whistleblowers Australia, *Submission LPP 77,* 7 October 2007.

125 *James Hardie (Investigations and Proceedings) Act 2004* (Cth).

126 National Australia Bank Limited and others, *Submission LPP 30,* 4 June 2007. See also Australian Institute of Company Directors, *Submission LPP 43,* 8 June 2007—the *James Hardie (Investigations and Proceedings) Act 2004* (Cth) 'was a response to a unique set of circumstances and should be considered atypical'.

127 New South Wales Bar Association, *Submission LPP 41,* 5 June 2007.

2.117 ACLA agreed, focusing upon the position of in-house lawyers.

> Many of the issues raised by the ALRC are isolated instances of individual behaviour and do not indicate a systemic problem in relation to in-house lawyers.[128]

ALRC's views

2.118 It is the ALRC's view that the doctrine of client legal privilege is a fundamental principle of the common law providing an essential protection to clients—both individual and corporate,[129] enabling them to communicate fully and frankly with their lawyers and those who may lawfully provide legal advice. The protection of the confidentiality of such communications facilitates compliance with the law and access to a fair hearing in curial and non-curial contexts, thereby serving the broad public interest in the effective administration of justice.

2.119 The ALRC considers that, rather than characterising client legal privilege as a right in and of itself, it is better seen as part of the right of access to a fair hearing. Its 'rights' character may be considered, therefore, as a right more generally described—of access to a fair hearing or trial and, as a corollary, access to legal advice. In this character, the doctrine serves the administration of justice in a broad sense and protects the rights of citizens against the state. Client legal privilege then may be seen to be facilitative of rights—and an aspect of the protection of rights recognised as human rights under international conventions.

2.120 The two limbs of the privilege doctrine have different origins, which have led to different expressions of the requisite elements. In the ALRC's view, however, the two limbs can be seen to share a broad rationale in common. While the two limbs have *particular* rationales, both can be seen today as sub-sets of the broader, overarching rationale—the administration of justice.

2.121 Insofar as issues of competing public interests (the pursuit of truth and the protection of client confidences) may be seen to arise, client legal privilege may be considered—to a large extent—as already encompassing a balancing of public interests, although occasions may arise where client legal privilege may be abrogated on the basis of some higher public interest. The ALRC considers in later chapters when such abrogation may be justified.

2.122 The ALRC agrees with submissions that where perceived problems have occurred in relation to claims of client legal privilege, the problem is not with the rationale of the doctrine, but lies broadly in the arena of practice and procedure. The ALRC puts forward specific recommendations in relation to such matters in later chapters of this Report.

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128 Australian Corporate Lawyers Association, *Submission LPP 83,* 31 October 2007.

129 The application of privilege to corporations is considered in Chapter 3.

3. Overview of Client Legal Privilege

Contents

Introduction

3.1 A legal 'privilege' is essentially a right to resist disclosing information that would otherwise be required to be disclosed.[1] There are several privileges available at common law and under evidence legislation in Australia, including:

- client legal privilege;
- the privilege against self-incrimination;
- public interest immunity; and
- privileges protecting other confidential relationships.[2]

1 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 91.

2 Parliamentary privilege, which grants parliamentarians immunity from any civil or criminal action arising from what they say in Parliament, also exists under state, territory and Commonwealth law.

3.2 Privileges are not only available as part of the rules of evidence, but also can apply outside court proceedings as a substantive doctrine wherever disclosure of information may be compelled, including by administrative agencies.[3] Therefore, privilege may be claimed in the production of documents before a trial (including with respect to an application for discovery or the issue of a subpoena), the answering of interrogatories, the giving of testimony or in the course of an administrative investigation.

3.3 Client legal privilege is perhaps the most frequently discussed and claimed privilege. As outlined below, it developed as a common law protection and also has been recognised under the uniform Evidence Acts.[4] Key modifications to the doctrine over time have included the extension of privilege from curial proceedings to investigative and administrative proceedings,[5] and the shift from a 'sole purpose' test[6] to a 'dominant purpose' test in relation to the purpose for which the document was created.[7]

3.4 The operation of the privilege under both the common law and the uniform Evidence Acts is substantially the same.[8] In 2005, the ALRC, the New South Wales Law Reform Commission and the Victorian Law Reform Commission conducted a review of the uniform Evidence Acts, which included a discussion of client legal privilege, and noted some developments in which the common law doctrine had moved away from the legislative provisions. The final report, *Uniform Evidence Law* (ALRC 102), made a number of recommendations designed to bring the Acts into line with the common law.[9] In July 2007, the Standing Committee of Attorneys-General (SCAG) endorsed a Model Uniform Evidence Bill, which is based on the *Evidence Act 1995* (NSW) and the *Evidence Act 1995* (Cth) with amendments as recommended in ALRC 102.[10] The New South Wales Parliament passed the relevant amendments to the *Evidence Act 1995* (NSW) in late 2007.[11] At the time of writing, amendments to the *Evidence Act 1995* (Cth) had not been introduced into Parliament.

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3 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; *Sorby v Commonwealth* (1983) 152 CLR 281; *Comptroller General of Customs v Disciplinary Appeal Committee* (1992) 35 FCR 466.

4 At the time of writing the uniform Evidence Acts are the *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2001* (Tas); *Evidence Act 2004* (NI).

5 *Baker v Campbell* (1983) 153 CLR 52.

6 *Grant v Downs* (1976) 135 CLR 674.

7 *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49.

8 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28, [11.23].

9 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005), Recs 14–2, 14–3, 14–4.

10 The Uniform Evidence Bill may be viewed at <www.pco.nsw.gov.au/uniform_legislation.htm> at 30 November 2007.

11 The Evidence Amendment Bill 2007 (NSW) was passed on 24 October 2007. At the time of writing, the Act was yet to be proclaimed.

3.5 The privilege provisions of the *Evidence Act 1995* (Cth) apply only to the adducing of evidence at trial.[12] In all other situations the common law rules persist, unless a statute abrogates the privilege in a particular context.

3.6 This Inquiry is concerned with the interaction between client legal privilege and the investigatory functions of federal bodies that have coercive information-gathering powers.[13] As the common law presently governs the matters being considered in this Inquiry, this chapter will focus on the common law doctrine, with more limited mention made of the *Evidence Act* provisions.

3.7 In ALRC 102, the three Commissions recommended that the privilege provisions of the *Evidence Act* be extended to apply to any compulsory process for disclosure, such as pre-trial discovery and the production of documents in response to a subpoena; and in non-curial contexts including search warrants and notices to produce documents, as well as court proceedings.[14] This recommendation does not form part of the Uniform Model Evidence Bill, but the ALRC understands it will be considered by the SCAG Officers Working Group in the future.

3.8 Although this present Inquiry must consider the law as it currently stands, if the recommendations in ALRC 102 are adopted, then the *Evidence Act* provisions will cover some of the types of investigations under consideration. As noted above, there are not many substantive differences between the Act and the common law, and the Commissions' recommendations in ALRC 102 will further harmonise these regimes.

3.9 As such, recommendations made by the ALRC in this Inquiry that are based on the operation of the common law will apply equally to the *Evidence Act* should it be extended to operate in federal investigations in the future. The recommendations in ALRC 102 would not apply the *Evidence Act* provisions to Royal Commissions, which are not bound by the rules of evidence and procedure.[15]

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12 It should be noted that in New South Wales, the Supreme Court and the District Court have amended their rules to provide specifically that the *Evidence Act 1995* (NSW) applies pre-trial. Since the enactment of the *Civil Procedure Act 2005* (NSW) and the *Uniform Civil Procedure Rules 2005* (NSW), privileged documents are defined in the Dictionary of the Rules as information that could not be adduced under Part 3.10 of the *Evidence Act 1995* (NSW). The rules apply Part 3.10 of the *Evidence Act 1995* (NSW) to discovery, interrogatories, subpoenas, notices to produce and oral examinations. These rules apply the Act only to civil proceedings and not, for example, to subpoenas in criminal matters.

13 The nature of those functions is discussed in Ch 4.

14 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005), Rec 14–1.

15 See *Royal Commissions Act 1902* (Cth); *Evidence Act 1995* (Cth) s 4. ALRC 102 did not recommend that the *Evidence Act* provisions should be extended to apply to Royal Commissions.

The development of client legal privilege

What is client legal privilege?

3.10 Client legal privilege in Australia today is both a doctrine of the common law and a matter of statute. Deane J in *Baker v Campbell* described it as 'a fundamental and general principle of the common law'.[16] As noted above, it also has been given effect in statutory form in the uniform Evidence Acts.

3.11 A concise statement of the contemporary doctrine is provided by Dr Sue McNicol:

> It provides that, in civil and criminal cases, confidential communications passing between a lawyer and her or his client, which have been made for the dominant purpose of seeking or being furnished with legal advice or for the dominant purpose of preparing for actual or contemplated litigation, need not be disclosed in evidence or otherwise revealed. This rule also extends to communications passing between a lawyer or client and third parties if made for the purpose of actual or contemplated litigation.[17]

3.12 Before further consideration of the contemporary doctrine, a brief review of the historical background is given.

Historical background

3.13 While it has been said that 'it will never be possible to come to a conclusive answer to the origin of and early rationale for the privilege',[18] it was described by the leading American evidence scholar, Professor John Henry Wigmore, as 'the oldest of the privileges for confidential communications'.[19]

3.14 Dr Jonathan Auburn described privilege as 'one of many rules in the large mass of law relating to testimonial compulsion' that developed in the 16th century.[20] There are several threads that can be identified in the history of the emergence of today's privilege doctrine.[21]

Chancery

3.15 The rule as to non-disclosure of evidence and the concept of 'discovery' have their source in chancery. Before the middle of the 19th century in England, discovery

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16 *Baker v Campbell* (1983) 153 CLR 52, 116–117.

17 S McNicol, 'Implications of the Human Right Rationale for Legal Professional Privilege—The Demise of Implied Statutory Abrogation?' in P Mirfield and R Smith (eds), *Essays for Colin Tapper* (2003) 48, 48.

18 Auburn states that 'the decisive pieces of information, the reasoning underlying the first reported cases and precise knowledge of pre-Elizabethan Chancery procedure, are simply not available': J Auburn, *Legal Professional Privilege: Law and Theory* (2000), 7.

19 J Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd ed, 1940), 547, [2290].

20 J Auburn, *Legal Professional Privilege: Law and Theory* (2000), 7.

21 The outline of the historical development of the doctrine is drawn principally from N Williams, 'Discovery of Civil Litigation Trial Preparation in Canada' (1980) 58(1) *The Canadian Bar Review* 1.

was a process that was mainly limited to the Chancery Courts. Hence it was in the chancery context that an evidentiary rule restricting access to certain evidence was seen.

> The premature disclosure of evidence was not a problem which confronted the common law courts since witnesses at law gave their evidence for the first time at trial. Also, at common law the parties could not have discovery of each other. Discovery for a common law action could be obtained by a bill of discovery in chancery but it was the procedure of that court which determined what information had to be given. The pre-hearing discovery of the parties and examination of witnesses was a peculiar characteristic of equity procedure which had been inherited from the Romano-Canonical system, and so only the Court of Chancery needed to regulate the extent and timing of disclosure of the evidence. In addressing the problem the Chancellors were moved by the same fear of perjury that had shaped the civil law practice. Like the civil law, equity made a distinction between the party's own testimony and the testimony which the party's witnesses could give. The adversary was allowed to find out the personal knowledge of the party but because of the danger of perjury, could not use discovery to compel the party to disclose the names of witnesses or his belief as to what their evidence would be.[22]

3.16 The fear of tampering with witnesses that might follow the premature disclosure of evidence also informed the approach to the discovery of documents.[23] The production of documents that were part of a party's evidence was considered as 'opening a wide door to perjury'.[24]

Trial at law

3.17 The trial at common law utilised oral examination and cross-examination of witnesses in the presence of parties, rather than the chancery process of secret depositions. While this was considered superior to the deposition method of chancery,[25] the trial at law was hampered by the prohibition of hearing the testimony of the parties themselves. As the parties were 'interested' in the outcome of the trial, they were not considered competent—'they could not be trusted to tell the truth'.[26] Chancery in its auxiliary jurisdiction could be enlisted to assist to some extent, but it was 'time-consuming, cumbersome and expensive'.[27]

3.18 The reform of common law procedures in the mid-19th century gave common law courts power to order discovery, overtaking the former chancery jurisdiction in this

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22 Ibid, 7.
23 Ibid, 10.
24 *Bligh v Benson* (1819) 146 ER 948, 949.
25 N Williams, 'Discovery of Civil Litigation Trial Preparation in Canada' (1980) 58(1) *The Canadian Bar Review* 1, 12.
26 Ibid, 13. The position in chancery was different. As Williams noted, 'The practice of requiring a party to produce evidence against himself that was in his possession, established originally in the ecclesiastical courts, rested on the notion that it would be against conscience to allow him to withhold it': 11.
27 Ibid, 13.

area. The reforms also made the parties 'generally competent and compellable to testify for and against each other in all courts of justice'.[28]

Privilege for documents relating to the case

3.19 As Victorian barrister Neil J Williams QC recorded, 'the privilege [to withhold documents] that relate exclusively to the case of the party giving discovery was brought into existence to shield title deeds from disclosure to strangers'.[29] The reason behind this privilege was a concern for security of tenure in days before any system for registration of land titles.

> The rule helped maintain security of tenure by concealing any defects in the formal chain of descent from persons opposed in claim or from blackmailers prepared to exploit the defects. Since a plaintiff in ejectment had to succeed on the strength of his own title rather than upon any defects in the defendant's, documents that impeached the defendant's title but which did not support the plaintiff's were not discoverable.[30]

3.20 By the middle of the 19th century this privilege in relation to title deeds had expanded to include any documents that formed the evidence for the party making discovery,[31] evolving as 'the common law equivalent of the protection that had originated in chancery for documents which formed the party's evidence'.[32] This developed into the 'litigation privilege' limb of client legal privilege of today.

3.21 The commitment of the common law to litigation as adversarial proceedings—of which the litigation privilege limb is an aspect—was said by Professor Wigmore to reflect its origin 'in a community of sports and games' and, therefore, to have been permeated by the 'instincts of sportsmanship'.

> This has had both its higher aspect and its lower aspect. On the one hand, it has contributed a sense of fairness, of chivalrous behaviour to a worthy adversary, or carrying out a contest on equal and honorable terms. The presumption of innocence, the character rule, the privilege against self-crimination, and other specific rules (to name those of Evidence alone), show the effect of this instinct against taking undue advantage of an adversary. The minor rules of professional etiquette … illustrate the same tendency even more clearly. On the other hand, it has contributed to lower the system of administering justice, and in particular of ascertaining truth in litigation, to the level of a mere game of skill or chance. The right to use a rule of procedure or evidence as one plays a trump card, or draws to three aces, or holds back a good horse till the home stretch, is a distinctive result of the common-law moral attitude towards parties in litigation.[33]

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28 Ibid, 13.
29 Ibid, 16.
30 Ibid, 16 (footnotes omitted).
31 Ibid, 16.
32 Ibid, 17.
33 J Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd ed, 1940), 374–375, [1845].

3.22 The 'sportsmanlike' simile is one found also in the earlier work of the great 19th century English legal historians, Sir Frederick Pollock and Professor Frederick W Maitland.[34] In describing the behaviour expected of judges, 'in different ages and by different systems of law', they said that it fluctuated 'between two poles'.

> At one of these the model is the conduct of the man of science who is making researches in his laboratory and will use all appropriate methods for the solution of problems and the discovery of truth. At the other stands the umpire of our English games, who is there, not in order that he may invent tests for the powers of the two sides, but merely to see that the rules of the game are observed. It is towards the second of these ideals that our English medieval procedure is strongly inclined. We are often reminded of the cricket-match. The judges sit in court, not in order that they may discover the truth, but in order that they may answer the question, 'How's that?'[35]

3.23 Williams summarised this approach as follows:

> Litigation was conducted in the spirit of a game. It was governed by rules that were known to the parties in advance, and that the rules were observed was no less important than the actual outcome of the contest. And just as players in a game were allowed to decide when to show their hand so was the litigant to be free to select the most propitious moment to present his evidence. Also the system stressed the virtue of industry and self-reliance, qualities that reflected the prevailing laissez-faire economic and social philosophy of the nineteenth century. … In this climate it would hardly be expected that the system would aid a party in getting the evidence in the case from the other side. Evidence was something that was to be obtained through the exercise of individual initiative and endeavour.[36]

3.24 The evidence rule in equity, that discovery could not be had of the evidence of the adversary's case, was mirrored at law in the privilege which developed to protect the materials prepared for the brief. As Williams commented, the chancery evidence rule 'matched the litigation philosophy of the common law'.[37] By 1876 it was 'well established both at law and in equity'

> that documents obtained by a party or his solicitor with a view to and in contemplation of litigation, either pending or anticipated, are protected even though received from persons unconnected with the litigation.[38]

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34 F Pollock and F Maitland, *The History of English Law Before the Time of Edward I* (2nd ed, 1899).

35 Ibid, vol 2, 670–671.

36 N Williams, 'Discovery of Civil Litigation Trial Preparation in Canada' (1980) 58(1) *The Canadian Bar Review* 1, 27.

37 Ibid.

38 *M'Corquodale v Bell* (1876) 1 CPD, 481; N Williams, 'Discovery of Civil Litigation Trial Preparation in Canada' (1980) 58(1) *The Canadian Bar Review* 1, 42. In equity the evidence rule was that discovery did not extend to the evidence in support of the adversary's case. The concern was to avoid perjury and witness interference. The common law privilege developed independently: N Williams, 'Discovery of Civil Litigation Trial Preparation in Canada' (1980) 58(1) *The Canadian Bar Review* 1, 42–43.

3.25 The basis of this protection and the connection with the adversarial system was explained by Williams:

> From [the perspective of the adversarial model] the privilege [protecting a party's brief] was but a logical consequence of the principal characteristics of the system—party responsibility for the collection of evidence and party autonomy in presenting the evidence that would best advance the party's case or destroy that of the adversary. What rendered the privilege 'necessary' were these characteristics, and the assertion that the material deserved protection as belonging to the party's brief reflected the same idea. The brief represented more than just the actual documents that constituted or set forth the party's evidence. It also symbolized the party's investment of time, expense and effort in searching out the facts. Under an adversary system, how the yield from that investment was to be dealt with, whether it was to be withheld or disclosed, was the prerogative of the party to decide.[39]

Emergence of the present doctrine

3.26 Dr Ronald Desiatnik provides a useful summary of how the content of client legal privilege has changed over time:

> Initially the privilege could only attach to 'communications received since the beginning of the *litigation at bar* and for its purposes only'. The privilege was then extended to apply to communications between lawyer and client 'for the purpose of any litigation whatsoever', be it actual or prospective. Subsequently the privilege was applied to 'cover communications relating to advice unrelated to legal proceedings'.[40]

3.27 Common law privilege emerged in the context of trials and extended to the pre-trial period of discovery. However, since *Baker v Campbell*,[41] it now also extends to non-curial contexts such as the exercise of coercive powers of investigatory or regulatory authorities. To quote Desiatnik further,

> [The doctrine] has risen from the ranks of other evidentiary laws to achieve post-graduate status while retaining its under-graduate evidentiary qualifications.[42]

Client legal privilege today

The common law limbs of privilege

3.28 The common law doctrine of client legal privilege has two distinct limbs: 'advice privilege' and 'litigation privilege', although there has been a blurring of the distinction in recent case law.

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39 N Williams, 'Discovery of Civil Litigation Trial Preparation in Canada' (1980) 58(1) *The Canadian Bar Review* 1, 47.

40 R Desiatnik, *Legal Professional Privilege in Australia* (2nd ed, 2005), 12 (footnotes omitted). The developments are considered more fully in, eg, J Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd ed, 1940), [2294].

41 *Baker v Campbell* (1983) 153 CLR 52.

42 R Desiatnik, *Submission LPP 24,* 1 June 2007.

Advice privilege

3.29 This limb of the common law doctrine protects confidential communications made between a lawyer and a client from compulsory production in the context of court and other proceedings where such communications were made for the dominant purpose of the lawyer providing (or the client receiving) legal advice.

3.30 In *AWB Ltd v Cole*, after considering a number of authorities as to what amounts to 'legal advice',[43] Young J concluded that legal advice is not confined to telling the client 'the law' but also includes advice about what action should be taken in that legal context. In the context of Royal Commissions, Young J accepted that legal advice 'includes professional advice given by lawyers to a client as to what evidence and submissions should be placed before a commission of inquiry'.[44]

Litigation privilege

3.31 This limb of the common law doctrine protects confidential communications made between:

(a) a lawyer and a client, for the dominant purpose of use in, or in relation to, existing or anticipated legal proceedings; or

(b) a lawyer, client and a third party, for the dominant purpose of use in, or in relation to, existing or anticipated legal proceedings.[45]

3.32 Litigation privilege also will cover other documents brought into existence for the dominant purpose of use in legal proceedings—for example, drafts of pleadings and physical evidence, such as surveillance tapes or expert reports.[46]

A blurring of the distinction

3.33 At one time, communications with third parties were not covered by advice privilege unless the third party was found to be acting as an 'agent' of the client in making the communication. However, in 2004, in *Pratt Holdings Pty Ltd v Commissioner of Taxation* (*Pratt*) the Full Federal Court held that a third party's communication with a client, even where there was no litigation pending, potentially could be protected by client legal privilege.[47] Otherwise, it was held, it may be difficult for a person seeking legal advice to communicate the problem in respect of which

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43 This included the decision of the House of Lords in *Three Rivers District Council v Governor and Company of Bank of England* [2005] 1 AC 610.

44 *AWB Ltd v Cole* (2006) 152 FCR 382, 410.

45 E Kyrou, 'Under Attack: Legal Professional Privilege' (2007) 81(3) *Law Institute Journal* 33, 33.

46 R Desiatnik, *Legal Professional Privilege in Australia* (2nd ed, 2005), 24.

47 *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217, [39].

advice is sought without input from a third party.[48] This was expressed in terms of the underlying rationale for client legal privilege:

> If … the policy implicit in [the rationale] is not to be subverted, the dominant purpose criterion must be applied recognising that the situations in which people need legal advice are increasingly complex and that the client may need the assistance of third party experts if he or she is to be able to instruct the legal adviser appropriately.[49]

3.34 It has been suggested that the decision in *Pratt* is indicative of a blurring of the distinction between the two limbs of client legal privilege:

> Arguably, the Full Court's approach represents a significant extension of the advice privilege, to a point where there is now little theoretical distinction between the advice privilege and the litigation privilege.[50]

3.35 The High Court's description of client legal privilege in *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (*Daniels*) provides support for this position.

> It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communication between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings.[51]

3.36 By determining that the case could be decided under the head of legal advice privilege, the Full Court did not have to resolve this issue. However, in *Pratt,* Stone J indicated that the High Court's exposition of the rationale for client legal privilege in *Daniels* was consistent with the appellant's submission that there was a single rationale in Australia for client legal privilege. Her Honour found that the rationale applies both to litigation privilege and legal advice privilege, although she did not accept that adopting a single rationale should lead to a refusal to distinguish between the categories.[52]

3.37 The 'blurring' discussed in the *Pratt* decision is consistent with—and indicative of—the conflation of instrumental rationales into one broad 'administration of justice'

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48 Ibid, [42], [104]; see V Morfuni, 'Legal Professional Privilege and the Government's Right to Access Information and Documents' (2004) 33 *Australian Taxation Review* 89, 108.

49 *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217, [87].

50 J O'Neill, 'Loosening the Shackles on Advice Privilege' (2004) 42(8) *Law Society Journal* 60, 60.

51 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 552.

52 *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217, [86]. In ALRC 102, the commissions recommended that the uniform Evidence Acts be amended to follow the reasoning in *Pratt* and allow communications with third parties to be included under the advice privilege: Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005), Rec 14–4. The importance of the decision in *Pratt* was most recently noted in *Visy Industries Holdings Pty Limited v Australian Competition and Consumer Commission* [2007] FCAFC 147.

rationale, underpinning both limbs of the doctrine of client legal privilege, as discussed in Chapter 2.

Statute

3.38 The *Evidence Act 1995* (Cth) also distinguishes between legal advice and litigation privilege. Section 118 provides that evidence is not to be adduced if, on objection by the client, the court finds that adducing the evidence would result in disclosure of:

> (a) a confidential communication made between the client and a lawyer; or
>
> (b) a confidential communication made between two or more lawyers acting for the client; or
>
> (c) the contents of a confidential document (whether delivered or not) prepared by the client or the lawyer;
>
> for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.

3.39 Section 119 establishes a 'litigation privilege', protecting confidential communications between a client and another person, or a lawyer acting for a client and another person, or the contents of a confidential document that was prepared for the dominant purpose of a client being provided with legal services related to an Australian or overseas proceeding, or anticipated proceeding, in which the client is or may be a party.

3.40 It should be noted that under s 118, advice privilege does not presently extend to third party communications, in contrast with the common law following the decision in *Pratt.* Under this section a third party must be an agent of the client for privilege to apply.

3.41 In *Westpac Banking Corporation v 789TEN Pty Ltd* (*Westpac*), the Court of Appeal of the Supreme Court of New South Wales (NSW) found that privilege could not be claimed over letters that were sent to PricewaterhouseCoopers (PWC), regarding an audit being conducted of Westpac.[53] In order for auditors to discharge their obligations under ss 297 and 305 of the *Corporations Act 2001* (Cth), companies are required to advise the auditors of the likely amount of their contingent liabilities. This is generally done through a letter to an auditor by a company's lawyer setting out the directors' estimate of any potential financial settlement, and the lawyer's opinion of that estimate.

3.42 In the *Westpac* case, the court found that client legal privilege did not attach to the letter to the auditor under either s 118 or s 119 of the *Evidence Act.* As regards

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53 *Westpac Banking Corporation v 789TEN Pty Ltd* [2005] NSWCA 321.

s 118, the court found the dominant purpose of the preparation of the letters was not to provide 'legal advice' to Westpac, but to enable PWC as the bank's auditor to use the information in the audit. There was also no evidence in the case to suggest that PWC was acting as an 'agent' of the bank.[54] The court also considered whether the letters were prepared for the dominant purpose of Westpac being provided with professional legal services in relation to a proceeding, and thus captured by s 119. Again, the court found that the letters were not created for the dominant purpose of Westpac being provided with advice in relation to legal proceedings, but for the dominant purpose of the auditors being provided with the lawyer's opinion in the course of meeting their obligations under the *Corporations Act*.[55]

3.43 In ALRC 102, the three Commissions recommended that s 118 of the *Evidence Act* be amended to replace the words 'client or lawyer' with the words 'client, a lawyer or another person' to extend advice privilege to information provided by a third party to the client or lawyer for the dominant purpose of providing legal advice.[56] This proposal has been adopted under the Model Uniform Evidence Bill.[57] This amendment could rectify problems arising from the requirement that a third party be an agent in order to fall within the scope of s 118, but will not deal with situations where such advice is not prepared for the dominant purpose of advising the client.

3.44 There is considerable concern amongst the legal community that the decision in *Westpac* means that companies that fully comply with their obligations under the *Corporations Act* may be required to disclose both the company's own view of its prospects in pending litigation and the view of its lawyers, if an opponent files a notice of discovery.[58] The NSW Attorney General's Department submitted early to this Inquiry that the decision may have implications for federal and state government departments that provide letters of representation to their Auditors-General.[59]

3.45 In *Westpac,* Tobias J stated:

> There is obviously a problem which may require legislative intervention. However, any such intervention (for instance, by amendment to the *Evidence Act* or the *Corporations Act*) should only be made in a manner which would not unduly extend the rationale which underpins the privilege in question and which, essentially, is no different to that which applies under the general law with respect to litigation privilege where the relevant confidential information is directly related to assisting the prosecution, defence or compromise of pending or contemplated proceedings.[60]

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54 Ibid, [29].
55 Ibid, [58].
56 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005), Rec 14–4.
57 Model Uniform Evidence Bill, s 118: <www.pco.nsw.gov.au/uniform_legislation.htm> at 30 November 2007.
58 Law Council of Australia, *Correspondence*, 12 July 2007.
59 Attorney General's Department of New South Wales, *Submission LPP 14,* 9 May 2007.
60 *Westpac Banking Corporation v 789TEN Pty Ltd* [2005] NSWCA 321, [65].

3.46 The ALRC notes the concerns raised in response to the *Westpac* case, however, as noted in the Discussion Paper in this Inquiry, *Client Legal Privilege and Federal Investigatory Bodies* (DP 73),[61] the issues are outside the terms of reference established for this Inquiry. Sections 297 and 305 of the *Corporations Act* are not examples of the Australian Securities and Investments Commission's (ASIC) coercive information-gathering powers; rather, they require annual reports to include a true and fair view of the financial position and performance of the disclosing entity. It is not ASIC that is seeking the information; it is a requirement of the auditor to fulfil the auditor's function under the Act.

3.47 The reasoning in *Westpac* appears to be correct—the letters to the auditors are not prepared for the dominant purpose of providing the client with legal advice; they are prepared for the purpose of providing information for an audit. The ALRC would have some concerns if the doctrine of client legal privilege were extended to include this type of advice, as this would be a distortion of the dominant purpose test, and could lead to an undesirable broadening of the privilege. However, it appears uncontroversial that this specific information should remain confidential (as noted by Tobias J above), and that compliance with a requirement under the *Corporations Act* should not lead to a risk that an opponent in litigation could discover that information.

3.48 The ALRC's view is that the confidentiality of the information should be maintained through amendment to the *Corporations Act* and associated amendments to state and territory legislation dealing with unincorporated entities and government bodies. Such amendments could stipulate that an auditor has a duty of confidentiality or secrecy in relation to the information.[62]

When client legal privilege can be claimed

Types of proceeding

3.49 At common law, client legal privilege can be claimed in civil proceedings at the interlocutory stage, during the course of a civil or criminal trial, and in non-judicial proceedings.[63] *Baker v Campbell* established that the doctrine applies 'in the absence of some legislative provision restricting its application … to all forms of compulsory disclosure of evidence'.[64]

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61 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), 68.

62 The ALRC received two submissions endorsing this approach (whilst noting the ALRC's view that the issue was outside the terms of reference of this Inquiry): Institute of Chartered Accountants in Australia, *Submission LPP 89,* 1 November 2007; Grant Thornton Association Inc, *Submission LPP 97,* 2 November 2007.

63 S McNicol, *Law of Privilege* (1992), 52.

64 *Baker v Campbell* (1983) 153 CLR 52, 132.

3.50 As noted above, the privileges under the *Evidence Act* (with the exception of s 127, concerning religious confessions) are confined to the adducing of evidence in relevant proceedings.[65]

3.51 The privilege is not automatic, either at common law or under statute, but must be claimed in order to be applied. As noted in Chapter 1, the privilege is that of the client, not the lawyer—although in practice a represented client will normally assert the claim through his or her lawyer.[66] A party making a claim of privilege must provide the party seeking disclosure with sufficient facts on which he or she could make a decision about whether the claim for privilege could be supported.[67] Where there is a dispute about whether the document or communication is privileged, the court may test the evidence of the purpose of the document.

> A person may succeed by pointing to the nature of the documents or by evidence describing the circumstances in which they were brought into existence. But it should not be thought that the privilege is necessarily or conclusively established by resort to any verbal formula or ritual. The court has power to examine the documents for itself, a power which has perhaps been exercised too sparingly in the past, springing possibly from a misplaced reluctance to go behind the formal claim of privilege. It should not be forgotten that in many instances the character of the documents that are the subject of the claim will illuminate the purpose for which they were brought into existence.[68]

3.52 Two recent cases have considered what constitutes 'litigation' for the purpose of claiming litigation privilege under both s 119 of the *Evidence Act* and the common law.

3.53 *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd*[69] (*Ingot*) concerned a claim for privilege over communications between a firm of solicitors and an expert the firm had retained to provide advice in a matter that was the subject of review by the Commonwealth Administrative Appeals Tribunal (AAT). The issue in *Ingot* was not the substance of the AAT appeal, but was an application by one of the defendants to the proceedings for access to the advice held by the respondent, for the purpose of use by the defendants in the private litigation.

3.54 The respondents claimed that litigation privilege applied to the documents, either under the *Evidence Act* or the common law, because the communications had been made for the purpose of providing legal advice in relation to an AAT proceeding.

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65 Since the commencement of the Commonwealth and New South Wales legislation in 1995, a number of appellate cases have applied the privilege provisions to discovery and inspection of documents on the basis that the uniform Evidence Acts have a derivative application to the common law. However, in *Mann v Carnell* (1999) 201 CLR 1 and *Esso v Commissioner of Taxation* (1999) 201 CLR 49, the High Court rejected this approach. The wording of the religious confessions privilege is not limited to apply only to a witness in a proceeding.

66 *Attorney-General for the Northern Territory v Maurice* (1986) 161 CLR 475, 487.

67 *National Crime Authority v S* (1991) 29 FCR 203, 211. The issue of sufficient disclosure is addressed further in Chapter 8.

68 *Grant v Downs* (1976) 135 CLR 674, 689.

69 *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* (2006) 67 NSWLR 91.

3.55 Bergin J held that litigation privilege under s 119 did not apply to proceedings before the AAT. Under s 33 of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act), the AAT is not bound by the rules of evidence, but may inform itself in any matter in such manner as it thinks appropriate. It is therefore not a 'federal court' under the definition in s 4 of the *Evidence Act*, and hence the Act does not apply to its proceedings.[70]

3.56 Bergin J then considered whether common law litigation privilege applied to AAT proceedings. Her Honour based her decision on whether AAT proceedings were inquisitorial or adversarial in nature. In concluding that the proceedings were inquisitorial, Bergin J cited Brennan J in *Bushell v Repatriation Commission* where he stated that while AAT proceedings may appear adversarial, the onus of proof 'which plays so important a part in fact-finding in adversarial proceedings before judicial tribunals, has no part to play in administrative proceedings'.[71]

3.57 Other matters that Bergin J found indicative of the non-adversarial nature of AAT proceedings were: the statutory obligation of the decision maker to assist the Tribunal in making its decision;[72] the administrative functions of the Tribunal; and the fact that the AAT is not a court and a decision on its review does not involve an exercise of judicial power.[73] The fact that AAT proceedings contemplate legal representation was not on its own considered sufficient to attract litigation privilege.[74] In conclusion, her Honour found that the dictates of fairness, which are served by the availability of common law advice and litigation privilege, did not apply to the processes of, and proceedings in, the AAT.[75]

3.58 *Ingot* followed the reasoning of Young J in *AWB v Cole,*[76] in which Young J found that litigation privilege did not apply to commissions of inquiry (although advice privilege did). Young J stated that:

> the reason why the litigation privilege has been recognised as a substantive rule of law and as a fundamental right, is that it operates to secure a fair civil or criminal trial within our adversarial system.[77]

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70 Ibid, [10].
71 *Bushell v Repatriation Commission* (1992) 175 CLR 408, 424.
72 *Administrative Appeals Tribunal Act 1975* (Cth) s 33(1AA).
73 *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* (2006) 67 NSWLR 91, [54].
74 Ibid, [39].
75 Ibid, [55]. The issue of whether the material could have been covered by advice privilege, on the basis that the decision in *Pratt* may allow some third party communications to be covered, was not raised in this case.
76 *AWB Ltd v Cole* (2006) 152 FCR 382.
77 Ibid, [37].

3.59 Following the release of the Issues Paper in this Inquiry, *Client Legal Privilege and Federal Investigatory Bodies* (IP 33),[78] it was suggested to the ALRC that it should consider whether it is appropriate to amend the *Evidence Act* or the AAT Act to rectify the decision in *Ingot*, so that both limbs of the privilege apply to AAT proceedings.[79]

3.60 In DP 73, the ALRC argued that there does appear to be an anomaly in the situation that if a party sought review of an administrative decision in the Federal Court, then the material that his or her lawyer prepared for the case would be covered by client legal privilege, but if the review was sought in the AAT, the lawyer's 'brief' would not be covered by privilege and the material could be sought by other parties. However (as the case concerned whether litigation privilege could protect advice given for the purpose of assisting a client in connection with an AAT proceeding), the issue is clearly not within the scope of the ALRC's Terms of Reference. It does not concern the particular issues of the exercise of a coercive information-gathering power by a federal body.[80]

3.61 Nevertheless, the ALRC has some concerns with the limited view of litigation privilege outlined by Bergin J in *Ingot.* As noted in Chapter 2, while the two limbs of advice and litigation privilege have particular rationales, both can be seen as sub-sets of a broader, overarching rationale expressive of the administration of justice. The administration of justice rationale relates not only to fairness in the adversarial context of protecting the lawyer's brief, but also facilitates access to a fair hearing in a non-curial context.

3.62 In the ALRC's view, material gathered for the dominant purpose of providing legal advice or legal services (to use the words of the *Evidence Act*) in an administrative tribunal should be covered by both advice and litigation privilege.

3.63 The ALRC's recommendation in ALRC 102 to extend the privilege provisions of the *Evidence Act* to non-curial contexts,[81] if adopted, would extend the operation of those sections of the *Evidence Act* to AAT proceedings. This extension would require making AAT proceedings a relevant proceeding for the purpose of s 119.[82]

3.64 In its submission the AAT supported the view that client legal privilege rather than 'common law legal professional privilege' should apply to proceedings before the AAT, and that the rules relating to the application of the privilege should be the same

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78 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007).

79 Law Council of Australia, *Submission LPP 26,* 4 June 2007.

80 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), [3.59]–[3.61].

81 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005), Rec 14–1.

82 It should be noted, however, that the ALRC did not recommend that the *Evidence Act* apply to AAT proceedings more generally.

in the federal courts and the AAT, in the absence of any compelling reasons to the contrary.[83]

3.65 In the recent case of *Re Farnaby and Military Rehabilitation and Compensation Commission*,[84] the Tribunal declined to follow *Ingot* and held that litigation privilege does apply to the Tribunal, unless abrogated in clear terms by a statute. In its decision, the Tribunal argued that the analysis of whether privilege applied should not depend on whether or not the proceedings were adversarial, but rather

> We think it is more useful to look at the proceedings themselves and enquire whether they carry features that warrant the recognition of privilege, rather than to strive for a label and attribute consequences to that label.[85]

3.66 In the view of the Tribunal, the fact that the AAT has the ability to make decisions which affect people's rights (as opposed to a commission of inquiry), renders its proceedings closer to that of a court.[86] It argued that the rationale for the privilege concerns wider considerations than just protecting parties to litigation, such as the public interest in the administration of justice and protecting freedom of communication. As such the Tribunal saw 'no basis upon which that rationale could sustain privilege in court proceedings and not in proceedings in the Administrative Appeals Tribunal'.[87]

Types of communications

Confidential

3.67 A key feature of the doctrine of client legal privilege is that, to be protected, the communications must be confidential.[88] It has been noted that this characteristic serves as a limitation on the application of the privilege.[89] However, the entirety of a lawyer's file is not protected, with documents like trust account ledgers, timesheets, records of objectively observable facts or notes of public proceedings falling outside the doctrine.[90] In addition, privilege does not attach to evidence of transactions such as

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83 Administrative Appeals Tribunal, *Submission LPP 111,* 6 November 2007.
84 *Re Farnaby and Military Rehabilitation and Compensation Commission* [2007] AATA 1792.
85 Ibid, [16].
86 Ibid, [20].
87 Ibid, [34]–[35].
88 J Hunter, C Cameron and T Henning, *Litigation I—Civil Procedure* (7th ed, 2005), [8.35]. This was most recently confirmed by the Court of Appeal of Western Australia, which found that confidentiality was a feature of both advice and litigation privilege: *Southern Equities Corporation Ltd v West Australian Government Holdings Ltd* (1993) 10 WAR 1, [22].
89 R Desiatnik, *Legal Professional Privilege in Australia* (2nd ed, 2005), 28.
90 See, eg, *Bennett v Chief Executive Officer of the Australian Customs Service* (2003) 37 AAR 8; *National Crime Authority v S* (1991) 29 FCR 203; *Attorney-General for the Northern Territory v Maurice* (1986) 161 CLR 475.

contracts or conveyances, even where they are provided to a lawyer for advice or for use in litigation.[91]

3.68 Communications made privately between a lawyer and a client are assumed to be confidential.[92] As a general rule, the privilege is lost where the communication is made in the presence of a third party (who is not an employee or agent of the lawyer), although there is some authority for the proposition that this may depend on whether it was unavoidable that the third party was present.[93] Whether or not the client intended the communication to be confidential will also be an important consideration.[94]

Purpose of communication

3.69 A key development in the Australian common law was the shift from a 'sole purpose' test to a 'dominant purpose' test. Until 1999, for a communication to be protected it had to be made for the sole purpose of contemplated or pending litigation, or for obtaining or giving legal advice, as enunciated in *Grant v Downs*.[95] In 1999, in *Esso Australia Resources Ltd v Commissioner of Taxation*, the High Court overruled *Grant v Downs*, holding that the common law test for client legal privilege was the dominant purpose test—in line with the test under the *Evidence Act* that has been in place since 1995.[96]

3.70 The scope of what may be covered by client legal privilege at common law is potentially expansive. The dominant purpose test serves as the primary limitation on its application. The purpose of the creation of the document or communication is therefore the vital question in a claim for client legal privilege.[97] The 'purpose' of the document has been defined as 'the reason why the document was brought into existence'.[98] In determining the purpose of a communication, courts have looked at the circumstances in which it was made, including the intention of the person making it, the nature of any previous dealings between the parties, and whether it was made in accordance with an internal procedure or practice.[99]

3.71 Under the dominant purpose test, there may be more than one reason for the communication. The High Court has stated that the 'dominant purpose' should be given its ordinary meaning, being that the purpose was 'the ruling, prevailing or most

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91 *Baker v Campbell* (1983) 153 CLR 52, 86; R Desiatnik, *Legal Professional Privilege in Australia* (2nd ed, 2005), 29.
92 J Hunter, C Cameron and T Henning, *Litigation I—Civil Procedure* (7th ed, 2005), [8.34].
93 *R v Braham and Mason* [1976] VR 547. See J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 98.
94 *R v Braham and Mason* [1976] VR 547.
95 *Grant v Downs* (1976) 135 CLR 674.
96 *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49.
97 *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1998) 153 ALR 393.
98 *Waterford v Commonwealth* (1987) 163 CLR 54, 66.
99 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 96.

influential purpose'.[100] This followed the approach of the United Kingdom courts to the issue.[101] Dr Ronald Desiatnik notes that the change from the sole purpose to the dominant purpose test creates the potential for greater pre-trial disputes and appeals by requiring the court to 'rank' the (potentially) multiple purposes for which a document may have been created.[102]

Copies

3.72 At common law, the extent to which copies of documents are covered by the doctrine of client legal privilege has been a matter of some contention.[103] It is clear that when a copy is made of an original that attracts privilege (ie, for the purpose of record keeping or administration) the copy is also privileged. The position is more difficult where the original is not privileged but a copy of that document—which is communicated for the purpose of seeking or giving advice or in preparation for litigation—may be.[104]

3.73 The majority of the High Court in *Australian Federal Police v Propend Finance* (*Propend*) found that privilege could exist in copies of documents made for the purpose of seeking legal advice or pending litigation.[105] Where a copy is made in such circumstances the copy becomes a separate communication in its own right to which the dominant purpose test is applied.[106] This rule therefore protects copies of unprivileged documents that become part of the lawyer's brief for litigation.[107]

3.74 The decision in *Propend* was based on the idea of protecting the lawyer's file or brief. Where a copy is produced for a 'privileged purpose'—for the purpose of providing legal advice or for litigation—then it should be accorded the protection of confidentiality, even if the original is unprivileged and could be obtained elsewhere.

> If privilege were denied to a copy of an unprivileged document when the copy is produced solely for the purpose of seeking advice from a solicitor or counsel or for the purpose of use in pending, intended or reasonably apprehended litigation there would be a risk that the confidentiality of solicitor-client communications would be breached. The way would be open for the execution of search warrants by the emptying out of, and sifting through, solicitors' files and counsels' briefs. That would undermine the adversary system under which most litigation is conducted.[108]

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100 *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404, 416. See R Desiatnik, *Legal Professional Privilege in Australia* (2nd ed, 2005), 39.
101 See *Waugh v British Airways Board* [1980] AC 521.
102 R Desiatnik, *Legal Professional Privilege in Australia* (2nd ed, 2005), 40.
103 A Ligertwood, *Australian Evidence* (4th ed, 2004), 293.
104 Ibid, 291.
105 *Australian Federal Police v Propend Finance* (1997) 188 CLR 501, 509.
106 A Ligertwood, *Australian Evidence* (4th ed, 2004), 96.
107 Ibid, 291.
108 *Australian Federal Police v Propend Finance* (1997) 188 CLR 501, 509. The decision in *Propend* was recently affirmed in *Barnes v Commissioner of Taxation* [2007] FCAFC 88 (22 August 2007).

3.75 It is easier to understand the basis of the *Propend* decision in the context of litigation privilege and the adversarial process rather than ordinary advice privilege. However, if copies of documents contained in the lawyer's file were not protected, it is possible to imagine a situation where disclosure of a group of documents not otherwise privileged would disclose a legal strategy being adopted, recommended or considered by a party's lawyers.

3.76 Where the original document is destroyed, the privileged copy loses its privilege. In *Propend*, Brennan J argued that if client legal privilege were accorded without qualification to a copy of an unprivileged document where the copy is brought into existence for a privileged purpose, the privilege might frustrate the power to search and seize, and thereby undermine the administration of justice. A person could make a copy for the purpose of litigation, and then destroy the unprivileged original.[109]

3.77 Similar authorities to *Propend* have been criticised in the United Kingdom. In *Ventouris v Mountain*, Bingham LJ suggested that the rule was 'ripe for authoritative reconsideration',[110] on the basis that it was hard to justify why copies of documents should be treated any differently from the original. In a South Australian case prior to *Propend*, Debelle J stated that 'generally speaking, it would be absurd for the copy to be privileged while the original was not'.[111]

3.78 In the recent case of *Barnes v Commissioner of Taxation*, the Full Federal Court applied the principles in *Propend* and noted that the relevant point in time for consideration of whether privilege attached to a document (ie, when determining the purpose for which the copy is made) is when the document was created, not when it is communicated.[112]

3.79 The Australian Taxation Office (ATO) has submitted to this Inquiry that the *Propend* decision has a potentially significant effect on its operations. As documents that are not privileged may become privileged if they are copied and meet the dominant purpose test, the ATO could be 'prevented from obtaining even basic and antecedent documents'.[113] The ATO also pointed to difficulties of the application of *Propend* where the response to a notice was that the original of the document could not be found, as distinct from being destroyed, hence arguably the copy was still within the protection of privilege.[114]

> We consider that the law should be clarified so that [client legal privilege] does not apply to a copy of a document where privilege would not have attached to the original document. In our view, this may help prevent warehousing of documents, will provide

109 Ibid, 509.
110 *Ventouris v Mountain* [1991] 1 WLR 607, 617.
111 *JN Taylor Holdings Ltd v Bond* (1991) 57 SASR 21, 34.
112 *Barnes v Commissioner of Taxation* [2007] FCAFC 88.
113 Australian Taxation Office, *Submission LPP 65,* 22 June 2007.
114 Australian Taxation Office, *Consultation LPP 35*, 27 June 2007.

> certainty about whether [client legal privilege] applies to copies, and will provide the Tax Office with greater access to transactional and antecedent documents.[115]

3.80 It has been suggested that the rule in *Propend* should be narrowed to circumstances where it can be established that the copied documents indicated the direction of the legal advice being given.[116] The ALRC is not in a position in this Inquiry to recommend substantive changes to the doctrine of client legal privilege. However, the Commission notes the comments of Dawson J (in the minority) in *Propend*:

> legal professional privilege … exists in order to preserve the confidential relationship between client and legal adviser, a relationship which is to be fostered and preserved for the better working of the legal system. However, that relationship is not impaired and the interests of justice are best served if the client or his legal adviser on his behalf is compelled to disclose a copy of the document when the original might be compelled without any ground for objection.[117]

3.81 In keeping with the approach to the rationale for client legal privilege in Chapter 2, the ALRC is of the view that any protection of copies of otherwise unprivileged documents should be limited to situations where the copies would disclose or lead to discovery of confidential advice.

The lawyer

Professional capacity

3.82 Client legal privilege does not protect all communications between a lawyer and a client; rather, it protects only those communications where the lawyer is acting in his or her professional capacity. Under the common law, part of the test of whether a lawyer is acting in a professional capacity is the lawyer's 'independence' from the client. In *Waterford v Commonwealth*, Brennan J argued that the law required that a lawyer be independent from a client

> in order that the personal loyalties, duties or interests of the adviser should not influence the legal advice which he gives or the fairness of his conduct of litigation on behalf of his client.[118]

In-house counsel

3.83 The fact that a lawyer is employed as 'in-house' counsel does not in itself preclude a claim to client legal privilege in relation to communications between the lawyer and the employer.[119] However, such claims may be more closely scrutinised by

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115 Australian Taxation Office, *Submission LPP 65,* 22 June 2007.
116 See B Thanki (ed) *The Law of Privilege* (2006), [4.23] citing *Lyall v Kennedy (No 3)* (1884) 27 Ch D 1.
117 *Australian Federal Police v Propend Finance* (1997) 188 CLR 501, 520.
118 *Waterford v Commonwealth* (1987) 163 CLR 54, 70. It should be noted that Brennan J's comments were obiter.
119 *Sydney Airports Corporation Ltd v Singapore Airlines Ltd and Qantas Ltd* [2005] NSWCA 47.

the court to ensure that the lawyer was acting in the role of independent legal adviser and not with a focus on other commercial aspects of the business.[120] As noted above, the communication must be made for the dominant purpose of providing legal advice. In determining whether the communication was made for that purpose, the courts have focused on the role of the lawyer in giving that advice.

3.84 In *Seven Network Ltd v News Ltd*, Tamberlin J noted that the fact that in-house counsel also may advise on other matters does not rule them out from claiming privilege on behalf of their employers.

> Commercial reality requires recognition by the courts of the fact that employed legal advisers not practising on their own account may often be involved to some extent in giving advice of a commercial nature related to the giving of legal advice. Such involvement does not necessarily disqualify the documents relating to that role from privilege. The matter is necessarily one of fact and degree and involves a weighing of the relative importance of the identified purposes.[121]

3.85 It has been suggested that where an in-house lawyer is actually 'a player in the transaction', his or her legal advice will not be privileged.[122] However, where an in-house lawyer provides independent advice and is not an active participant in the transaction, then the in-house lawyer's advice may clearly be privileged.

3.86 In *Telstra Corporation Ltd v Minister for Communications, Information Technology and the Arts (No 2)*, the Court considered 'dominant purpose' in terms of the independence of in-house counsel. In that case, Telstra indicated that the basis for its privilege claim was that the documents were prepared by internal legal advisers for the dominant purpose of providing legal advice. The judgment focused on two key issues: first, the circumstances in which in-house lawyers can make a valid claim of client legal privilege, and second, the need to provide evidence of the independence of in-house lawyers. Graham J set out a test for what is an appropriate degree of independence to apply to the work of an in-house lawyer, stating:

> In my opinion an in-house lawyer will lack the requisite measure of independence if his or her advice is at risk of being compromised by virtue of the nature of his employment relationship with his employer. On the other hand, if the personal loyalties, duties and interests of the in-house lawyer do not influence the professional legal advice which he gives, the requirement for independence will be satisfied.[123]

3.87 His Honour stated that the court should not start from the premise that the communications of in-house lawyers are by their very nature communications which

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120 E Kyrou, 'Under Attack: Legal Professional Privilege' (2007) 81(3) *Law Institute Journal* 33, 34.

121 *Seven Network Ltd v News Ltd* [2005] FCA 142, [5].

122 *Zemanek v Commonwealth Bank of Australia* (Unreported, Federal Court of Australia, Hill J, 2 October 1997), [4] cited in E Kyrou, 'Under Attack: Legal Professional Privilege' (2007) 81(3) *Law Institute Journal* 33, 35.

123 *Telstra Corporation Limited v Minister for Communications, Information Technology and the Arts (No 2)* [2007] FCA 1445, [35].

attract privilege in the same way that it might for documents which are 'opinions expressed by identified Senior Counsel'.[124]

3.88 Graham J held that Telstra had merely asserted that the relevant documents were privileged and not provided sufficient information to satisfy the Court of the independence of its internal legal advisers. Telstra had therefore not satisfied the Court that the documents were in fact privileged, and discovery was ordered.[125] In-house lawyers are discussed further in Chapters 8 and 9.

Practising certificate

3.89 Related to the issue of independence is whether a lawyer must hold a current practising certificate for the purpose of the privilege.[126] In the Australian Capital Territory Supreme Court case of *Vance v McCormack*, Crispin J found that privilege only attached where the lawyer concerned held a current practising certificate or had a statutory right to practise.[127] Crispin J based this finding on what he considered to be the rationale for client legal privilege,[128] being the public interest in proper representation of clients. Where a legal adviser has no right to represent a client, no privilege should attach.[129] His Honour noted that, in Australian jurisdictions, the statutory right to *practise* law generally depends on the holding of a current practising certificate.[130] In August 2005, the ACT Court of Appeal overturned this decision, finding that Crispin J had erred by applying the common law rather than the *Evidence Act* test when considering if the documents were covered by client legal privilege.[131]

3.90 In considering the definition of a lawyer under s 117 of the *Evidence Act*, the Court of Appeal found that, while holding a practising certificate is an important indicator, it is not conclusive on the issue of whether the legal advice was sufficiently independent to constitute legal advice.

> Admission to practice of itself carries with it an obligation to conform to the powers of the Court to remove or suspend a legal practitioner for conduct that the Court considers justifies such a determination. … The person remains bound to uphold the standards of conduct and to observe the duties undertaken upon admission to the roll of practitioners. The holding of a practising certificate reinforces that regime and

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124 Ibid, [36].

125 Ibid, [36].

126 S McNicol, 'Client Legal Privilege and Legal Professional Privilege: Considered, Compared and Contrasted' (1999) 18 *Australian Bar Review* 189.

127 *Vance v McCormack* (2004) 154 ACTR 12. This case concerned advice given by legal and military officers employed by the Department of Defence.

128 Crispin J determined that this case concerned an application for an order to produce documents for inspection pre-trial, so the common law applied rather than the uniform Evidence Acts.

129 *Vance v McCormack* (2004) 154 ACTR 12, [38]–[40].

130 Ibid, [28], citing, eg, *Legal Practitioners Act 1970* (ACT) s 22; *Legal Profession Act 1987* (NSW) s 25; *Legal Practice Act 1996* (Vic) s 314.

131 *Commonwealth v Vance* [2005] ACTCA 35. The ACT Court of Appeal found that *Supreme Court Rules 1937* (ACT) O 34 r 3 applied the *Evidence Act* pre-trial.

> makes it more immediately applicable but the underlying obligations subsist even if a current practising certificate is not held.[132]

3.91 The Court of Appeal cited *Australian Hospital Care v Duggan (No 2)* in support of this finding.[133] That case concerned advice given by an in-house company lawyer who had been admitted to practice and held a practising certificate in the past, but did not hold a current Victorian practising certificate. In that case, Gillard J extensively outlined the case law establishing independence as a crucial element of the features that must be present for client legal privilege to apply in respect of a confidential communication between a private sector employer and its own employee lawyer.[134]

> In my opinion there [are] sufficient dicta to support the proposition that the employee legal adviser when performing his role in a communication concerning a legal matter must act independently of any pressure from his employer and if it is established that he was not acting independently at the particular time then the privilege would not apply or if there was any doubt the court should in those circumstances look at the documents.[135]

The client

Application to corporations

3.92 Unlike the privilege against self-incrimination, client legal privilege is available for corporations as well as natural persons. This was most recently confirmed by the decision of the High Court in *Daniels*.[136]

3.93 However, there has been debate regarding the correctness of this proposition in view of the move by some members of the High Court to describe client legal privilege in human rights terms.[137] If such a rationale were accepted as a key basis for continuation of the privilege, then it becomes an important question whether corporations should remain able to claim it.[138] McNicol has argued that:

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132 Ibid, [21].

133 *Australian Hospital Care v Duggan (No 2)* [1999] VSC 131.

134 Ibid, [35]–[59]. See, eg, *Attorney-General (NT) v Kearney* (1985) 158 CLR 500 and *Waterford v Commonwealth* (1987) 163 CLR 54.

135 *Australian Hospital Care v Duggan (No 2)* [1999] VSC 131, [54]. This view was also espoused in *Australian Securities and Investments Commission v Rich* [2004] NSWSC 1089. See also Brennan J in *Waterford v Commonwealth* (1987) 163 CLR 54, 71: 'If the purpose of the privilege is to be fulfilled, the legal adviser must be competent and independent. ... Independent, in order that the personal loyalties, duties or interests of the adviser should not influence the legal advice which he gives or the fairness of his conduct of litigation on behalf of his client. If a legal adviser is incompetent to advise or to conduct litigation or if he is unable to be professionally detached in giving advice or in conducting litigation, there is an unacceptable risk that the purpose for which privilege is granted will be subverted'.

136 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

137 See discussion in Ch 2 of the 'human right' rationale for client legal privilege.

138 S McNicol, 'Implications of the Human Right Rationale for Legal Professional Privilege—The Demise of Implied Statutory Abrogation?' in P Mirfield and R Smith (eds), *Essays for Colin Tapper* (2003) 48, 49.

> If 'human' in the phrase 'human right' is defined literally as something that is enjoyed by human beings, then the privilege rule will have to be narrowed so that only human clients of lawyers can enjoy the benefits of it.[139]

3.94 In the case of the privilege against self-incrimination, the inherent strengths of a corporate entity as opposed to an individual were seen as part of the reasoning behind limiting the availability of the privilege.[140] In *Environment Protection Authority v Caltex Refining Co Pty Ltd*, Mason CJ and Toohey J took the view that:

> In general, a corporation is usually in a stronger position vis-à-vis the state than is an individual; the resources which companies possess and the advantages which they tend to enjoy, many stemming from incorporation, are much greater than those possessed and enjoyed by natural persons. The doctrine of the corporation as a separate legal entity and the complexity of many corporate structures and arrangements have made corporate crime and complex fraud one of the most difficult areas for the state to regulate effectively.[141]

3.95 This position was applied to client legal privilege by Wilcox J, in the Full Federal Court decision in *Daniels*.

> The policy considerations that influenced the High Court in *Pyneboard,* in relation to self-incrimination, are equally apposite to legal professional privilege. Conduct that involves a contravention of the *Trade Practices Act* often comprises many separate acts, some of which may be effected through lawyers. Without information about contacts between the person under investigation and that person's lawyer it may be impossible for the ACCC [Australian Competition and Consumer Commission] to see the whole picture.[142]

3.96 Alex Bruce has summarised the arguments against corporations having the right to assert the privilege, including that:

- Corporate activity is complex, carried on through layers of management and principally in documentary form.

- Often the best and the only evidence about the conduct of a corporation can be obtained from that corporation. This is especially so where any 'victim' of corporate misconduct is an 'amorphous entity such as a market'.

- Corporations are often large and powerful and better placed to initiate and defend investigation and litigation. They can do this by being better able to

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139 Ibid, 49.
140 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.
141 Ibid, 500.
142 *Australian Competition and Consumer Commission v Daniels Corporation International Pty Ltd* (2001) 128 ALR 114, [57].

conceal evidence of wrongdoing and to deploy resources to frustrate investigation and litigation.

- If corporations can employ common law privileges to resist the production of documents concerning the truth of alleged misconduct, the public interest in detecting and punishing crime, as expressed in statutes like the *Trade Practices Act 1974* (Cth) (TPA), is likely to be diminished.[143]

3.97 In *Daniels*, Kirby J noted the argument that the right to the privilege as a 'fundamental human right' should only apply to humans—and that the interests of the public may be well served in some cases by allowing these documents to be in the public realm. However, his Honour ultimately drew a distinction between the privilege against self-incrimination and client legal privilege, based on their very different historical origins.

> Occasionally, in any case, a fundamental human right is an expression of an even larger concept, namely a fundamental civil right belonging also to artificial persons such as corporations. Protection from self-incrimination rests upon different historical, legal and policy considerations almost all related to individual human beings. The entitlement to sound legal advice, immune from compulsory disclosure to investigating or prosecuting public authorities, is arguably necessary both for natural and artificial persons.[144]

3.98 Kirby J cited the comments of Advocate-General Sir Gordon Slynn in *AM & S Europe Ltd v Commission of the European Communities*, explaining the principle as applicable to both natural and legal persons.

> Whether it is described as the right of the client or the duty of the lawyer, this principle has nothing to do with the protection or privilege of the lawyer. It springs essentially from the basic need of a man in a civilised society to be able to turn to his lawyer for advice and help, and if proceedings begin, for representation; it springs no less from the advantages to a society which evolves complex law reaching into all the business affairs of persons, real and legal, that they should be able to know what they can do under the law, what is forbidden, where they must tread circumspectly, where they run risks.[145]

3.99 McNicol argues that the issue of whether corporations should be entitled to the benefit of client legal privilege highlights the importance of clarifying the rationale for the privilege.[146] If client legal privilege is based on the need for full and frank communications in order to obtain proper legal advice, then there is no reason that it should not apply to corporations as strongly as individuals. If corporations were denied

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143 A Bruce, 'The Trade Practices Act 1974 and the Demise of Legal Professional Privilege' (2002) 30 *Federal Law Review* 373, 387.

144 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 576.

145 Ibid, 576; citing *AM & S Europe Ltd v Commission of the European Communities* [1983] QB 878, 913.

146 S McNicol, 'Implications of the Human Right Rationale for Legal Professional Privilege—The Demise of Implied Statutory Abrogation?' in P Mirfield and R Smith (eds), *Essays for Colin Tapper* (2003) 48, 63.

the shield of privilege it may deter candid, detailed, written advice being given by lawyers and hamper the development of internal corporate compliance programs.

Submissions and consultations

3.100 In IP 33, the ALRC asked whether client legal privilege should apply to only natural persons and not corporations.[147]

3.101 No submissions supported this distinction. The NSW Bar Association argued that the privilege

> helps to protect and foster a fiduciary and confidential relationship which is integral to the rule of law. Citizens, whether corporate or natural, are entitled to the benefit of that relationship.[148]

3.102 This was also the view taken by ASIC;[149] and the Law Council of Australia (Law Council). The Law Council submitted that the rationale for the privilege applied equally whether the client was an individual or a corporation and noted that it was incorrect to view all corporate entities as large and well resourced.[150]

3.103 The Law Society of NSW submitted that the complexity of laws governing corporations meant that they may have an even greater need for confidential legal advice.

> In general terms, corporations rather than private citizens have a greater need for obtaining advice from lawyers as to their legal, general and ongoing obligations. It would be a strange and inconsistent result if privilege was not available to corporations in circumstances where it is recognised that the primary rationale for the existence of privilege is to enable compliance with legal obligations to be more efficiently undertaken and for the administration of justice to be better and more efficiently carried out.[151]

3.104 The Australian Government Solicitor (AGS) noted that the case for protection against self-incrimination has been seen as not as compelling for corporations as it is for natural persons, as corporations can only suffer financial detriment, rather than penal sanction. By contrast, client legal privilege is just as necessary to protect a

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147 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies,* IP 33 (2007), Question 2–3.

148 New South Wales Bar Association, *Submission LPP 41,* 5 June 2007.

149 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007.

150 Law Council of Australia, *Submission LPP 26,* 4 June 2007.

151 Law Society of New South Wales, *Submission LPP 40,* 1 June 2007. A similar view was expressed in: Australian Corporate Lawyers Association, *Submission LPP 66,* 22 June 2007; National Australia Bank Limited and others, *Submission LPP 30,* 4 June 2007; BHP Billiton Mitsubishi Alliance, *Submission LPP 21,* 1 June 2007.

corporation's effective access to legal advice and (more generally) its legal interests, as is the case with a natural person.[152]

3.105 Civil Liberties Australia (ACT) submitted that, while the compliance rationale applied equally to individuals and corporations, the injustices that may be occasioned to corporations when the privilege is abrogated will rarely be comparable to that occasioned to individuals. Therefore, when consideration is being given to the question of when it is in the public interest to abrogate the privilege, the standard applied to individuals should always be far more rigorous than that applied to corporations.[153]

ALRC's views

3.106 As outlined in Chapter 2, client legal privilege enables full and frank communication with lawyers and facilitates compliance with the law. Any characterisation of the doctrine as a right should be viewed more in terms of a right to access to a fair hearing or trial or access to legal advice, rather than a right that only can be ascribed to humans. No change to the current law in this regard is recommended.

When client legal privilege can be lost

3.107 Client legal privilege can be lost in a number of circumstances such as:

- when a party has died;
- through waiver;
- where the communication may be adduced by a criminal defendant (where there are joint clients); and
- where the communication is made in furtherance of the commission of an offence or fraud.[154]

3.108 The two major examples where client legal privilege may be lost are discussed here—namely, waiver and the fraud or crime exception.

Waiver

3.109 Under common law, waiver was traditionally imputed where the circumstances were such that it was unfair for the client to say that the privilege had not been waived.[155] What is 'unfair in the circumstances' was determined by the conduct of the

152 Australian Government Solicitor, *Submission LPP 50,* 13 June 2007.
153 Civil Liberties Australia (ACT) Inc, *Submission LPP 86,* 1 November 2007.
154 See S McNicol, *Law of Privilege* (1992), Ch 2.
155 A Ligertwood, *Australian Evidence* (4th ed, 2004), 296.

client. In 1999, the High Court in *Mann v Carnell* focused the common law test on inconsistency, rather than on fairness alone.

> 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 the maintenance of confidentiality; not some overriding principle of fairness operating at large.[156]

3.110 In *DSE (Holdings) Pty Ltd v Interan Inc*, Allsop J noted that by subordinating the notion of fairness to possible relevance in the assessment of the inconsistency between the act and the confidentiality of the communication, *Mann v Carnell* had produced an important change to the existing law.[157]

3.111 The approach in *Mann v Carnell* was restated by the Federal Court in *SQMB v Minister for Immigration and Multicultural and Ethnic Affairs*,[158] where it was found that waiver occurs 'when a party does something inconsistent with the confidentiality otherwise contained in the communication'.[159]

3.112 One of the most common examples of implied waiver is where a party raises an issue as to his or her belief or state of mind (usually in a pleading or court document or to a third party) that indicates the substance of the communication.[160] One of the ways in which waiver can be implied is where the person claiming the privilege has made his or her 'state of mind' an issue in the proceedings, and the legal advice in question is likely to have contributed to that state of mind.[161] It is not sufficient to constitute waiver merely to show that the legal advice might be relevant—it must be shown that:

> The legal advice in question was relevant to the formation of that state of mind or belief or that the advice itself in some way becomes an issue in the action.[162]

3.113 This issue has particular implications for government decision makers who may be relying on legal advice in making determinations.[163] For instance, in *Commissioner of Taxation v Rio Tinto*, Rio Tinto alleged that the Commissioner could not have had a proper basis on which to make his decision that a transaction was a dividend stripping transaction.[164] The Commissioner stated that the matters taken into consideration were found in documents over which he had claimed privilege in the matter. In considering

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156 *Mann v Carnell* (1999) 201 CLR 1, 13. See also A Ligertwood, *Australian Evidence* (4th ed, 2004), 296.

157 *DSE (Holdings) Pty Ltd v Interan Inc* (2003) 127 FCR 499, [14].

158 *SQMB v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 205 ALR 392. See also M Edelstein, 'Legal Professional Privilege' (2004) 78(11) *Law Institute Journal* 54, 57.

159 *SQMB v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 205 ALR 392, [17].

160 E Kyrou, 'Under Attack: Legal Professional Privilege' (2007) 81(3) *Law Institute Journal* 33, 35.

161 R Desiatnik, *Legal Professional Privilege in Australia* (2nd ed, 2005), 168.

162 *Southern Equities Corporation Ltd (in liq) v Arthur Anderson and Co* (1997) 70 SASR 166, 193; see R Desiatnik, *Legal Professional Privilege in Australia* (2nd ed, 2005), 168.

163 *Waterford v The Commonwealth* established the general principle that client legal privilege could be claimed by public sector decision makers: *Waterford v Commonwealth* (1987) 163 CLR 54.

164 *Commissioner of Taxation v Rio Tinto* (2006) 151 FCR 341.

the question of when privilege would be waived, the Full Federal Court found that issue waiver occurs where

> the privilege holder's conduct is inconsistent with the continued confidentiality of communication because he or she has put into issue the character or contents of the communication in pursuing a right or claim, or has created a situation where another party must reasonably do so by way of a defence.[165]

3.114 In such circumstances, the Full Federal Court found that the Commissioner had gone further than merely saying that the legal advice was relevant, he had made reference to specifically relying on the contents of the advice, and thus put the advice in issue, thereby waiving the privilege.[166]

3.115 In the recent case of *Secretary Department of Justice v Osland*, the Court of Appeal of the Supreme Court of Victoria affirmed the test as one of inconsistency and found that the circumstance and purpose of the disclosure were relevant. The court specifically rejected the idea that there was a general rule that disclosure of the conclusions of legal advice waived privilege. Maxwell P noted that the test of inconsistency

> is well capable of accommodating the notion that, in appropriate circumstances, the privilege-holder should be able to disclose publicly that it is acting on advice and what the substance of that advice is, without being at risk of having to disclose the confidential content of the advice.[167]

3.116 Maxwell P stated that the purpose for which the privilege-holder made the disclosure is highly relevant to determine inconsistency. The relevant question in *Osland* was whether the purpose for which the conclusion of the legal advice was disclosed was inconsistent with the maintenance of confidentiality in respect of the content of the advice.[168]

Fraud or crime exception

3.117 Client legal privilege does not extend to communications made in furtherance of a crime or fraud, as the law of client legal privilege should not be able to be used as a shield to cover advice that may assist in the commission of a crime.[169] Communications made for an illegal purpose, such as an abuse of statutory power, are also not covered by the privilege.[170] The fraud need not be known to the lawyer or the client, and may be that of a third party.[171]

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165 Ibid, [54]. Cited in E Kyrou, 'Under Attack: Legal Professional Privilege' (2007) 81(3) *Law Institute Journal* 33, 35.
166 *Commissioner of Taxation v Rio Tinto* (2006) 151 FCR 341, [72]–[74].
167 *Secretary Department of Justice v Osland* [2007] VSCA 96, [50].
168 Ibid, [63].
169 E Kyrou, 'Under Attack: Legal Professional Privilege' (2007) 81(3) *Law Institute Journal* 33, 104.
170 *Attorney-General (NT) v Kearney* (1985) 158 CLR 500.
171 *Capar v Police Commissioner* (1994) 34 NSWLR 715.

3.118 Over time, the fraud or crime exception has expanded to include other improper purposes. In *AWB v Cole (No 5)*, Young J stated that the term 'fraud exception' does not capture the full reach of this principle.

> The principle encompasses a wide species of fraud, criminal activity or actions taken for illegal or improper purposes and extends to 'trickery' and 'shams'. As the fraud exception is based on public policy grounds, it is sufficiently flexible to capture a range of situations where the protection of confidential communications between lawyer and client would be contrary to the public interest.[172]

3.119 Young J defined a 'sham' as 'steps which take the form of a legally effective transaction but which the parties intend should not have the apparent, or any legal consequences'.[173]

3.120 In order to prove that the exception applies, the party alleging that the communication is in furtherance of an offence must present a prima facie case to support their allegations.[174] In *Propend*, Brennan CJ held that the test was one of there being 'reasonable grounds for believing that the relevant communication was for an improper purpose'.[175] In *AWB v Cole (No 5)*, Young J found that it was not necessary to prove an improper purpose on the balance of probabilities; rather, the test was a prima facie one, in keeping with the fact that issues of client legal privilege were usually dealt with at the interlocutory stage of proceedings.[176]

3.121 There has been some question about what evidence can be used to establish a prima facie case in this regard. A key issue in *Propend* was whether evidence, that would otherwise be considered hearsay and inadmissible, could be used to show that client legal privilege should be lost on the basis of the fraud exception. The High Court was split on this issue. Whilst a majority of the court found that hearsay could be used to displace the privilege,[177] Gaudron and Kirby JJ placed different caveats on the use of hearsay evidence. Gaudron J found that it ordinarily could not be used, although if it were admissible on some other issue it could be relied on if the witness were available for cross-examination.[178] Kirby J found that hearsay evidence could be relied on, but it was insufficient on its own to displace the privilege.[179]

3.122 Desiatnik highlights the sensitivity for the judge when dealing with cases in which this exception is raised. When a court has to decide whether the fraud exception

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172 *AWB v Cole (No 5)* [2006] FCA 1234, [210].
173 Ibid, [211].
174 *O'Rourke v Darbishire* [1920] AC 581.
175 *Australian Federal Police v Propend Finance* (1997) 188 CLR 501, 514.
176 *AWB v Cole (No 5)* [2006] FCA 1234, [218].
177 Dawson, Toohey, Gaudron, and Kirby JJ. McHugh J and Brennan J were in dissent. Gummow J did not deal with this question: R Desiatnik, *Legal Professional Privilege in Australia* (2nd ed, 2005), 116.
178 *Australian Federal Police v Propend Finance* (1997) 188 CLR 501, 547.
179 Ibid, 593.

applies, it is often the case that the fraud allegedly contained in the documents is central to the entire proceedings. This means that if the trial judge expresses the view that the communication was for an improper purpose, there is a real risk that the party against whom the privilege ruling is made could seek to have that judge removed from the case on the ground of apprehended bias.[180]

3.123 In defence of the preservation of client legal privilege, it is often argued that the fraud exception prevents the privilege being used for an improper purpose. However, there are questions about how effectively the fraud exception operates in practice. Dawson J noted in *Corporate Affairs Commission of New South Wales v Yuill* (*Yuill*) that in some cases it will be very hard to determine whether a person has been fraudulent or negligent without access to the legal advice they have received.[181]

Submissions and consultations

3.124 In response to IP 33,[182] a number of submissions expressed the view that the fraud exception was not effective in stopping improper claims of client legal privilege, and that there were a number of practical difficulties for federal bodies in proving that a communication is not privileged on this basis.

3.125 For example, ASIC submitted that this exception is of limited utility and application for two reasons. First, for the exception to apply, it is not enough for the privileged communication to provide evidence of the fraud or illegality. The communication itself must be made in furtherance of the fraud or illegality. In ASIC's view the exception would be more effective if it were sufficient that the privileged communication relate to, rather than be made in furtherance of, a fraud or offence.

3.126 ASIC also argued that it is difficult to obtain the requisite prima facie evidence to support an allegation that the exception applies.[183] The Australian Competition and Consumer Commission (ACCC) stated that it remains 'difficult, if not impossible' to detect and prove an improper purpose.

> In most cases, the material that is the subject of the claim is likely to be the best material available to decide this issue, which creates a vicious cycle.[184]

3.127 However, a number of submissions argued that the current test of establishing a prima facie case was appropriate. Desiatnik disagreed with the proposition that a prima

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180 R Desiatnik, *Legal Professional Privilege in Australia* (2nd ed, 2005), 11.

181 *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319, 333.

182 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007), Question 2–1.

183 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007.

184 Australian Competition and Consumer Commission, *Submission LPP 53,* 13 June 2007. For other submissions, see Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), [3.112].

facie case would be hard to establish.[185] The Law Society of NSW argued that, in the absence of prima facie evidence, the efficacy of the claim should be accepted.[186]

3.128 The Law Council considered that the problems of identifying whether a document is subject to a valid claim for privilege are overstated.

> The Law Council notes that if fraud cannot be discerned without reference to privileged documents, then it may be that there has been no fraud. The argument also assumes that the legal advice would display the client's fraudulent purpose, and that may not be the case.[187]

ALRC's views

3.129 The fraud exception poses a significant hurdle for agencies because of the evidentiary problems of establishing even a prima facie case over a document that the agency has not seen. The ALRC was told in a number of consultations that 'you don't know what you don't know'.[188]

3.130 However, many of the difficulties expressed by federal agencies in establishing the fraud exception relate to the lack of information available when a claim of privilege is made, or to the delay in resolving contested claims. The ALRC is of the view that the procedural changes recommended in Chapter 8, which require a person claiming client legal privilege to give an investigatory body greater detail as to the nature of the claim, will assist bodies to determine whether a claim is properly made. The recommendations for a uniform process to resolve contested privilege claims should also assist in this regard.

When client legal privilege is abrogated

3.131 In *Principled Regulation* (ALRC 95), the ALRC noted that few federal statutes expressly remove the operation of client legal privilege.[189] Most federal statutes are silent on the availability of the privilege. Some statutes expressly state that the privilege does apply, for example, one statute states that privilege applies in the same way as it does to a witness in a High Court proceeding.[190] This issue is discussed in more detail in Chapter 5.

3.132 In 2002, the *Daniels* case clarified when client legal privilege could be abrogated by necessary implication. In *Yuill*, the first case to remove the privilege by

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185 R Desiatnik, *Submission LPP 24,* 1 June 2007.
186 Law Society of New South Wales, *Submission LPP 40,* 1 June 2007.
187 Law Council of Australia, *Submission LPP 26,* 4 June 2007.
188 For example, Office of the Commonwealth Director of Public Prosecutions, *Consultation LPP 24*, Canberra, 31 May 2007.
189 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), [19.9].
190 *Broadcasting Services Act 1992* (Cth) s 200(3).

implication, the High Court held that privilege was not a 'reasonable excuse' for a failure to comply with the investigatory powers under the *Companies (NSW) Code.*[191]

3.133 In *Daniels*, the High Court considered whether client legal privilege was abrogated by implication under s 155 of the TPA. The High Court found that client legal privilege was 'not merely a rule of substantive law. It is an important common law right or, perhaps more accurately an important common law immunity'.[192] As such, express words or necessary implication were required to abrogate the privilege:

> It is now well established that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect.[193]

3.134 The decisions of the High Court in *Yuill* and *Daniels* are discussed in detail in Chapter 5.

The comparative dimension

The law of the professional secret in civil law

3.135 While the doctrine of client legal privilege in its litigation arm is historically connected to the nature of adversarial court processes of the common law, a doctrine protecting the confidential communications of clients with their lawyers is not confined to the common law.

3.136 In *AM & S Europe v Commission of the European Communities* (1983) (*AM & S Europe*), the European Court of Justice had to consider whether the protection of legal confidence was a principle of European Community law. It found that, while there were differences between the applicable principles in the common law as distinct from the civil law countries, all member states afforded some protection to confidential relations between lawyer and client.[194]

3.137 The Council of the Bars and Law Societies of the European Union (CCBE)—which participated in the *AM & S Europe* litigation—has had occasion to survey and report upon the relevant doctrines several times since the 1970s.[195] In 1976, DAO

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191 *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319.

192 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 553.

193 Ibid, 553.

194 *AM & S Europe Ltd v Commission of the European Communities* [1983] 1 QB 878, 941.

195 D Edward, *The Professional Secret, Confidentiality and Legal Professional Privilege in the Nine Member States of the European Community* (1976) Council of the Bars and Law Societies of the European Community (as the Council was then called); Council of the Bars and Law Societies of the European Union, *The Professional Secret, Confidentiality and Legal Professional Privilege in Europe: An Update on the Report by DAO Edward, QC* (2003); Council of the Bars and Law Societies of the European Union, *Protection of Confidences between European Lawyer and Client* (2004); J Fish, *Regulated Legal Professionals and Professional Privilege within the European Union, the European Economic Area and Switzerland, and Certain Other European Jurisdictions* (2004) Council of the Bars and Law Societies of the European Union.

Edward QC, then Treasurer of the Faculty of Advocates in Scotland and Rapporteur-Général of the CCBE,[196] prepared a report on *The Professional Secret, Confidentiality and Legal Professional Privilege in the Nine Member States of the European Community* (the Edward Report).[197] The CCBE published an update in 2003, entitled *The Professional Secret, Confidentiality and Legal Professional Privilege in Europe*.[198] In February 2004, a further report was released, written by John Fish, Former President of the CCBE and Solicitor, Dublin, entitled *Regulated Legal Professionals and Professional Privilege within the European Union, the European Economic Area and Switzerland, and Certain Other European Jurisdictions* (the Fish Report).[199] These reports reveal the widespread applicability of a protection of information communicated in confidence by clients to their lawyers.

3.138 In the European Union (EU) the rule is broadly known as one of 'professional secrecy' or 'the law of the professional secret'. In the 1970s, the source of the protection amongst those states was the relevant Penal Code, providing that it was an offence to reveal another person's 'secret'.

> This provision of the Penal Code is the source of the lawyer's duty and, since breach of that duty is a criminal offence, the duty is not simply a professional or contractual duty, but a matter of public order.
>
> The duty of the lawyer carries with it corresponding rights, in particular (i) the right to refuse to give evidence on matters covered by the professional secret, and (ii) the right to withhold from seizure by the police and judicial authorities any document which contains information covered by the professional secret. These rights are in some cases expressly conferred by the Codes of Criminal and/or Civil Procedure.
>
> The secret thus enjoys both positive and negative protection: positive protection, in that the lawyer is bound to keep the secret and not to divulge it; negative protection, in that the courts and other authorities cannot force him to divulge it.[200]

3.139 In the EU the obligation of professional secrecy was not confined to lawyers, but extended, for example, to doctors and priests as well.[201] In some European

196 Mr Edward subsequently became President of the CCBE and then a Judge.

197 The member states considered were: France, Belgium, Luxembourg, the Netherlands, Germany, Italy, Denmark, United Kingdom and Ireland.

198 Council of the Bars and Law Societies of the European Union, *The Professional Secret, Confidentiality and Legal Professional Privilege in Europe: An Update on the Report by DAO Edward, QC* (2003).

199 J Fish, *Regulated Legal Professionals and Professional Privilege within the European Union, the European Economic Area and Switzerland, and Certain Other European Jurisdictions* (2004) Council of the Bars and Law Societies of the European Union.

200 D Edward, *The Professional Secret, Confidentiality and Legal Professional Privilege in the Nine Member States of the European Community* (1976) Council of the Bars and Law Societies of the European Community, 5–6, [2]–[4].

201 Ibid, 6, [6]. See, eg, art 226–13 of the French Criminal Code which states that the disclosure of secret information by a person entrusted with such a secret, either because of his position or profession, or because of a temporary function or mission, is punished by one year's imprisonment and a fine of €15,000.

jurisdictions, such as Germany, obligations relating to professional secrecy are also included in the law regulating the legal profession.[202]

3.140 The law of the professional secret concerns the duties and corresponding rights of the person to whom a secret has been communicated. It applies to information communicated *by the client* to the lawyer; not advice or information communicated *by the lawyer* to the client.[203] Communications *by the lawyer* may be protected through different rules and to different extents in each particular country. For example, in *AM & S Europe*, Advocate-General Slynn referred to the position in Belgium.

> In Belgium it seems that confidential communications between lawyer and client are protected and cannot be seized or used as evidence. Although the basis of the rule may have been that information confided to the lawyer must be protected, it seems … that it also covers confidential advice given to the client.[204]

3.141 In relation to France, the Advocate-General summarised the different threads in the relevant doctrine:

> In France breach of the rule of professional secrecy is a criminal offence and, although it seems that documents may be seized in some circumstances even in the hands of the lawyer, the importance of the rule is stressed in Lemaire *Les règles de la profession de l'avocat* which has been provided for the court. This rule appears to be closely linked with the right to a fair trial (les droits de la défense).
>
> The principle of the 'droits de la défense' appears to cover confidential documents passing in both directions between lawyer and client … and includes protection from seizure of legal advice given to the client before commencement of proceedings and found in his possession or in the possession of a person associated with him … There is also a wider protection for confidential letters than exists under the common law systems.[205]

The position of in-house lawyers

3.142 One key difference between the civil and common law systems is the protection of advice provided by in-house counsel. In *AM & S Europe*, the Court of Justice limited the availability of privilege to 'independent' lawyers, which did not include lawyers employed by their clients.[206]

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202 *Bundesrechtsanwaltordnung (BRAO) German Lawyers Act*, §43 a II ('The lawyer is bound by professional secrecy obligations. This duty refers to information that the lawyer becomes aware of in the course of the exercise of his profession. This does not apply to facts which are public or do not require secrecy according to their significance'): set out in Council of the Bars and Law Societies of the European Union, *The Professional Secret, Confidentiality and Legal Professional Privilege in Europe: An Update on the Report by DAO Edward, QC* (2003), 3.

203 D Edward, *The Professional Secret, Confidentiality and Legal Professional Privilege in the Nine Member States of the European Community* (1976) Council of the Bars and Law Societies of the European Community, 6, [5].

204 *AM & S Europe Ltd v Commission of the European Communities* [1983] 1 QB 878, 731.

205 Ibid, 731.

206 Ibid, [20]–[21].

3.143 In *Akzo Nobel Chemicals Ltd v Commission of European Communities*, lawyers groups sought to push the bounds of the *AM & S Europe* decision by arguing that 'independence' could be established notwithstanding that a lawyer was an employee of the client—ie, that the question was not just employment alone. However, this argument was rejected by the European Court of First Instance, which found that the requirement of independence meant that the protection could not apply where a lawyer was 'bound to his client by a relationship of employment', regardless of whether he or she was a member of a professional association or subject to professional discipline or ethics.[207]

3.144 This may be contrasted with the Australian cases noted above where the privilege may apply to in-house counsel where the requisite degree of independence can be established.

Similarities of civil law and common law

3.145 The common law doctrine of client legal privilege developed from the law of evidence and protects communications not only by the client to the lawyer, but communications in both directions—catching advice given by the lawyer as well as information communicated by the client. The nearest common law equivalent to the civilian law of the professional secret is the law of official secrets.[208]

3.146 In *AM & S Europe*, Advocate-General Slynn focused upon 'the overall picture':

> Thus the question is not whether 'legal professional privilege' (a misnomer and the right of the client) is identical with 'le secret professionnel' (the duty, inter alia, of the lawyer), which plainly it is not, but whether from various sources a concept of the protection of legal confidence emerges, eg in England from the 'privilege' and any rules as to the protection of confidentiality in France from an amalgam of 'le secret professionnel', 'les droits de la défense' and rules applicable to 'le secret des lettres confidentielles'.[209]

3.147 While there are technical differences between the civil and common law doctrines,[210] the Edward Report identified their overall similarity of purpose:

> In all the member states of the European Community, the law protects from disclosure information communicated in confidence to a lawyer by his client. The member states differ in the methods by which this protection is achieved. In some states legal duties

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207 *Akzo Nobel Chemicals Ltd v Commission of European Communities* (Unreported, Court of First Instance of the European Communities, 17 September 2007), [166]–[168].

208 D Edward, *The Professional Secret, Confidentiality and Legal Professional Privilege in the Nine Member States of the European Community* (1976) Council of the Bars and Law Societies of the European Community, 6, [7].

209 *AM & S Europe Ltd v Commission of the European Communities* [1983] 1 QB 878, 730.

210 D Edward, *The Professional Secret, Confidentiality and Legal Professional Privilege in the Nine Member States of the European Community* (1976) Council of the Bars and Law Societies of the European Community, 8.

> are expressly imposed upon the lawyer and corresponding rights are expressly conferred. In other states, protection is achieved by the creation of 'privileges' or exemptions from the ordinary rules of law. The nature and extent of these rights, duties, privileges and exemptions, vary from state to state. By whatever means protection is achieved, and whatever its nature and extent, its purpose is the same in all states.[211]

3.148 'The purpose of the law', he stated, was 'not to protect the individual lawyer or his individual client':

> The purpose is, first, to protect every person who requires the advice and assistance of a lawyer in order to vindicate his rights and liberty and, second, to ensure the fair and proper administration of justice.[212]

3.149 The Edward Report was written in 1976, at the behest of the CCBE, at a time when the protection of client confidences was considered to be under threat:

> Terrorism, tax evasion and the abuse of monopoly power have added a new dimension to the age-old problem of preserving a proper balance between the interests of the state and the liberty of the individual. Moreover, the conduct of some lawyers has led (rightly or wrongly) to the suspicion that they are abusing their legal privileges and acting as accomplices, rather than advocates or advisers, of their clients.[213]

3.150 The update to the Edward Report in 2003 noted the continuation of these trends:

> It seems generally admitted in most of the jurisdictions consulted that over the last 25 years there has been a trend towards the greater limitations in the protection of professional secrecy. This trend is mainly caused by tougher statutory developments in order to overcome corruption, drugs and terrorism.
>
> In particular, there has been a development of legislation increasing the means of coercion or the investigation methods mainly in economic, tax and financial matters such as money laundering or revenue enquiries, investigations by the competition authorities. This statutory intrusion is motivated by the search of a total transparency in the economic and financial transactions and the suspicion that lawyers may be involved in illegal matters or permit themselves to be used for illegal purposes.
>
> The most clear and significant example of this statutory development would be the European Directive on money laundering … Under the Directive, lawyers may have the obligation to breach confidentiality in an attempt to make investigations more efficient. This is clearly done at the cost of confidentiality.[214]

3.151 The circumstances attracting such comments bear a striking similarity to those that have led to this Inquiry.

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211 Ibid (footnote references omitted).

212 Ibid, 4. This is very much in line with the rationale for the privilege under the common law, as discussed in Ch 2.

213 Ibid, 24, [10].

214 Council of the Bars and Law Societies of the European Union, *The Professional Secret, Confidentiality and Legal Professional Privilege in Europe: An Update on the Report by DAO Edward, QC* (2003), 11.

3.152 By drawing attention to the functional similarity of the civilian and common law doctrines protecting the lawyer-client relationship, and making suggestions as to what should be done about perceived abuses, the CCBE, through the Edward Report, in many ways may be seen as anticipating some of the very questions posed in IP 33:

> The Community and national authorities should recognise that the rights, duties and privileges of lawyers are not simply a peculiarity of the law relating to lawyers but are specifically designed to protect the liberty and privacy of the individual, the proper administration of justice and the right to a fair trial. The Bars of the member states have a right and duty to protest against any infringement or curtailment of that protection. They stand, in this respect, between the citizen and the state. Abuse of privilege by individual lawyers acting as accomplices of their clients should be punished by professional and, if appropriate, by penal sanctions directed against them as individuals, rather than by withdrawing protection from the innocent. If abuse cannot be proved against individuals, it is not to be presumed to exist.[215]

3.153 The concerns of the CCBE were expressed in 2001, and affirmed in December 2004, as *A Statement of Position on Lawyers' Secrecy and Confidentiality and their Importance for a Democratic Society that follows the System of Justice*.[216]

3.154 The view is commonly expressed that the civil or inquisitorial system is more directly concerned with discovery of the truth—unlike the adversarial system, which uses the rules of evidence to prevent the court from considering what would be otherwise relevant material.[217] It is therefore interesting to note the direct similarities between the rules protecting client-lawyer confidentiality in both systems. This similarity supports the argument that confidentiality between lawyer and client promotes the proper administration of justice and the right to a fair trial, regardless of the system of justice employed.

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215 D Edward, *The Professional Secret, Confidentiality and Legal Professional Privilege in the Nine Member States of the European Community* (1976) Council of the Bars and Law Societies of the European Community, 25, [14].

216 Council of the Bars and Law Societies of the European Union, *Protection of Confidences between European Lawyer and Client* (2004).

217 See, eg, E Whitton, 'Justice or Money? How to Save the Law from Contempt' (1998) 5(4) *E Law — Murdoch University Electronic Journal of Law* <www.murdoch.edu.au/elaw/issues/v5n4/whitton54.html>.

4. Overview of Federal Bodies with Coercive Information-Gathering Powers

Contents

Introduction

4.1 This chapter considers the investigatory and associated functions of federal bodies that have coercive information-gathering or related powers, as well as the nature of those powers. The bodies discussed include those nominated in the Terms of Reference as well as a number of other federal agencies and departments. Where the information is available, the chapter will also address the frequency with which federal bodies use coercive powers,[1] and their policies in this regard. Some bodies, for example, have a policy of using their coercive powers only as a measure of last resort.

1 To supplement the limited information available in annual reports of federal bodies, the ALRC wrote directly to federal bodies with investigatory functions to ask for further input on the use of their coercive powers. Where non-confidential information was provided to the ALRC, this has been included in relevant chapters of this Report. The information taken from annual reports that was set out in the Discussion Paper in this Inquiry, *Client Legal Privilege and Federal Investigatory Bodies* (DP 73) has been updated to include 2006–07 annual reports, where available.

4.2 Investigatory functions may involve ascertaining factual circumstances or whether there has been a breach of the law, or gathering evidence of breaches of the law. Associated functions vary, but include functions flowing from the outcome of investigations, such as: conducting prosecutions; taking civil or administrative enforcement action; seizing the proceeds of crime; and making recommendations for reform. There are also functions that are not dependent on the outcome of investigations such as: gathering intelligence; conducting audits; and monitoring compliance with Commonwealth regulatory laws.

4.3 There are, of course, important differences in the aims and functions of federal bodies, and the subject matters with which they deal. Varying coercive powers support the different functions of federal bodies in a vast array of areas, including: criminal law enforcement; border control and immigration; competition regulation and consumer protection; financial and prudential regulation; revenue; social security; communications; health and aged care; human rights and public administration.[2]

4.4 For the purpose of performing their investigative and associated functions, federal bodies may obtain information and documents on a voluntary basis. However, they also have the ability to obtain information by using a range of coercive powers, which are found in various statutes. Appendix 1 sets out a list of the statutes containing coercive information-gathering powers exercisable by particular federal bodies. These powers include: the power to compel the production of documents, things or information; the power to compel the answering of questions; the interception of communications; and the entering of premises to search and seize records. Some federal bodies have the power to apply for an order that a witness deliver his or her passport in order to secure compliance with their coercive powers where there is reason to suspect that the witness intends to leave the country.

4.5 There are different statutory prerequisites to the exercise of coercive powers and different ranks of persons delegated to exercise those powers. Failure to comply with the requirements is often an offence, attracting punishment in the form of fines or imprisonment. Failure to comply also may trigger an agency's powers to make other orders or may lead to a court order to comply.

4.6 Many information-gathering powers can be exercised against persons who are not the target of an investigation but happen to have information or documents that may be relevant to an investigation concerning the conduct of other persons.

4.7 Not all coercive powers can be categorised as information gathering—for example, powers of arrest on their own are not 'information gathering', although arrest can be a precursor to the exercise of coercive information-gathering powers. Further, the application of client legal privilege will not typically arise in relation to certain

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2 For the purposes of this chapter, the ALRC has adopted broad categories of federal responsibility, under which it describes the functions of federal bodies. The functions performed by some federal bodies may be broader than the boundaries of a particular categorisation—or even fall within more than one category.

coercive information-gathering powers—such as powers to search for and record fingerprints, or to take samples of a person's handwriting or DNA—although the exercise of such powers may involve a consideration of the application of the privilege against self-incrimination.

Criminal law enforcement

Australian Crime Commission

4.8 The Australian Crime Commission (ACC) is a federal statutory body established under the *Australian Crime Commission Act 2002* (Cth) (ACC Act) to reduce the incidence and impact of serious and organised crime.[3] It commenced operations on 1 January 2003, replacing the National Crime Authority, the Australian Bureau of Criminal Intelligence and the Office of Strategic Crime Assessments. The ACC works in collaboration with other law enforcement agencies, federal and state.

ACC's functions

4.9 The ACC has a number of intelligence and investigatory functions, including: collecting and analysing criminal intelligence; undertaking intelligence operations; investigating matters relating to 'federally relevant criminal activity' when authorised by the ACC Board; and providing reports to the ACC Board on the outcomes of intelligence and investigations, as well as advice on national criminal intelligence priorities.[4] The ACC Board comprises members from a number of federal bodies including: the Commissioner of the Australian Federal Police; the Secretary of the Attorney-General's Department; the Chief Executive Officer (CEO) of the Australian Customs Service; the Chairperson of the Australian Securities and Investments Commission (ASIC); the Director-General of the Australian Security Intelligence Organisation (ASIO); and the head of the police force of each state and territory.[5]

ACC's powers

4.10 The ACC has a range of coercive powers, which are used where ordinary law enforcement methods are considered unlikely to be effective. The ACC Board determines the use of these powers.[6] The powers are exercisable by ACC examiners, who are independent statutory officers, appointed by the Governor-General, and support the ACC's special intelligence operations and special investigations. A special investigation is designed to disrupt and deter identified criminal groups by gathering evidence of criminal activity that may result in criminal proceedings and the seizure of

3 See *Australian Crime Commission Act 2002* (Cth) s 4 for definition of 'serious and organised crime'.
4 Ibid s 7A. See s 4 for definition of 'federally relevant criminal activity'.
5 Ibid s 7B.
6 Australian Crime Commission, *Annual Report 2005–06*, 10; *Australian Crime Commission Act 2002* (Cth) ss 4, 7C.

illegally obtained assets.[7] From 18 August 2007, a special investigation may also include an investigation into Indigenous violence or child abuse.[8]

4.11 The coercive powers include the ability to summon a person to attend an examination to give evidence under oath or affirmation and the power to require a person to produce documents or things specified in a notice.[9] Failure to comply is an indictable offence punishable with a maximum fine of $22,000 and five years' imprisonment.[10] These powers are complemented by the ACC's powers to obtain information from certain federal, state and territory agencies,[11] and to apply for warrants for the interception of communications in respect of a telecommunications service, and for surveillance device warrants for the investigation of certain federal or territory offences and certain state offences with a federal aspect.[12] The ACC also has the power to apply for the issue of a warrant, including by telephone in circumstances of urgency, and to apply for a court order requiring a person to deliver his or her passport to the ACC.[13]

4.12 During 2005–06, the ACC conducted 605 examinations and used its powers to demand documents under s 29 of the *Australian Crime Commission Act 2002* (Cth) (ACC Act) on 480 occasions.[14] In that period, the ACC reported the successful disruption of 22 criminal syndicates and 26 organised crime identities.[15] The ACC Board has approved the National Indigenous Violence and Child Abuse Intelligence Task Force and the Outlaw Motorcycle Gangs National Intelligence Task Force, a number of special intelligence operations, and the following special investigations:

- *High Risk Crime Groups*—Investigates high risk crime groups involved in significant serious and organised crime. These groups have a willingness and capacity to corrupt public officials, intimidate witnesses and use knowledge of law enforcement methods to defeat investigations.
- *Money Laundering and Tax Fraud*—Investigates serious financial crime such as large-scale money laundering, tax fraud and associated crimes, with

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7 Australian Crime Commission, *Annual Report 2005–06*, 38.

8 Amendments to the *Australian Crime Commission Act 2002* (Cth) were made by the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) sch 2.

9 *Australian Crime Commission Act 2002* (Cth) ss 28–29.

10 Ibid ss 29(3A), 30(6).

11 Ibid ss 19A, 20. The power to obtain information from a 'State agency'—which includes an agency of the Northern Territory or ACT—was inserted by the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth). This power only operates in relation to state and territory agencies where an arrangement between the federal minister and the appropriate state or territory minister is in force under the *Australian Crime Commission Act 2002* (Cth) s 20A.

12 Australian Crime Commission, *Annual Report 2005–06*, 10, 139. The application of the ACC's powers to territory offences was inserted by the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) sch 2.

13 Australian Crime Commission, *Annual Report 2005–06*, 139. See also *Australian Crime Commission Act 2002* (Cth) ss 22–24; *Telecommunications (Interception and Access) Act 1979* (Cth) s 39.

14 Australian Crime Commission, *Annual Report 2005–06*, 41, app B.

15 Ibid, 8, 39.

the aim of detecting and dismantling underlying organised criminal enterprises.

- *Wickenby Matters*—Progresses criminal investigations under Operation Wickenby into nationally significant organised tax fraud and associated money laundering activities. The ACC also provides partner agencies with assistance through the use of its coercive powers to gather strategic intelligence and support additional criminal investigations resulting from the wider Project Wickenby.
- *Established Criminal Networks (Victoria*)—investigates state offences committed by members of established criminal networks active and based in Victoria, including murder, illicit drugs, firearms and corruption.[16]

Australian Federal Police

4.13 The Australian Federal Police (AFP) is a statutory authority established under the *Australian Federal Police Act 1979* (Cth) (AFP Act). The AFP is the primary law enforcement agency responsible for enforcing federal law.[17] It also takes a lead role in the maintenance of national security.

AFP's functions

4.14 The AFP has a number of functions set out in the AFP Act including the provision of police services for the purposes of assisting Australian and foreign law enforcement agencies, intelligence agencies and government regulatory agencies, and the provision of police services in relation to: the laws of the Commonwealth, the Australian Capital Territory and the Jervis Bay Territory; the property of the Commonwealth; and the safeguarding of Commonwealth interests. It also performs functions conferred by the *Witness Protection Act 1994* (Cth) and the *Proceeds of Crime Act 2002* (Cth)[18] and provides protection to Australian High Office Holders, visiting Heads of State and selected national establishments and infrastructure.[19]

4.15 The AFP investigates federal crime, including: terrorism; illegal drug importation; tax and social security fraud; people smuggling; and the domestic and international exploitation of women and children.[20] It also investigates state crime that has a federal aspect.[21]

4.16 The Minister for Justice and Customs can direct the AFP as to the general policy to be pursued by it in performing its functions.[22] The Ministerial direction, signed on

16 Australian Crime Commission, *Australian Crime Commission Profile 'Dismantling Serious and Organised Criminal Activity'* (2007) <www.crimecommission.gov.au> at 20 August 2007.
17 Of 551 indictable matters referred to the Commonwealth Director of Public Prosecutions in 2006–07, 225 of these were referred by the AFP, representing the most indictable matters referred by any agency: Commonwealth Director of Public Prosecutions, *Annual Report 2006–07*, 72.
18 *Australian Federal Police Act 1979* (Cth) s 8.
19 Australian Federal Police, *Annual Report 2006–07*, 8.
20 Ibid, 9.
21 *Australian Federal Police Act 1979* (Cth) s 8(1)(baa).
22 Ibid s 37(2).

31 August 2004, directs the AFP to give special emphasis to a number of strategies, including:

- preventing, countering and investigating terrorism under Commonwealth legislation;
- preventing, countering and investigating transnational and multi-jurisdictional crime, illicit drug trafficking, organised people smuggling, serious fraud, 'high tech' crime involving information technology and communications, and money laundering; and
- identifying and confiscating assets involved in or derived from the above criminal activities.[23]

4.17 In 2006–07, the AFP reported that it had undertaken: major drug investigations involving attempted importations of amphetamine type substances and precursor chemicals; investigations into people smuggling, human trafficking and child-sex tourism; high profile counter-terrorism investigations and airport security; and provided key policing assistance to Pacific nations and established the Technology Enabled Crime Working Group.[24]

4.18 Agencies may request the AFP to undertake or assist them with investigations. For example, the AFP can provide operational assistance in the course of agencies' criminal investigations, including execution of search warrants pursuant to s 3E of the *Crimes Act 1914* (Cth),[25] international liaison and Interpol requests.[26] In 2006–07, the AFP provided assistance with the execution of search warrants to a number of agencies including the Australian Taxation Office (ATO), Centrelink and the Department of Immigration and Citizenship (DIAC).[27]

AFP's powers

4.19 AFP officers have a wide range of coercive powers, including powers to: arrest persons without warrant[28] or pursuant to a warrant;[29] conduct ordinary frisk and strip

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23 Australian Federal Police, *Annual Report 2006–07*, 9.

24 Ibid, 2–7.

25 *Crimes Act 1914* (Cth) s 3F sets out what a search warrant authorises. For example, it authorises the executing officer, or a constable assisting, to search for and record fingerprints and to take samples of things found at the premises for forensic purposes.

26 See Australian Federal Police, *Australian Federal Police Investigation Services* <www.afp.gov.au/services/investigation> at 20 August 2007.

27 Australian Federal Police, *Annual Report 2006–07*, 37.

28 See, eg, *Crimes Act 1914* (Cth) ss 3W, 3X, 3Y; *Environment Protections (Sea Dumping) Act 1981* (Cth) s 32; *Financial Transaction Reports Act 1988* (Cth) s 33A.

29 See, eg, *Australian Crime Commission Act 2002* (Cth) s 31; *Service and Execution of Process Act 1992* (Cth) s 82.

searches of persons;[30] and search conveyances and premises under warrant,[31] or without warrant in certain circumstances, including in emergency situations.[32] AFP members of varying ranks of seniority also have powers to:

- apply to a magistrate for permission to carry out prescribed procedures on a suspect in order to determine his or her age;[33]
- stop, question and search persons in relation to terrorist acts, and to seize terrorism related items found on a person;[34]
- obtain information or documents, for example, about terrorist acts from operators of aircraft or ships;[35] or documents from any person that are relevant to the investigation of a serious terrorism offence or a serious offence;[36]
- request specified information and documents from financial institutions under the *Proceeds of Crime Act 2002* (Cth);[37]
- apply to a magistrate for an order requiring a person to produce 'property-tracking' documents;[38]
- use, without warrant, optical surveillance devices and surveillance devices for listening to or recording words;[39]
- apply for warrants authorising the use of surveillance devices on specified premises, in or on a specified object or class of object, or in respect of the conversations, activities or location of a specified person or a person whose identity is unknown;[40]

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30 See, eg, *Crimes Act 1914* (Cth) ss 3ZE, 3ZF, 3ZH (search of arrested persons); s 3F (ordinary or frisk search where authorised by search warrant). See also *Financial Transaction Reports Act 1988* (Cth) s 33(3A); *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) ss 199, 200.

31 See, eg, *Crimes Act 1914* (Cth) pt IAA div 2; *Radiocommunications Act 1992* (Cth) pt 5.5, div 2; *Superannuation Industry (Supervision) Act 1993* (Cth) s 272; *Royal Commissions Act 1902* (Cth) s 4; *Australian Securities and Investments Commission Act 2001* (Cth) s 36; *Environment Protections (Sea Dumping) Act 1981* (Cth) s 30; *Therapeutic Goods Act 1989* (Cth) ss 49–50.

32 See, eg, *Crimes Act 1914* (Cth) pt IAA div 3; *Proceeds of Crime Act 2002* (Cth) s 251.

33 *Crimes Act 1914* (Cth) s 3ZQB.

34 Ibid pt IAA, div 3A.

35 Ibid s 3ZQM.

36 Ibid ss 3ZQN, 3ZQO.

37 *Proceeds of Crime Act 2002* (Cth) s 213. During 2005–06, 1,028 notices to financial institutions were served. See Australian Federal Police, *Annual Report 2005–06*, 43.

38 *Proceeds of Crime Act 2002* (Cth) s 202.

39 See *Surveillance Devices Act 2004* (Cth) ss 37, 38.

40 Ibid s 14. See also pt 3 in relation to emergency authorisations.

- intercept communications, without warrant, in certain circumstances,[41] and to apply for warrants to intercept communications;[42]

- take identification material from a person in lawful custody or cause such material to be taken, including prints of the person's hands, fingers, feet or toes, recordings of the person's voice, samples of the person's handwriting or photographs and video recordings of the person;[43] and

- order a person to carry out a non-intimate forensic procedure on a suspect.[44]

Australian Commission for Law Enforcement Integrity

4.20 The Australian Commission for Law Enforcement Integrity (ACLEI), established by the *Law Enforcement Integrity Commissioner Act 2006* (Cth), (LEIC Act) began operating on 30 December 2006.[45] The function of ACLEI is to assist the Integrity Commissioner in performing his or her functions.[46] ACLEI staff provide investigative, intelligence and administrative support to the Integrity Commissioner.[47]

Integrity Commissioner's functions

4.21 The core function of the Integrity Commissioner is to detect, investigate and prevent corruption within the AFP and the ACC, as well as any other Australian Government agency that has a law enforcement function and is prescribed in the regulations.[48] Other functions of the Integrity Commissioner include: referring corruption issues, where appropriate, to a law enforcement agency for investigation; managing or overseeing the investigation of corruption issues by law enforcement agencies; conducting public inquiries into corruption issues, at the request of the Minister; and collecting, analysing and disseminating intelligence in relation to corruption in law enforcement agencies.[49] The Integrity Commissioner is required to give priority to serious or systemic corruption in carrying out his or her functions.[50]

4.22 The known incidence of corruption in the AFP and the ACC is infrequent.[51] However, the (then) Attorney-General expressed the view that it is important that

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41 *Telecommunications (Interception and Access) Act 1979* (Cth) s 7(4)–(10).
42 Ibid s 39.
43 *Crimes Act 1914* (Cth) s 3ZJ.
44 Ibid pt ID, div 4, esp s 23WM.
45 Australian Government Attorney-General's Department, 'Acting Integrity Commissioner Appointed' (Press Release, 22 December 2006).
46 *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 196.
47 Revised Explanatory Memorandum, Law Enforcement Integrity Commissioner Bill 2006 (Cth), 2.
48 No other agencies have been prescribed in the regulations to date.
49 *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 15.
50 Ibid s 16.
51 Parliament of Australia—Senate Legal and Constitutional Legislation Committee, *Provisions of: Law Enforcement Integrity Commissioner Bill 2006; Law Enforcement Integrity Commissioner (Consequential Amendments) Bill 2006; Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006* (2006), [3.2]; P Ruddock (Attorney-General) and C Ellison (Minister for Justice and Customs), 'Commonwealth to Set Up Independent National Anti-Corruption Body' (Press Release, 16 June 2004).

safeguards are in place to preserve integrity in law enforcement[52] and to establish a body that would detect and investigate corruption in the AFP or ACC 'should it arise'.[53] In its first six months of operation, ACLEI investigated 18 corruption allegations against the AFP and ACC.[54]

Integrity Commissioner's powers

4.23 The Integrity Commissioner may initiate his or her own investigations, or have information about a corruption issue referred by the Minister, the head of an agency or any other person. The Integrity Commissioner has powers similar to those of Royal Commissions concerning the conduct of investigations.[55] Many of the provisions in the LEIC Act mirror the provisions of the *Royal Commissions Act 1902* (Cth) and the ACC Act. For the purposes of investigating a corruption issue the Commissioner has the power to:

- request a staff member of a law enforcement agency or a person other than a staff member, to give specified information or to produce documents or things;[56]
- summon a person to attend a hearing to give sworn evidence or to produce documents or things, overriding the privilege against self-incrimination;[57] and
- enter places occupied by law enforcement agencies without a search warrant and inspect and copy any documents relevant to the investigation, and in certain circumstances, seize those documents.[58]

4.24 The Integrity Commissioner also can apply for a court order that a person deliver up his or her passport if there is reason to suspect that the person—having received a summons to attend a hearing or having appeared at a hearing—intends to leave Australia and there are reasonable grounds to believe that the person may be able to give evidence or produce documents or things relevant to an investigation.[59]

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52 Australian Government Attorney-General's Department, 'Acting Integrity Commissioner Appointed' (Press Release, 22 December 2006). In Australian Law Reform Commission, *Integrity: But Not By Trust Alone—AFP & NCA Complaints and Disciplinary Systems*, ALRC 82 (1996), Rec 6, the ALRC recommended that a new agency to be known as the National Integrity and Investigations Commission should be established to investigate, or supervise the investigation of, complaints against the AFP and the (then) National Crime Authority.

53 Parliament of Australia—Senate Legal and Constitutional Legislation Committee, *Provisions of: Law Enforcement Integrity Commissioner Bill 2006; Law Enforcement Integrity Commissioner (Consequential Amendments) Bill 2006; Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006* (2006), [3.2]; P Ruddock (Attorney-General) and C Ellison (Minister for Justice and Customs), 'Commonwealth to Set Up Independent National Anti-Corruption Body' (Press Release, 16 June 2004).

54 C Stewart, 'More Bite for Police Watchdog', *The Australian* (online), 13 July 2007, <www.theaustralian.com.au>.

55 Revised Explanatory Memorandum, Law Enforcement Integrity Commissioner Bill 2006 (Cth), 2.

56 *Law Enforcement Integrity Commissioner Act 2006* (Cth) ss 75, 76.

57 Ibid ss 83, 84.

58 Ibid s 105.

59 Ibid s 97.

4.25 Authorised officers of ACLEI, including the Integrity Commissioner, also have the same powers of arrest as a police constable[60] and are able to apply for and execute warrants to search premises and persons for the purposes of investigating a corruption issue.[61] The LEIC Act sets out the scope of the powers to search.[62] For example, the power to search premises includes the power to take fingerprints and samples of things found at the premises for forensic purposes, as well as the power to take photographs or video recordings of things on the premises.[63] The power to search persons extends to searching any aircraft, vehicle or vessel that the person had operated or occupied within 24 hours before the search began, for things specified in the warrant.[64] Authorised officers also have the power to apply for telephone intercept warrants and warrants authorising the use of surveillance devices.[65]

4.26 The Acting Integrity Commissioner advised the ALRC that during the first six months of operation he only once used the coercive information-gathering powers conferred by the LEIC Act, and summonses were issued to a number of persons to provide information in connection with an investigation.[66] Powers in relation to telephone intercept warrants and surveillance devices were not used. The Commissioner expressed the opinion that the various coercive information-gathering powers are an 'indispensable investigative tool available to ACLEI'.[67] The Senate Legal and Constitutional Committee supported the use of coercive powers to detect corruption,

> particularly in light of the fact that ACLEI will be required to investigate officers in law enforcement agencies who are experienced in investigative practices and, by implication, the ways to avoid detection.[68]

4.27 The LEIC Act contains a number of offence provisions relating to the failure to comply with a request by the Integrity Commissioner, or a failure to comply with a confidentiality direction, and conduct in the nature of contempt.[69]

4.28 The Integrity Commissioner is required to report his or her findings at the conclusion of an investigation, subject to provisions in the LEIC Act, which ensure the

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60 Ibid s 139.
61 Ibid ss 108, 109, 111 (warrants by telephone, fax, email).
62 See, eg, Ibid ss 112, 113, 121.
63 Ibid ss 112(b), 121(1).
64 Ibid s 113.
65 *Telecommunications (Interception and Access) Act 1979* (Cth) s 39; *Surveillance Devices Act 2004* (Cth) ss 6, 14. For discussion of these powers, see Parliament of Australia—Senate Legal and Constitutional Legislation Committee, *Provisions of: Law Enforcement Integrity Commissioner Bill 2006; Law Enforcement Integrity Commissioner (Consequential Amendments) Bill 2006; Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006* (2006), [3.54].
66 Australian Commission for Law Enforcement Integrity, *Submission LPP 69*, 20 July 2007.
67 Ibid.
68 Parliament of Australia—Senate Legal and Constitutional Legislation Committee, *Provisions of: Law Enforcement Integrity Commissioner Bill 2006; Law Enforcement Integrity Commissioner (Consequential Amendments) Bill 2006; Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006* (2006), [3.60].
69 See, eg, *Law Enforcement Integrity Commissioner Act 2006* (Cth) ss 78, 90, 94.

confidentiality of protected information. Where there is a corruption issue within ACLEI, the Minister may authorise a special investigator to conduct an external special investigation into that issue.[70]

Prosecutions

Office of the Commonwealth Director of Public Prosecutions

4.29 The Office of the Commonwealth Director of Public Prosecutions (CDPP) is an independent prosecuting agency established under the *Director of Public Prosecutions Act 1983* (Cth) (DPP Act), which operates under the control of the Director. The DPP Act ensures the separation of the investigative and prosecutorial functions in the federal criminal justice system. The CDPP does not have investigatory functions or powers—its main functions are to prosecute offences against federal law and to initiate court proceedings in order to confiscate the proceeds of federal crime.[71] It relies on other investigatory agencies to refer briefs of evidence for consideration of prosecution action.[72]

4.30 The CDPP regularly provides advice and assistance to federal investigators and works closely with them, often during the investigatory stage.[73] The decision whether to investigate a particular matter and refer that matter to the CDPP is a matter for each investigative agency.[74] The CDPP considers briefs of evidence referred by a wide range of investigative agencies and departments and decides whether to pursue criminal charges, and, if so, which charges should be laid in light of the available evidence.

4.31 During 2006–07, the CDPP received referrals from 32 Australian Government agencies—including the Australian Fisheries Management Authority, the AFP, ASIC, the ACC, the Australian Taxation Office and Centrelink—as well as a number of state and territory agencies.[75] Of any agency, Centrelink refers the largest number of briefs to the CDPP.[76]

4.32 The main offences prosecuted by the CDPP involve drug importation and money laundering, corporations law offences, fraud on the Commonwealth—including tax and social security fraud—people smuggling, people trafficking—including sexual servitude and sexual slavery—terrorism, and a range of regulatory offences.[77]

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70 See Ibid pt 12, div 4.

71 However, under the *Proceeds of Crime Act 2002* (Cth) ch 3, the CDPP is able to ask questions during an examination undertaken by an approved examiner. There were 50 compulsory examinations under the Act during 2006–07: Commonwealth Director of Public Prosecutions, *Annual Report 2006–07*, 79.

72 Commonwealth Director of Public Prosecutions, *Submission LPP 61*, 12 June 2007.

73 Ibid; Commonwealth Director of Public Prosecutions, *Annual Report 2006–07*, 2.

74 See Commonwealth Director of Public Prosecutions, *The Office of the Commonwealth Director of Public Prosecutions* <www.cdpp.gov.au/AboutUs/TheOffice/> at 20 August 2007.

75 Commonwealth Director of Public Prosecutions, *Annual Report 2006–07*, 72, Table 11.

76 Ibid, 13.

77 Ibid, 71.

4.33 Decisions to prosecute are made in accordance with the Prosecution Policy of the Commonwealth, which sets out a two-stage test that must be satisfied. This test is that:

- there must be sufficient evidence to prosecute the case, which requires not just that there be a prima facie case but that there also be reasonable prospects of conviction; and

- it must be evident from the facts of the case, and all the surrounding circumstances, that the prosecution would be in the public interest.[78]

4.34 Other functions of the CDPP include:

- to conduct committal proceedings and summary prosecutions for offences against state law where a Commonwealth officer is the informant;

- to assist a coroner in inquests and inquiries conducted under the laws of the Commonwealth;

- to appear in proceedings under the *Extradition Act 1988* (Cth) and the *Mutual Assistance in Criminal Matters Act 1987* (Cth); and

- in respect of relevant matters, to take civil remedies on behalf and in the name of the Commonwealth in connection with the recovery of tax.[79]

Competition laws and consumer protection

Australian Competition and Consumer Commission

4.35 The Australian Competition and Consumer Commission (ACCC) is an independent statutory authority, established in 1995 to administer the *Trade Practices Act 1974* (Cth) (TPA) and other Acts.[80] Its primary responsibility is to ensure that individuals and businesses comply with Commonwealth fair trading, competition and consumer protection laws.[81] The ACCC promotes effective competition and informed markets—for example, by preventing price fixing; encouraging fair trading; protecting consumers; and regulating infrastructure service markets and other markets where

78 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* <www.cdpp.gov.au/Prosecutions/Policy/> at 20 August 2007.

79 See *Director of Public Prosecutions Act 1983* (Cth) s 6 for a full list of functions. See also Commonwealth Director of Public Prosecutions, *The Office of the Commonwealth Director of Public Prosecutions* <www.cdpp.gov.au/AboutUs/TheOffice/> at 20 August 2007.

80 The predecessors of the ACCC were the Trade Practices Commission and the Prices Surveillance Authority.

81 Australian Competition and Consumer Commission, *Annual Report 2005–06*, 14.

competition is restricted, including the electricity, gas, telecommunications and transport sectors.[82]

4.36 The ACCC's role in relation to fair trading and consumer protection is complemented by that of the state and territory consumer affairs agencies which administer the mirror legislation of their jurisdictions, and the Competition and Consumer Policy Division of the Commonwealth Treasury.[83]

ACCC's functions

4.37 The scope and nature of the ACCC's functions vary significantly across the various parts of the TPA.[84] However, undertaking enforcement action has been described as the 'cornerstone' of the agency.[85] The ACCC is responsible for enforcing certain prohibitions in the TPA, such as: certain anti-competitive conduct; unconscionable conduct; unfair consumer practices and price exploitation conduct. The ACCC detects possible contraventions of the TPA through a variety of means including: complaints; observation of marketplace conduct; information from governments; and proactive market inquiries.[86] To enforce the provisions of the TPA, the ACCC can seek a number of remedies, including: declarations of contraventions; injunctions; probation orders; damages; enforceable undertakings; adverse publicity orders; and pecuniary penalties.[87]

4.38 The ACCC has identified the detection and prosecution of cartels as a major priority,[88] stating that:

> Significant, difficult or complex matters such as cartels, require a recognition that enforcement activities will involve complex investigations and the most effective application of our investigative and legal resources.[89]

ACCC's powers

4.39 The ACCC has a number of coercive information-gathering powers available.[90] Some of these powers have not been used or have been used infrequently.[91] The ACCC

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82 Ibid, 14–16, 19.

83 Australian Competition and Consumer Commission, *What We Do* <www.accc.gov.au/conten/index.phtml /itemId/54137/fromItemId/3744> at 20 August 2007.

84 Australian Competition and Consumer Commission, *Collection and Use of Information* (2000), 2.

85 Australian Competition and Consumer Commission, *Annual Report 2005–06*, 3.

86 Australian Competition and Consumer Commission, *Enforcement Priorities* <www.accc.gov.au/content/ index.phtml/itemId/344494> at 20 August 2007.

87 Australian Competition and Consumer Commission, *Annual Report 2005–06*, 17.

88 Ibid, 26.

89 Ibid, 5.

90 See, eg, *Trade Practices Act 1974* (Cth) ss 65Q(1), 95S, 95ZK, 151BK(5), 155. The ACCC also has information-gathering powers relating to the telecommunications access regime under the *Trade Practices Act 1974* (Cth): see ss 151BU, 152BT, 152CBB.

91 The powers under ss 65Q(1), 95S and 151BK(5) do not appear to have been used. Section 95K was inserted in 2003 and since then has been used by the ACCC only once, at the end of 2006, to obtain information for monitoring purposes. In 2006, two requests for information were issued under s 152BT and three requests under s 152CBB: Australian Competition and Consumer Commission, *Submission*

generally prefers to obtain its information through cooperation,[92] because this is 'more efficient, less time-consuming and more flexible than the alternative practice of obtaining information by using its coercive powers'.[93] However, there are various reasons why the ACCC will choose to use its coercive powers, including where voluntary disclosure is not forthcoming, or because the use of powers will allow sanctions to be imposed for non-compliance.[94]

4.40 Section 155 of the TPA is the ACCC's most widely used coercive information-gathering power,[95] although the decision to issue a s 155 notice is not taken lightly.[96]

> The main focus in using s 155 notices is upon corporations. Where a notice is issued to a corporation, commonly notices are also issued to one or more employees of the corporation who are considered to be directly involved in the conduct in question. Issuing notices to a corporation's advisers and related parties is less frequent.[97]

4.41 Prior to issuing a notice, the ACCC will consider whether the information is otherwise available, including whether it would be provided voluntarily.[98] A s 155 notice can be issued in certain specified circumstances, including where the ACCC has reason to believe that a person is capable of furnishing information, giving evidence or producing documents relevant to a contravention of the TPA.[99] A s 155 notice gives the ACCC power to require a person to provide information, produce documents, answer questions, and in some circumstances, to enter premises and inspect or copy documents.

4.42 In 2005–06, the ACCC reported that it had issued 347 notices under its powers in s 155 to compulsorily acquire information. These consisted of 124 notices to provide information in writing; 135 notices to provide documents; and 88 notices to appear in person. No authorities were issued to enter premises and inspect documents.[100] The ACCC has also reported that its compulsory evidence-gathering powers are being used more widely than just for enforcement purposes, including in mergers investigations and adjudication processes.[101]

LPP 53, 13 June 2007; Australian Competition and Consumer Commission, *Submission LPP 2*, 14 March 2007.

92 Australian Competition and Consumer Commission, *Section 155 of the Trade Practices Act: Information-Gathering Powers of the Australian Competition and Consumer Commission in Relation to its Enforcement Function*, 1 October 2000, 3.

93 Australian Competition and Consumer Commission, *Collection and Use of Information* (2000), 6.

94 Ibid, 6.

95 Australian Competition and Consumer Commission, *Section 155 of the Trade Practices Act: Information-Gathering Powers of the Australian Competition and Consumer Commission in Relation to its Enforcement Function*, 1 October 2000, 1.

96 Ibid, 6.

97 Australian Competition and Consumer Commission, *Submission LPP 2*, 14 March 2007.

98 Australian Competition and Consumer Commission, *Section 155 of the Trade Practices Act: Information-Gathering Powers of the Australian Competition and Consumer Commission in Relation to its Enforcement Function*, 1 October 2000, 6.

99 *Trade Practices Act 1974* (Cth) s 155(1).

100 Australian Competition and Consumer Commission, *Annual Report 2005–06*, 43.

101 Ibid, 5.

4.43 In January 2007, the power to enter premises and inspect documents was repealed from s 155(2) of the TPA, and enacted in a new form in Part XID. The Part enables authorised ACCC officers to enter premises in particular circumstances, either with consent of the occupier or in accordance with a search warrant. The search warrant powers in Part XID have not as yet been used.[102]

Financial markets

Australian Securities and Investments Commission

4.44 ASIC is an independent federal body that regulates companies and financial services and promotes investor, creditor and consumer protection under the *Australian Securities and Investments Act 2001* (Cth) (ASIC Act), the *Corporations Act 2001* (Cth), and various other statutes, including those relating to superannuation and insurance.[103]

ASIC's functions

4.45 The ASIC Act sets out the objectives and functions of the agency. Its objectives include: maintaining and improving the performance of the financial system; promoting the confident and informed participation of investors and consumers in the financial sector; and taking action to enforce and give effect to the laws that confer it with functions and powers.[104] Its functions include investigatory functions conferred on it by the legislation that it administers, as well as monitoring and promoting market integrity in relation to the financial and payments systems.[105]

4.46 ASIC may commence an investigation where it suspects that there may have been a contravention of the corporations law. It can also commence an investigation where it suspects a contravention of a law that concerns the management or affairs of a body corporate or managed investment scheme; or involves fraud or dishonesty and relates to a body corporate, managed investment scheme or financial products.[106] In addition, the Minister may direct ASIC to investigate a matter, where he or she is of the opinion that an investigation is in the public interest.[107]

4.47 In 2005–06, ASIC reported that it had concluded enforcement proceedings against a record 352 people or companies and managed a number of high profile and challenging investigations. These included investigations relating to HIH Insurance,

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102 Australian Competition and Consumer Commission, *Submission LPP 53*, 13 June 2007.

103 See *Insurance Contracts Act 1984* (Cth); *Superannuation (Resolution of Complaints) Act 1993* (Cth); *Life Insurance Act 1995* (Cth); *Retirement Savings Account Act 1997* (Cth); *Superannuation Industry (Supervision) Act 1993* (Cth); *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003* (Cth).

104 *Australian Securities and Investments Commission Act 2001* (Cth) s 1(2). Enforcement action can be in the nature of criminal, civil or administrative proceedings.

105 Ibid ss 11, 12A.

106 See Ibid s 13(1). ASIC may also commence an investigation where it has reason to suspect unacceptable circumstances or a contravention as referred to in s 13(2), (6) respectively.

107 Ibid s 14.

the Westpoint group, the National Australia Bank foreign currency traders, James Hardie, and the cross-agency tax-related investigation, 'Project Wickenby'.[108] In 2006–07, the CDPP reported that, on referral from ASIC, it dealt with 34 defendants on summary charges and 37 defendants on indictable charges.[109]

ASIC's powers

4.48 ASIC has a number of coercive information-gathering powers. These include the power to:

- require a person to attend an examination to answer questions on oath or affirmation and to give all reasonable assistance in connection with an investigation;[110]
- inspect books;[111]
- require the production of books, records or information;[112]
- enter premises and inspect, take extracts from, and copy, records;[113] and
- require a person to give all reasonable assistance in connection with a prosecution—which may involve answering questions, explaining documents and diligently searching for and producing documents.[114]

4.49 Some of ASIC's information-gathering powers that require the production of books and documents can be exercised as part of a general monitoring of a company's affairs. ASIC can issue such notices 'for the purposes of ensuring compliance with the corporations legislation' as well as in the course of an investigation with a view to taking enforcement action.[115]

4.50 A notice to produce documents under s 33 of the ASIC Act requires a person to produce books in that person's possession. The *Corporations Act* defines 'possession'

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108 Australian Securities and Investments Commission, *Annual Report 2005–06*, 3, 4, 18.

109 Commonwealth Director of Public Prosecutions, *Annual Report 2006–07*, 72, Table 11.

110 *Australian Securities and Investments Commission Act 2001* (Cth) s 19. During the financial year 2005–2006, ASIC issued 596 notices under s 19: see Australian Securities and Investments Commission, *Submission LPP 5*, 29 March 2007.

111 *Australian Securities and Investments Commission Act 2001* (Cth) s 29.

112 See, eg, Ibid ss 28, 30–33, 41; *Superannuation Industry (Supervision) Act 1993* (Cth) ss 254(2), 269; *Life Insurance Act 1995* (Cth) ss 132, 141. During the financial year 2005–06, ASIC served 1950 notices under s 30 and 1327 notices under s 33 of the ASIC Act: Australian Securities and Investments Commission, *Submission LPP 5*, 29 March 2007.

113 See, eg, *Retirement Savings Account Act 1997* (Cth) ss 94, 99; *Superannuation Industry (Supervision) Act 1993* (Cth) ss 256, 268.

114 *Australian Securities and Investments Commission Act 2001* (Cth) s 49; *Re ABM Pastoral Co Pty Ltd* (1978) 3 ACLR 239. See also *Corporations Act 2001* (Cth) s 1317 (requirement to give reasonable assistance concerning a declaration of contravention, pecuniary penalty order or criminal proceedings).

115 *Australian Securities and Investments Commission Act 2001* (Cth) s 28.

to include what is in a person's custody or control.[116] Documents held by a person's solicitor are within that person's control because the person has a legal entitlement to require them to be produced.[117] Therefore, a notice issued under this provision can require production of documents held by a person's solicitor on behalf of that person.[118]

4.51 A failure to comply with a notice requiring attendance at an examination or the production of books under the ASIC Act carries a maximum penalty of $11,000 or imprisonment for two years or both.[119] In certain circumstances, ASIC officers can apply for a warrant to seize books not produced pursuant to a notice.[120] Further, where ASIC is of the view that information about the affairs of a body corporate or financial products needs to be found for the purposes of the exercise of ASIC's powers, but that information cannot be found because a person has failed to comply with a coercive information-gathering power, ASIC may make orders in relation to the securities of a body corporate or financial products generally. For example, ASIC may make orders restraining a specific person from disposing of, or acquiring, any interest in specified financial products or specified securities of a body corporate.[121]

4.52 ASIC has the ability to obtain documents voluntarily—but sometimes organisations and persons prefer to have compulsory powers exercised against them. One reason for this is that the ASIC Act specifically provides that a person who produces documents in response to a notice issued under Part 3 Division 3 of the ASIC Act is protected against liability for breach of the duty of confidentiality.[122] Also, where a person is a friend, associate, employer or work colleague of a person suspected to be under investigation, he or she may not wish to be seen to be volunteering information relevant to that investigation to ASIC.

Australian Prudential Regulation Authority

4.53 The Australian Prudential Regulation Authority (APRA) is the prudential regulator of the financial services industry. It oversees credit unions, banks, building societies, life and general insurance companies, friendly societies and most members of the superannuation industry.[123] APRA was established in 1998 under the *Australian Prudential Regulation Authority Act 1998* (Cth) (APRA Act) following recommendations from the Wallis Inquiry that a single prudential regulator be set up

116 *Corporations Act 2001* (Cth) s 86.
117 *Federal Commissioner of Taxation v Australia and New Zealand Banking Group Ltd* (1979) 143 CLR 499; *Australian Securities Commission v Dalleagles Pty Ltd* (1992) 36 FCR 350.
118 A Black, 'Representation of Clients in Investigations by the Australian Securities & Investments Commission' (2005) (June–August) *Commercial Law Quarterly* 16, 17.
119 *Australian Securities and Investments Commission Act 2001* (Cth) s 63.
120 Ibid s 35.
121 Ibid ss 72–73.
122 Ibid s 92.
123 Australian Prudential Regulation Authority, *About APRA Home* <www.apra.gov.au/aboutApra/> at 23 August 2007.

for the financial services sector.[124] It brought together the prudential supervisory responsibilities of 11 separate agencies.[125]

APRA's functions

4.54 The APRA Act provides that the purpose of APRA is to

> regulate bodies in accordance with other laws of the Commonwealth that provide for prudential regulation or for retirement income standards, and for developing the administrative practices and procedures to be applied in performing that regulatory role.[126]

4.55 APRA's stated mission is

> to establish and enforce prudential standards and practices designed to ensure that, under all reasonable circumstances, financial promises made by institutions [it] supervise[s] are met within a stable, efficient and competitive financial system.[127]

4.56 APRA's functions are those conferred under the APRA Act, and various other laws such as the *Banking Act 1959* (Cth) and the *Superannuation Industry (Supervision) Act 1993* (Cth) that relate to specific industry sectors.[128] Those functions include supervising, monitoring and investigating certain participants in the financial services industry. In performing its functions and exercising its powers, APRA is directed to 'balance the objectives of financial safety and efficiency, competition, contestability and competitive neutrality'.[129]

4.57 APRA has a number of investigatory functions. For example, it can:

- investigate, in certain circumstances, the affairs of an authorised deposit institution;[130]
- appoint a person to investigate and report on prudential matters in relation to certain body corporates if it is satisfied that such a report is necessary; [131]
- investigate designated security trust funds[132] and, in certain circumstances, a body corporate that is a general insurer or an authorised non-operating holding

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124 Financial System Inquiry Committee, *Financial System Inquiry Final Report* (1997).
125 Parliament of Australia—House of Representatives Standing Committee on Economics Finance and Public Administration, *Review of the Australian Prudential Regulation Authority: Who Will Guard the Guardians?* (2000), 5.
126 *Australian Prudential Regulation Authority Act 1998* (Cth) s 8(1).
127 Australian Prudential Regulation Authority, *Annual Report 2006–07*, 1.
128 *Australian Prudential Regulation Authority Act 1998* (Cth) s 9.
129 Ibid s 8(2).
130 *Banking Act 1959* (Cth) ss 13, 13A.
131 See Ibid s 61.
132 *Insurance Act 1973* (Cth) s 79.

company, including where it suspects that the body corporate has contravened a provision of the *Insurance Act 1973* (Cth);[133]

- investigate the life insurance business of a life company or an associated company;[134]

- investigate the affairs of a retirement savings account provider if it appears that there may have been a contravention of the *Retirement Savings Account Act 1997* (Cth);[135] and

- investigate the affairs of a superannuation entity if it appears that there may have been a contravention of the *Superannuation Industry (Supervision) Act 1993* (Cth) in relation to the superannuation entity or the financial position of the entity may be unsatisfactory.[136]

4.58 In 2006–07, APRA reported that eight investigations were in progress, including some carrying on from previous years.[137] Investigations conducted by APRA in 2006–07 included the conclusion of the investigation into the marketing and promotion of complex financial reinsurance products by General Reinsurance Australia Limited.[138]

Approach to enforcement

4.59 APRA takes enforcement action, when required, to protect the interests of depositors, policyholders and superannuation fund members. However, such action is the exception, rather than the rule, with APRA having expressed a preference to 'work cooperatively to resolve issues that are likely to impinge on the ability of an institution to meet its financial promises'.[139] About 7% of APRA's staffing resources are devoted to enforcement activity.[140]

APRA's powers

4.60 APRA has a number of coercive information-gathering powers that it can use for its investigatory or monitoring functions. These powers enable it to: require the production of information, books, accounts and documents; enter premises to inspect, copy and take books; and require persons to provide assistance or answer questions.[141]

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133 Ibid s 52.
134 *Life Insurance Act 1995* (Cth) ss 137–138.
135 *Retirement Savings Account Act 1997* (Cth) s 95.
136 *Superannuation Industry (Supervision) Act 1993* (Cth) s 263.
137 Australian Prudential Regulation Authority, *Annual Report 2006–07*, 21.
138 Ibid, 19.
139 Ibid, 19.
140 Ibid, 18.
141 See, eg, *Banking Act 1959* (Cth) ss 13, 16B, 61–62; *Insurance Act 1973* (Cth) ss 49, 54, 55, 81; *Life Insurance Act 1995* (Cth) ss 131–133, 140–143; *Superannuation Industry (Supervision) Act 1993* (Cth) ss 254(2), 255–256, 264(2), 268–272. Additional powers to enter premises under warrant and to require production of information in relation to an investigation of unauthorised insurance are proposed by the Financial Sector Legislation Amendment (Discretionary Mutual Funds and Direct Offshore Foreign Insurers) Bill 2007 (Cth) sch 2, item 12, which, if passed, would add a new pt VA to the *Insurance Act 1973* (Cth).

Sometimes the powers can be exercised 'for the purposes' of the relevant Act—which means that they can be exercised for monitoring purposes in the absence of an investigation.[142] APRA uses these powers as part of its general supervisory processes, and does not record the frequency of use of such powers.[143]

4.61 In other cases, the powers can be exercised only for the purposes of an investigation.[144] In some instances, a power can be exercised by APRA either for the purposes of an investigation or for monitoring purposes.[145] APRA has indicated that it utilises its coercive powers 'fairly infrequently'.[146]

Australian Transaction Reports and Analysis Centre

4.62 The Australian Transaction Reports and Analysis Centre (AUSTRAC) is Australia's anti-money laundering regulator and specialist financial intelligence unit. Counter-terrorism financing is also now included in the scope of AUSTRAC's work. AUSTRAC was established under the *Financial Transaction Reports Act 1988* (Cth) (FTR Act) and continues in existence under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (AML/CTF Act).[147]

AUSTRAC's functions

4.63 AUSTRAC's mission is to 'make a valued contribution towards a financial environment hostile to money laundering, major crime and tax evasion'.[148] In its regulatory role, AUSTRAC oversees compliance with the reporting requirements under the FTR Act by a wide range of cash dealers, financial service providers, and the gambling industry. Under the FTR Act, cash dealers are required to report 'suspect transactions' and 'significant cash transactions' to AUSTRAC.[149] In its intelligence role, AUSTRAC collects, analyses and disseminates financial intelligence to a range of Australian law enforcement, revenue, national security, and social justice agencies, as well as a number of overseas financial intelligence units.[150] AUSTRAC's functions, although not investigatory, assist its partner agencies in the investigation and prosecution of criminal and terrorist enterprises.[151] The data contained in financial transaction reports may indicate illegal activity, assisting partner agencies to combat major crimes, including financing of terrorism and tax evasion.[152]

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142 See, eg, *Superannuation Industry (Supervision) Act 1993* (Cth) ss 254(2), 255.
143 Australian Prudential Regulation Authority, *Submission LPP 74*, 6 July 2007.
144 See, eg, *Superannuation Industry (Supervision) Act 1993* (Cth) ss 269–70.
145 See, eg, Ibid s 255.
146 Australian Prudential Regulation Authority, *Submission LPP 74*, 6 July 2007.
147 See *Financial Transaction Reports Act 1988* (Cth) s 3, definition of 'AUSTRAC'; *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 209.
148 Australian Transaction Reports and Analysis Centre, *Annual Report 2006–07*, 16.
149 See *Financial Transaction Reports Act 1988* (Cth) ss 7, 16.
150 Australian Transaction Reports and Analysis Centre, *Annual Report 2006–07*, 16.
151 Ibid, 16.
152 Ibid, 16.

4.64 The function of AUSTRAC is to assist its CEO in the performance of his or her functions,[153] including to:

- retain, compile, analyse and disseminate eligible collected information, including FTR information;
- provide advice and assistance, in relation to AUSTRAC information, to the persons and agencies entitled to access; and
- advise and assist reporting entities in relation to their obligations under the AML/CTF Act, and to promote compliance with that Act.[154]

AUSTRAC's powers

4.65 Under the FTR Act, authorised officers of AUSTRAC have powers to access the premises of cash dealers and solicitors; and to inspect, copy and take extracts of certain records and systems kept at those premises.[155] Those powers are used to address systemic non-compliance.[156] Failure to comply with a notice under s 27E(3) of the Act is an offence, carrying a maximum penalty of two years' imprisonment.[157] Under the AML/CTF Act, authorised officers of AUSTRAC have powers to apply for a monitoring warrant[158] and to enter premises by consent or under a monitoring warrant;[159] as well as a range of monitoring powers, including to:

- search premises for relevant things or compliance records;
- inspect, copy and take extracts of relevant documents;[160] and
- ask questions of the occupier of the premises or of any person on the premises, and require those persons to produce documents.[161]

4.66 Where an authorised officer is on premises under a monitoring warrant a person who breaches a requirement to answer any questions or produce any documents relating to the operation of the Act commits an offence, punishable on conviction by six months' imprisonment or a fine of $3,300 or both.[162] Authorised officers of AUSTRAC also have general powers to obtain information and documents[163] and to

153 *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 210.
154 Ibid s 212. See also functions under *Financial Transaction Reports Act 1988* (Cth) s 38.
155 *Financial Transaction Reports Act 1988* (Cth) ss 27C–27E.
156 Australian Transaction Reports and Analysis Centre, *Annual Report 2006–07*, 17.
157 *Financial Transaction Reports Act 1988* (Cth) s 28.
158 *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 159.
159 Ibid s 147.
160 Ibid s 148.
161 Ibid s 150.
162 Ibid s 150.
163 Ibid s 167.

issue notices to reporting entities to produce documents.[164] Failure to comply with these requirements is an offence.[165] The AUSTRAC CEO may require a reporting entity to provide further information or produce documents, and civil penalties may apply to a failure to comply with the request.[166]

4.67 AUSTRAC indicated to this Inquiry that it has enhanced its regulatory capacity and supervision of the industry in recent years.[167] Between 1 January 2000 and 31 December 2004, AUSTRAC completed 225 inspection audits and 25 joint studies visits,[168] with written notices to access business premises usually issued under s 27E of the FTR Act on these occasions. From 1 October 2005 to 1 June 2007, AUSTRAC exercised its coercive information-gathering powers under the FTR Act to undertake 92 audit/inspection visits, and a further 20 visits were planned for June 2007. As at 1 June 2007, the new monitoring and information-gathering powers set out in the AML/CTF Act had not yet been exercised by AUSTRAC. AUSTRAC noted, however, its enhanced role as Australia's AML/CTF regulator and gave some indication of how its coercive information-gathering powers may be used in the future.

> AUSTRAC's regulatory philosophy of fostering co-operation and voluntary compliance will continue under the new AML/CTF regime. However, where necessary AUSTRAC will exercise its monitoring and information-gathering powers under the AML/CTF Act, and seek other available remedies (such as enforceable undertakings) for non-compliance with breaches of the AML/CTF Act. AUSTRAC's enhanced supervisory role of reporting entities under the new regime may lead to increased use of its coercive powers.[169]

Revenue

Australian Taxation Office

4.68 The Australian Taxation Office (ATO) is the Australian Government's principal revenue collection agency and administers Australia's tax, superannuation and excise laws. The ATO's responsibilities include managing and shaping the administrative systems supporting the tax system, collecting revenue (excluding customs duty) and administering regulatory and expenditure programs.[170]

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164 Ibid s 202.

165 Ibid ss 167(3), 204.

166 Ibid s 49. Other bodies are also given powers under this section to make requests of reporting entities to provide further information of produce documents, including the AFP, the ACC, the Commissioner of Taxation, the CEO of Customs, and the Integrity Commissioner.

167 Australian Transaction Reports and Analysis Centre, *Submission LPP 31*, 4 June 2007.

168 Joint studies are a cooperative program that look at all aspects of a cash dealer's broader anti-money laundering procedures, including staff training and reporting processes, and includes a rectification period to address any non-compliance detected. AUSTRAC no longer conducts joint studies as part of its regulatory program: Ibid.

169 Ibid.

170 Australian Taxation Office, *Annual Report 2005–06*, 2.

4.69 The ATO notes that the Australian tax system is based on self assessment, requiring the ATO to make judgments as to likely risks to the revenue and to allocate scarce resources to address those risks.

> One way the Tax Office addresses these risks is by engaging in active compliance work to ensure that taxpayers are paying the correct amount of tax. Our active compliance work includes activities to secure certain lodgments, pre-issue activities to prevent incorrect refunds or payments being issued, as well as post-issue activities such as reviews and audits.[171]

4.70 Most of the Acts administered by the ATO give the Commissioner or delegated officers rights of access to information and documents, which assist in undertaking the compliance work. The ATO's *Access and Information Gathering Manual* lists 22 Acts that contain powers to enter and remain on premises and access documents.[172] The most well known powers to access documents and obtain evidence are under ss 263 and 264 of the *Income Tax Assessment Act 1936* (Cth).

4.71 Section 263 gives the Commissioner or an authorised officer power to have 'full and free' access to all buildings, places, books, documents and other papers for the purposes of administering the Act. Section 264 is the provision regarding notices. Under that section, the Commissioner may give a notice requiring a person:

> (a) to furnish him with such information as he may require; and
>
> (b) to attend and give evidence before him or before any officer authorised by him in that behalf concerning his or any other person's income or assessment, and may require him to produce all books, documents and other papers whatever in his custody or under his control relating thereto.
>
> (2) The Commissioner may require the information or evidence to be given on oath or affirmation and either verbally or in writing, and for that purpose he or the officers so authorized by him may administer an oath or affirmation.

4.72 The *Taxation Administration Act 1953* (Cth) contains penalty provisions, including an offence of refusing a request to provide information or answer questions pursuant to a taxation law.[173]

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171 Australian Taxation Office, *Submission LPP 65*, 22 June 2007.

172 Australian Taxation Office, *Access and Information Gathering Manual* <www.ato.gov.au> at 23 August 2007, [1.1.7]. These include the *Fringe Benefits Tax Assessment Act 1986* (Cth) ss 127–128; *Income Tax Assessment Act 1936* (Cth) ss 263–264; *Product Grants and Benefits Administration Act 2000* (Cth) ss 42, 45, 48; *Petroleum Resource Rent Tax Assessment Act 1987* (Cth) s 108; *Superannuation Contributions Tax (Assessment and Collection) Act 1997* (Cth) s 38; *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997* (Cth) ss 32–33; *Superannuation Guarantee (Administration) Act 1992* (Cth) s 76; *Taxation Administration Act 1953* (Cth) ss 13F, 66; and *Termination Payments Tax (Assessment and Collection) Act 1997* (Cth) s 26(1).

173 *Taxation Administration Act 1953* (Cth) ss 8C, 8D.

4.73 The scope of s 263 is not confined to investigations where there is a suspicion of wrongdoing. As the section allows access for 'any of the purposes under this Act', it also covers audits to check compliance with the legislation or general investigations into certain industries where there is no suggestion of a particular breach.[174] Similarly, although s 264 is confined to obtaining information or evidence concerning the income or assessment of any person, it may apply equally to innocent situations where the ATO is reconciling information provided by a person with information obtained from another source.[175] Richard Travers notes that s 264 notices are often simply used as a formal mechanism of communication between the Commissioner and a taxpayer.[176] The ATO's *Access and Information Gathering Manual* contains guidelines on the contents of notices and covering letters, and the circumstances in which the various types of notices should be used.

4.74 The ATO has significant discretion in relation to the use of its information-gathering powers. The *Taxpayers' Charter*[177] sets out the ATO's approach to when it will use its powers, providing that:

- ATO officers will approach taxpayers and seek information cooperatively before formal requests are made;
- access and information-gathering powers will be used only by authorised officers, and it will be made clear when information is being sought cooperatively and when a formal power is being used;
- when asking for information under a formal power, taxpayers will be told of their rights and obligations under the law;
- prior notice and a reasonable time to comply with the notice will be given;
- where information is sought from a third party, the taxpayer will be told, unless special circumstances apply; and
- explanations will be given to the taxpayer as to decisions made about the use of access and information-gathering powers.[178]

4.75 The obligation under ss 263 and 264 is expressed in general terms, and not expressly subject to any qualification.[179] However, as discussed in Chapter 5, this does not mean that the provisions are not subject to common law rights.

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174 R Travers, 'Confidentiality of Legal Advice after Australian Competition and Consumer Commission v Daniels Corporation' (2002) 9 *Competition and Consumer Law Journal* 289, 302.
175 Ibid, 302.
176 Ibid, 305.
177 Australian Taxation Office, *Taxpayers' Charter: Fair Use of Our Access and Information Gathering Powers* (2007) <www.ato.gov.au/content/downloads/N2559book9web.pdf> at 23 August 2007.
178 Ibid.
179 R Travers, 'Confidentiality of Legal Advice after Australian Competition and Consumer Commission v Daniels Corporation' (2002) 9 *Competition and Consumer Law Journal* 289, 302.

Inspector-General of Taxation

4.76 The Office of the Inspector-General of Taxation was established in 2003, and is an independent statutory office that reviews systemic tax administration issues and makes recommendations to the Australian Government for improving tax administration. The Inspector-General does not deal with individual taxpayer matters but can, in conducting reviews, invite submissions from, or consult with, the public or particular groups of taxpayers or tax professionals.[180] Any information obtained from the private sector or government agencies other than the ATO is given voluntarily.[181]

4.77 The *Inspector-General of Taxation Act 2003* (Cth) grants the Inspector-General a power to require the Commissioner of Taxation and tax officials to provide information or answer questions relevant to a review.[182] It is an offence for a tax officer to fail to comply with a notice from the Inspector-General.[183] To date, the Inspector-General has not used this coercive power, and all information provided by the ATO has been given voluntarily in response to requests for information made under s 14 of the *Inspector-General of Taxation Act*.[184]

Intelligence and security

Australian Security Intelligence Organisation

4.78 The Australian Security Intelligence Organisation (ASIO) is Australia's national security service. Its main role is to gather information and produce intelligence that will enable it to warn the government about matters or activities that might pose a risk to Australia's national security. ASIO focuses on terrorists, persons who may act violently for political reasons, and those who may harm Australia's interests, including spies, in order to further their own causes or the interests of foreign governments.[185]

ASIO's functions

4.79 ASIO's functions are set out in the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act) and include: obtaining and evaluating intelligence relevant to security; communicating such intelligence for security purposes; providing security assessments and protective security advice; and collecting foreign intelligence in Australia—but only on the request of the Minister for Foreign Affairs or the Minister for Defence.[186] ASIO is not a law enforcement agency. It does not undertake criminal investigations and ASIO officers have no power of arrest.[187]

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180 Australian Government Inspector-General of Taxation, *Website* <www.igt.gov.au> at 27 August 2007.
181 Inspector-General of Taxation, *Submission LPP 13*, 16 May 2007.
182 *Inspector-General of Taxation Act 2003* (Cth) s 15.
183 Ibid s 15(6).
184 Inspector-General of Taxation, *Submission LPP 13*, 16 May 2007.
185 Australian Security Intelligence Organisation, *About ASIO* <www.asio.gov.au/About/Content/what.aspx> at 27 August 2007.
186 Ibid; *Australian Security Intelligence Organisation Act 1979* (Cth) s 17.
187 Australian Security Intelligence Organisation, *Annual Report 2006–07*, viii.

ASIO's powers

4.80 ASIO gathers information in a number of ways, including from publicly available sources, members of the public, intelligence services in other countries and through interviews.[188] ASIO has powers to require information or documents from operators of aircraft or vessels.[189] ASIO has special powers to use intrusive methods of investigation when authorised to do so under a warrant signed by the Attorney-General of Australia. These powers are to:

- use listening devices[190] and tracking devices relating to persons and to objects;[191]
- intercept communications;[192]
- access computers;[193]
- enter and search premises;[194] and
- examine postal articles and delivery service articles.[195]

4.81 Proposals to use special powers are subject to 'rigorous internal consideration and approvals at a senior level'.[196] The use of special powers under the ASIO Act[197] or telecommunications interception legislation[198] requires that 'the subject's activities are, or are reasonably suspected to be, or are likely to be, prejudicial to security'.[199] In the majority of cases, investigations are resolved through less intrusive means.[200]

4.82 ASIO also can seek warrants for the questioning of persons for the purpose of investigating terrorism.[201] In limited circumstances, the warrants may authorise the

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188 Australian Security Intelligence Organisation, *About ASIO: Frequently Asked Questions About ASIO* <www.asio.gov.au/About/Content/Faq.aspx> at 27 August 2007.
189 *Australian Security Intelligence Organisation Act 1979* (Cth) s 23.
190 Ibid s 26.
191 Ibid ss 26B, 26C.
192 *Telecommunications (Interception and Access) Act 1979* (Cth) pt 2–2.
193 *Australian Security Intelligence Organisation Act 1979* (Cth) s 25A.
194 Ibid s 25.
195 Ibid ss 27, 27AA. See also Australian Security Intelligence Organisation, *About ASIO: Frequently Asked Questions About ASIO* <www.asio.gov.au/About/Content/Faq.aspx> at 27 August 2007.
196 Australian Security Intelligence Organisation, *Annual Report 2006–07*, 45.
197 See *Australian Security Intelligence Organisation Act 1979* (Cth) pt III div 2.
198 *Telecommunications (Interception and Access) Act 1979* (Cth) pt 2–2.
199 Australian Security Intelligence Organisation, *Attorney-General's Guidelines in Relation to the Performance by the Australian Security Intelligence Organisation of its Function of Obtaining Intelligence Relevant to Security* <www.asio.gov.au/About/Content/what.aspx> at 27 August 2007, [2.14].
200 Australian Security Intelligence Organisation, *Annual Report 2006–07*, 45.
201 See *Australian Security Intelligence Organisation Act 1979* (Cth) ss 34D, 34E.

detention of a person.[202] ASIO is required to obtain the consent of the Attorney-General before seeking these warrants from a federal magistrate or judge. Any questioning pursuant to a warrant must be conducted in the presence of a prescribed authority—such as a former or serving senior judge—on the conditions determined by that authority.[203] The Inspector-General of Intelligence and Security may be present during any questioning or detention under a warrant. It is an offence to disclose information without authorisation about the existence of a questioning or questioning and detention warrant, questioning conducted under the warrant, or any operational information.[204] No questioning warrants were executed during 2006–07.[205]

Guidelines on performance of functions

4.83 The Attorney-General has issued guidelines under the ASIO Act on how ASIO should perform its functions relating to politically motivated violence and to obtaining intelligence relevant to security.[206] In relation to politically motivated violence, the guidelines provide that in deciding whether or not to conduct an investigation, and the investigatory methods to be used, the Director-General shall consider all of the circumstances, including:

> (a) the magnitude of the threatened or perceived violence or harm;
>
> (b) the likelihood that it will occur;
>
> (c) the immediacy of the threat; and
>
> (d) the privacy implications of any proposed investigation.[207]

4.84 The guidelines also provide that:

> The immediate purpose of an ASIO investigation should generally be to obtain information concerning the nature of any activities of a person or group which may be relevant to security. The need for information is not confined to information about particular offences that may be committed but extends to information about persons

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202 See Ibid ss 34F, 34G.

203 Australian Security Intelligence Organisation, *About ASIO: Frequently Asked Questions About ASIO* <www.asio.gov.au/About/Content/Faq.aspx> at 27 August 2007.

204 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34ZS. Set time periods apply under the section to particular types of information. ASIO may authorise disclosure in certain circumstances, including to obtain legal advice in relation the warrant: Australian Security Intelligence Operation, *Disclosures of Information About ASIO Activities* (2005) <www.asio.gov.au/About/Content/disclosure .aspx> at 23 August 2007.

205 Australian Security Intelligence Organisation, *Annual Report 2006–07*, 45.

206 Australian Security Intelligence Organisation, *Attorney-General's Guidelines in Relation to the Performance by the Australian Security Intelligence Organisation of its Functions Relating to Politically Motivated Violence* <www.asio.gov.au/About/Content/what.aspx> at 27 August 2007; Australian Security Intelligence Organisation, *Attorney-General's Guidelines in Relation to the Performance by the Australian Security Intelligence Organisation of its Function of Obtaining Intelligence Relevant to Security* <www.asio.gov.au/About/Content/what.aspx> at 27 August 2007.

207 Australian Security Intelligence Organisation, *Attorney-General's Guidelines in Relation to the Performance by the Australian Security Intelligence Organisation of its Functions Relating to Politically Motivated Violence* <www.asio.gov.au/About/Content/what.aspx> at 27 August 2007, [3.6].

> who may be prepared to engage in or promote activities of security concern, including their plans and capabilities.[208]

4.85 In relation to ASIO's function of obtaining intelligence relevant to security, the Guidelines provide that ASIO's investigations shall be of two types:

> (a) 'preliminary investigations' to assess whether there is sufficient evidence of activities relevant to security to justify a more detailed investigation of a subject; or
>
> (b) 'general investigations' to assess whether the activities of a subject are prejudicial to security, or to monitor whether there is any change in the significance of the activities of a subject whose activities have previously been assessed to be prejudicial to security.[209]

4.86 The Guidelines contain provisions regarding the bases for, and authorisation, conduct and review of, investigations.

4.87 ASIO has stated that subjects of investigations have become more skilled at hiding their activities and intentions from security and law enforcement agencies, and from other members of the community.[210]

Inspector-General of Intelligence and Security

4.88 The Inspector-General of Intelligence and Security (IGIS) is an independent statutory office holder who assists the Prime Minister, the Attorney-General, the Minister for Foreign Affairs and the Minister for Defence, to oversee the following six agencies which formally constitute the Australian Intelligence Community (AIC):

- ASIO;
- Australian Security Intelligence Service;
- Defence Signals Directorate (DSD);
- Defence Imagery and Geospatial Organisation;
- Defence Intelligence Organisation; and
- Office of National Assessments.[211]

4.89 The office was established by the *Inspector-General of Intelligence and Security Act 1986* (Cth) (IGIS Act) following recommendations, made by Justice Robert Hope

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208 Ibid, [3.7].

209 Australian Security Intelligence Organisation, *Attorney-General's Guidelines in Relation to the Performance by the Australian Security Intelligence Organisation of its Function of Obtaining Intelligence Relevant to Security* <www.asio.gov.au/About/Content/what.aspx> at 27 August 2007, [2.2].

210 Australian Security Intelligence Organisation, *Annual Report 2006–07*, 41.

211 Inspector-General of Intelligence and Security, *Annual Report 2006–07*, 8.

in the Royal Commission on Australia's Security and Intelligence Agencies (RCASIA) General Report and the RCASIA Report on the Australian Security Intelligence Organisation, that such an office be created.[212]

4.90 The IGIS's role fulfils an important public interest in ensuring that the AIC is kept accountable. The functions of the IGIS are set out in the IGIS Act.[213] The IGIS can undertake an inquiry into the activities of an AIC agency on request from the responsible Minister, in response to a complaint, on the IGIS's own motion,[214] or on request from the Prime Minister.[215] The IGIS also has inspection and monitoring powers in relation to the activities of the AIC agencies. Inspection activities are the 'centrepiece' of IGIS, taking up a majority of the office's time.[216]

4.91 IGIS has powers to inquire into the following matters concerning AIC agencies:

- compliance with the law or with ministerial directions and guidelines;
- the propriety of their particular activities; and
- whether any of their acts or practices are inconsistent with human rights.[217]

4.92 Examples of inquiries that have been conducted under the IGIS Act include:

- whether the AIC had prior intelligence warning of the Bali bombings;[218]
- investigating allegations about DSD's conduct in respect of the Tampa affair;[219] and
- inquiring into ASIO's issue of an adverse security assessment against a United States citizen, which led to his removal from Australia.[220]

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212 I Carnell and N Bryan, *Watching the Watchers: How the Inspector-General of Intelligence and Security Helps Safeguard the Law* (2005) Inspector-General of Intelligence and Security <http://igis.gov.au/statements.cfm> at 14 February 2007, 3–4.
213 See *Inspector-General of Intelligence and Security Act 1986* (Cth) ss 8, 9, 9A.
214 Ibid s 8.
215 Ibid s 9.
216 Inspector-General of Intelligence and Security, *Annual Report 2006–07*, 8.
217 *Inspector-General of Intelligence and Security Act 1986* (Cth) s 8.
218 I Carnell and N Bryan, *Watching the Watchers: How the Inspector-General of Intelligence and Security Helps Safeguard the Law* (2005) Inspector-General of Intelligence and Security <http://igis.gov.au/statements.cfm> at 14 February 2007, 16.
219 Ibid, 16.
220 Inspector-General of Intelligence and Security, *Annual Report 2006–07*, viii, 7.

4.93 Approximately 30–40% of IGIS's resources are dedicated to inquiry work.[221] The IGIS must conduct inquiries in private.[222] This is because these inquiries often concern matters that involve highly classified or sensitive information and the methods by which it is collected, the public airing of which could be injurious to the national interest.[223]

4.94 The IGIS has, and uses, Royal Commission type powers when conducting a full inquiry.[224] The IGIS can compel witnesses to appear and answer questions on oath or affirmation where the IGIS has reason to believe that the person is able to give information relevant to a matter the subject of inquiry.[225] The IGIS can compel a person to give him or her information in writing, and to produce documents relevant to an inquiry.[226] It is an offence not to comply with these requirements.[227] The IGIS also has the capacity to enter agencies' premises for the purposes of an inquiry.[228]

4.95 Since March 2004, the IGIS has used coercive powers under s 18 of the IGIS Act in relation to three inquiries, consisting of 19 notices to appear and answer questions and one notice to produce information in writing. The current IGIS, Mr Ian Carnell, submitted to the ALRC that:

> Section 18 powers have not been used in all inquiries because, in my view, it has not been necessary or appropriate to use them. In most instances inquiries have proceeded by way of examination of records (access to which has been freely provided by the relevant agencies), interviews with relevant staff which have not involved compulsion and the administration of an oath or affirmation, and obtaining statutory declarations from staff addressing questions pertinent to the inquiry.
>
> …
>
> In the three inquiries where I have issued notices under section 18, this was done either because I formed a belief based on reasonable grounds that certain persons may not have been forthcoming or truthful, or because I took the view that as it was a matter of significant public interest, key witnesses should give their evidence on oath or affirmation.[229]

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221 I Carnell and N Bryan, *Watching the Watchers: How the Inspector-General of Intelligence and Security Helps Safeguard the Law* (2005) Inspector-General of Intelligence and Security <http://igis.gov.au/statements.cfm> at 14 February 2007, 13. See also Inspector-General of Intelligence and Security, *Annual Report 2005–06*, 17.

222 *Inspector-General of Intelligence and Security Act 1986* (Cth) s 17(1).

223 Inspector-General of Intelligence and Security, *Annual Report 2006–07*, 8.

224 I Carnell and N Bryan, *Watching the Watchers: How the Inspector-General of Intelligence and Security Helps Safeguard the Law* (2005) Inspector-General of Intelligence and Security <http://igis.gov.au/statements.cfm> at 14 February 2007, 15.

225 *Inspector-General of Intelligence and Security Act 1986* (Cth) s 18(3)–(5).

226 See Ibid s 18(1)–(2).

227 Ibid s 18(7).

228 Ibid s 19.

229 Inspector-General of Intelligence and Security, *Submission LPP 22*, 1 June 2007. The IGIS indicated that he thought that his predecessor had taken a similar approach to the use of coercive powers.

Public administration

Commonwealth Ombudsman

Commonwealth Ombudsman's functions

4.96 The office of the Commonwealth Ombudsman exists to 'safeguard the community in its dealings with government agencies, and to ensure that administrative action taken by Australian Government agencies is fair and accountable'.[230] The *Ombudsman Act 1976* (Cth) provides that the functions of the Ombudsman are to investigate complaints made under the Act and to perform other functions conferred by the Act and other legislation.[231] The *Ombudsman Act* confers on the Ombudsman the specialist roles of Defence Force Ombudsman, Immigration Ombudsman, Postal Industry Ombudsman, and Taxation Ombudsman.[232] The three major statutory roles of the Ombudsman are to:

- investigate and review the administrative action of Australian Government officials and agencies, upon receipt of complaints;[233]
- investigate, on the initiative or 'own motion' of the Ombudsman, the administrative actions of Australian Government agencies;[234] and
- inspect the records of agencies such as the AFP and the ACC to ensure compliance with legislative provisions applying to selected law enforcement and regulatory activities.[235]

4.97 In conducting investigations, the Ombudsman seeks to determine whether:

> the administrative action under investigation is unlawful, unreasonable, unjust, oppressive, improperly discriminatory, factually deficient or otherwise wrong. At the conclusion of the investigation, the Ombudsman can recommend that corrective action be taken by an agency.[236]

4.98 The *Ombudsman Act* sets out a number of matters in respect of which the Ombudsman does not have jurisdiction to investigate, including action taken by a

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230 Commonwealth Ombudsman, *Annual Report 2006–07*, 7.

231 *Ombudsman Act 1976* (Cth) s 4.

232 The Commonwealth Ombudsman is also the Law Enforcement Ombudsman. See *Law Enforcement (AFP Professional Standards and Related Measures) Act 2006* (Cth); Commonwealth Ombudsman, *Annual Report 2005–06*, 7.

233 *Ombudsman Act 1976* (Cth) s 5(1). The Ombudsman can also investigate complaints about government contractors providing goods and services to the public under a contract with a government agency.

234 Ibid s 5(1)(b). Own motion investigations often arise from insights gained from handling individual complaints. See Commonwealth Ombudsman, *Annual Report 2006–07*, 7.

235 Commonwealth Ombudsman, *Annual Report 2006–07*, 7. For example, the Ombudsman is responsible for monitoring the integrity of the records of the telecommunications interceptions and use of surveillance devices by the AFP and the ACC.

236 Ibid, 8. See also *Ombudsman Act 1976* (Cth) pt II div 2 in relation to the reporting powers of the Ombudsman.

minister or by a justice or judge.[237] The Act also gives the Ombudsman discretion not to investigate certain complaints, for example, where an investigation is not warranted having regard to all the circumstances.[238] Prior to commencing an investigation into the action of a Department or prescribed authority, the Ombudsman is required to inform the principal officer of the Department or authority that the action is to be investigated. Investigations under the Act are to be conducted in private.[239]

4.99 The bulk of the work of the Ombudsman is conducting complaint based and own motion investigations.[240] During 2006–07, the Ombudsman investigated complaints made about 104 Australian Government departments and agencies.[241] In that time, the Ombudsman received 33,234 approaches and complaints.[242] The Ombudsman also completed 13 own motion and major investigations.[243]

Commonwealth Ombudsman's powers

4.100 The Ombudsman has coercive information-gathering powers under the Act. He or she may compel the production of information and documents, and compel a person to answer questions relevant to an investigation.[244] The Ombudsman also may examine a person on oath or affirmation.[245] Where a person refuses or fails, without reasonable excuse, to comply with a notice to furnish information or produce documents, or to attend before the Ombudsman to answer questions, or to be sworn or affirmed, the person commits an offence and may be liable to a maximum penalty of $1,000 or imprisonment for three months.[246] In addition, the Ombudsman may apply to the Federal Court for an order directing the person to comply.[247] The Ombudsman, Deputy Ombudsman and persons authorised by the Ombudsman also have the power to enter certain premises, including the premises of departments and prescribed authorities, and to inspect documents relevant to an investigation at those premises.[248]

4.101 The Ombudsman submitted to this Inquiry that the available coercive powers are used sparingly, not routinely, and the office relied instead on voluntary cooperation of agencies.[249] There are some practical constraints on the use of coercive powers under s 9 of the *Ombudsman Act*, including that most investigative officers do not have the

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237 See *Ombudsman Act 1976* (Cth) s 5(2).
238 Ibid s 6.
239 Ibid s 8.
240 Commonwealth Ombudsman, *Annual Report 2006–07*, 7.
241 Ibid, 17. The majority of the complaints concerned five Australian Government agencies, namely: Centrelink, the Child Support Agency, the ATO, Australia Post and the Department of Immigration and Citizenship. See Commonwealth Ombudsman, *Annual Report 2006–07*, 17.
242 Commonwealth Ombudsman, *Annual Report 2006–07*, 17.
243 Ibid, 53.
244 *Ombudsman Act 1976* (Cth) s 9.
245 Ibid s 13.
246 Ibid s 36.
247 Ibid s 11A(2).
248 See Ibid s 14. The Attorney-General can declare that the Ombudsman is not to enter certain premises if the carrying on of an investigation at that place might prejudice the security or defence of the Commonwealth.
249 Commonwealth Ombudsman, *Submission LPP 47*, 12 June 2007.

appropriate delegation to exercise s 9 powers, and that the Minister must be informed of an investigation prior to use of a s 9 power, an action that is not necessary or practical in relation to every investigation, given the number of investigations undertaken each year. On the other hand, the Ombudsman indicated that the voluntary cooperation of agencies occurs in substantial part because of the existence of coercive powers. The Ombudsman also noted that the existence of coercive powers can also be useful in less cooperative investigations, or where an agency wishes to be protected by a clear distinction between its actions and the decisions of the Ombudsman.[250]

Building and construction

Office of the Australian Building and Construction Commissioner

4.102 The Office of the Australian Building and Construction Commissioner (ABCC) was established by the *Building and Construction Industry Improvement Act 2005* (Cth) (BCII Act) and commenced operations on 1 October 2005. It absorbed the Building Industry Taskforce which operated from 1 October 2002.[251] The ABCC's purpose is to reform conduct in the building and construction industry,[252] and it has coercive information-gathering powers in order to assist it to achieve that purpose. [253]

4.103 The BCII Act sets out the functions of the Commissioner, which include:

- monitoring and promoting appropriate standards of conduct by building industry participants;

- investigating suspected contraventions, by building industry participants of: the BCII Act; the *Workplace Relations Act 1996* (Cth); the Building Code; a federal certified collective agreement or award, or an order of the Australian Industrial Relations Commission; and

- instituting, or intervening in, proceedings in accordance with the BCII Act.[254]

4.104 The ABCC's coercive information-gathering powers are similar to those of other regulatory agencies, and include the ability to require a person to provide information and documents, and to give evidence by way of affirmation or oath.[255] The ABCC has published guidelines in relation to the exercise of its powers, stating that the decision to exercise its powers 'will not be taken lightly'.[256] The ABCC has also stated

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250 Ibid.
251 Office of the Australian Building and Construction Commissioner, *Annual Report 2006–07*, 14.
252 Ibid, 14.
253 See Office of the Australian Building and Construction Commissioner, *Report on the Exercise of Compliance Powers by the ABCC for the Period 1 October 2005 to 31 December 2006* (2006), 2–3.
254 *Building and Construction Industry Improvement Act 2005* (Cth) s 10.
255 Ibid s 52.
256 See Australian Government Office of the Australian Building and Construction Commissioner, *Building and Construction Industry Improvement Act 2005: Guidelines in Relation to the Exercise of Compliance Powers in the Building and Construction Industry* (2005), [3].

that it only uses these powers as a last resort.[257] The powers can only be used for investigation into a contravention by a building industry participant of a designated building law.[258] The Commissioner or Deputy Commissioner can issue a notice where he or she believes on reasonable grounds that a person issued with a notice has information or documents relevant to an investigation, or is capable of giving evidence relevant to an investigation.[259]

4.105 The ABCC has stated:

> The enforcement of workplace relations law throughout the industry remains a challenge. The ABCC receives numerous complaints about unlawful conduct from all sectors of the industry. The complaints are investigated and if the public interest is served, proceedings against contraveners are commenced.
>
> It remains of concern that some industry participants are reluctant to cooperate with our investigations.[260]

4.106 In 2006–07, the ABCC reported that it had pursued 216 investigations into suspected contraventions of workplace laws. Trade unions were the subject of the majority of its investigations, and the major breaches investigated were industrial action, coercion and agreement/dispute resolution.[261] During 2006–07, 20 notices to attend and answer questions were issued.[262] Since the commencement of the ABCC, the majority of notices to attend and answer questions have been served on individual workers.[263] The power under s 52(c) of the BCII Act to require the giving of information has not as yet been used, with the preference being to require a person to attend an examination. The power in s 52(d) to require production of documents has also not been used to date, with a preference to issue notices for production under s 59, with the option of using s 52(d) where production is refused.[264] The ABCC has stated that 'the compliance powers have proven to be a particularly effective method of obtaining information from reluctant witnesses'.[265]

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257 Office of the Australian Building and Construction Commissioner, *Submission LPP 33*, 4 June 2007; Office of the Australian Building and Construction Commissioner, *Report on the Exercise of Compliance Powers by the ABCC for the Period 1 October 2005 to 31 December 2006* (2006), 2.

258 Australian Government Office of the Australian Building and Construction Commissioner, *Building and Construction Industry Improvement Act 2005: Guidelines in Relation to the Exercise of Compliance Powers in the Building and Construction Industry* (2005), [8].

259 *Building and Construction Industry Improvement Act 2005* (Cth) s 52(1).

260 Office of the Australian Building and Construction Commissioner, *Annual Report 2005–06*, 8.

261 Office of the Australian Building and Construction Commissioner, *Annual Report 2006–07*, 24.

262 Ibid, 27.

263 Office of the Australian Building and Construction Commissioner, *Report on the Exercise of Compliance Powers by the ABCC for the Period 1 October 2005 to 31 December 2006* (2006), [13].

264 Office of the Australian Building and Construction Commissioner, *Submission LPP 33*, 4 June 2007.

265 Office of the Australian Building and Construction Commissioner, *Annual Report 2005–06*, 28; Office of the Australian Building and Construction Commissioner, *Report on the Exercise of Compliance Powers by the ABCC for the Period 1 October 2005 to 31 December 2006* (2006), [22].

Social security

Centrelink

4.107 Centrelink is a government statutory agency, responsible for delivering a range of social services and income support to the Australian community. Its stated purpose is to serve Australia 'by assisting people to become self-sufficient and supporting those in need'.[266] Centrelink is a service provider to 6.5 million customers in respect of 9.89 million individual entitlements.[267] Its clients include those looking for work, families, retired persons, sole parents, students, and young people.

4.108 Centrelink operates under the Department of Human Services (DHS). Centrelink was established under the *Commonwealth Services Delivery Agency Act 1997* (Cth), (CSDA Act) which provides that its function is to assist the CEO in the performance of his or her functions.[268] The CEO's functions include providing Commonwealth services in accordance with service arrangements, and doing anything included in the arrangements that is incidental or related to the provision of those services.[269] Such arrangements may include:

- undertaking education, compliance, investigation and enforcement activities related to the provision of services; or
- recovering overpayments and other amounts due to the Commonwealth in connection with the provision of services; or
- conducting litigation or proceedings related to the provision of services.[270]

4.109 In the period 2006–07, Centrelink completed 42,000 fraud investigations[271] reportedly identifying $127 million in savings and debts.[272] During the same period the CDPP prosecuted 3,400 Centrelink cases with a conviction rate of 98.7%.[273]

4.110 Centrelink has a number of coercive information-gathering powers, which are conferred on it by various federal statutes. These include the power to require a person to provide information or produce documents.[274] For example, under s 194 of the *Social Security (Administration) Act 1999* (Cth) the Secretary can require a person to produce information if it is relevant to the financial situation of a person who owes a

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266 Centrelink, *About Us Index* <www.centrelink.gov.au/internet/internet.nsf/about_us/index.htm> at 23 August 2007; Centrelink, *Annual Report 2005–06*, 11. The CSDA Act was amended by the *Human Services Legislation Amendment Act 2005* (Cth), which commenced on 1 October 2005.

267 Centrelink, *Annual Report 2006–07*, 2.

268 *Commonwealth Services Delivery Agency Act 1997* (Cth) s 6A.

269 Ibid s 8.

270 Ibid s 7. These functions are similar to those conferred on Medicare Australia.

271 Centrelink, *Annual Report 2006–07*, 32.

272 Ibid, 32.

273 Ibid, 32.

274 See, eg, *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) ss 154–157, 26A, 57A, 57F, 219TJ, 219TK; *Farm Household Support Act 1992* (Cth) s 54; *Social Security (Administration) Act 1999* (Cth) ss 192–195; *Social Security Act 1991* (Cth) ss 92F, 1061ZZBR, 1061ZZBY, 1209; *Student Assistance Act 1973* (Cth) ss 343–345.

debt to the Commonwealth or may assist to locate a debtor to the Commonwealth. Other powers require persons to attend an office of the DHS or another place for a particular purpose, or to attend for a medical, psychiatric or psychological examination.[275]

4.111 Centrelink has indicated that it uses its coercive information-gathering powers in the majority of its fraud investigations to collect information from other government agencies and third parties.[276]

Health and aged care

Medicare Australia

4.112 Medicare Australia (Medicare) is an Australian government agency within the DHS. Its objective is to assist in improving health outcomes in Australia.[277] Medicare works in collaboration with the Department of Health and Ageing to achieve the health policy objectives of the Australian Government.[278] Medicare is a service organisation that administers a range of health and payment programs, including: Medicare; the Pharmaceutical Benefits Scheme; the Family Assistance Office; the Australian Organ Donor Register; the Australian Childhood Immunisation Register; and Special Assistance Schemes, including Bali 2005 Special Assistance.[279]

Medicare's functions

4.113 The function of Medicare is to assist the CEO in the performance of his or her functions.[280] The CEO's service delivery functions, set out in the *Medicare Australia Act 1973* (Cth), are to provide Commonwealth services in accordance with service arrangements.[281] The Act specifies that arrangements for the provision of Commonwealth services may include making arrangements for:

- undertaking education, compliance, investigation and enforcement activities related to the provision of services; or
- recovering overpayments and other amounts due to the Commonwealth in connection with the provision of services; or
- conducting litigation or proceedings related to the provision of the services.[282]

4.114 The CEO's functions also include investigating compliance with the *Health Insurance Act 1973* (Cth) and with Part VII of the *National Health Act 1953* (Cth).[283]

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275 See *Social Security (Administration) Act 1999* (Cth) ss 63–64.
276 Centrelink, *Submission LPP 35*, 17 July 2007.
277 Medicare Australia, *About Us* <www.medicareaustralia.gov.au/about/about_us/index.shtml> at 23 August 2007.
278 Ibid.
279 Ibid.
280 *Medicare Australia Act 1973* (Cth) s 4A.
281 Ibid s 7. See also s 6 concerning the CEO's Medicare functions.
282 Ibid s 7(e)–(g).
283 See, eg, Ibid s 8ZQ.

4.115 Medicare's program review function is to detect and investigate fraud and inappropriate claiming.[284] Medicare has stated that:

> Criminal investigation, and subsequent prosecution by the Commonwealth Director of Public Prosecutions is one of the most powerful tools that Medicare Australia has in its effort to reduce fraud in the programs that it administers.[285]

4.116 In the period 2006–07, Medicare reported that it had 550 new investigation cases; and that it had referred 79 cases to the CDPP.[286] Medicare may undertake investigations in collaboration with other agencies. In 2005–06 it reported that a multi-jurisdictional taskforce, including Medicare and Centrelink, was investigating a case of a family involved in identity fraud.[287]

4.117 Depending on the nature and significance of any non-compliance detected by Medicare, it may opt to recover benefits paid incorrectly.[288] In 2006–07, it identified 499 cases for potential recovery action totalling $3.37 million.[289]

Medicare's powers

4.118 The CEO of Medicare may authorise an employee to exercise investigative powers conferred under the *Medicare Australia Act*. The powers can be exercised in connection with an investigation that the CEO is conducting in the performance of his or her functions.[290] The powers include the ability to require a person to give information or to produce documents in the person's custody or control, if the authorised officer has reasonable grounds to believe that a relevant offence has been or is being committed, and the information or documents are relevant to the offence.[291] This is the coercive power most frequently used by Medicare, with 56 notices of this kind issued in 2005–06.[292] Failure to comply with such a notice without reasonable excuse attracts a maximum penalty of six months' imprisonment.[293]

4.119 Authorised officers may also conduct searches for the purposes of monitoring compliance either without warrant where the occupier of the premises has consented,[294] or pursuant to a search warrant.[295] Medicare has indicated that the extensive powers to conduct searches without a warrant under s 8V of the *Medicare Australia Act* are

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284 Medicare, *Annual Report 2006–07*, 18.
285 Ibid, 159.
286 Ibid, 128.
287 Medicare Australia, *Annual Report 2005–06*, 141.
288 Medicare, *Annual Report 2006–07*, 105.
289 Ibid, 127.
290 See *Medicare Australia Act 1973* (Cth) s 8L.
291 Ibid s 8P.
292 Medicare Australia, *Submission LPP 6*, 10 April 2007.
293 *Medicare Australia Act 1973* (Cth) s 8R.
294 See Ibid ss 8U, 8V.
295 See Ibid pt IID div 5.

infrequently used as most evidential material is obtained using either voluntary cooperation, s 8P notices to produce information, or by obtaining a search warrant.[296]

Department of Health and Ageing

Therapeutic Goods Administration

4.120 The Therapeutic Goods Administration (TGA) is a unit of the Australian Government Department of Health and Ageing. It is responsible for administering the *Therapeutic Goods Act 1989* (Cth) (TG Act), which provides a national framework for the regulation of therapeutic goods to ensure the quality, safety and efficacy of medicines; and the quality, safety and performance of medical devices.[297] The TG Act requires therapeutic goods to be entered on the Australian Register of Therapeutic Goods before they can be supplied in Australia, and it stipulates various requirements for the inclusion of goods on the register, including advertising, labelling, and product appearance guidelines. The TGA undertakes various assessment and monitoring activities to ensure that therapeutic goods available in Australia are of an acceptable standard.[298]

4.121 During 2006–07, the TGA completed 463 investigations concerning breaches of the TG Act and the TGA Surveillance Unit issued 234 formal warnings to persons and companies, and charged 20 persons and companies with 104 criminal offences.[299]

4.122 The Secretary of the Department has a number of coercive information-gathering powers under the TG Act. For example, the Secretary may require a person who has imported therapeutic goods or supplied them in Australia to provide information concerning the composition, indications, directions for use or labelling of the goods, or concerning advertising material relating to the goods.[300] Failure to comply with such a notice carries a maximum penalty of $6,600.[301] The Secretary may also seek information or documents relating to compliance by medical devices with certain requirements;[302] and relating to medical devices covered by exemptions.[303] Failure to comply with these requirements carries a maximum penalty of $55,000[304] and $44,000 respectively.[305]

4.123 The Secretary also may require a person—other than the wrongdoer—to provide information in relation to an application for a civil penalty order, where the Secretary

296 Medicare Australia, *Submission LPP 6*, 10 April 2007. The s 8V power was used once in 2005–06.
297 Australian Government Therapeutic Goods Administration, *Regulation of Therapeutic Goods in Australia* (2005) <www.tga.gov.au/docs/html/tga/tgaginfo.htm> at 26 February 2007.
298 Ibid.
299 Australian Government Department of Health and Ageing, *Annual Report 2006–07*, 42.
300 *Therapeutic Goods Act 1989* (Cth) s 8.
301 See Ibid ss 8, 42YB.
302 Ibid pt 4–8, div 1.
303 Ibid pt 4–8, div 2.
304 Ibid s 41JB.
305 Ibid s 41JG.

suspects that a person may have breached a civil penalty provision of the TG Act.[306] If the person fails to give assistance, the Federal Court may, on the application of the Secretary, order the person to comply with the requirement. Failure to comply carries a maximum penalty of $3,300.[307]

Aged care

4.124 The Department of Health and Ageing has wide-ranging responsibilities, including health and safety matters such as food and therapeutic goods regulation—as discussed above—and the provision of aged care services. The Minister for Health and Ageing is responsible for administering 69 statutes,[308] including the *Aged Care Act 1997* (Cth).

4.125 The *Aged Care Act* confers a number of information-gathering powers—or 'monitoring powers' as they are referred to in the Act—on authorised officers to assist the Department in its function of monitoring compliance by approved providers of aged care with their responsibilities under the Act. Monitoring powers in relation to premises include searching premises; inspecting and taking samples of substances or things found at premises; inspecting documents on the premises and taking extracts of those documents or copying them.[309] Some of these powers can only be exercised with the consent of an occupier;[310] while others can be exercised without an occupier's consent.[311] The Secretary also has powers to require aged care providers to provide information in relation to specific matters,[312] and require a person to attend before an authorised officer to answer questions and/or produce documents.[313] Failure to comply with certain requests is considered a breach of responsibility under the *Aged Care Act*, but in a number of cases failure to comply is a criminal offence.[314]

4.126 An authorised officer can apply to a magistrate for a monitoring warrant, which may be granted if it is reasonably necessary to assess whether an approved provider of aged care is complying with its responsibilities.[315] Where a monitoring warrant is issued to an authorised officer, in addition to powers of search and seizure, the officer can require persons to answer questions, produce documents and to give reasonable assistance.

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306 Ibid s 42YE.
307 Ibid s 42YE.
308 See Australian Government Department of Health and Ageing, *Legislation Administered by the Minister for Health and Ageing* <www.health.gov.au/internet/wcms/publishing.nsf/Content/health-eta2.htm> at 30 August 2007.
309 *Aged Care Act 1997* (Cth) s 90–4.
310 Ibid pt 6.4 div 91.
311 Ibid pt 6.4 div 92.
312 Ibid ss 9–2, 9–3, 9–3A.
313 Ibid pt 6.4 div 93.
314 Criminal offences for failure to comply apply in relation to powers excercised under Ibid ss 9–2, 9–3A; pt 6.4 divs 92, 93.
315 See Ibid s 92–2.

4.127 The Department of Health and Ageing has indicated that the extent to which the powers conferred by the *Aged Care Act* are used depends on the extent of compliance within the aged care industry from time to time. The Department notes, however, that the powers are 'an important tool to assist in enforcing the *Aged Care Act* where other less coercive measures have not been successful'.[316]

Gene Technology Regulator

4.128 The Gene Technology Regulator (GTR) was established by the *Gene Technology Act 2000* (Cth), and the Office of the GTR (OGTR) has been established within the Australian Government Department of Health and Ageing to provide administrative support to the GTR in the performance of his or her functions. The *Gene Technology Act* introduces a national scheme for the regulation of genetically modified organisms (GMOs) in Australia in order to protect the health and safety of individuals and the environment.

4.129 The functions of the OGTR include to: provide information to other regulatory agencies about GMOs and genetically modified (GM) products; promote the harmonisation of risk assessments for GMOs and GM products by regulatory agencies; and monitor and enforce the legislation.[317]

4.130 The *Gene Technology Act* provides inspectors appointed under the Act with a variety of monitoring powers—many of which are information-gathering in their nature. An inspector is able to enter premises and exercise certain powers for the purpose of finding out whether the Act or the regulations have been complied with if: the occupier of the premises has consented; the entry is made under warrant; or the occupier is a licence holder and the entry is at a reasonable time.[318] Monitoring powers include:

- conducting tests on samples found at the premises;
- taking photographs or making audio or video recordings;
- inspecting records on the premises; and
- where the entry is under warrant, requiring any person on the premises to answer questions and produce any records.[319]

316 Australian Government Department of Health and Ageing, *Submission LPP 51*, 17 July 2007.
317 *Gene Technology Act 2000* (Cth) s 27.
318 Ibid s 152. The Office of the Gene Technology Regulator, *Operations of the Gene Technology Regulator Annual Report 2005–06*, 41–48 provides statistical information about the number and breakdown of inspections carried out. For example, the OGTR reported that it had conducted 74 inspections during 2005–06 of containment facilities—including laboratories and animal and plant containments.
319 See *Gene Technology Act 2000* (Cth) s 153.

4.131 Inspectors also have powers to search and seize goods, and to search baggage containing goods that are to be, or have been, taken off a ship or aircraft.[320] Further, to deal with situations which present an imminent risk of damage, serious illness or injury, or serious damage to the environment, inspectors have the power to search premises and secure things until a warrant for seizure is obtained, and to require a person to take steps to comply with the legislation.[321]

4.132 The OGTR has adopted an operational philosophy that emphasises assisting accredited organisations and licence holders to comply with their legislative obligations.[322] The OGTR has published a compliance and enforcement strategy, which states:

> The OGTR investigates all reported or detected contraventions of legislation it administers … The OGTR investigates serious contraventions to the point where enough information is available to determine whether a criminal prosecution should be pursued, alternatively options not involving criminal sanctions may also be considered depending on the facts and circumstances of the breach. In serious instances the Regulator may refer and assist the Australian Federal Police or other enforcement agencies.[323]

4.133 The OGTR reported that, during 2006–07, it investigated all suspected breaches of the Act that were detected through OGTR routine monitoring activities or were self-reported. In all instances, risks to human health and safety were assessed as negligible and commensurate action was taken, including increased monitoring and education.[324]

4.134 The OGTR also reported that it completed two investigations during 2006–07. The investigations centred on the conduct of alleged unauthorised GMO dealings, and compliance with protocols in a clinical trial.[325]

Australian Pesticides and Veterinary Medicines Authority

4.135 The Australian Pesticides and Veterinary Medicines Authority (APVMA) is an independent Australian Government statutory authority within the portfolio of the Minister for Agriculture, Fisheries and Management. It was originally known as the National Registration Authority for Agricultural and Veterinary Chemicals.

4.136 A number of the functions of the APVMA are set out in the *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth). These include to:

- assess the suitability for sale in Australia of active constituents for proposed or existing chemical products;

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320 Ibid ss 164–165.
321 Ibid s 158.
322 Office of the Gene Technology Regulator, *Annual Report 2006–07*, 36.
323 Australian Government Department of Health and Ageing, *Office of the Gene Technology Regulator: Compliance and Enforcement Policy*, 1 May 2006.
324 Office of the Gene Technology Regulator, *Annual Report 2006–07*, 37.
325 Ibid, 37.

- evaluate the effects of the use of chemical products in the states and participating territories; and

- collect, interpret, disseminate and publish information relating to chemical products and their use.[326]

4.137 The list of functions does not specifically refer to any investigative function, although the Act provides that the APVMA has any functions or powers conferred on it by relevant legislation,[327] and power to do anything incidental to any of its powers.[328]

4.138 The APVMA is responsible for the registration of pesticides[329] and veterinary medicines[330] prior to sale and their regulation up to and including the time of retail sale.[331] The consequences of using unregistered chemical products may include: threats to personal and public health; occupational health and safety hazards; crop and herd damage; economic loss; environmental damage; and international trading losses.[332]

4.139 The *Agricultural and Veterinary Chemicals Code Act 1994* (Cth) provides the APVMA with its full range of powers including: the evaluation, registration and review of agricultural and veterinary chemical products; the issuing of permits; the control of the manufacture of chemical products; controls regulating the supply of chemical products; and provisions ensuring compliance with, and for the enforcement of, the Code.[333]

4.140 An important part of the APVMA's role is to ensure that pesticides and veterinary medicines supplied to the marketplace comply with the APVMA's legislation. The APVMA has stated that it applies three compliance strategies to ensure that the standards of registration are met, one of which is surveillance and enforcement. It has also stated that it actively investigates alleged breaches and implements risk based enforcement strategies, which can include prosecution, recall or negotiated compliance.[334]

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326 See *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth) s 7(2).
327 See Ibid s 7(1).
328 Ibid s 7(3)(e).
329 Pesticides include herbicides, insecticides, fungicides and pest traps. See Australian Pesticides and Veterinary Medicines Authority, *Introducing the Australian Pesticides and Veterinary Medicines Authority* <www.apvma.gov.au/publications/downloads/introdoc.pdf> at 27 August 2007, 6.
330 Veterinary medicines include vaccines, antibiotics, worming products and anaesthetics: see Ibid, 6.
331 Ibid, 3.
332 Australian Pesticides and Veterinary Medicines Authority, *Information Sheet: Compliance with the Law* (2004).
333 See Australian Pesticides and Veterinary Medicines Authority, *Legislation Governing the APVMA* <www.apvma.gov.au/about_us/legislat.shtml> at 27 August 2007.
334 Australian Pesticides and Veterinary Medicines Authority, *Introducing the Australian Pesticides and Veterinary Medicines Authority* <www.apvma.gov.au/publications/downloads/introdoc.pdf> at 27 August 2007, 9. The other strategies are prevention and quality facilitation.

4.141 The APVMA's investigations may relate to unregistered products, unapproved labels, or the supply of restricted products to unauthorised users.[335] The APVMA may appoint members of its staff—as well as other appropriate persons—to be inspectors for the purpose of a relevant law. Inspectors have coercive information-gathering powers, including the ability to conduct searches of premises to monitor compliance with legislation.[336] The power to search premises includes the power to take and keep samples of things kept at the premises and to inspect documents kept at the premises. An inspector who has entered premises also has power to require a person to give information and produce documents. Failure to comply with such a requirement carries a maximum penalty of $3,300.[337]

Human rights

Human Rights and Equal Opportunity Commission

4.142 The Human Rights and Equal Opportunity Commission (HREOC) is an independent statutory body that was established in 1986 by the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOC Act). Human rights are strictly defined, and relate only to the seven international instruments scheduled to, or declared under, the Act.[338] In addition to the HREOC Act, HREOC administers a suite of anti-discrimination legislation, namely: the *Age Discrimination Act 2004* (Cth), the *Disability Discrimination Act 1992* (Cth), the *Sex Discrimination Act 1984* (Cth) and the *Racial Discrimination Act 1975* (Cth). HREOC's inquiry functions include:

- to inquire into, and attempt to conciliate, complaints of unlawful discrimination;
- to inquire into any act or practice, including any systemic practice that may constitute discrimination, or may be inconsistent with, or contrary to, any human right.[339]

4.143 In respect of the latter type of inquiry, HREOC is required, where appropriate, to endeavour to settle the matters that gave rise to the inquiry by way of conciliation, or to report to the Minister in relation to the inquiry where conciliation is either inappropriate or unsuccessful.[340] The inquiry functions of HREOC do not include inquiring into any act or practice of an intelligence agency that may constitute discrimination or a breach of human rights. Complaints in relation to these matters are to be referred to the IGIS.[341]

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335 Australian Pesticides and Veterinary Medicines Authority, *Information Sheet: Compliance with the Law* (2004).

336 See *Agricultural and Veterinary Chemicals Code Act 1994* (Cth) s 131; *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth) s 69EB.

337 See *Agricultural and Veterinary Chemicals Code Act 1994* (Cth) s 144; *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth) s 69EN.

338 *Human Rights and Equal Opportunity Commission Act 1986* (Cth) schs 1–5.

339 See Ibid ss 11(aa), 11(f), 31(b).

340 Ibid ss 11(f), 31(b).

341 Ibid s 11(3).

4.144 HREOC has a number of non-inquiry functions including: promoting an understanding and acceptance of human rights and equality of opportunity and treatment in employment in Australia; reporting to the Minister as to laws that should be made by the Commonwealth on matters relating to human rights and equality of opportunity and treatment in employment; and where it considers appropriate to do so, intervening in court proceedings that involve human rights and discrimination issues.[342]

4.145 For the purpose of performing its functions, HREOC can hold an examination or inquiry in such manner as it thinks fit.[343] It has powers under the HREOC Act to require a person or body corporate to give information in writing or to produce documents;[344] and to examine persons on oath or affirmation.[345] Failure to comply with these requirements carries a maximum penalty of $1,000 for natural persons, and $5,000 for bodies corporate.[346]

4.146 The President of HREOC also has specific powers to obtain information and documents and to require persons to attend a compulsory conference in relation to inquiries concerning unlawful discrimination.[347] Failure to comply with these requirements carries a maximum penalty of $1,100.[348]

4.147 HREOC reported that during the period 2005–06, it finalised:

- 196 complaints under the *Racial Discrimination Act*;
- 314 complaints under the *Sex Discrimination Act*;
- 512 complaints under the *Disability Discrimination Act*; and
- 80 complaints under the *Age Discrimination Act*.[349]

4.148 HREOC has indicated that it uses its coercive powers infrequently.[350] For example, the power under s 21 of the HREOC Act to require that information be given in writing, or that documents be produced, was used four times in 2006. HREOC does, however, make mention of the existence of its coercive powers in written communications about a delay in responding to a request for voluntary production of information, thus encouraging voluntary compliance without recourse to formally exercising the coercive powers. HREOC also notes that it must sometimes use coercive

342 Ibid ss 11, 31.
343 Ibid s 14.
344 Ibid s 21.
345 Ibid s 22.
346 Ibid s 23.
347 Ibid ss 46PI, 46PJ.
348 Ibid ss 46PL, 46PM.
349 See Human Rights and Equal Opportunity Commission, *Annual Report 2005–06*, 56, 59, 61, 64.
350 Human Rights and Equal Opportunity Commission, *Submission LPP 28*, 4 June 2007.

powers to obtain information, which it would not be able to obtain through voluntary production, such as where there are privacy or patient confidentiality issues.[351]

Privacy

Office of the Privacy Commissioner

4.149 The Office of the Privacy Commissioner (OPC) is an independent statutory organisation that reports to the Attorney-General of Australia.[352] Its purpose is to promote an Australian culture that respects privacy.[353] This is done by supporting individuals with privacy concerns, and working with organisations and agencies to improve their practices in the handling of personal information.[354]

4.150 The OPC, and more particularly the Privacy Commissioner, has legislative responsibilities under the *Privacy Act 1988* (Cth), the *Data-matching Program (Assistance and Tax) Act 1990* (Cth), the *Telecommunications Act 1997* (Cth), the *Crimes Act 1914* (Cth)[355] and the *National Health Act 1953* (Cth).

4.151 When the *Privacy Act* was enacted, it was mainly limited to public sector agencies. Its scope was extended to cover private sector organisations with effect from 21 December 2001. The *Privacy Act* provides protection to individuals by establishing Information Privacy Principles and National Privacy Principles which set out strict safeguards for the collection, use and retention of personal information. The Act also provides protection for individuals' tax file numbers and consumer credit information held by credit reporting agencies and credit providers.

4.152 Under the *Data-matching Program (Assistance and Tax) Act*, the Privacy Commissioner regulates the comparison of personal information held by the ATO and welfare assistance agencies and issues guidelines for the conduct of data-matching. The *Telecommunications Act* sets out rules for telecommunications carriers, carriage service providers and others in their use and disclosure of personal information. The OPC has the role of monitoring compliance with those provisions. The *National Health Act* requires the Privacy Commissioner to issue guidelines relating to the management of personal information collected from claims on the Medicare and Pharmaceutical Benefits programs. The Commonwealth 'Spent Conviction Scheme', under Part VIIC of the *Crimes Act*, gives individuals the right not to disclose spent, quashed or pardoned Federal or territory convictions. The OPC deals with complaints under this

351 Ibid.

352 Office of the Privacy Commissioner, *About the Office of the Privacy Commissioner* <www.privacy .gov.au/about/index.html> at 27 August 2007.

353 Ibid.

354 Ibid. The ALRC is currently undertaking a major review of the *Privacy Act*. At the time of writing, a discussion paper with proposals for reform has been released for comment: *Review of Privacy* (DP 74). The final report is due for release in March 2008.

355 Under the Spent Convictions Scheme: *Crimes Act 1914* (Cth) s 85ZM.

scheme and also assesses applications from organisations seeking to be excluded from the operation of this law.[356]

4.153 The OPC provides information and advice to the public, and works with organisations and agencies that have obligations to protect privacy. It handles complaints and conducts audits of the procedures for handling personal information, provides policy advice and training on the *Privacy Act* and works to inform and educate the community about privacy issues.[357]

4.154 Most complaints received by the OPC regarding alleged contraventions of the *Privacy Act* are resolved through negotiation and conciliation. In most cases, where the Privacy Commissioner has formed the view that the respondent has contravened the *Privacy Act*, the respondent agrees to take appropriate action. This may include a written apology, retraining of staff, changing procedures or amending or deleting personal information. The Privacy Commissioner only has powers to negotiate or order compensation for an individual for damages directly arising from an interference with privacy, but monetary compensation cannot be used as a fine to punish the respondent.[358]

4.155 While the Privacy Commissioner has formal complaint determination powers under the *Privacy Act*, these are rarely used.[359] If the Commissioner finds a complaint substantiated, he or she may make a declaration that: the conduct should not be repeated or continued; the respondent should redress any loss or damage suffered by the complainant; the complainant be entitled to compensation; or it is inappropriate for any further action to be taken.[360]

4.156 The *Privacy Act* provides for investigations to be conducted by the Commissioner. An investigation may be undertaken because a person has complained that his or her privacy rights under the *Privacy Act* have been infringed. In that case, before commencing an investigation, the Commissioner has power to conduct preliminary inquiries.[361] The power is limited by its purpose, which is to determine whether the Commissioner has power to investigate the matter to which the complaint relates or whether the Commissioner may, in his or her discretion, decide not to investigate the matter.[362]

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356 Office of the Privacy Commissioner, *The Operation of the Privacy Act: Annual Report 2005–06*.

357 Office of the Privacy Commissioner, *About the Office of the Privacy Commissioner* <www.privacy.gov.au/about/index.html> at 27 August 2007.

358 Office of the Privacy Commissioner, *Privacy Complaints* <www.privacy.gov.au/privacy_rights/complaints/index.html> at 27 August 2007.

359 Office of the Privacy Commissioner, *Complaint Case Notes, Summaries and Determinations* <www.privacy.gov.au/act/casenotes/index.html> at 27 August 2007.

360 *Privacy Act 1988* (Cth) s 52.

361 Ibid s 42.

362 Ibid s 42.

4.157 As a general rule, an investigation is to be 'conducted in private but otherwise in such manner as the Commissioner thinks fit'.[363] The Commissioner has power to obtain information and documents from persons, and make inquiries of persons or examine witnesses on oath or affirmation.[364] The Commissioner also has the power to enter premises with consent or a search warrant and may inspect any documents that are kept at those premises, with some exceptions.[365]

4.158 In 2006–07, the OPC received a total of 1,094 complaints across all areas of its jurisdiction.[366] Twelve per cent of matters were closed following a formal investigation and, where appropriate, a conciliated response. Around 36% of cases were closed following preliminary inquiries. In other cases the Privacy Commissioner declined to investigate the matter—for example, because of a lack of jurisdiction or where the matter involved a body not covered by the *Privacy Act*.[367]

4.159 The OPC has indicated that it does not routinely exercise its coercive powers, but does use them from time to time.[368] Examples of when coercive powers are likely to be used include where protected personal information is required from third parties, or where a person has failed to respond to the OPC's routine requests to provide information. The OPC has not to date obtained a warrant to enter premises.[369]

Border control and immigration

Australian Customs Service

4.160 The principal roles of the Australian Customs Service (ACS) are to facilitate trade and the movement of people into Australia while maintaining compliance with Australian law, collecting customs revenue, and administering specific industry schemes and trade measures. The ACS also has a role in border control and safety.

4.161 The ACS administers the *Customs Act 1901* (Cth), the *Customs Tariff Act 1995* (Cth) and related legislation. It also administers legislation on behalf of other government agencies, principally in relation to the movement of goods and people across the Australian border.[370] The ACS provides air- and sea-based surveillance and response services to a number of government agencies.[371]

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363 Ibid s 43(2). Similarly, see *Ombudsman Act 1976* (Cth) s 8(2); *Migration Act 1958* (Cth) s 429.

364 *Privacy Act 1988* (Cth) ss 43(3), 44–46. The power to obtain information and documents is subject to ss 69–70. It is an offence not to comply with the Commissioner's directions: *Privacy Act 1988* (Cth) ss 46(2), 65–66.

365 *Privacy Act 1988* (Cth) ss 68, 70(1)–(2). The role and powers of the Office of the Privacy Commissioner are considered in detail in Australian Law Reform Commission, *Review of Privacy*, IP 31 (2006).

366 Office of the Privacy Commissioner, *The Operation of the Privacy Act: Annual Report 2006–07*, [3.3.1].

367 Ibid, [3.3.2].

368 Australian Government Office of the Privacy Commissioner, *Submission LPP 71*, 29 June 2007.

369 Ibid.

370 Australian Customs Service, *Annual Report 2006–07*, 5.

371 Ibid, 5.

4.162 The ACS prioritises protecting the Australian community by intercepting illegal goods and weapons, and employs surveillance techniques to identify and intercept vessels and persons to detect border incursions. The ACS also has inspection powers under a range of anti-terrorism provisions. [372]

4.163 Much of the work of the ACS operates in a self-assessment environment. It can conduct audits and impose sanctions such as: warning letters; removal of ACS agents from the self-assessment scheme; revocation of deferred duty arrangements or the imposition of additional conditions; refusal of permission for movements under bond or imposition of conditions on the permission holder; imposition of administrative penalties of up to twice the customs duty; cancellation, suspension or imposition of a conditional licence for warehouse licence holders; and prosecution action.[373]

4.164 The ACS makes use of a number of 'monitoring' powers, including entry to premises and obtaining information.[374] The monitoring powers can be exercised under consent or under a warrant. The ACS has noted, however, that there has been no requirement to seek a warrant to enter premises for the purposes of exercising monitoring powers since the commencement of the monitoring powers in 2002.[375] Any matters arising that suggest an offence has been committed are referred to the Investigations Branch of the ACS.

4.165 ACS officers play a role, alongside the AFP, in the investigation and prosecution of breaches of border control laws. To fulfil this function, ACS officers have wide powers to execute search and seizure warrants and seize evidentiary material.[376] The *Customs Act* includes a wide range of coercive powers including powers to:

- board and search ships, collect documents and question passengers;[377]
- make copies of, and take extracts from, documents in certain circumstances;[378]
- question passengers of aircraft;[379]
- question persons claiming packages;[380]

372 Australian Customs Service, *Protecting Our Borders* (2007), 3.
373 Australian Customs Service, *Customs Regulatory Philosophy* (2005) <www.customs.gov.au/site/page.cfm?u=4839> at 28 August 2007.
374 *Customs Act 1901* (Cth) pt XII div 1 subdiv J.
375 Australian Customs Service, *Submission LPP 56*, 13 June 2007.
376 Australian Customs Service, *Protecting Our Borders* (2007), 13.
377 *Customs Act 1901* (Cth) ss 184, 189, 185.
378 Ibid s 185.
379 Ibid s 195.
380 Ibid s 196(C).

- apply for search warrants in respect of things believed to be evidential material;[381]

- detain and search persons for purposes of law enforcement cooperation;[382] and

- require production of commercial documents and records verifying the content of communications made to the ACS.[383]

4.166 In 2006–07, the ACS reported that it had implemented measures improving industry compliance, implemented new export air cargo security measures; and enhanced investigatory capability through improvements in policy, procedures and legislation.[384] In that period 16 revenue fraud cases and 138 other fraud cases were adopted for prosecution.[385] The ACS has indicated that its Regional Investigations Branch officers seek the issue and execution of search warrants under s 198 and seizure warrants under s 203 of the *Customs Act* on a weekly basis.[386]

Department of Immigration and Citizenship

4.167 The core activities of the Department of Immigration and Citizenship (DIAC) are the managed entry of people into Australia, the settlement of migrants and refugees, and the promotion of citizenship and cultural diversity. DIAC implements the *Migration Act 1958* (Cth), which regulates the entry of non-citizens into Australia. The Act contains powers of detention and removal of unlawful non-citizens, as well as a number of character-related powers, which include criminal deportation and visa cancellation on character grounds.

4.168 Following the Palmer Report into the detention of Cornelia Rau,[387] DIAC committed to making a number of improvements to the operational culture of the department based around the three themes of making the department more open and accountable, ensuring fair and reasonable dealings with clients, and providing the organisation with well-trained and supported staff.[388]

4.169 The *Migration Act* contains a number of coercive information-gathering powers used frequently by DIAC. These include:[389]

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381 Ibid pt XII div 1 subdiv C.
382 Ibid pt XII div 1 subdiv BA.
383 Ibid ss 240AA, 240AC.
384 Australian Customs Service, *Annual Report 2006–07*, 63.
385 Ibid, 61.
386 Australian Customs Service, *Submission LPP 56*, 13 June 2007.
387 M Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau Report* (2005).
388 Australian Government Department of Immigration and Citizenship, *On the Move to Improve—DIMA's Progress on Palmer* <www.immi.gov.au/about/department/perf-progress/dima-improvements/index.htm> at 28 August 2007.
389 Information below on the frequency of use of these powers was provided to the ALRC by DIAC: see Australian Government Department of Immigration and Citizenship, *Submission LPP 73*, 4 July 2007.

- A general power to obtain information and documents about unlawful non-citizens.[390] This power is used many times each working day. Prior to establishment of electronic links to the ATO, up to 5,000 notices were issued each year to the ATO alone.

- Powers that enable authorised officers to issue a production notice or attendance notice in relation to a visa monitoring purpose.[391] In 2005–06, some 27 production notices were issued to education providers in the course of investigations into student non-compliance, compared with 60 notices issued in 2004–05. Authorised officers also have powers to enter premises under a monitoring warrant, and require a person to answer questions relevant to visa monitoring purposes.[392]

- Powers of entry and search pursuant to a search warrant.[393] DIAC notes that the purpose of s 251 warrants is generally to locate individuals rather than documents, although documents can be searched pursuant to the warrant.[394] Section 251 warrants are issued across Australia on every working day. At present, somewhere below 500 are issued each year, although up to 1,500 a year have been issued in the past.

- Persons in immigration detention under the Act may be required to answer such questions as an officer considers necessary to determine their status.[395]

4.170 A number of other coercive powers provided by the *Migration Act* are generally exercised by ACS officers or the Australian Navy, including powers to board and search ships, examine documents and goods on board, and require those on board to answer questions,[396] and powers to muster crews and require production of identity documents.[397]

Australian Quarantine Inspection Service

4.171 The Australian Quarantine Inspection Service (AQIS) operates within the Department of Agriculture, Fisheries and Forestry. AQIS provides quarantine inspection services for the arrival of international passengers, cargo, mail, animals and plants or their products into Australia, and inspection and certification for a range of animal and plant products exported from Australia.

390 *Migration Act 1958* (Cth) s 18.
391 Ibid ss 268BA, 268BD.
392 Ibid s 268CK.
393 Ibid s 251.
394 Australian Government Department of Immigration and Citizenship, *Submission LPP 46*, 12 June 2007.
395 *Migration Act 1958* (Cth) s 257.
396 Ibid s 245F(3).
397 Ibid s 225.

4.172 AQIS is responsible for the administration of the *Quarantine Act 1908* (Cth) and its related legislation. AQIS provides screening services for goods and passengers at airports, seaports and mail centres.[398] AQIS also administers the *Imported Food Control Act 1992* (Cth) and related legislation, which ensures that imported food complies with public health and food standards; and the *Export Control Act 1982* (Cth), which controls the process of government certification, which is a prerequisite to gaining entry to most overseas markets for most food and agricultural products. AQIS also administers the *Australian Meat and Livestock Industry Act 1997* (Cth), which provides for the licensing of meat and livestock exporters.

4.173 AQIS embraces co-regulation as a basic regulatory strategy whereby requirements are set in consultation with industry. AQIS administers the requirements set out in law, while industry implements management systems to achieve compliance. The AQIS website states that AQIS systems verify compliance and, where there is non-compliance, AQIS takes action by prosecution or by administrative actions.[399]

4.174 AQIS has submitted that its coercive information-gathering powers fall into two broad categories.[400] The first relates to the collection of information that enables AQIS to decide whether regulatory standards under the legislation AQIS administers have been met, for example, requirements to provide notices of proposed importation goods or give a report and information about arrivals and departures.[401]

4.175 The second category of information-gathering powers relates to the collection of information that enables AQIS to decide whether an offence has been committed under the legislation it administers. Quarantine officers have, or have delegated to them, wide powers to search, seize and treat goods suspected of being a quarantine risk, and a number of information-gathering powers requiring the provision of information, production of documents, and answering of questions.[402] Some powers can only be exercised with consent or pursuant to a warrant.[403]

Australian Fisheries Management Authority

4.176 The Australian Fisheries Management Authority (AFMA) is a statutory body that administers the day-to-day management of fisheries.[404] AFMA is responsible for enforcing the *Fisheries Management Act 1991* (Cth) and the *Torres Strait Fisheries Act 1984* (Cth) through the detection and investigation of illegal activities by both domestic

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398 Australian Government Department of Agriculture Fisheries and Forestry, *AQIS at a Glance* <www.daff.gov.au/aqis/about/reports-pubs/at-a-glance> at 27 August 2007.

399 Australian Government Department of Agriculture Fisheries and Forestry, *Quarantine Laws and the Role of AQIS* <www.daff.gov.au/aqis/about/compliance-investigations/laws-role> at 27 August 2007.

400 Australian Quarantine and Inspection Service, *Submission LPP 16*, 29 May 2007.

401 *Quarantine Act 1908* (Cth) ss 16AC, 27A, 27B.

402 See, eg, Ibid ss 16AD, 66AB, 66AD, 66AI, 70B; *Export Control Act 1982* (Cth) ss 10A–10E, 10H, 10J, 11P, 11Q; *Australian Meat and Livestock Industry Act 1997* (Cth) ss 17, 34, 35, 47, 51.

403 *Quarantine Act 1908* (Cth) ss 66AF, 74BC; *Imported Food Control Act 1992* (Cth) ss 24, 26, 28, 30.

404 Australian Fisheries Management Authority, *Annual Report 2006–07*, 5. Broader fisheries policy, international negotiations and strategic policy issues are administered by another group within the Department of Agriculture, Fisheries and Forestry.

and foreign fishing boats in the Australian fishing zone and Commonwealth-managed fisheries.

4.177 AFMA undertakes these functions in conjunction with other relevant federal agencies, with specific compliance functions being undertaken by state fisheries authorities on an agency basis. While state agencies provide the personnel and expertise, AFMA provides overall co-ordination, policy direction, technical advice and funding.[405] AFMA also has responsibilities in relation to protection of the marine environment by maintaining sustainable fishery levels.

4.178 AFMA has surveillance and enforcement powers under Part 6 of the *Fisheries Management Act*. Under this part, AFMA officers have a number of powers including to:

- board and search a boat for equipment that has been used, is being used, is intended to be used or is capable of being used for fishing or for any document or record relating to the fishing operations of the boat;[406]
- search the land or premises for, inspect, take extracts from, and make copies of, any documents relating to the receiving of fish;[407] and
- require a person found on any land or premises entered to produce any documents in the person's possession or under the person's control relating to any fish found on the land or in the premises, vehicle or aircraft.[408]

4.179 AFMA achieves compliance through a combination of measures, including continued education and stakeholder participation in the development of management rules, law enforcement deterrents such as targeted operations and inspections, intelligence gathering, risk assessments and mitigation measures.[409]

Migration Agents Registration Authority

4.180 The Migration Agents Registration Authority (MARA) is a statutory industry self-regulation authority for migration agents in Australia, established under the *Migration Act 1958* (Cth). MARA is a division of the Migration Institute of Australia Limited, the professional association of migration agents in Australia.[410]

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405 This compliance arrangement is under review: Australian Fisheries Management Authority, *Compliance* <www.afma.gov.au/management/compliance/default.htm> at 27 August 2007.

406 *Fisheries Management Act 1991* (Cth) s 84(1)(a)(i).

407 Ibid s 84(1)(h)(ii).

408 Ibid s 84(1)(s)(ii). Similar powers exist under the *Torres Strait Fisheries Act 1984* (Cth) pt VI.

409 Australian Fisheries Management Authority, *Compliance* <www.afma.gov.au/management/compliance/default.htm> at 27 August 2007.

410 *Migration Act 1958* (Cth) s 315.

4.181 The function of MARA is to assist consumers of migration assistance[411] and maintain standards of ethics and professionalism in the delivery of migration advice. MARA maintains a Register of Migration Agents,[412] monitors the conduct of registered agents, and investigates consumer complaints about potential breaches of the Migration Agents Code of Conduct.[413]

4.182 When investigating a registered migration agent's continued registration, MARA may require agents to make a statutory declaration in answer to questions in writing,[414] appear before individuals specified by MARA to answer questions[415] or provide MARA with specified documents or records.[416] MARA exercises its powers under s 308 regularly.[417]

4.183 In circumstances where MARA is considering refusing a registration application or making a decision to cancel or suspend an agent's registration or caution a registered agent, it has power to serve notice on an agent requiring him or her to provide specified information or documents.[418] Failure to respond to the notice is a strict liability offence.[419] MARA also has information-gathering powers in circumstances where it is considering barring a former registered migration agent from being a registered migration agent for a period of time.[420] The powers under ss 305C and 311EA are rarely used.[421]

Communications

Australian Communications and Media Authority

4.184 The Australian Communications and Media Authority (ACMA) is responsible for the regulation of broadcasting, the internet, radiocommunications and telecommunications. ACMA was formed in 2005 following the merging of the Australian Communications Authority and the Australian Broadcasting Authority. ACMA's responsibilities include: promoting self-regulation and competition in the communications industry, while protecting consumers and other users; fostering an environment in which electronic media respect community standards and respond to audience and user needs; managing access to the radiofrequency spectrum; and

411 Migration assistance is defined for the purposes of MARA: Ibid s 276.
412 Ibid ss 286, 287.
413 Ibid ss 284(1), 314.
414 Ibid s 308(1)(a).
415 Ibid s 308(1)(b).
416 Ibid s 308(1)(c).
417 Australian Government Department of Immigration and Citizenship, *Submission LPP 46*, 12 June 2007.
418 *Migration Act 1958* (Cth) s 305C.
419 Ibid s 305C(4), (5).
420 Ibid s 311EA.
421 Australian Government Department of Immigration and Citizenship, *Submission LPP 46*, 12 June 2007.

representing Australia's communications interests internationally.[422] ACMA also administers the Do Not Call Register, which commenced operation in May 2007.[423]

4.185 ACMA has powers under the *Broadcasting Services Act 1992* (Cth), the *Telecommunications Act 1997* (Cth), the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth), the *Radiocommunications Act 1992* (Cth) and the *Interactive Gambling Act 2001* (Cth). ACMA works primarily under a self-regulatory approach with the broadcasting and communications industries, while also undertaking investigations and enforcement action to ensure compliance with licence conditions, codes and standards.[424]

4.186 Under the *Broadcasting Services Act*, ACMA's role in complaints is to establish whether the code of practice has been implemented or whether there has been compliance with licence conditions. ACMA has a range of information-gathering powers under the Act, including powers to conduct investigations, undertake examinations and hearings and seek the production of documents.[425]

4.187 ACMA also has powers to obtain information and make inquiries under the *Interactive Gambling Act* in investigating complaints under the Act, or on its own initiative.[426] These powers are subject to ACMA's information-gathering powers set out in the *Broadcasting Act*.

4.188 ACMA also has extensive information-gathering powers under Part 27 of the *Telecommunications Act*. Under this part, ACMA may, by written notice, obtain information and documents from carriers and service providers or from other persons.[427] ACMA also has a number of search powers in relation to technical offences under Part 21 of the Act or for breaches of the *Spam Act 2003* (Cth).[428] ACMA inspectors may exercise these powers under the authority of a search warrant, with consent or in an emergency.[429] An inspector may require the giving of certain information, and the production of certain documents, relevant to compliance with the *Spam Act* or Part 21 of the *Telecommunications Act*.[430]

4.189 Under the *Radiocommunications Act*, ACMA has powers to search and seize, and require production of relevant documents, in undertaking an investigation into an

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422 Australian Communications and Media Authority, *About ACMA's Role* <www.acma.gov.au/WEB/STANDARD//pc=ACMA_ROLE_OVIEW> at 28 August 2007.

423 The *Do Not Call Register Act 2006* (Cth) does not contain information-gathering powers. In administering compliance with the Register, ACMA must rely on the powers in *Telecommunications Act 1997* (Cth) pt 27, discussed below.

424 Australian Communications and Media Authority, *Annual Report 2006–07*, Ch 2.

425 *Broadcasting Services Act 1992* (Cth) pt 13.

426 *Interactive Gambling Act 2001* (Cth) s 22.

427 *Telecommunications Act 1997* (Cth) ss 521, 522.

428 Ibid pt 28.

429 Ibid s 535.

430 Ibid ss 542, 548, 549.

offence against the Act.[431] The powers can be exercised with consent, pursuant to a warrant, or in an emergency. In 2006–07, ACMA reported that it conducted 483 radiocommunications investigations, resulting in 61 advice notices and 142 warning notices being issued.[432]

4.190 The *Telecommunications (Consumer Protection and Service Standards) Act* includes a power for the responsible minister to require a carrier or provider, by written notice, to provide information relevant to the minister's functions under the Universal Service Regime established by the Act.[433] ACMA has noted that this power is exercised by the responsible minister, not by ACMA.[434] A written notice issued under this section is a disallowable instrument.

Environment

Department of the Environment and Water Resources

4.191 The Department of the Environment and Water Resources advises on and implements policies and programs for the protection and conservation of the environment. The Department administers the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act).[435] The EPBC Act regulates actions that will, or are likely to, have a significant impact on any matter of national environmental significance.[436]

4.192 The EPBC Act contains several compliance and enforcement mechanisms, including injunctions, environmental audits, civil and criminal penalties, orders to remedy environmental damage, personal liability of executive officers, and publicising of contraventions. In 2006–07, the Department dealt with 580 reports of incidents or activities potentially in breach of the provisions relating to activities that may have a significant impact on matters of national environmental significance.[437]

4.193 The Department states that, in order to ensure that the referral, assessment and approval regulatory system established under the EPBC Act is applied rigorously and is enforceable, it has adopted a structured, compliance-based approach. The

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431 *Radiocommunications Act 1992* (Cth) pt 5.5.

432 Australian Communications and Media Authority, *Annual Report 2006–07*, 32.

433 *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) s 22C.

434 Australian Communications and Media Authority, *Submission LPP 20*, 29 May 2007.

435 The EPBC Act replaced the *National Parks and Wildlife Conservation Act 1974* (Cth), the *Whale Protection Act 1980* (Cth), the *Endangered Species Protection Act 1992* (Cth), the *World Heritage Properties Conservation Act 1983* (Cth) and the *Environment Protection (Impact of Proposals) Act 1974* (Cth).

436 The Act identifies six matters of national environmental significance: Ramsar wetlands, listed threatened species and ecological communities, World Heritage properties, listed migratory species, the Commonwealth marine environment, and nuclear actions (including uranium mining).

437 Australian Government Department of Environment and Heritage, *Legislation Annual Report 2006–07*, 49.

Department has established a compliance auditing programme to monitor adherence to approval conditions.[438]

4.194 The Department operates in a tri-agency model of environmental investigations in conjunction with the AFP and ACS, and hosts outposted officers from these agencies.[439] In 2006–07, the Department investigated 44 cases related to matters of national environmental significance, incursions into protected areas, threatened species and ecological communities, and wildlife matters.[440]

4.195 Division 7 of the EPBC Act provides for the Minister to appoint commissions to carry out inquiries into the impacts of actions. Under this division, Commissioners have powers to call witnesses, obtain documents and inspect places for the purposes of their inquiries.[441] Failure to comply with such a requirement carries a maximum penalty of $3,300.[442] Commissioners may also inspect premises either by consent or with a warrant.[443]

Great Barrier Reef Marine Park Authority

4.196 The Great Barrier Reef Marine Park Authority provides for the protection, use, understanding and enjoyment of the Great Barrier Reef in perpetuity through the care and development of the Great Barrier Reef Marine Park.[444]

4.197 The Authority manages the Marine Park and makes any recommendations to the Minister as to its care and development. As part of the management of the Marine Park, the Authority may set charges for its use by visitors. Under Division 6 of the *Great Barrier Reef Marine Park Act 1975* (Cth), inspectors have the authority to search aircraft, vessels or premises and inspect documents that are relevant to ascertaining a person's liability to charge or to pay a collected amount due to the Authority under the Act.[445] While Authority inspectors regularly exercise powers to search and enter premises under ss 39S and 39T, the Authority does not generally obtain or execute warrants under s 39U. Where a warrant is necessary, this is generally obtained under the *Crimes Act* and executed by police officers.[446]

Australian Maritime Safety Authority

4.198 Commonwealth legislation has been enacted to protect the marine environment and to adopt international conventions governing marine pollution. A package of 'protection of the sea' legislation was enacted in 1981 to implement international

438 Ibid, 50.
439 Ibid, 51.
440 Ibid, 51.
441 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 111–114.
442 Ibid s 112(3).
443 Ibid ss 115, 116.
444 Great Barrier Reef Marine Park Authority, *Goals & Aims* <www.gbrmpa.gov.au/corp_site/about_us/goals_aims> at 27 August 2007.
445 *Great Barrier Reef Marine Park Act 1975* (Cth) ss 39S, 39T, 39U.
446 Great Barrier Reef Marine Park Authority, *Submission LPP 17,* 1 June 2007.

conventions and provide funding for a national plan to deal with oil and chemical spills by imposing levies. This legislation is enforced by the Australian Maritime Safety Authority (AMSA). AMSA also has regulatory functions in relation to transport, and is discussed below.

Defence

Department of Defence and the Australian Defence Force

4.199 The Department of Defence is responsible for Australia's international defence relations and defence cooperation, defence scientific research and development, defence procurement and purchasing, and defence industry development and co-operation.

4.200 Section 51SO of the *Defence Act 1903* (Cth) provides that a member of the Australian Defence Force, as directed by the Chief of the Defence Force,[447] may require a person to answer a question or to produce a particular document. This power is only available if the member of the Defence Force believes on reasonable grounds that it is necessary for the purpose of preserving the life or safety of other persons or to protect Commonwealth interests. Failure to comply with such a direction is a criminal offence.

4.201 Under the *Defence Force Discipline Act 1982* (Cth), there is a uniform system of military justice for the three armed services in Australia. There are three types of service tribunals that may hear defence force disciplinary matters: summary authorities, court martial and defence force magistrates.[448] Section 138 of the Act grants powers to appropriate authorities to require defence personnel to give evidence or to provide documents as required by the rules of procedure of the service tribunals.[449]

Energy

Australian Energy Regulator

4.202 Since July 1995, the Australian Energy Regulator (AER) has had responsibility for compliance monitoring, reporting and enforcement in the National Electricity Market. The AER is part of the ACCC, although it operates as a separate legal entity. In addition to its economic regulation powers, the AER has a range of compliance monitoring and enforcement functions under s 15 of the National Electricity Law.[450] The AER is required to monitor compliance with the National Electricity Law, the National Electricity Regulations and the National Electricity Rules. The AER may

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447 *Defence Act 1903* (Cth) s 51D. This power can arise in connection with the exercise of powers in the Australian offshore area: div 3A.

448 *Defence Force Discipline Act 1982* (Cth) pt VII.

449 Ibid s 149. Appropriate authorities are defined to mean the Registrar of Military Justice, President of court martial or Defence Force magistrate.

450 The National Electricity Law is contained in the *National Electricity (South Australia) Act 1996* (SA).

investigate breaches or possible breaches, and may enforce the law, the regulations and the rules.[451]

4.203 The *National Electricity (South Australia) Act 1996* (SA) establishes the laws of the National Electricity Market. Under Part 3 Division 2 of that Act, the AER is granted a broad series of investigation powers to obtain search warrants to enter premises and inspect documents and equipment where the AER has a reasonable belief that there has been a breach of a provision of the Act.[452] Under s 28 of the Act, the AER may serve a notice requiring a person to furnish to the AER any information the AER requires for the performance or exercise of a function or power conferred on it under the Act. To date, these powers have not been used by the AER, although it was submitted that they are an important part of the economic regulatory and enforcement framework.[453] Rather than using its coercive powers, the AER relies on routine information that must be provided to it by regulated businesses in accordance with the National Electricity Rules.

Transport

Office of the Inspector of Transport Security

4.204 The Office of the Inspector of Transport Security (ITS) was established in December 2005 within the Department of Transport and Regional Services. The ITS undertakes independent inquiries, as required by the Minister for Transport and Regional Services, into major transport security incidents or incidents that suggest systemic weaknesses in aviation or maritime security regulatory regimes. The ITS also inquires into surface transport security matters, subject to the agreement of the relevant state or territory government.

4.205 The functions of the ITS were incorporated into legislation in the *Inspector of Transport Security Act 2006* (Cth), which commenced operation on 7 June 2007. Under Part 5 of the *Inspector of Transport Security Act*, the Inspector has powers to request information that he or she believes is relevant to an inquiry from other government agencies or any person.[454] Special procedures apply for requests for on-board recording information.[455]

4.206 The ITS may also enter and search premises and board and search transport vehicles, with the consent of the controller of the premises or vehicle.[456] The Inspector may also exercise his or her powers to ask questions while conducting the search.[457]

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451 Australian Energy Regulator, *Monitoring and Enforcement Functions under the National Electricity Law* <www.aer.gov.au/content/index.phtml/itemId/685897> at 27 August 2007.
452 *National Electricity (South Australia) Act 1996* (SA) s 19.
453 Australian Competition and Consumer Commission, *Submission LPP 53,* 13 June 2007.
454 *Inspector of Transport Security Act 2006* (Cth) ss 35, 36.
455 Ibid ss 35, 37.
456 Ibid ss 41, 43, 44, 46.
457 Ibid s 45.

4.207 None of the powers of the ITS are 'coercive' in nature as they can only be exercised with consent from the relevant person or government agency, and that consent can be revoked at any time.[458]

Civil Aviation Safety Authority

4.208 The Civil Aviation Safety Authority (CASA) is an independent statutory authority established under the *Civil Aviation Act 1988* (Cth). CASA is responsible for the regulation of aviation safety in Australia and the safety of Australian aircraft overseas, and falls within the portfolio of the Department of Transport and Regional Services.

4.209 CASA administers the *Civil Aviation Act*, which prescribes the drafting of Civil Aviation Regulations, safety education, surveillance and enforcement processes. CASA is also governed by the *Civil Aviation Regulations 1988* (Cth) and the *Civil Aviation Safety Regulations 1998* (Cth). The *Civil Aviation Act* and Regulations give effect to the Chicago Convention, an international convention that regulates international civil aviation.[459]

4.210 To undertake its functions, CASA aims to develop effective enforcement strategies to secure compliance with aviation safety standards.[460] CASA takes enforcement action when it detects non-compliance with obligations imposed by the Act, the Regulations and other instruments made under the Act and Regulations. Non-compliance in this context may involve contravention of the Act or the Regulations, but it also may involve a breach of a condition attaching to a licence or certificate, or acts or omissions that indicate that a person no longer meets the standards required by the legislation for the holding of a licence or certificate.[461]

4.211 The penalties under the *Civil Aviation Act* and Regulations are directed at aircraft manufacturers, aircraft owners, aircraft hirers, pilots, maintenance personnel, handlers of dangerous goods, and any person who interferes with crew or aircraft.

4.212 CASA has a range of enforcement tools available which are set out in detail in its enforcement manual.[462] These include a demerits point scheme, enforceable undertakings, and protection for self-reporting of inadvertent mistakes. CASA states that its system of enforcement is based on protecting those who make innocent mistakes and encouraging them to report, measured responses to minor breaches and

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458 Australian Government Inspector of Transport Security, *Submission LPP 7*, 9 May 2007.

459 The Convention on International Civil Aviation (usually called the Chicago Convention) was entered into in 1944. The Chicago Convention and several Protocols amending it are set out as schedules to the *Air Navigation Act 1920* (Cth): Civil Aviation Safety Authority, *Guide—How to Use the Civil Aviation Safety Regulations 1988* <www.casa.gov.au/rules/1998casr/index.htm> at 27 August 2007.

460 Civil Aviation Safety Authority, *Enforcement Action: Introduction* <www.casa.gov.au/rules/action/index.htm> at 27 August 2007.

461 Civil Aviation Safety Authority, *Enforcement Manual* (2007), 2.

462 Ibid, 2.

concentration of enforcement action on cases where there are serious safety breaches.[463]

4.213 There are 23 provisions under the Act and the Regulations that allow CASA access to aircraft, aerodromes, premises or documents. For example, under s 53 of the Act, CASA is empowered to require the production of documents and other things required in the investigation of defects. Regulation 305 is a general access provision authorising access to premises and documents for regulatory purposes. Access powers are only available to authorised inspectors under the Regulations.[464] Under reg 305(1A), it is an offence for a person to prevent or hinder access by an inspector to any place.

Australian Maritime Safety Authority

4.214 AMSA is a regulatory safety agency established under the *Australian Maritime Safety Authority Act 1990* (Cth) (AMSA Act). It is largely self-funded through levies on the commercial shipping industry. AMSA reports to the Minister for Transport and Regional Services.

4.215 AMSA's goal, as set out in the AMSA Act, is to achieve world's best practice in providing services to Australia in maritime safety, aviation and marine search and rescue, and protection of the marine environment from ship-sourced pollution. As discussed above, AMSA is also responsible for enforcing federal legislation that has been enacted to protect the marine environment and to adopt international conventions governing marine pollution.

4.216 The *Navigation Act 1912* (Cth) is the main piece of federal legislation that regulates matters such as ship safety, coastal trade, employment of seafarers and shipboard aspects of the protection of the marine environment, and provides a national search and rescue service.

4.217 Under the *Navigation Act*, a person authorised by the Minister or by AMSA may search a ship in a port where the person has reasonable grounds for believing the search to be necessary for the purposes of the Act. An authorised person also may enter and inspect any premises; summon persons before him or her and require them to answer questions; and require and enforce the production of documents by any person.[465] Refusal to comply with such a direction is an offence under the Act, with a maximum penalty of $1,000.[466]

463 Ibid, 2.
464 Ibid, 12.
465 *Navigation Act 1912* (Cth) ss 412, 413.
466 Ibid s 413.

4.218 AMSA also provides inspectorate services under the *Occupational Health and Safety (Maritime Industry) Act 1993* (Cth).[467] Under the Act, inspectors appointed by AMSA have powers to enter, search and inspect ships, and require persons to answer questions or produce documents in relation to an investigation into health and safety on the ship.[468] It is an offence to not comply with such requests made by inspectors.

Australian Transport Safety Bureau

4.219 The Australian Transport Safety Bureau (ATSB) is an operationally independent body within the Department of Transport and Regional Services and is Australia's prime agency for transport safety investigations.[469]

4.220 The ATSB's stated objective is safe transport. Its mission is to maintain and improve transport safety and public confidence through excellence in: independent investigation of transport accidents and other safety occurrences; safety data recording, analysis and research; and raising safety awareness and knowledge.[470]

4.221 The ATSB's functions and powers are governed by the *Transport Safety Investigation Act 2003* (Cth). The object of the Act is to improve transport safety through, among other things, independent investigations of transport accidents and incidents and the making of safety action statements and recommendations that draw on the results of those investigations.[471] ATSB investigations avoid apportioning blame or determining liability.[472] In 2006–07, the ATSB released 80 final investigation reports.[473]

4.222 The ATSB has powers to investigate under Part 5 of the *Transport Safety Investigation Act.* Those powers are only able to be exercised in the context of an investigation.[474] Under s 32 of the Act, the Executive Director of ATSB has powers to require a person to answer questions or produce documents relevant to an investigation. A person who refuses to attend or answer questions when required is guilty of an offence.

4.223 In a submission to this Inquiry, the ATSB indicated that it generally uses its powers under s 32 to require production of documents or appear to answer questions in most investigations, with multiple notices likely to be issued in major investigations.[475]

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467 The general administration of this Act is overseen by the Seacare Authority, but the investigative and information-gathering powers are vested in and exercised by AMSA.

468 *Occupational Health and Safety (Maritime Industry) Act 1993* (Cth) ss 89, 90.

469 Australian Transport Safety Bureau, *Australian Transport Safety Bureau* <www.atsb.gov.au> at 29 August 2007.

470 Australian Transport Safety Bureau, *About the ATSB* <www.atsb.gov.au/about_atsb/about.aspx> at 29 August 2007.

471 *Transport Safety Investigation Act 2003* (Cth) s 7.

472 This approach is set out in Ibid s 7, and is consistent with the Convention on International Civil Aviation (Chicago Convention): Australian Transport Safety Bureau, *Submission LPP 34*, 28 May 2007.

473 Australian Transport Safety Bureau, *Annual Review 2007*, 1.

474 *Transport Safety Investigation Act 2003* (Cth) s 28.

475 Australian Transport Safety Bureau, *Submission LPP 34*, 28 May 2007.

As certain protections attach to documents produced under s 32, the ATSB regularly considers it 'necessary' to use the power to facilitate the appropriate confidentiality requirements. The ATSB considers this fits with the objectives of the Act in not apportioning blame or determining liability as part of its investigations.[476]

4.224 Other coercive information-gathering powers under the Act include powers to: enter premises with consent, under a warrant or in emergencies; search, photograph and take evidence from premises; and seize material that is the subject of an investigation warrant.[477] The ATSB indicated that it has not had cause to use the powers with respect to warrants, as parties generally comply with notices issued under s 32 to produce evidential material.[478]

4.225 The ATSB website contains a number of publications regarding its investigation powers, outlining what steps are taken when a major transport accident occurs, and detailing the rights and obligations of parties who participate in investigations.[479]

Other

Workplace Ombudsman

4.226 The Workplace Ombudsman was established under recent amendments to the *Workplace Relations Act 1996* (Cth) (WRA), commencing operation on 1 July 2007.[480] The role of the Workplace Ombudsman is to:

- educate employers and workers to understand their rights and obligations under the WRA;
- promote and monitor compliance with the WRA, including inquiring into any potentially non-compliant practices and investigating suspected contraventions of the WRA;
- institute proceedings to enforce the WRA;
- represent employees who are or might become a party to proceedings under the WRA; and
- appoint and direct workplace inspectors.[481]

476 Ibid.

477 *Transport Safety Investigation Act 2003* (Cth) ss 33–40.

478 Australian Transport Safety Bureau, *Submission LPP 34*, 28 May 2007. The ATSB noted that it applied a number of times for a warrant under the *Navigation (Marine Casualty) Regulations 1990* (Cth), which were repealed in 2003, but that it was never necessary for the ATSB to execute the warrant.

479 See Australian Transport Safety Bureau, *Publications* <www.atsb.gov.au/publications/> at 30 August 2007.

480 *Workplace Relations Amendment (A Stronger Safety Net) Act 2007* (Cth) sch 3. The Office of Workplace Services, which was established in March 2006 and exercised the powers discussed below, was replaced by the Workplace Ombudsman.

481 *Workplace Relations Act 1996* (Cth) s 166B.

4.227 Under s 169 of the WRA, workplace inspectors have coercive information-gathering powers to determine whether an employer's obligations under the Act are being met. Inspectors under the Act may enter premises, interview any person, require documents to be produced for inspection and inspect, and make copies from or extract any document provided.[482] Inspectors may also, by notice in writing, require a person to produce a document.[483] It is an offence to contravene a requirement of an inspector to produce a document.[484]

4.228 Building on the previous work of the Office of Workplace Services, which conducted similar functions to the Workplace Ombudsman between March 2006 and June 2006, the Workplace Ombudsman has been involved in a number of successful prosecutions and recovery of unpaid worker entitlements.[485] At the end of November 2007, 37 court cases have been finalised, and a further 45 cases were before the courts.[486] The Workplace Ombudsman has produced a fact sheet providing information on the powers of workplace inspectors, including their coercive information-gathering powers.[487]

Comcare

4.229 Comcare is a federal statutory authority established under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (SRC Act). Comcare administers the Commonwealth's workers' compensation scheme under the SRC Act and also the *Occupational Health and Safety Act 1991* (Cth) (OHS Act).[488] Comcare also administers the *Asbestos-Related Claims (Management of Commonwealth Liabilities) Act 2005* (Cth) (ARC Act).

4.230 Comcare states that its priorities are: to promote safe and healthy workplaces; provide accessible and affordable compensation services; and encourage and support the early and safe return to work of injured employees.[489]

4.231 Comcare conducts investigations to determine compliance with the OHS Act and may do so on its own initiative, or in response to a direction from the Safety, Rehabilitation and Compensation Commission.[490] Investigations may be reactive (undertaken in response to an incident) or proactive, where an investigation is

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482 Ibid s 169(2)(a), (b).
483 Ibid s 169(2)(c).
484 Ibid s 819(1).
485 Australian Government Workplace Ombudsman, 'More Protection for Australian Workers from New Workplace Watchdog from 1 July 2007' (Press Release, 1 July 2007).
486 Australian Government Workplace Ombudsman, *Legal Action* (2007) <www.wo.gov.au/asp/index.asp?sid=7407&page=legal-action> at 29 August 2007.
487 Australian Government Workplace Ombudsman, *Fact Sheet: What are the Powers of Workplace Inspectors* (2007).
488 Until 3 March 2007, this Act was known as the *Occupational Health and Safety (Commonwealth Employment) Act 1991* (Cth). The change of title was made by the *OHS and SRC Legislation Amendment Act 1996* (Cth).
489 Comcare, *Annual Report 2005–06*, 20.
490 Ibid, 50.

generally scheduled in advance as part of a targeted compliance program. During 2005–06, Comcare commenced a total of 189 investigations, made up of 76 reactive investigations, 64 proactive investigations and 49 review investigations.[491]

4.232 Under the OHS Act, investigators have powers to enter and inspect premises and require persons: to give to the investigator reasonable assistance; to answer any questions put by the investigator; and to give to the investigator any documents requested by the investigator or copies of such documents.[492] Failure to comply with an investigator's request is an offence.[493] After receiving an investigation report, the Safety, Rehabilitation and Compensation Commission also has the power to obtain information and documents relevant to the matters of the investigation.[494] The Commission may conduct public or private inquiries under s 55 of the Act, and has the power to summon witnesses and require the production of documents for that purpose.[495]

4.233 Comcare has indicated that it frequently uses its coercive information-gathering powers under the OHS Act, in particular ss 42 and 43. Comcare also notes that it is currently moving away from the practice of informally obtaining documents and information from employers by consent, and is instead issuing statutory notices whenever possible.[496]

4.234 To assist the functions of assessing claims, Comcare has powers under the SRC Act and the ARC Act to request information in relation to compensation claims.[497] It is not an offence to fail to comply with such requests, but Comcare can refuse to deal further with the claim if the request is not met. Comcare has indicated that it uses the powers of request under the SRC Act on a regular basis, but generally obtains information in relation to asbestos claims through a simple written request rather than using s 11 of the ARC Act.[498]

Child Support Agency

4.235 The Child Support Agency (CSA) was established under the *Child Support (Registration and Collection) Act 1988* (Cth) to administer the Commonwealth Government's Child Support Scheme. Since 2004, the CSA has been part of the Australian Government Department of Human Services. The function of the CSA is to ensure separated parents share in the cost of supporting their children. The CSA has a Child Support Registrar,[499] who maintains a register of child support payments[500] and

491 Ibid, 50.
492 *Occupational Health and Safety Act 1991* (Cth) ss 42, 43.
493 Ibid s 43(2).
494 Ibid s 54.
495 Ibid s 56.
496 Comcare, *Submission LPP 64*, 14 June 2007.
497 *Safety, Rehabilitation and Compensation Act 1988* (Cth) ss 58, 71; *Asbestos-Related Claims (Management of Commonwealth Liabilities) Act 2005* (Cth) s 11.
498 Comcare, *Submission LPP 64*, 14 June 2007.
499 *Child Support (Registration and Collection) Act 1988* (Cth) s 10.
500 Ibid s 13.

manages their collection and regular and timely distribution to families. Under the *Child Support (Assessment) Act 1989* (Cth), the Child Support Registrar can make administrative determinations of the level of child support required to be paid by individuals.

4.236 Under both Acts, the Child Support Registrar has the power to serve notice on a person requiring them to provide the Registrar with relevant information or documents.[501] The Registrar also has the power to require a person to attend for questioning by the Registrar.[502] Refusal or failure to comply with requests issued under the *Child Support (Registration and Collection) Act* is an offence punishable by a fine not exceeding $2,000.[503] Refusal or failure to comply with notices issued under the *Child Support (Assessment) Act* is an offence punishable by imprisonment not exceeding 6 months.[504]

4.237 Similar powers are available to the Registrar under the *Child Support (Registration and Collection) Act* for obtaining information from a person who is, or was, a resident of an overseas jurisdiction prescribed under the regulations as reciprocating on child support matters. Failure to comply is not, however, an offence under the Act.[505]

4.238 The CSA has comprehensive compliance strategies in place to ensure that the right amount of child support is paid on time.[506] In 2006–07, the CSA referred over 101,000 customers to the ATO for lodgement-enforcement action.[507] As a last resort, the CSA takes legal action for enforcement, with 786 cases finalised in 2006–07.[508] Proactive investigation of avoiders and income-minimisers significantly increased between 2005–06 and 2006–07.[509]

Insolvency and Trustee Service Australia

4.239 The Insolvency and Trustee Service Australia (ITSA) is responsible for the administration and regulation of the personal insolvency system in Australia. ITSA's purpose is to 'provide a personal insolvency system that produces equitable outcomes for debtors and creditors, enjoys public confidence and minimises the impact of financial failure on the community'.[510]

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501 Ibid s 120(1)(a), (c); *Child Support (Assessment) Act 1989* (Cth) s 161(1)(a), (c).
502 *Child Support (Registration and Collection) Act 1988* (Cth) s 120(1)(b); *Child Support (Assessment) Act 1989* (Cth) s 161(1)(b).
503 *Child Support (Registration and Collection) Act 1988* (Cth) s 120(3).
504 *Child Support (Assessment) Act 1989* (Cth) s 161(3).
505 *Child Support (Registration and Collection) Act 1988* (Cth) s 121A.
506 Australian Government Department of Human Services, *Annual Report 2006–07*, 51.
507 Ibid, 52.
508 Ibid, 52.
509 Ibid, 51.
510 Insolvency and Trustee Service Australia, *Structure: Role and Functions* <www.itsa.gov.au /dir228/itsaweb .nsf/docindex/about+us->structure->structure> at 29 August 2007.

4.240 The coercive information-gathering powers relevant to ITSA can be grouped in three categories:

- Powers available to an official receiver to assist a trustee in the administration of a particular matter, or to assist in the administration of the Act itself. Official receivers are appointed in each bankruptcy district, and provide Australia's bankruptcy registry service.

- Powers available to the Official Trustee to obtain information to assist in the administration of a particular matter. The Official Trustee is a body corporate established under the *Bankruptcy Act 1966* (Cth) which can act as a trustee of bankrupt estates and the administrator of other types of arrangements.

- Powers exercised by the Inspector-General in Bankruptcy in the regulation of principally registered trustees and debt agreement administrators and in the investigation of offences under the *Bankruptcy Act*.[511]

4.241 Under s 77AA of the *Bankruptcy Act*, official receivers are able, at all reasonable times, to have full and free access to all premises and books for any purpose of the Act, and remove from premises any books that the receiver or officer reasonably considers may be relevant to the examinable affairs of a debtor or bankrupt under that part of the Act. Official receivers also have the power under s 77C to require a person, by written notice, to produce information or books, or appear to give evidence.[512] It is an offence to fail to comply with notices issued under ss 77AA and 77C. In 2005–06, official receivers issued 504 notices under ss 77AA and 77C.[513] ITSA has recently published a best practice statement on the exercise of the powers of official receivers.[514]

4.242 Under the *Bankruptcy Act*, trustees have a number of information-gathering powers to assist in the administration of a bankruptcy. These can be exercised by the Official Trustee or any registered private trustee. The powers include requiring: production by a bankrupt of information concerning the statement of his or her financial affairs;[515] production of books of an 'associated entity' of a bankrupt;[516] and provision of additional information concerning a person's income.[517] Failure to comply

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511 Insolvency and Trustee Service Australia, *Submission LPP 62,* 20 June 2007. There are also information-gathering powers exercised by the Official Trustee under the *Proceeds of Crime Act 2002* (Cth). These powers relate to the Official Trustee's duties under the Act concerning property in respect of which a Court has ordered custody and control to be given to the Official Trustee.

512 *Bankruptcy Act 1966* (Cth) s 77C. An additional power to require a person outside Australia to give information or evidence is contained in s 81A, although the notice can be contained in a notice issued under s 77C.

513 Insolvency and Trustee Service Australia, *Submission LPP 62*, 20 June 2007.

514 Insolvency and Trustee Service Australia, *Official Receiver Best Practice Statement—Exercise of Official Receiver's Powers to Assist Trustees* (2007).

515 *Bankruptcy Act 1966* (Cth) s 6A(3).

516 Ibid s 77A.

517 Ibid s 139V.

with notices issued under these provisions is an offence. Section 130 allows a trustee to apply for a warrant to enter premises and seize property or books relevant to a bankrupt's affairs. ITSA does not record the number of warrants obtained, or the exercise of coercive information-gathering powers by the Official Trustee or any other trustee.[518]

4.243 The Inspector-General in Bankruptcy has two broad functions: regulation of trustees and administrators, and investigation of offences under the *Bankruptcy Act*. Regulatory work is undertaken by ITSA's Bankruptcy Regulation branch, and investigations are undertaken by the Bankruptcy Fraud Investigation unit. To assist with its regulatory activities, the Inspector-General is empowered to make a broad range of inquiries or investigations into a range of different matters under the Act.[519]

4.244 The Inspector-General also has a number of general investigation powers under the Act, including the power to require trustees, administrators and former administrators to produce books or answer an inquiry made to him or her, and the power to investigate the books of a trustee, administrator or former administrator at any time.[520] ITSA reported that during 2006–07 the Fraud Investigation unit received and assessed 1,104 alleged offence referrals; commenced 825 investigations; completed 809 investigations; achieved compliance in 299 matters; referred two matters to state and federal police agencies for investigation; and forwarded 298 briefs of evidence to the CDPP.[521]

4.245 Over the same period, ITSA also issued warning letters to 117 first-time alleged offenders regarding less serious breaches of the *Bankruptcy Act*. ITSA states that warning letters save investigative time and resources and are issued to those alleged offenders it considers to have committed minor infringements of the offence provisions of the *Bankruptcy Act*. Where a warning letter is issued, follow-up interviews are conducted to educate alleged offenders about their rights and responsibilities, and the potential consequences of any future non-compliance. Where a recipient of a warning letter elects not to participate in this interview process, ITSA withdraws the warning letter and initiates prosecution actions.[522]

National Offshore Petroleum Safety Authority

4.246 The National Offshore Petroleum Safety Authority (NOPSA) is a statutory authority which administers offshore petroleum safety legislation.[523] It commenced operations in January 2005. The organisation's primary objectives include:

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518 Insolvency and Trustee Service Australia, *Submission LPP 62*, 20 June 2007.
519 *Bankruptcy Act 1966* (Cth) s 12.
520 Ibid s 12(2).
521 Insolvency and Trustee Service Australia, *Annual Report 2006–07*, 33.
522 Ibid, 34.
523 *Petroleum (Submerged Lands) Act 1967* (Cth) pt IIIC. This Act gives NOPSA functions and powers in relation to Commonwealth waters. Agreements are in place to introduce mirror legislation in the states and Northern Territory to recognise NOPSA and give it similar functions and powers in relation to state

- improving health and safety outcomes across the offshore petroleum industry
- ensuring health and safety regulation of the offshore petroleum industry is provided to standards that are equal to the best in the world
- reducing the regulatory burden on the offshore petroleum industry, which operates across multiple jurisdictions, by delivering a consistent and comprehensive health and safety regime.[524]

4.247 Schedule 7 of the *Petroleum (Submerged Lands) Act 1967* (Cth) establishes an occupational health and safety regime for petroleum activities in Commonwealth waters. Under the Act, NOPSA's occupational health and safety inspectors are granted powers to enter and search premises of facilities and regulated business premises, require a person to answer questions in person or in writing, and produce documents or articles.[525] Failure to comply with these requirements is an offence. Powers to enter and search other premises can be exercised with consent or pursuant to a warrant. [526]

4.248 NOPSA's *Compliance and Enforcement Policy* indicates that the agency has a graduated enforcement system that allows an inspector to escalate the compliance and enforcement action according to the response of the responsible party and the significance of the non-compliance.[527] The options commence with a verbal warning, and progress through written notices, improvement notices and prohibition notices, to recommendations for prosecution. In 2006–07, NOPSA undertook 66 inspections of facilities, issued 14 improvement notices and one prohibition notice.[528]

Royal Commissions of inquiry

4.249 Royal Commissions of inquiry have been described as 'unquestionably the most ancient and the most dignified' of the various bodies of inquiry.[529] The origins of Royal Commissions can be traced back to the 12th century.[530]

> In spite of the decline of this type of inquiry between the late 17th and the end of the 18th century, the practice was revived under Queen Victoria. It is naturally of special interest to Australia that the quasi-political device of using Royal Commissions of inquiry was revived at the time when British settlement created a new society in Australia.[531]

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and territory waters. Such legislation is operational in Victoria, Queensland, South Australia, Western Australian and the Northern Territory.

524 National Offshore Petroleum Safety Authority, *Welcome to NOPSA!* <www.nopsa.gov.au/index.asp> at 30 August 2007. The regulatory activities of NOPSA are operated in a full cost recovery basis.

525 *Petroleum (Submerged Lands) Act 1967* (Cth) sch 7, cls 31, 31A, 32.

526 Ibid sch 7, cls 31B, 31C.

527 National Offshore Petroleum Safety Authority, *Compliance and Enforcement Policy* (2007), 1–2.

528 National Offshore Petroleum Authority, *Annual Report 2006–07*, 6, 25.

529 S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), 5. See also H Clokie and J Robinson, *Royal Commissions of Inquiry: The Significance of Investigations in British Politics* (1969), 24–25.

530 D Borchardt, *Commissions of Inquiry in Australia: A Brief Survey* (1991), 6–7.

531 Ibid, 7.

4.250 Royal Commissions 'owe their foundation to an exercise of the royal prerogative to appoint appropriate citizens of the realm to perform duties on behalf of the Crown'.[532] The *Royal Commissions Act 1902* (Cth) allows the Governor-General, by Letters Patent, to

> issue such commissions, directed to such person or persons, as he thinks fit, requiring or authorising [those persons] to make inquiry into and report upon any matter specified in the Letters Patent, and which relates to or is connected with the peace, order and good government of the Commonwealth, or any public purpose or any power of the Commonwealth.[533]

4.251 Royal Commissions are normally established only where a matter of public interest so requires. Their ad hoc nature distinguishes them from permanent standing federal agencies and bodies. Their purpose is usually to ascertain factual circumstances and make recommendations.[534] The discovery of the truth has been described as a prime function of a Royal Commission.[535] The findings of a Royal Commission do not have any legally binding status, although they may assist in the formulation of government policy and the enactment of new legislation.[536]

> [Royal Commissions] can provide policy advice to governments or they can investigate and report on major disasters or events that become a matter of public concern as a result for example of some alleged maladministration in the workings of government.[537]

4.252 Justice Neville Owen, the Royal Commissioner in the HIH inquiry, stated:

> Royal commissions have a particular ability to delve beneath the surface and explore and expose matters that otherwise might not readily come to light. They also have the capacity to marshal evidence and other material in such a way as to assist those whose responsibility it is to consider future action. There is thus a continuing public benefit from the work royal commissions do.[538]

4.253 Royal Commissions are a common feature of Australian public life.[539] There have been a number of high profile federal Royal Commissions, including those into the Australian Wheat Board; HIH Insurance; the building and construction industry; and Aboriginal deaths in custody.[540] In addition, since the late 1980s, each Australian state has had a high profile commission into crime or corruption.[541]

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532 Ibid, 6.
533 *Royal Commissions Act 1902* (Cth) s 1A.
534 T Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (2006), [7.65].
535 Ibid, [7.66].
536 G Lindell, *Tribunals of Inquiry and Royal Commissions: Law and Policy Paper 22* (2002) Federation Press and Centre for International and Public Law, Australian National University, 1.
537 Ibid, 1, 3.
538 N Owen, *Report of the HIH Royal Commission* (2003), [1.1].
539 S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), 5.
540 See T Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (2006); N Owen, *Report of the HIH Royal Commission* (2003); T Cole, *Royal Commission*

4.254 In the Second Reading of the Royal Commissions Bill 1902, Senator O'Connor stated:

> It is quite evident that the power to appoint Royal commissions is of no value whatever unless you can give power to examine witnesses on oath, and to compel the attendance of witnesses, and the production of documents.[542]

4.255 A federal Royal Commission has the power to summon a person to appear before it to give evidence or to produce the documents or things specified in the summons;[543] and to require a person appearing at the hearing of evidence to take an oath or affirmation.[544] Legal practitioners appointed or authorised to assist a Royal Commission may, so far as the Royal Commission thinks proper, examine or cross-examine any witness on any matter which the commission deems relevant to the inquiry.[545] A person who fails to attend a hearing or to produce the requested documents or things, without reasonable excuse, commits an offence, punishable by a maximum penalty of $1,000 or imprisonment for six months.[546] The same maximum penalty applies to a person who refuses to be sworn, make an affirmation or to answer any relevant question asked by the Royal Commission.[547] However, a witness cannot be compelled to disclose to a Royal Commission 'any secret process of manufacture'.[548] A federal Royal Commission may also authorise a member of the commission or a member of the AFP or of the police force of a state or territory to apply for search warrants in relation to matters into which it is inquiring.[549]

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into the Building and Construction Industry (2003); E Johnstone, *Royal Commission into Aboriginal Deaths in Custody* (1991).

541 For example, the Fitzgerald Inquiry in Queensland; the Royal Commission into the New South Wales Police Service in New South Wales (the Wood Royal Commission); and the WA Inc Royal Commission in Western Australia.

542 Commonwealth, *Parliamentary Debates*, Senate, 26 August 1902, 15659 (R O'Connor), 15659.

543 *Royal Commissions Act 1902* (Cth) s 2(1).

544 Ibid s 2(3).

545 Ibid s 6FA.

546 Ibid s 3.

547 Ibid s 6. The Act provides for the separate offence of contempt of a Royal Commission: see s 6O.

548 Ibid s 6D(1).

549 Ibid s 4.

5. Client Legal Privilege in Federal Investigations

Contents

Introduction

5.1 This chapter considers the law on client legal privilege in the specific context of federal investigations. Legislative provisions and significant cases dealing with the application of the privilege are discussed. This chapter contains recommendations aimed at achieving greater clarity in the law on the application of privilege to federal coercive information-gathering powers. It also considers whether there needs to be

greater consistency in the law on the application of client legal privilege to those powers.

Legislative provisions

5.2 Federal legislative provisions conferring coercive information-gathering powers on federal bodies take a number of different approaches in dealing with the issue of the application of client legal privilege. In broad terms, legislation variously:

- is silent on the issue;
- expressly abrogates the privilege;
- expressly preserves the privilege;
- modifies or partially abrogates the privilege;
- makes specific provision for the application of the privilege to lawyers—whether or not it otherwise remains silent on the application of the privilege to the client; or
- makes provision for procedural aspects in determining the application of the privilege to specific communications, or in protecting privileged communications.

Silence

5.3 Unfortunately, for the most part, federal laws contain no express provision in relation to client legal privilege.[1]

5.4 A subset of the provisions that are silent on privilege provide that it is not an offence for a person intentionally or recklessly to fail to comply with a coercive information-gathering power if there is a reasonable excuse, without specifying whether or not a claim of client legal privilege amounts to a reasonable excuse.[2]

Abrogation of privilege

James Hardie (Investigations and Proceedings) Act 2004 (Cth)

5.5 Only a few federal statutes expressly abrogate client legal privilege. One example is the *James Hardie (Investigations and Proceedings) Act 2004* (Cth), which

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1 See, eg, *Building and Construction Industry Improvement Act 2005* (Cth); *Gene Technology Act 2000* (Cth); *Social Security Act 1991* (Cth); *Medicare Australia Act 1973* (Cth); *Insurance Act 1973* (Cth); *Banking Act 1959* (Cth); *Taxation Administration Act 1953* (Cth).

2 See, eg, *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) s 159(3); *Social Security (Administration) Act 1999* (Cth) s 74(3); *Insurance Contracts Act 1984* (Cth) ss 11C(2), 11D(3).

abrogates client legal privilege in relation to certain material, allowing its use in investigations of the James Hardie Group and any related proceedings.[3] The Act also makes it clear that a lawyer cannot refuse to produce 'James Hardie material' on the ground that it would involve disclosing a privileged communication.[4]

5.6 In introducing the James Hardie (Investigations and Proceedings) Bill 2004 into Parliament, the then Treasurer, the Hon Peter Costello MP, noted that there are situations in which the abrogation of the privilege is justified in order to serve a higher public policy interest. He identified the 'effective enforcement of corporate regulation' as one such interest.[5] In the Second Reading Speech for the Bill, the Treasurer stated:

> There is considerable community concern about the conduct of James Hardie … and particularly in relation to the separation of subsidiary companies with liabilities via a group restructure, the transfer of key assets offshore in that restructure and the subsequent underfunding of obligations to compensate those victims who have a legitimate claim against James Hardie for asbestos-related diseases.
>
> These obligations have recently been estimated at approximately $1.5 billion. However, the figure could be as high as $2 billion as the number of victims identified increases. …
>
> A thorough investigation of the conduct of James Hardie, with proceedings brought where misconduct is found, is essential to maintaining community confidence in the Australian corporate regulatory regime. …
>
> The government shares the community's concern about the difficulties faced by the victims of asbestos disease and their families and wishes to ensure that they are treated fairly. We also place great store on ethical behaviour by corporations. We do not condone or support companies that restructure their affairs to avoid their legal liabilities to those people whose suffering is very great and whose lives are shattered by horrible disease.[6]

Crimes Act 1914 (Cth)

5.7 Client legal privilege is also abrogated in certain situations under the *Crimes Act 1914* (Cth). A person is not excused from providing documents to:

- the Australian Federal Police (AFP), pursuant to a notice under s 3ZQN of the *Crimes Act* requiring the production of certain documents relating to the investigation of a serious terrorism offence; or

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3 See *James Hardie (Investigations and Proceedings) Act 2004* (Cth) s 4.
4 See Ibid s 4(3). 'James Hardie material' is defined in s 3.
5 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 2004, 1 (P Costello—Treasurer), 2.
6 Ibid, 1.

- to a magistrate, pursuant to a notice under s 3ZQO of the *Crimes Act* requiring the production of certain documents relating to the investigation of a serious offence;

on the ground that production of the documents would disclose material that is protected against disclosure by client legal privilege or any other duty of confidence.[7]

Other statutory provisions

5.8 Similarly, a person is not excused from providing:

- certain property tracking records pursuant to an order made by a magistrate under s 202 of the *Proceeds of Crime Act 2002* (Cth); or

- information or documents, or answering questions under the *Inspector-General of Taxation Act 2003* (Cth);

on the ground that it would disclose information the subject of client legal privilege.[8]

Preservation of privilege

5.9 The *Trade Practices Act 1974* (Cth) (the TPA) expressly preserves the application of client legal privilege in the context of the Australian Competition and Consumer Commission's main coercive information-gathering power under s 155. This section provides that the exercise of that power does not require a person to produce a document that would disclose information the subject of a privilege claim.[9] This provision was inserted in the TPA by the *Trade Practices Amendment Act (No 1) 2006* (Cth), implementing a recommendation made by the Trade Practices Act Review Committee—following the decision in *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (*Daniels*)—that the TPA should provide explicitly that s 155 does not require the production of documents to which privilege attaches.[10]

5.10 Some federal legislation expressly provides that the law concerning client legal privilege is not affected, which also has the effect of preserving the common law concerning privilege. Examples of this type of provision can be found in the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act);[11] the *Law Enforcement*

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7 *Crimes Act 1914* (Cth) s 3ZQR.

8 *Proceeds of Crime Act 2002* (Cth) s 206; *Inspector-General of Taxation Act 2003* (Cth) s 16(1).

9 *Trade Practices Act 1974* (Cth) s 155(7B).

10 Australian Government Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act* (2003), rec 13.5. The High Court's decision in *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 relating to the application of the privilege to *Trade Practices Act 1974* (Cth) s 155 is discussed below.

11 See *Australian Security Intelligence Organisation Act 1979* (Cth) s 34ZV, which relates to the exercise of ASIO's special powers under div 3 relating to terrorism offences. However, the ASIO Act is silent on privilege in so far as it applies to ASIO's exercise of special powers under div 2 of the Act.

Integrity Commissioner Act 2006 (Cth);[12] and the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth).[13] Consistent with the approach of the High Court in *Baker v Campbell*,[14] the *Crimes Act* expressly preserves the application of privilege in the course of search and seizure.[15]

Modification or partial abrogation

5.11 As discussed in Chapter 3, there are two limbs to client legal privilege—the 'advice' limb and the 'litigation' limb. Some federal legislative provisions modify the application of the privilege, by narrowing the circumstances in which the privilege can be claimed. For example, the *Inspector-General of Security and Intelligence Act 1986* (Cth) does not excuse a person from giving information or producing a document on the ground that it would disclose legal advice given to a Minister, an agency, or an authority of the Commonwealth.[16] However, it seems that a claim for client legal privilege would excuse a person from giving information or producing a document if doing so would involve disclosing legal advice given to someone other than a Minister, an agency, or an authority of the Commonwealth, or if it fell within the litigation limb of the privilege and the document did not fall within the category of 'legal advice' to one of the specified entities. So, for example, draft pleadings and affidavits would be excused from production.[17]

Provisions relating to lawyers

5.12 A number of federal statutes give lawyers express statutory protection from complying with a coercive power, where to do so would involve disclosing a privileged communication unless:

- the client to whom the privilege belongs consents to the lawyer complying with the requirement; or
- the liquidator consents where the privilege belongs to a body corporate under administration.

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12 *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 138 provides that pt 9 div 4 (concerning search warrants) does not affect the law relating to client legal privilege.

13 *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 242. See also Exposure Draft Human Services (Enhanced Service Delivery) Bill 2007 (Cth) cl 155(3).

14 *Baker v Campbell* (1983) 153 CLR 52. This case is discussed in Ch 3.

15 *Crimes Act 1914* (Cth) s 3ZX, provides that pt 1AA of the *Crimes Act* (concerning powers of search, information gathering, arrest and related powers) does not affect the law relating to client legal privilege.

16 *Inspector-General of Intelligence and Security Act 1986* (Cth) s 18(6)(b). See also *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 24(3) (which is in similar terms, although it also applies to information or documents that would disclose legal advice given to a person or body that acts on behalf of the Commonwealth); *Ombudsman Act 1976* (Cth) s 9(4)(ab) (which applies only to certain types of legal advice and communications) and *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 80(5)(c).

17 This is considered further in Ch 6.

5.13 If a lawyer refuses to comply, he or she must reveal the name and address of the relevant client—where they are known—and provide sufficient particulars to identify the documents containing the privileged communications.[18] Sometimes legislation states that such a provision does not affect the law relating to client legal privilege,[19] but more often the legislation is silent on this point.[20]

Provisions relating to procedure

5.14 Given that most federal legislation conferring coercive powers is silent on the issue of privilege, it is rare for such legislation to make provision for the procedures to be adopted in resolving claims for privilege.[21]

5.15 An example of a federal provision that relates to the procedures to be adopted in protecting privileged information is s 89 of the *Law Enforcement Integrity Commissioner Act.* It provides that a person must give evidence in private if the evidence is likely to disclose specified types of legal advice or communications that attract client legal privilege.

5.16 Another notable exception is the *Royal Commissions Act 1902* (Cth) as amended by the *Royal Commission Amendment Act 2006* (Cth). The *Royal Commissions Act* provides that the power of a Royal Commission to require or summon a person to produce a document includes the power to require or summon the person to produce a document that is subject to client legal privilege.[22] It also provides that it is not a reasonable excuse to fail to produce a document to a Royal Commission on the basis that it is the subject of a claim for privilege unless:

- a court has found the document to be privileged; or
- the claim is made to the member of the Commission who required production of the document within the time required for production of the document.[23]

5.17 Where a claim for privilege is made to a Royal Commission, the Commission may serve a notice requiring the production of the document the subject of the claim for the purpose of inspecting it to decide whether to accept or reject the claim.[24] Where the claim is accepted, the Royal Commission must return the document and disregard

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18 See, eg, *Law Enforcement Integrity Commissioner Act 2006* (Cth) ss 79, 95; *Australian Crime Commission Act 2002* (Cth) s 30(3); *Australian Securities and Investments Commission Act 2001* (Cth) s 69; *Retirement Savings Account Act 1997* (Cth) s 118; *Superannuation Industry (Supervision) Act 1993* (Cth) s 288.

19 See, eg, *Law Enforcement Integrity Commissioner Act 2006* (Cth) ss 79(5), 95(5); *Australian Crime Commission Act 2002* (Cth) s 30(9).

20 See, eg, *Australian Securities and Investments Commission Act 2001* (Cth).

21 Practical and procedural issues associated with resolving claims for privilege are discussed in Ch 8.

22 *Royal Commissions Act 1902* (Cth) s 2(5). However, this section contains a note that under s 6AA client legal privilege might still be a reasonable excuse for refusing to produce the document.

23 Ibid s 6AA(1).

24 Ibid s 6AA(2), (3).

the privileged material for the purposes of any report or decision it makes.[25] Where the claim is rejected, the Royal Commission may use the document for the purposes of its inquiry.[26] The Act also sets out offences in relation to the non-production of documents the subject of a claim for client legal privilege.[27]

5.18 Amendments to the *Royal Commissions Act* in 2006 were designed to

> put beyond doubt that a Commissioner may require the production of a document in respect of which [client legal privilege] is claimed, for the limited purpose of making a finding about that claim, that is deciding to accept or reject it, for the purposes of the Commission.[28]

5.19 The amendments were requested by Commissioner Terence Cole, who headed the inquiry into AWB Ltd (AWB) and the Oil-for-Food Programme (the AWB Royal Commission),[29] following the decision in *AWB Ltd v Cole*.[30]

5.20 During the AWB Royal Commission, AWB Ltd challenged Commissioner Cole's decision to reject a claim of client legal privilege over a particular document and his capacity to determine privilege claims. In the Federal Court, Young J held that the document in question was not subject to privilege. He also held that Commissioner Cole had power in the circumstances of that case—as the document had been inadvertently provided to the Royal Commission and without any accompanying claim for privilege at that time—to form an opinion as to whether the document was subject to privilege.[31] However, Young J's decision cast doubt on the ability of a Royal Commissioner to inspect a document in respect of which client legal privilege has been claimed to determine whether the claim is made out—although he stated that it was inappropriate for him to grant declaratory relief on this issue.[32]

5.21 In the Second Reading Speech for the Royal Commissions Amendment Bill 2006, the Hon Malcolm Turnbull MP, the then Parliamentary Secretary to the Prime Minister, in referring to the decision of Young J, stated:

> It puts royal commissions in a very difficult practical situation, because it means that, if an order or direction is made that a document … be produced and a claim of legal

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25 Ibid s 6AA(4).
26 See Ibid s 6AA(5).
27 Ibid s 6AB.
28 Explanatory Memorandum, Royal Commissions Amendment Bill 2006 (Cth), 1.
29 See T Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (2006).
30 *AWB Ltd v Cole* (2006) 152 FCR 382. See also Explanatory Memorandum, Royal Commissions Amendment Bill 2006 (Cth), l.
31 See *AWB Ltd v Cole* (2006) 152 FCR 382, in particular [189]. See also Explanatory Memorandum, Royal Commissions Amendment Bill 2006 (Cth), 1.
32 *AWB Ltd v Cole* (2006) 152 FCR 382, [184]–[194]. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 26 May 2006, 18 (M Turnbull—Parliamentary Secretary to the Prime Minister), 20.

> professional privilege is made, the commission then must either abandon its efforts to obtain access to the document or go to a court itself to seek a declaration that legal professional privilege does not apply or indeed to seek a mandatory injunction that the document be produced. This is, in practical terms, an impossible obligation, because the commissioner has not seen the document and does not know how strong the claim of privilege is. It would make the conduct of inquiries of this kind open to considerable delay and, indeed, possibly tactical claims for legal professional privilege.[33]

Need for clarification

5.22 Where statutes conferring coercive information-gathering powers are silent on client legal privilege—or address the obligations of lawyers, but not their clients, concerning the provision of privileged information in response to a coercive power—there may be confusion about whether the exercise of a particular power overrides the privilege by implication. Confusion may arise because:

(a) the common law has not considered whether the exercise of a particular power abrogates privilege by necessary implication;

(b) where the common law has decided whether the exercise of a particular power abrogates privilege by implication, there may be differing interpretations about the extent to which that decision applies to other powers not considered specifically by the court; or

(c) it is not readily apparent whether particular federal bodies take the view that their powers abrogate privilege by necessary implication, especially where such powers have never been used.[34]

5.23 In addition, where privilege is abrogated by express words, or where a federal body takes the position that its powers abrogate privilege by necessary implication, there may be uncertainty about whether the abrogation extends to advice given in relation to an investigation or communications concerning the representation of a client in an investigation.[35]

5.24 In some instances, clarification about the application of the privilege to particular powers has been provided by the common law. For example, in *Carmody v Mackellar* the Federal Court held that the power to listen to and record communications under s 45 of the then *Telecommunications (Interception) Act 1979* (Cth) overrode client legal privilege. The Court stated that the telecommunications interception legislation would be unworkable if it were not to be construed as

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33 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 May 2006, 18 (M Turnbull—Parliamentary Secretary to the Prime Minister), 20.

34 The lack of transparency of approach of particular federal bodies is addressed separately below.

35 This issue is discussed in Ch 7.

authorising the recording or overhearing of privileged communications.[36] The decision in *Carmody v Mackellar* is relied upon by federal bodies exercising telecommunications interception powers under legislation authorising such interception, such as the *Telecommunications (Interception and Access) Act 1979* (Cth) and the *Surveillance Devices Act 2004* (Cth).[37]

5.25 Conversely, the cases mentioned below have held that the following powers do not abrogate client legal privilege:

- *Commissioner of Taxation v Citibank Ltd* in relation to the powers of access of the Commissioner of Taxation under s 263 of the *Income Tax Assessment Act 1936* (Cth);[38]
- *Joel v Migration Agents Registration Authority* in relation to s 308 of the *Migration Act 1958* (Cth);[39]
- *Re Steele; Ex parte Official Trustee in Bankruptcy v Clayton Utz* in relation to s 77A of the *Bankruptcy Act 1966* (Cth);[40] and
- *Re Compass Airlines Pty Ltd* in relation to the right of a liquidator to obtain information under s 597 of the *Corporations Law*.[41]

5.26 The High Court's decision in *Daniels* clarified that privilege does apply to the coercive information-gathering power under s 155 of the TPA.[42] Although the decision in *Daniels* has wider implications for the application of privilege to other coercive information-gathering powers, as the discussion below bears out, there remain areas of uncertainty. There are significant questions about the interrelationship between *Daniels* and the earlier case, *Corporate Affairs Commission of New South Wales v Yuill* (*Yuill*),

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36 *Carmody v Mackellar* (1997) 76 FCR 115.

37 Australian Federal Police, *Submission LPP 115,* 29 November 2007. See also Officers from the Australian Security Intelligence Organisation and the Inspector-General of Security and Intelligence, *Consultation LPP 34*, Sydney, 26 June 2007.

38 *Commissioner of Taxation v Citibank Ltd* (1989) 20 FCR 403. See also *Allen Allen & Hemsley v Deputy Federal Commissioner of Taxation* (1989) 20 FCR 576.

39 *Joel v Migration Agents Registration Authority* [2000] FCA 1919, [32]. Section 308 empowers the Migration Agents Registration Authority to require a registered migration agent to answer questions (either by statutory declaration or in person) and to produce specified documents and records.

40 *Re Steele; Ex parte Official Trustee in Bankruptcy v Clayton Utz* (1994) 119 ALR 716. See also *Boensch v Pascoe* [2007] FCA 532; *Lombe v Pollak* [2004] FCA 264.

41 *Re Compass Airlines Pty Ltd* (1992) 35 FCR 447.

42 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543. This case is discussed in more detail below.

which dealt with the implied abrogation of privilege by the now repealed *Companies (New South Wales) Code* (the *Companies Code*).[43]

5.27 Not all coercive information-gathering powers replicate the wording of s 155 of the TPA, nor do they all share the same investigatory contexts. Each federal body with coercive information-gathering powers, and the persons and entities subject to those powers, may be forced to litigate to resolve conclusively the question of whether the privilege is available in response to the exercise of their particular investigatory powers.

5.28 In 2003—prior to the amendments to the *Royal Commissions Act*—Justice Neville Owen, the Royal Commissioner in the HIH Royal Commission, expressed a desire for clarity in the law. In the Report of the HIH Royal Commission, Justice Owen stated:

> As a consequence of the doubt over whether legal professional privilege is available in the context of a royal commission, large amounts of time were devoted to dealing with the associated questions that arose. Accordingly, if it is the legislature's intention that legal professional privilege should not be available as a reasonable excuse against the production of documents in answer to royal commission processes, it is desirable that the Act be amended to make this explicit.[44]

Decision in *Yuill*

5.29 A majority of the High Court in *Yuill* held that a claim of client legal privilege was not a 'reasonable excuse' for refusing to comply with a requirement under s 295(1) of the *Companies Code*.[45] Section 295(1) empowered an inspector to require an officer of a corporation, the subject of an investigation, to produce such books of the corporation that were in his or her custody or control and to appear before the inspector for examination.

5.30 The *Companies Code*—which was enacted prior to the decision in *Baker v Campbell*[46]—did not contain a provision abrogating the privilege expressly. The law, as understood at that time, and declared in *O'Reilly v State Bank of Victoria Commissioners*,[47] was that client legal privilege was limited to judicial and quasi-judicial proceedings. Brennan J stated that the *Companies Code* was to be construed in light of the law as it stood when it came into force.[48] He also stated that even if ss 295 and 296(2) were to be construed in the light of *Baker v Campbell*, the *Companies Code* evinced an intention that client legal privilege should not be a reasonable excuse for failure to comply with a requirement under s 295(1).

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43 *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319. This case is discussed below.

44 N Owen, *Report of the HIH Royal Commission* (2003), [2.9].

45 *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319.

46 *Baker v Campbell* (1983) 153 CLR 52.

47 *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1.

48 *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319, 323.

> 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.[49]

5.31 The High Court relied on a number of reasons for implying that the privilege was abrogated. The first was that s 308 of the *Companies Code* entitled a lawyer to refuse to comply with a notice where it would involve a breach of client legal privilege, as long as the lawyer provided the client's name and address. Brennan J stated:

> The enactment of s 308 would be otiose and the specifying of a condition governing the solicitor's excuse for non-compliance would be futile if the observance of legal professional privilege were a reasonable excuse for non-compliance, for a solicitor who is bound to observe legal professional privilege would be entitled to refuse to comply with a notice issued under s 295 without satisfying such a condition … The apparent purpose of the statutory condition is to ensure that a client can be located and required to disclose communications protected by … privilege although the solicitor may be excused from disclosing them.[50]

5.32 Secondly, s 299(2)(d) of the *Companies Code* provided that a statement made in an examination which disclosed matter, in respect of which a claim for client legal privilege could be made, was not admissible in evidence against the person in any civil or criminal proceedings. This was said to imply that an assertion of client legal privilege was not a reasonable excuse to refuse to comply with a requirement to answer questions and that it would be

> a curious asymmetry to treat an assertion of the privilege as a 'reasonable excuse' for non-compliance with a requirement to produce books, for the contents of the books could be ascertained in any event by compelling oral disclosure by any person who has knowledge of them.[51]

5.33 Dawson J expressed the view that 'reasonable excuse' more aptly referred to any 'physical or practical difficulties' in complying with a requirement under s 295.[52]

> To construe it as embracing legal professional privilege would be to render ss 299(2)(d) and 308 superfluous and to produce an incongruity with the denial of self-incrimination as a reasonable excuse.[53]

5.34 Emphasis also was placed on the purpose of instituting a special investigation under Part VII of the *Companies Code.* Part VII provided for investigations into the affairs of corporations when investigation was, in the opinion of the relevant Minister,

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49 Ibid, 323.

50 Ibid, 324. See also 334 (Dawson J).

51 Ibid, 325. See also 335.

52 Ibid, 336. Gaudron J, in dissent, expressed the view that 'reasonable excuse' was wide enough to cover any answer, defence, justification or excuse acknowledged by the law at the time of the refusal to comply, including client legal privilege: see *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319, 338–339.

53 *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319, 336.

warranted in the public or national interest, or when the Ministerial Council decided that an investigation should take place.[54] The view was expressed that an inspector's ability to satisfy the public or national interest would be significantly diminished if he or she could not compel the disclosure of privileged communications passing between persons whose conduct was material to an investigation, and their legal advisers.[55]

5.35 The *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) does not contain a provision that expressly abrogates client legal privilege. However, it contains provisions similar to those in the *Companies Code* that were the subject of the decision in *Yuill*.[56] ASIC relies on *Yuill* to support its position that the ASIC Act impliedly abrogates privilege.[57]

Decision in *Daniels*

5.36 Prior to 2006, the TPA was silent on the application of client legal privilege to the coercive information-gathering powers under s 155 of the TPA. In an important decision on whether or not privilege was abrogated by necessary implication, the High Court in *Daniels* overturned the decision of the Full Court of the Federal Court[58] and determined that s 155 does not entitle the Australian Competition and Consumer Commission (ACCC) to obtain or access documents subject to a valid claim for client legal privilege.[59]

5.37 Fundamental to the High Court's decision was the finding that client legal privilege 'is not merely a rule of substantive law. It is an important common law right, or, perhaps, more accurately, an important common law immunity'.[60] The High Court stated that statutory provisions were not to be construed as abrogating important common law rights in the absence of express unambiguous words or a necessary implication to that effect.[61]

> Courts do not construe legislation as abolishing, suspending or adversely affecting rights, freedoms and immunities that the courts have recognised as fundamental unless the legislation does so in unambiguous terms. In construing legislation, the courts begin with the presumption that the legislature does not interfere with these fundamental rights, freedoms and immunities unless it makes its intention to do so unmistakably clear.[62]

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54 Ibid, 326, 333.
55 Ibid, 326.
56 *Australian Securities and Investments Commission Act 2001* (Cth) ss 69, 76(1)(d).
57 Australian Securities and Investments Commission, *Submission LPP 5,* 29 March 2007.
58 See *Australian Competition and Consumer Commission v Daniels Corporation International Pty Ltd* (2001) 108 FCR 123, where the Court held that client legal privilege was abrogated under s 155 of the TPA.
59 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.
60 Ibid, [11].
61 Ibid, [11], [43].
62 Ibid, [43].

5.38 The High Court rejected the ACCC's argument that the purpose of investigating contraventions of the TPA would be impaired or frustrated if client legal privilege could be availed of to resist compliance with a notice under s 155, and stressed that a communication that was made to seek assistance to evade the law by illegal conduct was not privileged.[63]

5.39 McHugh J rejected the argument that the TPA impliedly abrogated the privilege. He noted:

> Section 155 would neither become inoperative nor be rendered practically useless if a person to whom a s 155 notice was addressed could refuse to produce documents because they were protected by legal professional privilege. Documents protected by the privilege must be a small percentage of the documents whose production can be required by such notices. Only in recent times has the Commission or its predecessor claimed that legal professional privilege does not apply to documents that are the subject of a s 155 notice. The Commission's long acceptance of its earlier position supports the view that the section's object would not be frustrated by holding that it does not abolish the right to claim immunity for documents protected by … privilege.[64]

5.40 Where the ACCC has reason to believe that a person has contravened the TPA, s 155(2) gives it power to enter premises and to inspect, copy or take extracts of documents on those premises. The High Court in *Daniels* noted that this power was similar to the power under the *Crimes Act* to issue a search warrant to enter premises and seize things, including documents, and that the Court's decisions in *Baker v Campbell*[65] and *Australian Federal Police v Propend Finance*[66] held and confirmed that the power of search and seizure under the *Crimes Act* did not authorise the seizure of material to which client legal privilege attached.[67]

5.41 The ACCC argued that the statutory proviso that a person 'must not refuse or fail to comply with a notice [under s 155] to the extent that the person is capable of complying with it' permitted non-compliance only where the person was physically incapable of complying with the notice. The High Court rejected this argument.

5.42 The High Court distinguished its earlier decisions in *Pyneboard Pty Ltd v Trade Practices Commission* (*Pyneboard*)[68] and *Yuill*. *Pyneboard* was distinguished on the basis that it dealt with the privilege against self-exposure to a penalty. The High Court stated that the decision in *Pyneboard*—that s 155(1) of the TPA impliedly abrogated the privilege against self-exposure to a penalty—could partly be supported by

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63 Ibid, [7], [35].
64 Ibid, [45].
65 *Baker v Campbell* (1983) 153 CLR 52.
66 *Australian Federal Police v Propend Finance* (1997) 188 CLR 501.
67 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [27], [50]–[51].
68 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.

reference to the 'absurdity that would result if that privilege could be claimed, and pursuant to s 155(7), the privilege against self-incrimination could not'.[69]

5.43 *Yuill* was distinguished on the basis that s 295 of the C*ompanies Code* was very different in context, history, purpose and wording from s 155 of the TPA. *Yuill* was decided in the context of statutory provisions that were enacted before the decision in *Baker v Campbell*, at a time when it was thought that client legal privilege could only apply in judicial and quasi-judicial proceedings.[70] The High Court stated that it may be that *Yuill* would now be decided differently,[71] and Kirby J expressed the view that *Yuill* may have been 'wrongly decided'.[72]

Implications of *Daniels*

General implications

5.44 It has been suggested that *Daniels* is important not merely because it establishes authoritatively that the TPA does not abrogate privilege, but because

> it reveals that the Court is applying established principles in a new way. It seems likely that a stricter approach will be taken in the future to the implied abrogation of … legal professional privilege.[73]

5.45 As Kirby J noted, the implications of the decision in *Daniels* transcend the TPA and the circumstances of the parties to that case.[74] Similar statutory language to that in s 155 of the TPA appears in other federal legislation affecting powers of investigation with respect to taxation and the environment, for example.

5.46 In 2003, the House of Lords in *R (Morgan Grenfell) v Special Commissioner of Income Tax*, reached a similar conclusion to the High Court in *Daniels*.[75] It held that s 20(1) of the *Taxes Management Act 1970* (UK)—which contained a power for a tax inspector to seek the production of documents on compulsion—did not abrogate client legal privilege either expressly or by necessary implication. Significantly, the House of Lords construed a provision in that Act which protected a lawyer from disclosing privileged information without the client's consent, as consistent with the preservation of client legal privilege.

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69 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [30]–[31], [48].

70 Ibid, [20].

71 Ibid, [35].

72 Ibid, [58]. See also *Deputy Commissioner of Taxation v Clark* (2003) 57 NSWLR 113, 146: 'Considerable doubt has now been cast on the result in *Corporate Affairs Commission v Yuill'* (Spigelman CJ).

73 S Donaghue, 'Coercive Investigations and Legal Professional Privilege' (2003) 77(11) *Law Institute Journal* 40, 44.

74 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [84].

75 *R (Morgan Grenfell) v Special Commissioner of Income Tax* [2003] 1 AC 563, [18], [22], [25].

> Why should Parliament want to preserve [privilege] for documents in the hands of the lawyer but not for documents … in the hands of the taxpayer? …
>
> [Client legal privilege] is, after all, a single privilege, for the benefit of the client, whether the documents are in his hands or that of his lawyer.[76]

5.47 While the *Building and Construction Industry Improvement Act 2005* (Cth) is silent on client legal privilege, the Guidelines issued by the Office of the Australian Building and Construction Commissioner state that, applying the reasoning in *Daniels*, the Commissioner 'expects that the … investigative power [under the Act] does not abolish the right to claim legal professional privilege when responding to a notice'.[77]

5.48 The Australian Prudential Regulation Authority (APRA) has informed the ALRC that, since the High Court's decision in *Daniels*, it has not pressed the view that its coercive information-gathering powers abrogate privilege. Prior to the decision in *Daniels*, however, APRA did take the view—particularly in the exercise of its investigation powers under the *Superannuation Industry (Supervision) Act 1993* (Cth)—that client legal privilege was not a reasonable excuse for a person (other than a person's lawyer) not to produce documents or provide information.[78]

5.49 However, it emerged in the ALRC's consultations that persons or entities the subject of APRA's coercive information-gathering powers have, on occasion, been requested by APRA to provide privileged information.[79]

Implications concerning ASIC

5.50 Despite the decision in *Daniels*, a federal body with coercive information-gathering powers may maintain that its specific investigatory powers abrogate client legal privilege. For example, there has been debate about whether specific investigatory powers conferred on ASIC by the ASIC Act abrogate client legal privilege. One view, taken by ASIC, is that the decision in *Yuill* is still applicable to those powers.[80] On that view the construction of ASIC's powers is not affected by *Daniels*.

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76 Ibid, [22], [25].

77 Australian Government Office of the Australian Building and Construction Commissioner, *Building and Construction Industry Improvement Act 2005: Guidelines in Relation to the Exercise of Compliance Powers in the Building and Construction Industry* (2005), [34]–[35].

78 Australian Prudential Regulation Authority, *Submission LPP 74,* 6 July 2007.

79 For example, G Healy and A Eastwood—Freehills, *Consultation LPP 30*, Sydney, 12 June 2007. In consultation a financial services industry association made a similar observation.

80 *Australian Securities Commission v Dalleagles Pty Ltd* (1992) 36 FCR 350 applied *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319 to investigations by ASIC under the *Australian Securities and Investments Commission Act 2001* (Cth) pt 3. As noted in Ch 1, the ALRC was informed on 11 December 2007 that, from 3 December 2007, ASIC explicitly notifies persons subject to its compulsory powers that they are not required to provide documents or information subject to client legal privilege.

5.51 However, stakeholders in this Inquiry have questioned ASIC's position on privilege, and its reliance on *Yuill*. The Law Council of Australia (Law Council) submitted that ASIC's position is 'unsustainable',[81] and the National Australia Bank, together with a number of other banks and corporations, submitted that ASIC's position is, in their view, 'erroneous'.[82]

5.52 The proposition that *Yuill* applies has also been challenged by commentators. Emilios Kyrou and Gillian Wong state:

> Applying the rationale in *Daniels* to ASIC, it is submitted that ASIC's powers to issue notices to obtain documents under the ASIC Act do not satisfy the abrogation test because they do not expressly abrogate legal professional privilege and the retention of privilege would not significantly impair ASIC's functions under the ASIC Act. Consequently, contrary to ASIC's stated position, respondents to ASIC notices may resist production of documents on the basis that they are subject to legal professional privilege.[83]

5.53 Geoff Healy and Andrew Eastwood express the view that: the decision in *Yuill* is problematic; it should no longer be followed; and the better view is that ASIC's investigative powers do not abrogate client legal privilege.[84] They argue that:

- unlike the *Companies Code*, at the time the ASIC Act was enacted in 2001, it was well established that client legal privilege was a fundamental immunity, which was not confined to judicial or quasi-judicial proceedings;[85]

- provisions giving lawyers statutory protection from divulging privileged communications in response to a coercive power—such as those under s 308 of the *Companies Code* and s 69 of the ASIC Act—are explicable as preserving the duty of confidence owed by a lawyer to a client;[86]

- provisions preserving client legal privilege in subsequent litigation in respect of a statement made at an examination—such as s 299(2)(d) of the *Companies Code* and s 76(1)(d) of the ASIC Act—should be interpreted to mean that even if a person discloses a privileged communication during an examination, this does not amount to a waiver of privilege in subsequent litigation;[87]

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81 Law Council of Australia, *Submission LPP 26,* 4 June 2007.

82 National Australia Bank Limited and others, *Submission LPP 30,* 4 June 2007.

83 E Kyrou and G Wong, 'Is ASIC Entitled To Your Privileged Documents? Yuill, Daniels and the James Hardie Acts' (2005) 8(5) *Inhouse Counsel* 49, 50.

84 G Healy and A Eastwood, 'Legal Professional Privilege and the Investigative Powers of the Australian Securities and Investments Commission' (2005) 23 *Company and Securities Law Journal* 375.

85 Ibid, 380. See also Ch 3 on when privilege can be claimed.

86 Ibid, 382. This was the approach adopted by the House of Lords in *R (Morgan Grenfell) v Special Commissioner of Income Tax* [2003] 1 AC 563, 609–610 (Hoffman LJ).

87 G Healy and A Eastwood, 'Legal Professional Privilege and the Investigative Powers of the Australian Securities and Investments Commission' (2005) 23 *Company and Securities Law Journal* 375, 382.

- the 'special investigations' regime considered in *Yuill* has since been repealed and had no equivalent in the ASIC Act;[88] and

- the fact that the Australian Government has considered it necessary to introduce a new piece of legislation to abrogate client legal privilege expressly with respect to ASIC's investigation into James Hardie, emphasises the uncertainty that exists concerning ASIC's ability to access privileged material in other investigations.[89]

5.54 Ashley Black also notes that ASIC's stance sits oddly with the *James Hardie (Investigations and Proceedings) Act 2004*, which expressly abrogates privilege.

> This raises the question why that legislation was necessary, unless ASIC's view that a person (other than a lawyer) does not have reasonable excuse to refuse to produce privileged documents under an ASIC notice is incorrect or at least open to serious question.[90]

5.55 The uncertainty concerning ASIC's position on privilege was referred to by the Treasurer in his Second Reading Speech on the James Hardie (Investigations and Proceedings) Bill 2004:

> The bill will confirm a longstanding interpretation of ASIC's investigative and enforcement powers which was cast into doubt by the decision of the High Court in 2002 in the Daniels case. That case created some uncertainty as to whether the 1991 decision of the High Court in the Yuill case would be followed today if a request by ASIC to produce material subject to legal professional privilege were to be challenged.[91]

5.56 On the other hand, there are also published views supportive of the continuing application of *Yuill.* For example, Dr Stephen Donaghue expresses the view that *Yuill* was a case in which the statutory text was more amenable to an interpretation that preserved client legal privilege than s 155 of the TPA and that, despite its having been treated as an aberration in *Daniels*, *Yuill* was consistent with a line of authority that placed great emphasis on the purpose of an investigatory scheme in deciding whether a common law privilege had been abrogated.[92]

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88 Ibid, 383.

89 Ibid, 384.

90 A Black, 'Representation of Clients in Investigations by the Australian Securities & Investments Commission' (2005) (June–August) *Commercial Law Quarterly* 16, 19.

91 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 2004, 1 (P Costello—Treasurer), 1–2.

92 S Donaghue, 'Coercive Investigations and Legal Professional Privilege' (2003) 77(11) *Law Institute Journal* 40, 42. See also *R v McLaughlin* [2004] SADC 86, [20], where Judge David expressed the view that 'the relevant sections of the ASIC Act make it clear that legal professional privilege is abrogated to the extent of the relevant documents being handed over to ASIC for the purposes of further investigation'.

5.57 The debate about the application of privilege to ASIC's powers has been substantial and serious, indicating the existence of uncertainty and contention about client legal privilege in an important area of commercial regulation.

5.58 In the absence of statutory clarification, resolution of the question whether or not the ASIC Act abrogates client legal privilege is dependent on the initiation of litigation that would test ASIC's position—most likely prompted by a party the subject of a coercive information-gathering power refusing to produce privileged information in circumstances where ASIC insists that it do so. However, the publicity associated with, and the time and resources that would be expended in, such test litigation would make many persons and companies subject to ASIC's powers reluctant to pursue such a course.

5.59 Submissions and consultations revealed that inconsistent legal advice is being given to clients about their obligations to produce privileged information to ASIC. Some lawyers advise their clients that they are under no obligation to produce privileged information to ASIC, in light of the decision in *Daniels*; while others give qualified advice in this regard.[93] The Law Council submitted that it

> is informed that advice is provided to clients under investigation by ASIC that they do not have to produce privileged material to ASIC. However, such advice is routinely qualified by noting that there is some uncertainty in this area due to the *Yuill* decision and the position asserted by ASIC. …
>
> In short, the uncertainty creates a significant risk to entities under investigation which may make them the test case. This uncertainty is undesirable and places those entities in a difficult position.[94]

5.60 Submissions and consultations also suggested the existence of inconsistent practices within ASIC concerning its pressing for production of privileged information.[95] The Law Council submitted:

> It has been the experience of practitioners that investigators of ASIC have conceded that there is a difference of opinion as to whether compliance with [a] notice requires privileged material to be produced.[96]

5.61 Further, there appears to be some uncertainty about whether ASIC's position—that its coercive powers under ss 19 and 30–33 of the ASIC Act abrogate privilege by necessary implication—extends to other coercive powers under the ASIC Act. Black notes that it is not clear whether the obligation to provide reasonable assistance to ASIC under s 49 of the ASIC Act would prevent a person asserting a claim to client

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93 Law Council of Australia, *Submission LPP 26,* 4 June 2007; Regulatory lawyers of Clayton Utz, *Consultation LPP 13*, Sydney, 15 May 2007.

94 Law Council of Australia, *Submission LPP 26,* 4 June 2007.

95 Ibid. A financial services industry association made a similar observation.

96 Ibid.

legal privilege in relation to a communication.[97] Notices issued under s 49(3) of the ASIC Act do not include any express reference to client legal privilege unless the notice is issued to a lawyer.[98]

Approaches to necessary implication

5.62 Where statutes conferring powers on federal bodies are silent on the application of privilege, it is not always possible to ascertain whether they take the stance that their particular powers override privilege. This information tends not to be available on the websites of federal bodies.

5.63 An exception to this is the Australian Taxation Office (ATO). Its *Access and Information Gathering Manual*, which is available on its website, proceeds on the basis that client legal privilege applies to its access and information-gathering powers, and makes express reference to the High Court's decision in *Daniels*.[99]

5.64 The ALRC wrote to federal bodies with coercive information-gathering powers and asked whether they take the view that any of their powers abrogate privilege by necessary implication. Many federal bodies are of the opinion that their powers do not abrogate privilege.[100] For example:

- APRA, as noted above, stated that since *Daniels*, it has not pressed its previously-held view that certain of its powers abrogate privilege;[101]

- the Department of Immigration and Citizenship, following the decision in *Minister for Immigration & Multicultural & Indigenous Affairs v Hamdan*,[102] takes the position that information subject to client legal privilege cannot be

97 A Black, 'Representation of Clients in Investigations by the Australian Securities & Investments Commission' (2005) (June–August) *Commercial Law Quarterly* 16, 23. The nature of the power under *Australian Securities and Investments Commission Act 2001* (Cth) s 49 is outlined in Ch 4.

98 Australian Securities and Investments Commission, *Submission LPP 5,* 29 March 2007.

99 See Australian Taxation Office, *Access and Information Gathering Manual* <www.ato.gov.au> at 23 August 2007, [6.14], [6.15].

100 See Australian Prudential Regulation Authority, *Submission LPP 74,* 6 July 2007; Australian Government Office of the Privacy Commissioner, *Submission LPP 71,* 29 June 2007; Australian Customs Service, *Submission LPP 56,* 13 June 2007; Australian Government Department of Health and Ageing, *Submission LPP 51,* 17 July 2007; Australian Government Department of Immigration and Citizenship, *Submission LPP 46,* 12 June 2007; Office of the Australian Building and Construction Commissioner, *Submission LPP 33,* 4 June 2007; Australian Transaction Reports and Analysis Centre, *Submission LPP 31,* 4 June 2007; Human Rights and Equal Opportunity Commission, *Submission LPP 28,* 4 June 2007; Australian Communications and Media Authority, *Submission LPP 20,* 29 May 2007.

101 Australian Prudential Regulation Authority, *Submission LPP 74,* 6 July 2007.

102 *Minister for Immigration & Multicultural & Indigenous Affairs v Hamdan* [2005] FCAFC 113. The Minister conceded in this case that the *Migration Act 1958* (Cth) s 21 does not abrogate client legal privilege: see Ibid, [38].

required to be given in response to a notice issued under s 18 of the *Migration Act*;[103]

- the Office of the Privacy Commissioner (OPC) takes the view that a claim for client legal privilege falls within the 'reasonable excuse' defence for not complying with a coercive information-gathering power under the *Privacy Act 1988* (Cth);[104] and

- the Department of Health and Ageing stated that, given that privileged information is not likely to be relevant to the information-gathering powers under the *Aged Care Act 1997* (Cth), it would be difficult to argue that any of the provisions of that Act abrogate the privilege by necessary implication.[105]

5.65 Some federal bodies stated that they have never had to consider the issue of whether their powers abrogate privilege by necessary implication;[106] or that they would be seeking advice in this regard or otherwise taking steps to reassess their position.[107]

5.66 The Insolvency and Trustee Service Australia (ITSA) stated that it was unaware of any authoritative statement on whether the exercise of the express power under s 6A(3) of the *Bankruptcy Act 1966* (Cth) abrogates privilege.[108] It also expressed the view that, while it was not aware of any authoritative statement on whether a trustee's powers under s 77 of the *Bankruptcy Act*[109] would abrogate a claim for client legal privilege, it would be difficult to argue that the privilege was not abrogated. In expressing this view, ITSA relied, by analogy, on the decision of the Full Federal Court in *Griffin v Pantzer*, which held that s 77 abrogates the privilege against self-incrimination.[110]

Submissions and consultations

5.67 In response to the Issues Paper in this Inquiry, *Client Legal Privilege and Federal Investigatory Bodies* (IP 33),[111] strong support was expressed in submissions

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103 Australian Government Department of Immigration and Citizenship, *Submission LPP 46,* 12 June 2007.

104 Australian Government Office of the Privacy Commissioner, *Submission LPP 71,* 29 June 2007. See *Privacy Act 1988* (Cth) s 66(1B).

105 Australian Government Department of Health and Ageing, *Submission LPP 51,* 17 July 2007.

106 Australian Transport Safety Bureau, *Submission LPP 34,* 28 May 2007; Australian Communications and Media Authority, *Submission LPP 20,* 29 May 2007; Great Barrier Reef Marine Park Authority, *Submission LPP 17,* 1 June 2007.

107 Comcare, *Submission LPP 64,* 14 June 2007; Australian Transport Safety Bureau, *Submission LPP 34,* 28 May 2007.

108 Insolvency and Trustee Service Australia, *Submission LPP 62,* 20 June 2007. Section 6A(3) allows a trustee to give written notice to a bankrupt to produce certain information concerning the statement of his or her financial affairs presented to the Official Receiver.

109 A trustee's powers under s 77 include requiring a bankrupt to deliver up books or provide information about the bankrupt's conduct and examinable affairs.

110 *Griffin v Pantzer* (2004) 137 FCR 209.

111 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007).

and consultations for the need to clarify the application of client legal privilege to the coercive information-gathering powers of federal bodies.[112] For example, the Australian Financial Markets Association submitted:

> We believe the current uncertainty surrounding the coercive information-gathering powers of Commonwealth bodies with particular reference to ASIC, and the status of client legal privilege within the context of these powers needs to be clarified.[113]

5.68 The Law Society of New South Wales (NSW) submitted that 'the time for statutory intervention has probably arrived to clarify the extent of the powers agencies have to override client legal privilege'.[114] The Federation of Community Legal Centres (Vic) Inc expressed particular concern about the lack of clarity on how the Australian Security and Intelligence Organisation (ASIO) approaches the issue of client legal privilege.[115]

5.69 Some submissions expressed the need for clarification of the law of privilege in specific contexts. For example, ITSA submitted that there were several uncertainties in the application of the privilege in the bankruptcy context, which require clarification, including whether a trustee can obtain privileged material that relates to a right of action that vests in the trustee, or advice to a bankrupt about whether or not he or she is 'the owner of property that would vest'.[116]

5.70 A minority of submissions expressed the view that there was no need to clarify the application of privilege to the coercive information-gathering powers of one or more federal bodies. The OPC submitted that there was no need to clarify the application of the privilege to its powers under the *Privacy Act*, because the OPC does not seek or compel the production of legal advice obtained by a party to a complaint and, in any event, takes the view that the 'reasonable excuse' exception in s 66(1B) of the *Privacy Act* includes a claim for client legal privilege.[117]

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112 See, eg, I Temby, *Submission LPP 72,* 19 July 2007; Australian Commission for Law Enforcement Integrity, *Submission LPP 69,* 20 July 2007; Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007; Australian Financial Markets Association, *Submission LPP 67,* 22 June 2007; Australian Corporate Lawyers Association, *Submission LPP 66,* 22 June 2007; Insolvency and Trustee Service Australia, *Submission LPP 62,* 20 June 2007; NSW Young Lawyers, *Submission LPP 49,* 12 June 2007; Australian Pesticides and Veterinary Medicines Authority, *Submission LPP 45,* 6 June 2007; Australian Institute of Company Directors, *Submission LPP 43,* 8 June 2007; Law Society of New South Wales, *Submission LPP 40,* 1 June 2007; Federation of Community Legal Centres (Vic) Inc, *Submission LPP 38,* 5 June 2007; National Australia Bank Limited and others, *Submission LPP 30,* 4 June 2007; Fitzroy Legal Service, *Submission LPP 29,* 4 June 2007; R Desiatnik, *Submission LPP 24,* 1 June 2007.

113 Australian Financial Markets Association, *Submission LPP 67,* 22 June 2007.

114 Law Society of New South Wales, *Submission LPP 40,* 1 June 2007.

115 Federation of Community Legal Centres (Vic) Inc, *Submission LPP 38,* 5 June 2007.

116 Insolvency and Trustee Service Australia, *Submission LPP 62,* 20 June 2007.

117 Australian Government Office of the Privacy Commissioner, *Submission LPP 71,* 29 June 2007.

5.71 BHP Billiton Mitsubishi Alliance submitted that the decision in *Daniels* is clear.

> We do not feel that statutory clarification … would be of any benefit. The advantage of relying on case law is that it is readily able to evolve to meet particular factual situations that were not envisaged by legislators. Introduction of statutory clarification would impede this flexibility.[118]

5.72 The Law Council also submitted that the common law concerning the application of privilege to the coercive powers of federal bodies is clear in light of the decisions in *Baker v Campbell*[119] and *Daniels*. It suggested that most regulatory agencies act in a manner consistent with *Daniels*. However, it submitted that there was potential for confusion for unrepresented persons, who would not understand the application of the principles in *Daniels* and, therefore, providing clarification would be beneficial.[120]

5.73 In response to the Discussion Paper in this Inquiry, *Client Legal Privilege and Federal Investigatory Bodies* (DP 73),[121] ITSA submitted that:

> There is a need to provide some clarification on the application of client legal privilege (CLP) to information-gathering powers exercised by Commonwealth agencies. Particularly in the bankruptcy context, where it is not uncommon for a debtor to have had dealings with a range of agencies prior to and during bankruptcy, there is a need for some form of guidance on the treatment of CLP claims in federal investigations.[122]

5.74 The Construction, Forestry, Mining and Energy Union (CFMEU) also submitted that there was a need for clarity concerning the application of client legal privilege in federal investigations.

> Given the invasive nature of the powers exercisable by a range of federal agencies it is important that the capacity to assert and rely on the doctrine of client legal privilege should be set out in the clearest possible terms.[123]

5.75 The Hon John Hannaford, formerly NSW Attorney General, and now an examiner with the Australian Crime Commission (ACC) submitted:

> With the introduction of the *Australian Crime Commission Act 2002* (Cth), following a lengthy inquiry, it is apparent to me that there has been uncertainty as to whether client legal privilege was modified by the amendments which were inserted into the ACC Act and which made changes to s 30 of that Act from that which were present in s 30 of the predecessor Act, the *National Crime Authority Act*. This uncertainty has extended to the nature and extent of the modification. This has been a continuing

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118 BHP Billiton Mitsubishi Alliance, *Submission LPP 21,* 1 June 2007.
119 *Baker v Campbell* (1983) 153 CLR 52.
120 Law Council of Australia, *Submission LPP 26,* 4 June 2007.
121 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007).
122 Insolvency and Trustee Service Australia, *Submission LPP 105,* 5 November 2007.
123 Construction Forestry Mining and Energy Union (Construction and General Division), *Submission LPP 90,* 1 November 2007.

> problem for the Australian Crime Commission and for the exercise of powers by Examiners within the Commission. This uncertainty has emanated from the requirements set out in *Daniels* … for there to be any abrogation or modification of [client legal privilege].[124]

ALRC's views

5.76 The ALRC considers that there is a need for legislative clarification of the application of client legal privilege to the coercive information-gathering powers of federal bodies. This need is particularly evident in relation to the application of the privilege to ASIC's powers, but submissions and consultations have suggested that there is a similar need for clarification in relation to the powers of other federal bodies, including APRA, ASIO and ITSA.

5.77 To expect the common law to achieve clarity in respect of the application of the privilege to the wide range of coercive information-gathering powers is problematic.[125] The common law is dependent on the institution of particular legal proceedings and its outcomes may be confined to specific fact situations. Given the nature of the common law, there may be a considerable passage of time before clarity is achieved in respect of the application of the privilege to the wide range of coercive information-gathering powers contained in legislation that is silent on the issue.

5.78 While the decision in *Daniels* is arguably clear, confusion may arise where the common law has not considered whether the exercise of a particular power abrogates privilege by necessary implication. In addition, where the common law has decided whether the exercise of a particular power abrogates privilege by necessary implication, there may be differing interpretations about the extent to which that decision applies to other powers not specifically considered by the court.

5.79 Whether or not persons produce privileged information in response to the exercise of a particular coercive power should not be dependent on whether those persons receive legal advice; from whom the advice is sought; or which federal officer within a federal body is exercising a power. It is unsatisfactory that the uncertainty surrounding ASIC's position on privilege has led to inconsistent legal advice being given to clients about their obligations to produce privileged information to ASIC. Moreover, it is undesirable that unrepresented persons may be at a particular disadvantage in this regard.

5.80 As discussed above, it is not readily apparent whether particular federal bodies take the view that their powers abrogate client legal privilege by necessary implication, especially where such powers have never been used. In some instances, federal bodies

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124 J Hannaford, *Submission LPP 114,* 19 November 2007.

125 The ALRC has identified 42 different federal bodies with statutory coercive information-gathering powers (including Royal Commissions of inquiry): see Ch 4.

have never considered whether their powers abrogate privilege. Clarifying the law will not only address present uncertainties but will have the advantage of addressing potential uncertainties that may arise in the future when there is cause to consider the application of privilege to a particular power.

Achieving clarity

Options for reform

5.81 In IP 33, the ALRC identified two methods of achieving statutory clarification.[126] One way would be to amend each federal Act that contains a coercive power to make it clear whether or not the exercise of that power preserves, modifies or abrogates client legal privilege.[127]

5.82 This approach received some support in other inquiries. The Administrative Review Council (ARC), in a draft report on the coercive information-gathering powers of federal bodies, recommended that the legislation of each agency should clearly indicate whether or not privilege is abrogated.[128] The Victorian Parliament Law Reform Committee, in considering the need for clarity in the context of state powers conferring coercive powers, recommended that, as a general principle, the application of client legal privilege—whether it applies or is abrogated—should be clarified in statutes containing inspectors' powers.[129]

5.83 Another method would be to enact a specific new federal statute, providing that, in the absence of any clear express statutory statement to the contrary, client legal privilege is preserved in relation to a coercive information-gathering power of a federal body.[130] Specific statutory regimes that sought to abrogate or modify the privilege would need to be amended individually in order to achieve that purpose.[131]

5.84 A further option for reform, identified in the final stages of the ALRC's Inquiry—unfortunately without the opportunity to seek feedback—is that a global provision protecting client legal privilege in relation to the exercise of coercive powers properly could be made a rule of interpretation of Commonwealth Acts and delegated legislation. This could be achieved, for example, by amending the *Acts Interpretation Act 1901* (Cth) and would operate as an amending provision in respect of existing acts which do not contain an express abrogation of privilege, but from which an implication

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126 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007), [4.60].

127 Appendix 1 sets out federal legislation containing coercive information-gathering powers.

128 Administrative Review Council, *Government Agency Coercive Information-Gathering Powers [Draft Report]* (2007), Principle 16.

129 See Victorian Parliament Law Reform Committee, *The Powers of Entry, Search, Seizure and Questioning by Authorised Persons* (2002), rec 35, 149.

130 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), Rec 19–1 recommended the inclusion of a provision to similar effect in the proposed Regulatory Contraventions Statute.

131 This is consistent with Ibid, Rec 19–2.

of abrogation would otherwise be drawn. As one parliament cannot bind its successors, it would operate as a general interpretive rule in respect of future Acts displaced by express provision to the contrary.

Submissions and consultations

Enactment of legislation of general application

5.85 In response to IP 33, strong support was expressed in submissions and consultations for clarity to be achieved by the enactment of a single specific federal statute.[132]

5.86 Dr Ronald Desiatnik submitted that:

> Clarification is best achieved by enacting one piece of legislation which need only contain a few provisions and which would have three appendices containing, respectively Acts which abrogate, modify or respect the doctrine. This Act could be amended from time to time to add or delete existing or future relevant legislation to the appendices.[133]

5.87 However, some stakeholders expressed concern about the enactment of legislation of general application.[134] ASIC, for example, submitted that:

> Enacting a single statute to cover all Commonwealth bodies may appear to reduce the complexity and extent of the task to be performed. That reduction may not be realised because:
>
> (1) the statute would be required, in relation to each body whose powers included an abrogation, to include specific provisions that relate solely to that body's legislation because of its unique requirements; and
>
> (2) the legislation setting out the powers of those bodies would likely require amendment in any event, to ensure that any existing provisions relating to client legal privilege would not be inconsistent with any newly enacted provisions.[135]

5.88 In DP 73, the ALRC proposed that the Australian Parliament should enact legislation of general application (referred to as federal client legal privilege

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132 NSW Young Lawyers, *Submission LPP 49,* 12 June 2007; Australian Institute of Company Directors, *Submission LPP 43,* 8 June 2007; Law Society of New South Wales, *Submission LPP 40,* 1 June 2007 Fitzroy Legal Service, *Submission LPP 29,* 4 June 2007; Law Council of Australia, *Submission LPP 26,* 4 June 2007, R Desiatnik, *Submission LPP 24,* 1 June 2007.

133 R Desiatnik, *Submission LPP 24,* 1 June 2007. Dr Desiatnik expressed similar views in consultation: R Desiatnik, *Consultation*, Sydney, 26 October 2007.

134 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007; Australian Government Solicitor, *Submission LPP 50,* 13 June 2007.

135 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007.

legislation) to cover various aspects of the law and procedure governing client legal privilege claims in federal investigations.[136]

5.89 This proposal received support in submissions and consultations from members of the legal community, representative bodies of entities subject to federal coercive information-gathering powers, and federal bodies.[137] It was described by the Australian Financial Markets Association as a 'welcome initiative'.[138] The Law Council, in expressing support for federal client legal privilege legislation, submitted that such legislation should not seek to 'cover the field' with respect to client legal privilege claims, and that it

> should also allow room for the continued development of the common law in this area. Case law provides a strong point of reference for legal practitioners and government agencies considering the application of client legal privilege. It also allows flexibility in the application of the doctrine and rationale associated with client legal privilege.[139]

5.90 The Law Society of NSW expressed qualified support for the proposal, submitting that:

> This support is based only on a recognition that the law will be assisted by legislation regulating the procedure by which privilege is claimed and contested. The Law Society remains firmly of the view that any abrogation or modification of privilege is not justified.[140]

5.91 The Australian Government Solicitor (AGS) and the Commonwealth Director of Public Prosecutions (CDPP) expressed caution concerning the enactment of legislation of general application.[141] AGS submitted:

> From the standpoint of practical utility, [AGS] would see the enactment of provisions in the legislation of each investigatory body that are uniform, to the extent that nothing in the body's functions requires a departure from the standard, as a more practicable course. …
>
> At the Commonwealth level, the effect of client legal privilege upon coercive powers of federal agencies is, in our view, too confined a subject to justify legislation

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136 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 5–1.

137 See, eg, National Legal Aid, *Submission LPP 106,* 5 November 2007; Insolvency and Trustee Service Australia, *Submission LPP 105,* 5 November 2007; Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007; Law Council of Australia, *Submission LPP 94,* 1 November 2007; Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007; Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007; Australasian Compliance Institute, *Submission LPP 79,* 26 October 2007; R Desiatnik, *Consultation*, Sydney, 26 October 2007.

138 Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007.

139 Law Council of Australia, *Submission LPP 94,* 1 November 2007.

140 Law Society of New South Wales, *Submission LPP 93,* 31 October 2007. Abrogation or modification of client legal privilege is discussed in Ch 6.

141 Australian Government Solicitor, *Submission LPP 113,* 5 November 2007; Commonwealth Director of Public Prosecutions, *Submission LPP 101,* 2 November 2007. See also Australian Federal Police, *Submission LPP 115,* 29 November 2007.

> governing it generally in every context in which it can arise. It stands in contrast to much broader subject matter which would ordinarily justify such general legislation, such as federal criminal law … and the laws of evidence in federal jurisdiction …
>
> A risk of using general legislation … is that the generality itself of the legislation is more likely to see it read down by the more specific provisions that obtain in the separate legislation that invests the coercive powers in the investigatory body in question and governs their exercise.
>
> A course that could be followed is to enact legislation which amends each enactment governing the exercise of an investigatory body's coercive powers by introducing the standard reforms (ie those resulting from the consideration of the ALRC's proposals) into each such enactment.[142]

5.92 The CDPP expressed concern about

> the impact that the proposed federal client legal privilege legislation could have on the operation of client legal privilege in relation to federal investigations. If the proposed legislation were to be enacted without limitations on its applicability to investigative powers Parliament has already legislated in relation to, the effect of the federal client legal privilege legislation would be to provide new rules for interpreting pre-existing powers which do not necessarily correlate with Parliament's intention in legislating for those powers. …
>
> Accordingly, it is the view of the CDPP that if the proposed federal client legal privilege legislation were to be implemented it should either only apply to legislation enacted by Parliament after the commencement of the federal client legal privilege legislation or, alternatively, a thorough harmonisation process of all Commonwealth legislation providing for coercive information-gathering powers would be necessary.[143]

Default provision preserving application of privilege

5.93 In response to IP 33, some stakeholders expressly supported the proposed statute of general application to contain a default provision that client legal privilege applies to federal coercive powers in the absence of express words to the contrary.[144]

5.94 In DP 73, the ALRC proposed that federal client legal privilege legislation should provide that, in the absence of any clear, express statutory statement to the contrary, client legal privilege applies to the coercive information-gathering powers of federal bodies.[145]

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142 Australian Government Solicitor, *Submission LPP 113,* 5 November 2007.

143 Commonwealth Director of Public Prosecutions, *Submission LPP 101,* 2 November 2007.

144 For example, NSW Young Lawyers, *Submission LPP 49,* 12 June 2007; Fitzroy Legal Service, *Submission LPP 29,* 4 June 2007; Law Council of Australia, *Submission LPP 26,* 4 June 2007. See also National Legal Aid, *Submission LPP 52,* 13 June 2007.

145 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 5–2.

5.95 This proposal received strong support.[146] For example,

- ASIC submitted that 'in the interests of certainty, express abrogation of client legal privilege is desirable';[147]

- APRA supported the proposal as a way 'to resolve the current uncertainty about whether client legal privilege has been abrogated in legislation administered by APRA';[148]

- Allens Arthur Robinson (AAR) submitted that this proposal (together with Proposal 5–3) represented 'a positive step to clarify an area of particular uncertainty (most notably in relation to the operation of the ASIC Act)';[149] and

- The Australian Financial Markets Association described it as a 'welcome initiative'.

> This would clarify and appropriately protect documents ordinarily the subject of client privilege from claims by regulators that they have powers to request documents in the absence of legislative direction.
>
> It is [the Australian Financial Markets Association's] position that regulators ought properly to have clearly sanctioned powers to obtain privileged materials, and in the absence of which, individuals' and entities' rights will be appropriately protected.[150]

5.96 Hannaford submitted:

> I strongly support the need for express statutory statements as to legislative intent where there is a proposal to modify client legal privilege. This may be achieved without the need for codification of the law relating to client legal privilege.[151]

5.97 The CFMEU submitted:

> The *Building and Construction Industry Improvement Act 2005* (Cth), while providing similar coercive powers to the *Trade Practices Act 1974* (Cth), contains no express reference to the right to claim client legal privilege. Reference to that right is contained only in [Australian Building and Construction Commissioner] Guidelines.
> …

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146 For example, NSW Young Lawyers, *Submission LPP 116,* 1 November 2007; Allens Arthur Robinson, *Submission LPP 107,* 5 November 2007; National Legal Aid, *Submission LPP 106,* 5 November 2007; Insolvency and Trustee Service Australia, *Submission LPP 105,* 5 November 2007; Law Council of Australia, *Submission LPP 94,* 1 November 2007; Law Society of New South Wales, *Submission LPP 93,* 31 October 2007; Westpac Banking Corporation, *Submission LPP 85,* 1 November 2007; Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007; R Desiatnik, *Consultation*, Sydney, 26 October 2007.

147 Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007.

148 Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007. As discussed in Ch 6, APRA is of the view that abrogation of client legal privilege is necessary for all APRA's coercive information-gathering powers.

149 Allens Arthur Robinson, *Submission LPP 107,* 5 November 2007.

150 Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007.

151 J Hannaford, *Submission LPP 114,* 19 November 2007.

> The *Building and Construction Industry Improvement Act 2005* (Cth) should be amended to expressly provide for the right to claim client legal privilege in the course of s 52 investigations. Alternatively, as proposed in the Discussion Paper, there should be Commonwealth legislation of general application that has the same effect.[152]

5.98 However, the AFP opposed this proposal because of its impact on telecommunications interception legislation. It submitted:

> Such a provision would have a significant detrimental impact on federal law enforcement. Relevant statutes in place at present, such as the *Telecommunications (Interception and Access) Act 1979* (Cth) and the *Surveillance Devices Act 2004* (Cth) do not expressly abrogate … client legal privilege, however, judicial consideration has determined that the privilege does not attach in certain circumstances (*Carmody v Mackellar* (1997) 148 ALRC 210).
>
> The AFP would object to the imposition of such provisions resulting in the requirement to reinterpret legislation which has already undergone judicial consideration concerning the applicability of [client legal privilege], resulting in an effective common law balance.
>
> Should any such proposal proceed, the AFP would recommend that it be made prospective only, so as not to affect the effectiveness of existing legislative provisions.[153]

5.99 Another view put forward in consultation was that the proposed federal client legal privilege legislation could contain a schedule of excluded Acts—essentially those containing federal telecommunications interception powers—which do not need to be amended to abrogate expressly client legal privilege, thereby allowing the privilege to continue to be implied by necessary implication.[154]

Any abrogation to be with specific reference to particular powers

5.100 In DP 73, the ALRC proposed that any legislative scheme which seeks to abrogate or modify client legal privilege must do so by express reference to the particular sections or divisions within that scheme that confer coercive information-gathering powers which abrogate or modify the privilege.[155]

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152 Construction Forestry Mining and Energy Union (Construction and General Division), Submission LPP 90, 1 November 2007.

153 Australian Federal Police, *Submission LPP 115,* 29 November 2007.

154 Australian Federal Police, *Consultation LPP 40*, Canberra, 23 October 2007.

155 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 5–3.

5.101 This proposal was widely supported, including on the basis that it promoted clarity and certainty.[156] The Law Council did not support abrogation or modification of client legal privilege in any context, but submitted that:

> If abrogation or modification of client legal privilege does occur, the legislative instrument abrogating or modifying the privilege should refer to specific sections or provisions in the enactment or scheme conferring a coercive information-gathering power.[157]

5.102 There was limited opposition to the ALRC's proposal.[158] Desiatnik, for example, did not support the proposal on the basis that any abrogation of the privilege should be opposed.[159]

ALRC's views

Enactment of statute of general application

5.103 There is some overlap between the ALRC's views on achieving clarity and the exposition of its views on whether achieving uniformity is desirable—an issue that is considered separately below. Accordingly, certain recommendations in this chapter serve a dual function insofar as they simultaneously address the issues of clarity and uniformity.

5.104 Having regard to the majority of views expressed in submissions and consultations, the ALRC remains of the view that there is a strong case for the enactment of a statute of general application to clarify the application of privilege to the coercive information-gathering powers of federal bodies—as well as other aspects of the law and procedure governing client legal privilege claims in federal investigations.[160] The enactment of a statute of general application would also achieve a degree of harmonisation of approach.

5.105 Such a statute would serve as the foundation of a scheme designed to inject greater certainty and consistency into client legal privilege law and procedure as it applies to federal investigations. Its purpose would be to provide a convenient and central location for various provisions relating to client legal privilege claims in such

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156 Allens Arthur Robinson, *Submission LPP 107,* 5 November 2007; National Legal Aid, *Submission LPP 106,* 5 November 2007; Insolvency and Trustee Service Australia, *Submission LPP 105,* 5 November 2007; Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007; Law Council of Australia, *Submission LPP 94,* 1 November 2007; Law Society of New South Wales, *Submission LPP 93,* 31 October 2007; Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007; Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007.

157 Law Council of Australia, *Submission LPP 94,* 1 November 2007.

158 Australian Federal Police, *Submission LPP 115,* 29 November 2007; R Desiatnik, *Consultation*, Sydney, 26 October 2007.

159 R Desiatnik, Consultation, Sydney, 26 October 2007.

160 The case for clarity and harmonisation of other aspects of the law and procedure concerning client legal privilege claims is made out in other parts of this Report, including Chs 7 and 8.

contexts. This would avoid the need to repeat those provisions in each of the many federal statutes containing coercive information-gathering powers.

5.106 The provisions that would be accommodated in such a statute would be intended to clarify the law, establish uniform procedures in relation to the making and resolving of client legal privilege claims, or to establish certain fundamental or default provisions that would have general application over all federal bodies exercising coercive information-gathering powers—including Royal Commissions—in the absence of express words to the contrary.[161] The establishment of default provisions has a precedent in the Commonwealth *Criminal Code*.[162]

5.107 The ALRC does not suggest a name for the proposed statute of general application. The ALRC recognises that, on one view, client legal privilege may be too limited a subject matter to warrant its own dedicated federal Act. However, the Act could be part of a general statute on federal regulation or federal investigations—such as the Regulatory Contraventions Statute recommended in ALRC 95[163]—or it could be part of a federal Act that also deals with other privileges in federal investigations, such as the privilege against self-incrimination. For the purposes of this Report, the ALRC will refer to the proposed legislation, as 'federal client legal privilege legislation'.

5.108 The ALRC notes the view expressed by the Law Council that the proposed federal client legal privilege legislation should not attempt to 'cover the field' in relation to client legal privilege, and should allow room for the common law to develop. As stated in DP 73, the proposed legislation is not intended to be a comprehensive code containing an all-encompassing statement of the law on client legal privilege in the context of federal investigations.[164] There will be room for developments in the common law, including in relation to the rationale for, parameters of, and exceptions to, the privilege.

5.109 The ALRC also notes the concerns expressed by the CDPP about the impact of the proposed federal client legal privilege legislation on existing provisions. However, that impact will be confined to particular circumstances, as discussed below in the section detailing the ALRC's views on the interaction of the proposed legislation and other federal statutes.

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161 However, certain provisions in federal client legal privilege legislation should be excluded from operating with respect to Royal Commissions. See, eg, Rec 8–11 (alternative dispute resolution).

162 See, eg, *Criminal Code* (Cth) ss 3.1, 5.1; M Goode, 'Constructing Criminal Law Reform and the Model Criminal Code' (2002) 26 *Criminal Law Journal* 152, 158.

163 See Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), Rec 6–7.

164 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), [5.94].

Default provision preserving application of privilege

5.110 Federal client legal privilege legislation should provide that, in the absence of any clear, express statutory statement to the contrary, client legal privilege applies to the coercive information-gathering powers of federal bodies.

5.111 The ALRC has deliberately chosen the words 'clear' and 'express' in framing its recommendation in this regard.[165] First, drawing on common law principles summarised in *Daniels*, clear and unambiguous terms must be used to abrogate a fundamental common law right.[166] The High Court stated:

> As in other countries of like legal tradition, that rule in Australia is, and should be, that the privilege is not lost by statutory words of generality. If it is to be taken away, this must be done clearly. At least then the attention of the legislature will have been addressed to the seriousness of the step. It will not be possible to deprive persons, whether natural or legal, of such a fundamental right by general words or by ambiguous formulae (such as 'capable of complying') that might not be understood by readers as working such a consequence.[167]

5.112 Second, the reference to 'express' is to distinguish it from abrogation by necessary implication.[168] This default provision dispenses with the uncertainty created by attempting to ascertain whether any particular power abrogates privilege by necessary implication. It also achieves a degree of harmonisation of approach across federal investigatory powers.[169] Where legislation is silent on privilege—which is in the majority of cases—the default provision will operate in the absence of any express amendment to the contrary.

5.113 Similarly, where legislation addresses the obligations of lawyers—but not their clients—in relation to producing privileged information, the default provision will make it clear that privilege is not abrogated in respect of the client. However, this will not affect any legislative obligations of lawyers to provide the names and contact details of their clients when information in their possession is the subject of a claim for client legal privilege. The inclusion of a default provision would avoid the need to amend a large number of statutes to include a provision preserving the privilege.

5.114 The enactment of this default provision will render client legal privilege available in ASIC investigations, in the absence of an express amendment to the contrary in the ASIC Act.[170] It will also necessitate amendment of telecommunications

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165 See Rec 5–2.

166 See, eg, *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [11], [43], [90], [93], [94], [103]–[105], [111]–[112], [134], and discussion on *Daniels* above.

167 Ibid, [111].

168 See Ibid, [16].

169 Harmonisation is discussed separately below.

170 Whether or not privilege should be abrogated or modified in ASIC investigations is discussed in Ch 6.

interception legislation insofar as such legislation has been held to abrogate privilege by necessary implication.

5.115 As mentioned above, a further option for reform, identified in the final stages of the ALRC's Inquiry is that a global provision protecting client legal privilege in relation to the exercise of coercive powers properly could be made a rule of interpretation of Commonwealth Acts and delegated legislation. This could be achieved, for example, by amending the *Acts Interpretation Act 1901* (Cth), and would operate as an amending provision in respect of existing acts which do not contain an express abrogation of privilege, but from which an implication of abrogation would otherwise be drawn. It would also operate as a general interpretive rule in respect of future Acts displaced by expressed provision to the contrary. The ALRC considers this an attractive feasible option but is unable to make a recommendation in this regard because the option was not identified in time to allow for feedback in submissions and consultations.

Impact of default provision on telecommunication interception powers

5.116 In making the recommendation that federal client legal privilege legislation contain a default provision preserving privilege in the absence of clear and express words to the contrary, the ALRC is cognisant of the AFP's concerns about the impact of such a provision on telecommunications interception legislation—in particular, the *Telecommunications (Interception and Access) Act 1979* and the *Surveillance Devices Act 2004*. Neither Act mentions privilege. It is no answer to make the proposed legislation prospective in operation because one of its key aims is to clarify the application of client legal privilege to *existing* federal investigatory powers in the vast majority of situations where legislation is silent on privilege.

5.117 Even if the ALRC were to recommend that clarity in the law should be achieved by the alternative option for reform—amending each federal Act that contains a coercive power to make it clear whether or not the exercise of that power preserves, modifies or abrogates client legal privilege—that would still entail amendments to telecommunications interception legislation to make it clear precisely which powers in such legislation abrogate privilege.

5.118 Similarly if, as suggested in consultation, federal client legal privilege legislation were to exclude from its application, wholly or partly, specific federal statutes conferring powers to intercept telecommunications, the particular powers intended to be excluded would need to be identified in the interests of clarity.[171] In any event, Commonwealth legislative drafting tends to suggest that where there is

171 See Rec 5–3 below. Powers ought to be identified by reference to sections or divisions within the relevant legislation.

legislation of general application, such as the *Criminal Code*,[172] and that general legislation is not to apply, in whole or in part, to other federal statutes, the excluding provision is to be found in those other federal statutes.[173]

5.119 Therefore, under *any* of the above scenarios, the Australian Parliament would be called upon to clarify in legislation the application of privilege to telecommunications interception powers. This would be achieved either by expressly providing that privilege is abrogated in circumstances where it is now taken to be abrogated by necessary implication, or by identifying the specific parts of particular legislation not intended to be covered by the default provision in the proposed federal client legal privilege legislation. In the latter case, this would, in effect, legislatively sanction abrogation by necessary implication in those particular cases.

5.120 To minimise the numerous specific amendments that would need to be made to every federal statute that contains a coercive information-gathering power and that is silent on the application of privilege, the ALRC remains of the view that the most practical option for reform is to enact a statute of general application containing a default provision preserving the application of privilege in the absence of clear and express words to the contrary. From a policy perspective, the ALRC considers that there is much to be said for clarity and transparency in the application of privilege to all federal investigatory powers—including federal telecommunications interception powers. The case for transparency and clarity in the application of privilege is arguably stronger in light of the fact that interception powers are exercised covertly. In promoting legislative clarity in this area, however, the ALRC is not seeking to question previous judicial determination that certain telecommunication interception powers abrogate privilege by necessary implication.

Any abrogation to be with specific reference to particular powers

5.121 Taking into account the strong support expressed by stakeholders, the ALRC remains of the view that if a federal statute seeks to abrogate or modify client legal privilege it would have to do so by express reference to particular sections or divisions within it, which confer coercive information-gathering powers.

5.122 It should not be assumed that abrogation or modification of the privilege would apply to each of the coercive powers of a federal body under a particular piece of legislation, unless that is expressly stated to be the case. This approach aims to avoid potential uncertainty about the extent of any abrogation.

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172 The Criminal *Code* is a schedule to the *Criminal Code Act 1995* (Cth).

173 For example, each of the following Acts exclude, in part, the operation of the *Criminal Code* (Cth): *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 26(2); *Age Discrimination Act 2004* (Cth) s 48; *Corporations Act 2001* (Cth) s 769A; *Road Transport Reform (Dangerous Goods) Act 1995* (Cth) s 10A; *Native Title Act 1993* (Cth) s 8A(2); *Ashmore and Cartier Islands Acceptance Act 1933* (Cth) s 6A; *Jervis Bay Territory Acceptance Act 1915* (Cth) s 4AA.

Interaction between federal client legal privilege legislation and other statutes

5.123 As mentioned above, the proposed federal client legal privilege legislation is not intended to be a comprehensive code containing an all-encompassing statement of the law on client legal privilege in the context of federal investigations. It is intended to operate in conjunction with developments in the common law, and with pre-existing federal legislation where Parliament has clearly and expressly abrogated or modified the privilege, or has expressly provided for the use, if any, to which otherwise privileged information can be put in the event of abrogation or modification.[174] However, where either pre-existing or prospective legislation is silent on:

- the application of client legal privilege to federal investigatory powers; or
- the use, if any, to which otherwise privileged information can be put in the event of abrogation or modification;

then default provisions in the proposed federal client legal privilege legislation are intended to fill those gaps.

5.124 As mentioned above, there is a limited number of federal statutes that expressly abrogate or modify the privilege. The proposed federal client legal privilege legislation may need to contain a 'grandfather' clause to address pre-existing provisions. However, the mere fact that pre-existing federal legislation abrogates or modifies the privilege expressly will not be inconsistent with the proposed privilege legislation because the default provision envisages abrogation or modification by clear and express words. Therefore, the proposed legislation is not intended to repeal, for example, existing provisions under the *Proceeds of Crimes Act 2002*, the *Inspector-General of Taxation Act 2003* and the *Inspector-General of Security and Intelligence Act 1986* that expressly abrogate or modify the privilege.

5.125 Ideally, where federal legislation, enacted after the commencement of the proposed federal client legal privilege legislation, seeks to depart from it, it should do so with express reference to the exclusion of federal client legal privilege legislation. That would have the salutary effect, in the ALRC's view, of making that departure a matter of affirmative statement and one that would require legislative expression and, therefore, parliamentary scrutiny and debate.

5.126 Legislative provisions cannot countenance a derogation of the competency of Parliament to pass inconsistent legislation after the passage of earlier legislation.[175] Therefore it may be problematic if federal client legal privilege legislation were to contain a provision that any later Act inconsistent with it is inoperative unless it

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174 Restrictions on use of otherwise privileged information is discussed in Ch 7.

175 See D Pearce and R Geddes, *Statutory Interpretation in Australia* (6th ed, 2006), [7.14].

expressly excludes federal client legal privilege legislation. However, the ALRC would hope that if federal client legal privilege legislation were enacted, future Parliaments would heed its underlying principles and only depart from it after a considered decision that it was necessary and appropriate in the circumstances to do so.

Recommendation 5–1 The Australian Parliament should enact legislation of general application to cover various aspects of the law and procedure governing client legal privilege claims in federal investigations (hereafter referred to as federal client legal privilege legislation) in accordance with the recommendations in this Report.

Recommendation 5–2 Federal client legal privilege legislation should provide that, in the absence of any clear, express statutory statement to the contrary, client legal privilege applies to the coercive information-gathering powers of federal bodies.

Recommendation 5–3 The Australian Government should ensure that any legislative scheme which seeks to abrogate or modify client legal privilege does so by express reference to the particular sections or divisions within that scheme that confer coercive information-gathering powers which abrogate or modify the privilege.

A uniform approach?

5.127 The Terms of Reference require the ALRC to consider whether it would be desirable to clarify *existing* provisions for the modification or abrogation of privilege, with a view to harmonising them across the Commonwealth statute book. A wider and related issue that arises is whether it is desirable to harmonise *all* provisions relating to the application of client legal privilege to the coercive information-gathering powers of federal bodies.[176]

5.128 Federal legislation containing coercive information-gathering powers does not reveal a principled, coherent policy towards client legal privilege. As discussed above, the majority of federal statutes are silent on the issue; while other statutes adopt varying approaches to its application.

5.129 ALRC 95 recommended that the Attorney-General order a review of federal investigatory powers with a view to providing greater consistency among regulators in

176 See Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007, Question 4–2.

relation to their ability to compel the disclosure of information and the operation of client legal privilege.[177]

5.130 Dr Ben Saul has expressed the view that:

> Confusion about the scope of legal professional privilege stems largely from the inconsistent approaches to expressly or impliedly removing privilege evident in federal statutes. The inconsistent nature of statutory provisions potentially undermines the public confidence in equal treatment before the law, makes it difficult for individuals to comply with their legal obligations, and ultimately confuses and confounds the rule of law.[178]

Practical considerations

5.131 The ARC has stated that consistency on matters relating to privilege—including whether or not it is abrogated—in legislation affecting a single industry or sector or a single agency would be likely to lead to efficiencies.[179]

5.132 On one view, consistency of approach would make it easier for persons subject to coercive powers to comply with their obligations, particularly in the context of multiple parallel investigations, or cross-agency investigations, where persons may be required to produce a privileged document to one federal body but not to another. It is not uncommon for more than one federal body with coercive powers to undertake an investigation concerning offences arising from the same transactions.

5.133 An example of a cross-agency investigation is the Project Wickenby taskforce, set up in 2004 to investigate internationally promoted tax arrangements that allegedly involve tax avoidance or tax evasion, and money laundering. The taskforce comprises the ATO, the ACC, the AFP, ASIC and the CDPP.[180]

5.134 Examples of separate parallel investigations are those conducted by provisional liquidators, ASIC, APRA, and a Royal Commission into the affairs of HIH. The categories of documents sought by ASIC and APRA 'overlapped to a significant extent'.[181] Justice Neville Owen, the HIH Royal Commissioner, noted that:

> The overlap in these processes and in the documents required led to evidentiary difficulties for the agencies and for those who were required to produce documents to them. …

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177 See Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), Rec 19–4.

178 B Saul, 'Is Removing Legal Professional Privilege a Policy Imperative?' (2001) 39(9) *Law Society Journal* 67, 69.

179 See Administrative Review Council, *Government Agency Coercive Information-Gathering Powers [Draft Report]* (2007), Principle 16.

180 P Costello (Treasurer), 'Project Wickenby Arrests' (Press Release, 20 July 2006).

181 N Owen, *Report of the HIH Royal Commission* (2003), [2.5].

> The difficulties arising from the parallel investigations by the inspector [appointed by APRA] and ASIC in turn gave rise to difficulties for the Commission. …
>
> Several parties expressed concern about ASIC's production of documents, in answer to a Commission summons, before those parties had the opportunity to review documents they had earlier produced to ASIC and that were likely to be produced by ASIC in answer to the Commission's summons. The specific concern related to the possible production by ASIC of documents over which a party might wish to assert legal professional privilege. A similar difficulty arose in respect of the Commission's summons to the inspector appointed by APRA. Resolution of this matter took considerable time … The need to manage questions of privilege and confidentiality continued throughout the term of the Commission.[182]

5.135 From a practical perspective, it is arguable that a consistent approach to privilege—embracing a consistent approach to the issue of appropriate safeguards, if privilege were to be abrogated or modified[183]—would alleviate some of the difficulties faced by federal bodies where parallel investigations are on foot, or where multi-agency taskforces work on the same investigation.

Varying investigatory contexts

5.136 An assessment of whether complete consistency of approach on client legal privilege is desirable or necessary across the range of federal bodies with coercive information-gathering powers also must entail a consideration of the investigatory contexts in which those bodies operate.

5.137 As the discussion in Chapter 4 reveals, there is a wide range of relevant federal bodies operating in vastly divergent areas including: criminal law enforcement; financial and prudential regulation; revenue; border control; health; social security; transport; and public administration. There are important differences in the aims, functions, operations and powers of these bodies.

5.138 Investigation is a core function for some federal bodies—such as the AFP and the ACC—whereas bodies such as Centrelink and Medicare, despite having investigatory powers, are primarily service providers.

5.139 Different functions performed by federal bodies include: conducting prosecutions; gathering intelligence; and conducting audits. While some federal bodies with investigatory powers have enforcement functions—such as the ACCC and ASIC—others—such as the Australian Transaction Reports and Analysis Centre—do not. Further, of those bodies possessing enforcement functions, there are significant differences in their policies and practices concerning resort to enforcement activity. For example, while the ACCC regards taking enforcement action as the 'cornerstone' of the agency,[184] APRA takes enforcement action as the exception rather than the rule,

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182 Ibid, [2.5]–[2.6].
183 Safeguards are discussed in Ch 7.
184 Australian Competition and Consumer Commission, *Annual Report 2005–06*, 3.

having expressed a preference for 'working cooperatively' with institutions to remedy weaknesses.[185]

5.140 There is potentially more at stake for persons the subject of investigations carried out by federal investigatory bodies the core function of which is enforcement, compared with persons the subject of investigations carried out by federal bodies the core focus of which is monitoring compliance.

5.141 IP 33 asked whether harmonisation is desirable and, if so, whether there should be distinctions drawn in the application of client legal privilege to federal coercive information-gathering powers depending on the functions performed by federal bodies, or the subject matter with which they deal.[186] If distinctions were to be drawn depending on the subject matter with which federal bodies deal, a consistent approach to privilege could be taken, for example, in respect of all federal bodies concerned with financial markets.

5.142 However, if distinctions were to be drawn according to whether the core function or focus of a federal body is investigation or enforcement, there would be different approaches to the application of privilege to investigations conducted by the ACCC and APRA—despite the fact that both those bodies deal, at least to some extent, in areas regulating financial markets. Another possible basis for a distinction raised in IP 33 is whether the body's enforcement focus is primarily criminal, civil or administrative.

Royal Commissions

5.143 There is also a question whether distinctions should be drawn between the approach to be taken to the application of privilege in the context of Royal Commissions, and its application to other federal investigatory bodies.[187] As discussed in Chapter 4, Royal Commissions are established only in special circumstances, where a particular public interest has been identified.

5.144 The discovery of the truth has been described as a prime function of a Royal Commission.[188] Unlike many other federal investigations, Royal Commissions are conducted in public—although evidence can be taken in private in certain situations.[189] Their function is to ascertain factual circumstances, report on matters specified in the Letters Patent, and make recommendations. If there are issues of major public interest

185 Australian Prudential Regulation Authority, *Annual Report 2006*, 18.
186 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007), Question 4–2(b).
187 Ibid, Question 4–2(a).
188 T Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (2006), vol 1, [7.66].
189 See *Royal Commissions Act 1902* (Cth) s 6D(2), (3).

at stake, then a failed Royal Commission can arguably do enormous damage. Conversely, a successful Royal Commission can benefit the public. As stated by Justice Owen in the HIH Inquiry:

> [Royal Commissions] … have the capacity to marshal evidence and other material in such a way as to assist those whose responsibility it is to consider future action. There is thus a continuing public benefit from the work royal commissions do.[190]

5.145 The ad hoc nature of Royal Commissions distinguishes them from permanent standing federal agencies and bodies. However, some inquiries that historically may have been the subject of a Royal Commission, may now fall within the jurisdiction of new federal bodies—such as the Australian Commission for Law Enforcement Integrity or the ACC. In addition, the subject matter of some inquiries conducted by Royal Commissions—such as the HIH Inquiry—also may fall squarely within the investigatory jurisdictions of federal regulatory bodies, such as ASIC and APRA. Therefore, there is an issue about whether it is appropriate for persons to be treated differently in relation to their ability to assert client legal privilege depending *solely* on the basis of whether or not an inquiry is the subject of a Royal Commission.

5.146 In the AWB Royal Commission, Commissioner Cole recommended that consideration be given to amending the *Royal Commissions Act 1902* to permit the Governor-General in Council by Letters Patent to determine that, in relation to the whole or a particular aspect of the matters the subject of inquiry, client legal privilege should not apply.[191] This approach did not advocate the outright abolition of privilege in all Royal Commissions. Rather, it put forward a mechanism through which privilege could be abrogated in Royal Commissions, depending on the subject matter of inquiry.

Submissions and consultations

Harmonisation across federal investigatory bodies

5.147 In response to IP 33, submissions and consultations were divided on the issue of whether legislative harmonisation of provisions relating to the application of privilege to federal powers is desirable—that is, whether there should be a harmonised approach to either preserving, abrogating or modifying client legal privilege across the board or based on particular categorisations.

5.148 The Law Council expressed opposition to legislative harmonisation. The more pressing need, in its view, is for harmonisation of the approaches taken by federal bodies in dealing with privilege claims.[192]

5.149 The Commonwealth Ombudsman submitted that:

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190 N Owen, *Report of the HIH Royal Commission* (2003), [1.1].

191 Ibid, rec 4.

192 Law Council of Australia, *Submission LPP 26,* 4 June 2007. However, the Law Council supported the introduction of a default provision preserving client legal privilege.

> This office would be reluctant to be subject to a uniform approach of a lower stringency than our current legislative provisions because of the practical problems that this would cause for us in attempting to fulfil our statutory role.[193]

5.150 Other stakeholders expressed 'in principle' support for legislative harmonisation of provisions.[194] Reasons included that it would allow for consistency in legal advice and, therefore, lead to a reduction in legal costs.[195] The Law Society of NSW, for example, submitted that there was 'a strong case for a harmonised approach across all agencies, without exception'. However, it noted that a 'cover the field approach' might be thought too onerous in some cases and insufficiently protective in others.[196]

5.151 There were different views about the approach to harmonisation and, in particular, whether distinctions should be drawn depending on the functions performed by federal bodies or the subject matter with which they deal. In light of the vastly diverse purposes and functions of federal bodies, there was support for each federal body to be analysed 'individually'—on a 'case-by-case' basis—to ascertain whether its particular circumstances warrant an abrogation or modification of the privilege.[197] Consideration of a federal body's functions and the subject matter with which it deals, were generally considered to be relevant to the issue of whether abrogation of the privilege on an individual basis is warranted—rather than forming the basis for wholesale harmonisation in particular sectors.[198]

5.152 Concerns were expressed about drawing distinctions based on whether or not the core function of a body is investigation or enforcement.[199] BHP Billiton Mitsubishi Alliance, for example, submitted that 'the fact that a particular body does not have enforcement powers does not reduce its ability to affect individuals'.[200] The difficulties of classifying federal investigatory bodies according to the subject matter with which they deal and their primary focus was also noted.[201] One stakeholder submitted that any

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193 Commonwealth Ombudsman, *Submission LPP 47,* 12 June 2007.

194 Australian Commission for Law Enforcement Integrity, *Submission LPP 69,* 20 July 2007; Australian Corporate Lawyers Association, *Submission LPP 66,* 22 June 2007; Australian Pesticides and Veterinary Medicines Authority, *Submission LPP 45,* 6 June 2007; Australian Institute of Company Directors, *Submission LPP 43,* 8 June 2007; Law Society of New South Wales, *Submission LPP 40,* 1 June 2007; R Desiatnik, *Submission LPP 24,* 1 June 2007. The Australian Corporate Lawyers Association also expressed support for legislative harmonisation of the information-gathering powers of federal bodies—an issue that goes beyond the ALRC's Terms of Reference.

195 Australian Institute of Company Directors, *Submission LPP 43,* 8 June 2007.

196 Law Society of New South Wales, *Submission LPP 40,* 1 June 2007.

197 National Legal Aid, *Submission LPP 52,* 13 June 2007; Law Council of Australia, *Submission LPP 26,* 4 June 2007; Sussex Street Community Law Service Inc, *Submission LPP 15,* 30 May 2007.

198 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007.

199 Fitzroy Legal Service, *Submission LPP 29,* 4 June 2007; Law Council of Australia, *Submission LPP 26,* 4 June 2007; BHP Billiton Mitsubishi Alliance, *Submission LPP 21,* 1 June 2007.

200 BHP Billiton Mitsubishi Alliance, *Submission LPP 21,* 1 June 2007.

201 See, eg, NSW Young Lawyers, *Submission LPP 49,* 12 June 2007.

attempted classification would suffer from the fact that a federal body's focus on investigation or enforcement could fluctuate over time.[202]

5.153 However, others expressed the view that the core focus of a federal body is a relevant matter in considering harmonisation.[203] In particular, support was expressed for distinctions to be made where a federal body's function is to oversee the activities of government agencies, on the basis that accountability of government is vital.[204]

5.154 Considerable support was expressed for legislative harmonisation to the extent of adopting a default provision that client legal privilege applies to the information-gathering powers of federal investigatory bodies.[205] For example, NSW Young Lawyers submitted:

> Establishing a uniform default provision that client legal privilege should apply in the context of regulatory investigations by Commonwealth agencies promotes clarity and consistency across regulation and places due weight on the policy rationales for recognition of client legal privilege.[206]

Distinguishing Royal Commissions

5.155 In response to IP 33, submissions and consultations were divided on the issue of whether distinctions should be drawn between federal investigatory bodies and Royal Commissions. Some stakeholders expressed 'in principle' opposition to a distinction being drawn based on the particular form of a federal body, or the forum in which a federal investigation takes place.[207]

5.156 Other stakeholders expressed the view that such a distinction is valid, and that the case for abrogation of the privilege in the context of Royal Commissions—particularly those that are inquisitorial rather than policy-focused—is stronger.[208]

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202 Ibid.

203 Australian Pesticides and Veterinary Medicines Authority, *Submission LPP 45,* 6 June 2007.

204 Commonwealth Ombudsman, *Submission LPP 47,* 12 June 2007; Inspector-General of Intelligence and Security, *Submission LPP 22,* 1 June 2007. The approach to be taken to oversight bodies is discussed further in Ch 6.

205 Taxation Institute of Australia, *Submission LPP 54,* 15 June 2007; National Legal Aid, *Submission LPP 52,* 13 June 2007; NSW Young Lawyers, *Submission LPP 49,* 12 June 2007; Fitzroy Legal Service, *Submission LPP 29,* 4 June 2007; Law Council of Australia, *Submission LPP 26,* 4 June 2007.

206 NSW Young Lawyers, *Submission LPP 49,* 12 June 2007.

207 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007; New South Wales Bar Association, *Submission LPP 41,* 5 June 2007. See also BHP Billiton Mitsubishi Alliance, *Submission LPP 21,* 1 June 2007.

208 R Desiatnik, *Submission LPP 24,* 1 June 2007; Inspector-General of Intelligence and Security, *Submission LPP 22,* 1 June 2007; Sussex Street Community Law Service Inc, *Submission LPP 15,* 30 May 2007.

ALRC's views

5.157 There is a less compelling case to strive for uniformity in the application of client legal privilege to federal investigatory powers than there is to achieve clarity about whether or not the privilege applies to particular powers.

5.158 There are difficulties in prescribing a 'one-size fits all' rule to be applied inflexibly to all federal bodies (including *all* Royal Commissions)—regardless of their particular exigencies or indeed the exigencies of particular inquiries or investigations.

5.159 Equally, attempting to establish a taxonomy of federal investigatory bodies according to their objectives, functions, approach to enforcement, and subject matter of regulation—as a basis for creating harmonisation of approach to client legal privilege within certain spheres or sectors—is fraught with difficulty. The ALRC does not, therefore, recommend harmonisation according to particular classifications of federal bodies. Nothing was expressed in submissions and consultations in response to DP 73, that would cause the ALRC to change its views in this regard.

5.160 However, factors such as a federal body's functions and subject matter of regulation are relevant considerations to be taken into account in assessing whether or not abrogation or modification of the privilege is warranted in particular cases. Further, such an assessment should be made with reference to consistent criteria, regardless of whether the investigation or inquiry is being undertaken by a federal investigatory body or a Royal Commission.[209]

5.161 As foreshadowed earlier in this chapter, there is some overlap in the ALRC's views on the issues of harmonisation and clarity. The ALRC's recommendation to enact legislation of general application, containing a default provision that client legal privilege applies to the coercive powers of federal bodies—including Royal Commissions—in the absence of clear and express words to the contrary,[210] achieves, in the ALRC's view, not only clarity, but an appropriate and desirable degree of legislative harmonisation, without impeding flexibility of approach where warranted.

5.162 Moreover, recommendations in Chapter 8 aim to address the need—identified in submissions and consultations—for uniformity of approach to making and resolving claims for client legal privilege. Arguably, many efficiencies to be gained from uniformity will arise from model uniform procedures as distinct from uniform legislative provisions concerning the application of privilege.

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209 This is discussed in Ch 6.
210 See Recs 5–1 and 5–2 above.

Achieving harmonisation

5.163 If it were desirable to aim for harmonisation, one way would be by creating a specific new federal statute, containing provisions on privilege, consistent with the approach taken in ALRC 95.[211]

5.164 Another way of achieving harmonisation would be to amend each federal statute that contains a coercive information-gathering power. As shown in Appendix 1, there are many federal Acts that contain such powers, so if harmonisation were to be achieved via this method, it would entail numerous separate amendments.

Submissions and consultations

Achieving federal harmonisation

5.165 In response to IP 33 , there was strong support in submissions and consultations for harmonisation to be achieved by the enactment of a new federal statute, rather than through the amendment of each federal statute containing coercive information-gathering powers.[212] Such an approach was said to be more practical. As noted above, in response to DP 73, there was also strong support expressed in submissions and consultations for the enactment of federal legislation of general application.[213] However, some stakeholders expressed concern about the complexity of enacting a statute of general application if that statute were to attempt to accommodate different qualifications and exceptions.[214]

Achieving national harmonisation

5.166 In DP 73, the ALRC proposed that, to promote national harmonisation, the Attorney-General of Australia should lead a process through the Standing Committee

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211 See Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007), [4.80]–[4.82]; Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), Rec 19–1. Rec 19–3 recommended the enactment of a default use immunity provision, in the absence of express words to the contrary. Use immunity is discussed in Ch 7.

212 Australian Institute of Company Directors, *Submission LPP 43,* 8 June 2007; Law Society of New South Wales, *Submission LPP 40,* 1 June 2007; Fitzroy Legal Service, *Submission LPP 29,* 4 June 2007; R Desiatnik, *Submission LPP 24,* 1 June 2007; BHP Billiton Mitsubishi Alliance, *Submission LPP 21,* 1 June 2007.

213 National Legal Aid, Submission LPP 106, 5 November 2007; Insolvency and Trustee Service Australia, Submission LPP 105, 5 November 2007; Australian Financial Markets Association, Submission LPP 95, 2 November 2007; Law Council of Australia, Submission LPP 94, 1 November 2007; Australian Prudential Regulation Authority, Submission LPP 91, 1 November 2007; Australian Securities and Investments Commission, Submission LPP 84, 31 October 2007; Australasian Compliance Institute, Submission LPP 79, 26 October 2007; R Desiatnik, Consultation, Sydney, 26 October 2007.

214 See, eg, Australian Government Solicitor, *Submission LPP 113,* 5 November 2007; Commonwealth Director of Public Prosecutions, *Submission LPP 101,* 2 November 2007; Australian Government Solicitor, *Submission LPP 50,* 13 June 2007.

of Attorneys-General (SCAG) to encourage the states and territories to adopt the Commonwealth model set out in Proposals 5–1 to 5–3.[215]

5.167 This proposal received both unqualified[216] and qualified support.[217] The Law Council expressed support for national harmonisation with respect to client legal privilege, provided a suitable model could be developed to which all parties could agree.[218] The Law Society of NSW submitted that it supported the proposal but noted:

> Whilst generally speaking uniformity of federal and state laws is desirable, the Law Society would not support New South Wales adopting a federal model which was thought to be flawed and, in any event, would wish to review whether there is a State-based requirement for a change other than merely to achieve uniformity.[219]

5.168 National Legal Aid expressed the view that 'harmonisation across states and territories is a matter for respective Attorneys-General'.[220] The AFP opposed this proposal.[221]

ALRC's views

5.169 As mentioned above, the ALRC's view is that there is a strong case for the enactment of legislation of general application, containing various provisions relating to client legal privilege claims in federal investigations. This would avoid the need to enact those provisions in each federal statute containing coercive information-gathering powers. Such a statute would serve as the foundation of a scheme—to be supplemented by policies and guidelines—designed to inject greater consistency into client legal privilege law and procedure as it applies to federal investigations.[222]

5.170 It is recommended that the statute contain a limited number of default provisions that would have general application over all federal bodies exercising coercive information-gathering powers—including Royal Commissions—in the absence of

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215 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 5–4.

216 For example, NSW Young Lawyers, *Submission LPP 116,* 1 November 2007; Insolvency and Trustee Service Australia, *Submission LPP 105,* 5 November 2007; Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007; Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007; R Desiatnik, *Consultation*, Sydney, 26 October 2007.

217 Law Council of Australia, *Submission LPP 94,* 1 November 2007; Law Society of New South Wales, *Submission LPP 93,* 31 October 2007.

218 Law Council of Australia, *Submission LPP 94,* 1 November 2007.

219 Law Society of New South Wales, *Submission LPP 93,* 31 October 2007.

220 National Legal Aid, *Submission LPP 106,* 5 November 2007.

221 Australian Federal Police, *Submission LPP 115,* 29 November 2007.

222 See Rec 5–1. A number of recommendations in this Report aim to achieve consistent policies and procedures in the approach by federal bodies to client legal privilege, and the approach by those claiming the privilege.

express words to the contrary. As discussed above, this includes a default provision preserving privilege in federal investigations.[223]

5.171 Given that the ALRC is not recommending harmonisation of approach based on particular classifications of federal bodies, the proposed legislation need not broach the complex task of attempting to accommodate the unique or special circumstances of certain federal bodies. In circumstances where Parliament sees fit to depart from the default provisions, express amendment to particular federal legislation containing coercive information-gathering powers will be necessary.

5.172 If the proposed scheme favoured by the ALRC as a means of achieving clarity and a degree of harmonisation is considered desirable, it may follow that national harmonisation is an equally desirable option. If that were so, the Australian Government should lead a process through SCAG to encourage the states and territories to adopt the Commonwealth model.

Recommendation 5–4 To promote national harmonisation, the Attorney-General of Australia should lead a process through the Standing Committee of Attorneys-General to encourage the states and territories to adopt the Commonwealth model proposed in Recommendations 5–1 to 5–3 above.

223 See Rec 5–2.

6. Modification or Abrogation of Privilege?

Contents

Introduction

6.1 In Chapter 2, the ALRC considers, and supports, the underlying rationale for client legal privilege—that the protection of the confidentiality of communications between a lawyer and a client facilitates compliance with the law and access to a fair hearing in curial and non-curial contexts, thereby serving the broad public interest in the effective administration of justice.

6.2 However, client legal privilege clearly conflicts with other important public interests, including that all relevant material should be available to a court—and,

presumably, investigations conducted by government agencies.[1] Claims of client legal privilege undoubtedly present some difficulties for investigators, since they would prefer access to all of the evidence concerning the role played by parties to an alleged contravention of the law. Litigating claims of client legal privilege is also time-consuming and expensive, and may delay and frustrate investigations.

6.3 The New Zealand Law Commission has noted that:

> The judicial response to the tension between the competing public policy interests has been to uphold the absolute nature of the privilege, while at the same time expanding its qualifications and exceptions and the doctrine of waiver, whereby privilege is lost.[2]

6.4 The chapter considers whether modification or abrogation of the privilege is necessary or desirable and discusses some of the problems that arise from the application of client legal privilege, both in a general sense and in its application to federal investigations.

6.5 As an underlying rationale of the privilege is to encourage clients to seek professional advice on their legal rights and responsibilities—this chapter also looks at whether the doctrine should be extended to other professionals who, while not lawyers, provide what amounts essentially to legal advice.

Should client legal privilege be abrogated?

6.6 Client legal privilege may be modified or abrogated by legislation.[3] Despite the importance given to common law rights by the courts, it is clear that privileges can be abrogated by statute if the legislature chooses to give higher priority to the interests of investigatory agencies in accessing information than to the interests served by maintaining privilege.[4] In relation to the privilege against self-incrimination it has been said that:

> If the legislature thinks that … the public interest overcomes some of the common law's traditional consideration for the individual, then effect must be given to the statute which embodies this policy.[5]

6.7 As outlined in Chapter 5, modification or abrogation of privilege must be express, as common law rights cannot be overridden in the absence of express

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1 *Baker v Campbell* (1983) 153 CLR 52. See also New Zealand Law Commission, *Search and Surveillance Powers*, Report 97 (2007), 355.

2 New Zealand Law Commission, *Search and Surveillance Powers*, Report 97 (2007), 355.

3 Chapter 5 outlines the examples where privilege has been expressly abrogated in federal statutes that contain coercive information-gathering powers.

4 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

5 *Rees v Kratzman* (1965) 114 CLR 63, 80 (Windeyer J).

unambiguous words or a necessary implication to that effect.[6] There are various ways that client legal privilege could be abrogated or modified in relation to federal investigatory bodies. One option would be to abrogate the privilege for all the coercive powers of federal bodies.[7] Another option would be to assess when it is appropriate to abrogate the privilege, based on the nature of each piece of legislation and the particular role and functions of the federal body concerned.

6.8 In the Issues Paper in this Inquiry, *Client Legal Privilege and Federal Investigatory Bodies* (IP 33), the ALRC discussed possible ways in which the privilege could be abrogated.[8] There are essentially two streams of argument in favour of abrogation. The first relates to the alignment with the underlying rationale. As noted in Chapter 2, if client legal privilege is viewed as a private right, then there are many occasions—particularly relating to the administration of the law by federal bodies—when it could be argued that the public interest should override those rights. The second stream is based more on practical considerations—that the availability of the privilege allows it to frustrate and delay investigations, and it may be used cynically to prevent or hinder the discovery of the truth.

Arguments for abrogation

Suppression of relevant evidence

6.9 As noted in Chapter 2, all legal privileges operate to allow people to resist providing information that they would otherwise need to disclose. This information may be highly relevant to the matters under investigation. Jeremy Bentham, the 18th century radical reformer and proponent of utilitarianism, was a staunch critic of client legal privilege.[9]

6.10 For Bentham, the happiness of society (the object of utilitarianism) was increased by conviction and punishment, not by the suppression of evidence.

> Disclosure of all legally-operative facts, facts investitive or divestitive of right, of all facts on which right depends, such, without any exception, ought to be, such, with a few inconsistent exceptions, actually is, the object of the law. … If falsehood is not favoured by the law, why should concealment? … Expect the lawyer to be serious in his endeavours to extirpate the breed of dishonest litigants! Expect the fox-hunter first to be serious in his wishes to extirpate the breed of foxes.[10]

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6 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

7 This model of abrogation could be combined with a number of different safeguards, including immunity after disclosure, which is discussed in Ch 7.

8 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007), 196.

9 See J Bentham, *Rationale of Judicial Evidence* (1827). Book IX, Ch V is entitled 'Examination of the Cases in which English Law Exempts One Person From Giving Evidence Against Another'.

10 Ibid, 311, 312.

6.11 In *Commissioner of Australian Federal Police v Propend*, Kirby J expressed the view that:

> a brake on the application of legal professional privilege is needed to prevent its operation bringing the law into 'disrepute', principally because it frustrates access to communications which would otherwise help courts to determine, with accuracy and efficiency, where the truth lies in disputed matters.[11]

6.12 In the report in the inquiry concerning the Australian Wheat Board (AWB) and the Oil-for-Food Programme (the AWB Royal Commission), Commissioner Cole singled out the significant 'public interest' that lies behind the establishment of Royal Commissions and the conflict of that public interest with 'the fundamental right of persons to obtain legal advice under conditions of confidentiality'.[12] The Commissioner identified a clash between 'the public interest in discovering the truth' and 'the private interest of companies or individuals in maintaining claims for legal professional privilege'.[13] He indicated that in some cases, depending on 'the issues the subject of the Royal Commission', the public interest should prevail over the private.[14]

6.13 A clash also can be identified between competing public interests, as opposed to a conflict between a public and a private interest. That is, there may be times 'when the public interest in the conduct of investigations overrides the public interest in client legal privilege'.[15] In *Baker v Campbell*, Wilson J commented along these lines, in saying that:

> It must be recognized that competing public interests may be involved. New forms of criminal activity pose a clear threat to the public welfare and may call for new measures of criminal investigation and law enforcement. The dictates of good administration of complex social and commercial legislation may require increasing resort to compulsory procedures.[16]

Hampering the effectiveness of investigations

6.14 It is argued that if client legal privilege were modified or abrogated, investigations could be more efficient or effective, and compliance improved. Dawson J has commented that 'a claim of legal professional privilege might well hamper an investigation as much as, if not more than, a claim of privilege against self-incrimination'.[17]

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11 *Australian Federal Police v Propend Finance* (1997) 188 CLR 501, 581.

12 T Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (2006), [7.66].

13 Ibid, [7.66].

14 Ibid, [7.67].

15 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005), [14.173].

16 *Baker v Campbell* (1983) 153 CLR 52, 96.

17 *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319, 335.

6.15 There is a pragmatic view regarding the ability of regulators to perform their functions effectively while the privilege is in place. As noted by the New Zealand Law Commission, 'on the face of it, removal of an obstruction to the power to require information must enable the power to work more smoothly'.[18]

6.16 A number of federal investigatory agencies have argued that their powers to obtain information are vital to performing their statutory functions. In *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (*Daniels*),[19] the Australian Competition and Consumer Commission (ACCC) argued that the purpose of investigating contraventions of the *Trades Practices Act 1974* (TPA) would be impaired or frustrated if client legal privilege could be used to resist compliance with a notice under s 155. The ACCC's view was that, since the expansion of client legal privilege in *Esso Australia Resources Ltd v Commissioner of Taxation* (*Esso*),[20] which adopted the dominant purpose test,[21] there was a significant chance that more legal advice would become unavailable due to the privilege.[22]

6.17 In *Corporate Affairs Commission of NSW v Yuill* (*Yuill*), which preceded *Daniels*, a key factor in the decision was that to allow client legal privilege as a reason for failing to comply with a notice to produce documents would impair (or even destroy) the effectiveness of the mechanism created to enforce the laws governing corporations.[23]

6.18 The decision of the Full Federal Court in *Daniels* (later overturned by the High Court) was influenced by a view that unlawful conduct

> often comprises many separate acts, some of which may be effected through lawyers. Without information about contacts between the person under investigation and that person's lawyer, it may be impossible for [the regulator] to see the whole picture.[24]

6.19 The complexity of modern business arrangements arguably tilts the balance towards the removal of privilege to facilitate monitoring of compliance with the law, particularly given the new compliance functions of lawyers, and the potential for the dominant purpose test to shield many revealing documents from inspection. As noted

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18 New Zealand Law Commission, *Tax and Privilege: Legal Professional Privilege and the Commissioner of Inland Revenue's Powers to Obtain Information*, Report 67 (2000), [9].

19 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

20 *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49.

21 The dominant purpose test is discussed in Ch 3.

22 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 557.

23 *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319, 326. This case is discussed further in Ch 5.

24 *Australian Competition and Consumer Commission v Daniels* (2001) 108 FCR 123, 137 (Wilcox J).

by Wilson J in *Baker v Campbell*, new forms of criminal activity may call for new measures of criminal investigation, law enforcement and an increasing resort to compulsory procedures in the interest of 'the dictates of good administration'. [25]

6.20 The Australian Securities and Investments Commission (ASIC) has told the ALRC that there are particular difficulties investigating misconduct in the financial sector and that:

> The type of matters that ASIC considers usually involve transactions that have many technical aspects in the legal, business, financial products or accounting areas. These areas are regulated and often legal advice is obtained in relation to the transactions. In some cases, lawyers are involved at every stage. Access to the correspondence flowing to and from lawyers is sometimes key to fully understanding how a transaction or series of transactions developed. The contents of correspondence created for the purposes of legal advice can contain details of the information known by persons of interest, or details of what those persons were seeking to do.[26]

6.21 In relation to taxation law, the Privy Council has observed:

> The whole rationale of taxation would break down and the whole burden of taxation would fall only on diligent and honest taxpayers if the Commissioner [of Taxation] has no power to obtain confidential information about taxpayers who may be negligent or dishonest.[27]

6.22 In a submission to the ALRC's inquiry into the use of civil and administrative penalties in federal law,[28] the Australian Taxation Office (ATO) stated that, while *Baker v Campbell* expressed the view that client legal privilege ensures 'some protection of the citizen—particularly the weak, the unintelligent and ill-informed citizen—against the leviathan of the modern state',[29] the ATO's experience is that it is rare for a privilege claim to be made by, or on behalf of, a citizen who would fit that description. Often it is claimed by large corporations or promoters of tax avoidance schemes.[30]

6.23 The New Zealand Law Commission also has downplayed fears that abrogation would deliver regulators unfettered power in such matters.

> Taxation obligations are imposed by an elected Parliament. Performance of those obligations by each taxpayer is as much in the interests of other taxpayers as of the

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25 *Baker v Campbell* (1983) 153 CLR 52, 96.
26 Australian Securities and Investments Commission, *Submission LPP 70*, 29 June 2007.
27 *New Zealand Stock Exchange v CIR* [1992] 3 NZLR 1, 4.
28 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002).
29 *Baker v Campbell* (1983) 153 CLR 52, 120.
30 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), [19.82].

> state. Because the taxpayer has the comprehensive knowledge of his financial position that the Commissioner does not, it is the taxpayer who is in the position of strength.[31]

6.24 In another submission to the ALRC's inquiry into the use of civil and administrative penalties in federal law,[32] the ACCC expressed the view that various species of privilege have been employed in the past to diminish significantly its ability to undertake investigations efficiently and thoroughly into alleged contraventions of the TPA. This was particularly the case in circumstances where legal advisers may be commercial partners in a transaction alleged to raise issues under the TPA.[33]

6.25 In *Daniels*, McHugh J did not accept this argument in relation to the ACCC, noting that documents that are subject to client legal privilege must be a very small percentage of the documents requested in a s 155 notice. McHugh J also expressed the view that:

> Only in recent times has the Commission or its predecessor claimed that legal privilege does not apply to documents that are subject to a s 155 notice. The Commission's long acceptance of its earlier position supports the view that the section's object would not be frustrated by holding that it does not abolish the right to claim immunity for documents protected by legal professional privilege.[34]

6.26 This view was shared by the majority in *Daniels*, who noted that a communication made between a client and a lawyer for the purpose of contravening the TPA would not be protected by privilege:

> it is difficult to see that the availability of legal professional privilege to resist compliance with a notice under s 155(1) of the Act would result in any significant impairment of the investigation of contraventions of the Act, much less in the frustration of such investigations. At least, that conclusion is far less obvious than in the case of the privilege against self-exposure to penalties.[35]

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31 New Zealand Law Commission, *Tax and Privilege: Legal Professional Privilege and the Commissioner of Inland Revenue's Powers to Obtain Information*, Report 67 (2000), [10].

32 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002).

33 Ibid, [19.39].

34 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 564.

35 Ibid, 557 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

6.27 In its submission to this Inquiry, the ACCC provided an example where material that was claimed as privileged would have been of assistance in an investigation.

CASE STUDY ONE

The ACCC issued s 155 notices as part of an investigation into a resale price maintenance allegation. Documents were provided by the company which included advice from a lawyer commenting on the documentation prepared by the company for distribution to retailers. The company later claimed that the legal advice was privileged and had been supplied inadvertently. Accordingly, the ACCC agreed to return the privileged document and make no further use of it. In the assessment of an ACCC investigator who read the relevant documents, the material supplied and then returned had the potential to open up lines of inquiry which could have established additional breaches of the TPA.

Delay and frustration

6.28 Claims of client legal privilege—even where asserted in good faith—may frustrate or delay investigations. At present, there is no forum, other than a court, where the proper basis for a claim can be determined.[36]

6.29 The submission of the Commonwealth Director of Public Prosecutions (CDPP), for example, identified a number of cases where privilege claims led to significant delays and hampered the progress of investigations.[37]

CASE STUDY TWO

In *Kennedy v Wallace*,[38] ASIC and the Australian Federal Police (AFP) executed a search warrant on 13 November 2003, at which time the relevant documents over which privilege was claimed were seized from Mr Kennedy. The final ruling of the Full Federal Court (that the documents were not privileged) was handed down on 23 December 2004.[39] The practical impact of the delay was that ASIC was not able to consider any evidence in those documents for just over thirteen months.

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36 *Baker v Campbell* (1983) 153 CLR 52.
37 Commonwealth Director of Public Prosecutions, *Submission LPP 61,* 12 June 2007.
38 *Kennedy v Wallace* (2004) 208 ALR 424.
39 *Kennedy v Wallace* (2004) 213 ALR 108. See I Govey, 'Legal Professional Privilege and Commonwealth Investigatory Bodies' (Paper presented at 35th Australian Legal Convention, Sydney, 23 March 2007), 5.

CASE STUDY THREE

R v Pearce and Ors[40] concerned a mass–marketed tax scheme, where accountants had received advice from a Queen's Counsel about the legitimacy of the scheme in order to induce people to enter into the scheme. The relevant evidence in this matter included letters and faxed communications from accountants who organised the scheme to the Queen's Counsel, in which they had sought changes to the advice to tailor it to suit their design and maximise its marketing potential. Search warrants were executed and claims for client legal privilege were made over these documents. The documents were held at the Federal Court Registry on the basis that the applicants had to commence action concerning legal professional privilege within a certain period of time. No action in relation to the privilege claim was commenced and the documents remained in the Federal Court Registry for a number of years, until the investigators sought access to the documents. The applicants made no attempt to enforce their claim of privilege. The documents were used in the trial of three persons accused of conspiracy to defraud the Commonwealth.

CASE STUDY FOUR

In the investigation into the affairs of Harts Australia Ltd, a tax and accounting adviser,[41] search warrants were issued on 6 September 1996, and executed on 9 and 10 September 1996. On 11 September 1996, Hart began a Federal Court challenge to the execution of the search warrants and claimed privileged material had been seized. The litigation was not resolved until 5 December 2002, over 6 years after the search warrants were executed.

6.30 In relation to the investigation in the Hart matter, the CDPP submitted that:

> The effect of the privilege claim was to paralyse the investigation, divert considerable investigative resources (both human and financial) and delay the investigation and eventual prosecution for over six years. At one stage the investigative agency was required to meticulously catalogue each of the thousands of documents it had seized under the search warrants so that the litigation could progress.[42]

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40 *R v Pearce* (Unreported, Supreme Court of Western Australia, 13 July 2004). For report of the appeal see *R v Pearce* (2005) 216 ALR 690.

41 *Hart v Commissioner of Australian Federal Police* (2002) 196 ALR 1.

42 Commonwealth Director of Public Prosecutions, *Submission LPP 61,* 12 June 2007. This investigation was also referred to by the AFP: Australian Federal Police, *Consultation LPP 28*, Canberra, 1 June 2007. Blanket claims are discussed further in Chs 8 and 9.

6.31 The ATO also submitted that blanket claims of client legal privilege can delay audit activities by significant periods of time.

> Claims can also operate to limit our ability to access information that is not privileged because claims are made over communications that are not privileged. Sometimes through negotiation or litigation we might gain access to these documents, but in other instances we may never receive the relevant information.[43]

6.32 The duration of disputes was a significant reason for the minority decision of Kirby J in *Esso*.[44] Kirby J suggested that the sole purpose test should remain in order to avoid the application of a test (the dominant purpose test) which is

> susceptible to more protracted pre-trial disputation and contentious evaluation with interlocutory applications and the appeals to which they give rise. If there is any doubt about this, consider how long it would take to sort out, in the case of almost 600 documents, the disputed question whether the dominant purpose of each communication was to seek or receive legal advice.[45]

6.33 In *Daniels*, Kirby J noted that in some areas of the ACCC's responsibility, such as the administration of mergers, 'speed on the part of the Commission and its officers is essential to the proper discharge of the functions imposed by Parliament'.[46]

Abuse of client legal privilege claims

6.34 Allegations of abuse of client legal privilege have been made in Australia and overseas. One court in the United States, for example, has said of the tobacco industry that it

> seems to believe and argues that when an attorney is somehow referenced within a document or generates a document, attorney-client privilege or work-product immunity must protect disclosure of the subject document.[47]

6.35 In 2000, the Australian National Audit Office, in conducting a review of tax penalties, reported that it was informed that:

> legal professional privilege is being used as a tactical tool to impede and frustrate both the progress and ultimate outcomes of taxation audits (in terms of restricting the auditor's ability to access factual information about transactions and arrangements).[48]

6.36 Commissioner Cole's report in the AWB Royal Commission expressed concerns about AWB's claims of client legal privilege. He stated that AWB had not

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43 Australian Taxation Office, *Submission LPP 65*, 22 June 2007.
44 *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49.
45 Ibid, 154.
46 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 574.
47 *Burton v RJ Reynolds Tobacco Company* 167 FRD 134 (D Kan, 1996), 184.
48 Australian National Audit Office, *ATO Administration of Tax Penalties*, Audit Report 31 (2000), [3.46].

produced a list of documents that formed the basis of the privilege claim.[49] He also noted that many documents for which privilege had been claimed initially were no longer claimed to be privileged.[50] In Commissioner Cole's view, AWB's lawyers had failed to produce documents that would have been required to be produced to the Commission at some stage, and thus had greatly increased the time and expense of the Commission.[51]

6.37 The ACCC submitted that, in the context of responding to s 155 notices,[52] there is scope to claim client legal privilege without a proper basis, and that from time to time, the ACCC considered that such improper claims have been made.[53]

6.38 The ACCC provided an example of how improper claims might only be discovered in a 'random' way. In a matter where a company had claimed privilege over certain documents sought pursuant to a s 155 notice, when those documents were obtained from another company which did not claim privilege, it revealed that the claims made by the first company were not soundly based.[54]

6.39 However, in consultations, a number of groups of lawyers argued that it was important to draw a distinction between over-cautious or incorrect claiming of the privilege and actual abuse.[55] Issues concerning alleged abuse of client legal privilege claims are considered further in Chapter 9.

Difficulties in Royal Commissions

6.40 The report of the AWB Royal Commission discussed in detail the difficulties caused by claims to client legal privilege that were made by the AWB during that Royal Commission. The AWB raised up to 40 claims of client legal privilege concerning more than 1,400 documents.[56]

6.41 The AWB challenged Commissioner Cole's decision to reject a claim for client legal privilege over a particular document as well as his capacity to determine privilege claims at all. In the Federal Court, Justice Young held that the document in question was not subject to privilege. Young J's decision also cast doubt on the ability of a

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49 T Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (2006), [7.42].

50 Ibid, [7.55].

51 Ibid, [7.64]. The AWB case is discussed further in Ch 9.

52 See Chs 4 and 5.

53 Australian Competition and Consumer Commission, *Submission LPP 53*, 13 June 2007. This is discussed further in Ch 9.

54 Ibid, see Ch 8 for further discussion of issues and problems in making a claim for privilege.

55 Members of the Victorian Bar, *Consultation LPP 21*, Melbourne, 25 May 2007; Members of the New South Wales Bar, *Consultation LPP 18*, Sydney, 23 May 2007; Regulatory lawyers of Clayton Utz, *Consultation LPP 13*, Sydney, 15 May 2007.

56 T Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (2006), [7.44].

Royal Commissioner to inspect a document in respect of which client legal privilege has been claimed, to determine whether the claim is sustained. Amendments were then made to the *Royal Commissions Act 1902* (Cth) designed to put beyond doubt that a Royal Commissioner may require the production of a document in respect of which client legal privilege is claimed, for the purpose of making a finding about that claim.[57]

6.42 Following these amendments to the *Royal Commissions Act*, the AWB continued action in the Federal Court contending, amongst other arguments, that the amendments were unconstitutional. In the course of the hearings on this issue, the AWB dropped the privilege claim over 15 volumes of documents it had previously said would be unavailable to the inquiry. Ultimately, around 900 documents remained in issue in the Federal Court.[58] Commissioner Cole reported that client legal privilege was frequently claimed in respect of a portion of a document but, after discussion in the hearing room or between counsel, a review of the claim resulted in the claim not being maintained.[59] A number of the claims for privilege were rejected by the Federal Court. However, the claims had delayed the progress of the inquiry by nine months.[60]

6.43 Commissioner Cole concluded that circumstances may arise where it is appropriate that client legal privilege be abrogated.[61] In his view, however, there should not be a blanket abrogation of client legal privilege in all Royal Commissions, as it is not possible to predict generally the circumstances where it could be said that the public interest in discovering the truth should prevail over the private interest in maintaining client legal privilege. In Commissioner Cole's view, that decision would depend upon the issues that are the subject of the particular Royal Commission.[62] On this basis, he recommended that there should be capacity in the *Royal Commissions Act* to permit the Governor-General in Council, by Letters Patent, to determine that, in relation to the whole or a particular aspect of matters the subject of inquiry, client legal privilege should not apply.[63]

6.44 Client legal privilege is abrogated for Royal Commissions established in New South Wales (NSW) and Victoria. Section 17(1) of the *Royal Commissions Act 1923* (NSW) states that a 'witness summoned to attend or appear before the commission shall not be excused from answering any question or producing any document or other

57 See *Royal Commissions Act 1902* (Cth) s 6AA(2), (3).
58 T Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (2006), [7.55].
59 Ibid, [7.59].
60 Ibid, [7.55].
61 The view of client legal privilege as a 'private interest' is discussed in Ch 2.
62 T Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (2006), [7.67]–[7.68].
63 Ibid, rec 4.

thing on the ground … of privilege or on any other ground'. This has been held to apply to client legal privilege as well as to the privilege against self-incrimination.[64]

6.45 Under the *Evidence Act 1958* (Vic), if a person is required by a Royal Commission to answer a question or produce a document, the person is not excused from complying with the requirement on the ground that their answer or document would disclose matters in respect of which the person could claim client legal privilege.[65] Client legal privilege was abrogated in the *Evidence Act 1958* (Vic) for the Longford Royal Commission into the accident at the Esso Gas Plant in Longford in 1998.[66]

6.46 As noted in Chapter 5, the *James Hardie (Investigations and Proceedings) Act 2004* (Cth) abrogated client legal privilege in relation to certain material, allowing its use in investigations of the James Hardie Group and any related proceedings.[67] This was done because, in the Australian Government's view, there are situations in which the abrogation of the privilege is justified in order to serve a higher public policy interest.[68] Whilst the James Hardie investigation was a New South Wales Special Commission of Inquiry, the operation and rules of Special Commissions of Inquiry are effectively the same as those of a Royal Commission.[69]

Arguments against abrogation

6.47 The main arguments against abrogation are based on the underlying rationale for the privilege, as outlined in Chapter 2. The benefit of fostering a candid client-lawyer relationship is one of the main reasons stated for opposing the abrogation of client legal privilege. In recent cases, judges have shown a broad acceptance of the proposition that an assurance of confidentiality is necessary to allow full and frank communications between clients and their lawyers. Deane J has commented that:

> Ultimately much depends on one's assessment of the extent of the detriment to the efficacy of legal professional privilege which would be likely to result from the proposed curtailment of the protection which it affords. In my view, that detriment could well be significant.[70]

6.48 In contrast, Dr Jonathan Auburn argues that lawyers are reluctant to question what he terms the 'abstract principles' behind the privilege.

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64 See *R v Hood* (1997) 91 A Crim R 526.

65 *Evidence Act 1958* (Vic) s 19D. In other state legislation governing Royal Commissions, client legal privilege is either expressly preserved (as in the ACT), or the legislation is silent on the issue.

66 *Crimes (Confiscation and Evidence) Amendment Act 1998* (Vic).

67 *James Hardie (Investigations and Proceedings) Act 2004* (Cth) s 4.

68 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 2004, 1 (P Costello—Treasurer), 2.

69 *Special Commissions of Inquiry Act 1983* (NSW).

70 *Carter v Northmore Hale Davey & Leake* (1995) 183 CLR 121, 139.

> Lawyers are confident that their experience in dealing with clients shows that the abstract principle behind the privilege holds true in practice. Thus it may be partly because the privilege is, on one level, counter-intuitive, and so demands justification from those who use it, that it has drawn such stern defence from the legal profession.[71]

6.49 Auburn states that:

> If the benefits to confidentiality resulting from the privilege are unknown, there is no reason to assume they are slight. At the same time, there is no reason to assume that such benefits would be completely destroyed by further incursions into the over-stated sanctity of the privilege.[72]

6.50 Empirical studies on privilege and confidentiality in the United States have proven to be inconclusive, although some have suggested that laypersons may have little understanding of the privilege.[73]

6.51 It is also argued that removal of the privilege may actually damage, rather than enhance, compliance. Fear of compulsory disclosure may deter candid, careful, detailed, written advice being given by lawyers to their clients and increase the amount of oral advice by lawyers.[74] Removing privilege also might deter complex advice testing the limits of the law.

> The majority decision in *Yuill* did not acknowledge the important part that professional legal advice can play in encouraging compliance with the law … instead, the reasoning of the majority was confined to analysing linguistic, textual and historical considerations without reference to the underlying policy debate.[75]

6.52 As noted above, in *Daniels*, both McHugh and Kirby JJ rejected the ACCC's view that it could not conduct investigations without access to privileged documents. Kirby J, in particular, noted that the ACCC has acknowledged in the past that legally privileged documents were unlikely to assist an investigation.[76] Geoff Healy and Andrew Eastwood suggest that legal advice about a client's past conduct, while it may refer to relevant facts and circumstances,

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71 J Auburn, *Legal Professional Privilege: Law and Theory* (2000), 65.

72 Ibid, 66.

73 'Attorney-Client and Work Product Privilege in a Utilitarian World: An Argument for Recomparison' (1995) 108 *Harvard Law Review* 1697, 1700. See also J Auburn, *Legal Professional Privilege: Law and Theory* (2000), 78.

74 See, eg, B Saul, 'Legal Professional Privilege: Balancing Law Enforcement Against Protecting the Regulated' (2002) 76(2) *Law Institute Journal* 68.

75 A Bruce, 'The Trade Practices Act 1974 and the Demise of Legal Professional Privilege' (2002) 30 *Federal Law Review* 373, 394, citing D Boniface, 'Legal Professional Privilege and Disclosure Powers of Investigative Agencies' (1992) 16 *Criminal Law Journal* 320, 328.

76 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 583.

> will rarely be, of itself, a relevant fact. Accordingly the effect of the expansion of the doctrine's ambit on the ability of regulators to probe and monitor corporate activity is, it is suggested, likely to be manageable.[77]

6.53 The 2003 *Review of the Competition Provisions of the Trade Practices Act* (Dawson Review)[78] recommended that client legal privilege be specifically preserved under the TPA, on the basis of its role in compliance.

> The privilege is in the public interest because it facilitates the obtaining of legal advice and promotes the observance of the law. This is particularly desirable in the area of competition law, which is often complex. Corporations and individuals should not be discouraged from seeking legal advice for fear that their communications might subsequently be used against them by the ACCC. Nor should clients be inhibited in giving instructions to their lawyer in order to obtain legal advice or be confined to oral communications. The Committee believes that legal professional privilege should be preserved under the Act.[79]

6.54 Healy and Eastwood also suggest that the limits placed on client legal privilege ensure that it does not unduly frustrate regulatory investigations. They cite the discussion in *Pratt Holdings v Commissioner of Taxation*[80] as demonstrating the difficulty of establishing the dominant purpose in cases of complex business transactions where advice is obtained from a number of professionals.[81]

> This limitation also acts as a natural barrier to any attempt by large corporations to take advantage of the increased scope of legal professional privilege. The mere provision of a document to an internal or external lawyer will not render a document subject to legal professional privilege if the document was brought into existence for commercial reasons.[82]

6.55 In addition, occasional abuse of the privilege is not necessarily a reason for outright removal of the protection. The American Bar Association (ABA) established a task force on attorney-client privilege in 2004 to inform the public and legal profession on the importance of the doctrine. The ABA argues that:

> While it may be true that in some limited instances attorneys abuse the privilege as a tactic to delay and hinder the discovery of otherwise discoverable material, such instances do not justify encroaching upon the protections afforded by the privilege.[83]

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77 G Healy and A Eastwood, 'Legal Professional Privilege and the Investigative Powers of the Australian Securities and Investments Commission' (2005) 23 *Company and Securities Law Journal* 375, 386.

78 Australian Government Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act* (2003).

79 Ibid, Ch 13, rec 13.5.

80 *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217. See discussion in Ch 3.

81 G Healy and A Eastwood, 'Legal Professional Privilege and the Investigative Powers of the Australian Securities and Investments Commission' (2005) 23 *Company and Securities Law Journal* 375, 338.

82 Ibid, 338.

83 American Bar Association, *Report of the Task Force on Attorney-Client Privilege* (2005).

6.56 In the United States (US), rules are already in place to address concerns about abuse of privilege. For example, Rule 3.4 of the *Model Rules of Professional Conduct* provides that 'a lawyer shall not unlawfully obstruct another party's access to evidence or conceal a document having potentially evidentiary value'.

6.57 If client legal privilege is sometimes being abused, there is a question about what measures could be put in place, short of abrogation, to prevent or redress such abuse. A number of detailed recommendations are made in Chapter 9, concerning guidance in professional rules of conduct about the making and maintaining of privilege claims, professional disciplinary action and education.

Client legal privilege and the privilege against self-incrimination

6.58 The common law privilege against self-incrimination entitles a person to refuse to answer any question, or produce any document, if that answer or the production would tend to incriminate that person.[84] The privilege also provides protection against self-exposure to a civil or administrative penalty.[85] In relation to the investigatory powers of federal regulators, a common approach has been to abrogate or modify the privilege against self-incrimination expressly by statute so that individuals are not entitled to refuse to produce documents, but are permitted to assert the privilege subsequently in civil or criminal proceedings commenced after the investigation.[86]

6.59 Given that both the privilege against self-incrimination and client legal privilege have the potential to 'defeat or stultify the purpose for which a coercive and investigative power is conferred',[87] it is worth considering whether there are fundamental differences between the two which would justify the abrogation of one and not the other.

6.60 Prior to the High Court's decision in *Daniels*, the question of whether client legal privilege should be accorded differential treatment from the privilege against self-incrimination was directly examined in *Re Compass Airlines Pty Ltd*.[88] In that case it was argued by counsel for the liquidators that express abrogation of the privilege against self-incrimination in s 597(12) of the *Corporations Law* implied the abrogation of client legal privilege. Lockhart J held that the privilege against self-incrimination and client legal privilege rest upon different foundations and are expressions of different public policy principles. Consequently, there was no necessary implication

84 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.
85 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.
86 B Bolton, 'Compelling Production of Documents to the ASC' (1995) 25 *Queensland Law Society Journal* 221, 238. Use and derivative use immunities are discussed in Ch 7.
87 S McNicol, 'Before the High Court: Australian Competition and Consumer Commission v The Daniels Corporation International Pty Ltd and Another' (2002) 24 *Sydney Law Review* 281, 282.
88 *Re Compass Airlines Pty Ltd* (1992) 35 FCR 447.

that client legal privilege had been abrogated.[89] In the same case, Beaumont and Gummow JJ reached the conclusion that it was one thing to construe the provision as taking away by implication the right of silence; but it was a different thing entirely to read into such a provision 'an intention to eliminate the very different privilege inherent in a proper legal professional relationship'.[90]

6.61 The decision in *Re Compass Airlines Pty Ltd* was largely based on an earlier decision *Re Transequity Ltd (in liq).*[91] There it was held that client legal privilege

> is to be found in an underlying principle of common law, where a person should be entitled to seek and obtain legal advice in the conduct of his own affairs and legal assistance in and for the purpose of the conduct of actual or anticipated litigation without the apprehension of being thereby prejudiced.[92]

6.62 Hence, it attracts an entirely different theoretical and policy foundation than the privilege against self-incrimination.

6.63 In *Daniels*, however, the Full Federal Court based its decision of whether to treat client legal privilege on an equal footing with the privilege against self-incrimination by answering the question whether the TPA would be hobbled or thwarted if privilege were applied. Wilcox J held that the policy considerations in relation to the privilege against self-incrimination are equally apposite to client legal privilege.[93] Moore J noted, however, that there was a difference between the two privileges based on the types of information sought.

> Different considerations arise in relation to communications for which a claim of legal professional privilege might be made. Privileged documents, for example, may be sought by a notice under s 155 in circumstances where the documents could ultimately prove to have a limited bearing on whether or not there had been a contravention of the TPA. Documents or information resisted on the grounds of the privilege against self-incrimination may be thought, in the ordinary course, to be likely to have a greater bearing on whether there had been a contravention.[94]

6.64 Wilcox J's view was later rejected by the High Court.[95] The decision of the Full Federal Court also has been criticised for making only passing reference to *Re*

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89 Ibid, 459.
90 Ibid, 464.
91 *Re Transequity Ltd (in liq)* (1991) 6 ACSR 517.
92 Ibid, citing *Baker v Campbell* (1983) 153 CLR 52, 114 (Deane J).
93 *Australian Competition and Consumer Commission v Daniels* (2001) 108 FCR 123, 137.
94 Ibid, 146. See also S McNicol, 'Before the High Court: Australian Competition and Consumer Commission v The Daniels Corporation International Pty Ltd and Another' (2002) 24 *Sydney Law Review* 281, 291.
95 See *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 559, 565.

Compass Airlines Pty Ltd, and for not considering the conceptual differences between the privilege against self-incrimination and client legal privilege.[96]

Trends in the United States

6.65 In the wake of such corporate scandals as the collapse of Enron and WorldCom in the past decade, US federal bodies such as the Department of Justice, the Securities and Exchanges Commission, the Commodities and Futures Trading Commission and the New York Stock Exchange began routinely to demand that corporations and their employees or agents cooperate fully with government investigations. As part of these investigations, enforcement bodies have asked corporations to waive attorney-client privilege and work-product protections, to make available to authorities, amongst other things, documents and reports of internal investigations.[97]

6.66 In January 2003, US Deputy Attorney General Larry Thompson issued a memorandum *Principles of Federal Prosecution of Business Organizations* (Thompson Memorandum), in which federal prosecutors are advised that a corporation should not be given credit for cooperating with the government if it refused to waive its attorney-client privilege, or if it advanced legal fees to employees facing investigations.[98]

6.67 Following the release of the Thompson Memorandum, concerns were expressed by members of Congress, former US Attorneys General and Deputy Attorneys General, civil libertarians, as well as academics and practitioners, about the effect of the memorandum on the right to counsel. On 15 September 2006, the Senate Judiciary Committee held hearings on the Thompson Memorandum's effect on the right to counsel in corporate investigations. From the public hearing, two particular strands of criticism of the memorandum emerged:

- the policy has contributed to a coercive 'culture of waiver', where government agencies believe it is reasonable and appropriate for them to expect a company under investigation to waive broadly its attorney-client privilege. The fear of indictment further exacerbates the corporation's concern that it might be seen or labelled as 'uncooperative' if it decides to assert privilege;[99] and

96 R Travers, 'Confidentiality of Legal Advice after Australian Competition and Consumer Commission v Daniels Corporation' (2002) 9 *Competition and Consumer Law Journal* 289, 299.

97 A Pinto, 'Cooperation and Self-Interest Are Strange Bedfellows: Limited Waiver of the Attorney-Client Privilege Through Production of Privileged Documents in a Government Investigation' (2003–04) 106 *West Virginia Law Review* 359, 360.

98 United States Deputy Attorney General, *Principles of Federal Prosecution of Business Organizations* (2003) <www.usdoj.gov/dag/cftf/corporate_guidelines.htm> at 31 August 2007.

99 See, eg, testimony of the American Bar Association <www.judiciary.senate.gov/testimony.cfm?id=2054&wit_id=5742> at 13 December 2007.

- the emphasis on waiver of attorney-client privilege and work-product protection threatens to create a counter-productive climate of distrust between corporations and their employees, it further dissuades clients from being forthcoming with their attorneys, and inhibits any motivation to comply with regulations.[100]

6.68 On 8 December 2006, Senator Arlen Specter introduced the *Attorney-Client Privilege Protection Act*. In the legislation, federal enforcement agents and attorneys would be barred from:

- demanding, requesting or conditioning treatment on the 'disclosure by an organisation, or persons affiliated with that organisation of any communication protected by the attorney-client privilege or any attorney work-product'; and

- conditioning a decision on whether to use a civil or criminal charge relating to an organisation or person, or use as a factor in determining whether an organisation or person is cooperating with the Government on any valid assertion of the attorney-client privilege.[101]

6.69 Under the legislation, a corporation is not prohibited from making, and a federal enforcement agent or attorney is not precluded from accepting, a voluntary or unsolicited offer to share the internal investigation materials of such an organisation.

6.70 On 12 December 2006, less than a week after Senator Specter introduced the proposed legislation, Deputy Attorney General McNulty issued revised charging guidelines for federal prosecutors *Principles of Federal Prosecution of Business Organizations* (the McNulty Memorandum).

6.71 The McNulty Memorandum notes the concerns expressed by those associated with the corporate legal community that the practices of federal bodies may be discouraging to full and candid communication between corporate employees and counsel. The Memorandum sets forth a balancing test by which prosecutors can determine whether they have a 'legitimate need' for materials protected by the attorney-client privilege or the work-product protection.

6.72 To determine whether a legitimate need exists, the following factors are relevant:

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100 See eg, testimony of Mr Mark Sheppard, <judiciary.senate.gov/testimony.cfm?id=2054&wit_id=5744> at 31 August 2007.

101 The Bill is available at <www.acc.com/public/attyclientpriv/hr3013.pdf > at 3 December 2007. The Bill was passed by the House of Representatives on 13 November 2007. As at 3 December 2007, the Bill had been referred to the Senate Committee on the Judiciary.

- the likelihood and degree to which the privileged information will benefit the federal body's investigation;

- whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver;

- the completeness of the voluntary disclosure already provided; and

- the collateral consequences to a corporation of a waiver.

6.73 If a prosecutor determines that there is a legitimate need, the prosecutor must seek the least intrusive waiver necessary to conduct a complete and thorough investigation, and should follow a step-by-step approach to requesting information. The memorandum divides information sought into two categories:

- Category I—includes purely factual information such as witness statements, factual interviews, memoranda, organisation charts, factual chronologies and factual summaries. It also includes contemporaneous legal advice when an organisation is asserting the 'advice of counsel' defence and legal advice falling under the crime-fraud exception to the privilege.

- Category II—includes other privileged attorney-client communication, such as legal advice given to the corporation before, during or after the underlying misconduct. It extends to attorney notes, memoranda or reports containing counsel's mental impression and conclusions, legal determinations as a result of internal investigation or legal advice given to the corporation.

6.74 Before obtaining Category I information, the prosecutor must get written authorisation from the US Attorney who must consult with the Assistant Attorney General of the Criminal Division. Category II information only can be obtained in 'rare circumstances' when purely factual information provides an incomplete basis to conduct a thorough investigation, and approval from the Deputy Attorney General is required.[102]

6.75 The ABA regards the McNulty Memorandum as a 'modest improvement' on the previous policy, but remains concerned that the changes have not gone far enough. According to ABA President Karen Mathis:

> the new guidelines fall far short of what is needed to prevent further erosion of attorney-client privilege … instead of eliminating the improper department practice of requiring companies to waive privileges in return for cooperation credit, the new

102 The McNulty Memorandum may be viewed at <news.findlaw.com/hdocs/docs/doj/ 121206mcnulty memo.html> at 3 December 2007.

> policy merely requires high-level department approval before waiver requests can be made.[103]

6.76 It is important to note that these matters in the US deal with information obtained voluntarily as part of a regulator's leniency policies and not pursuant to the coercive information-gathering powers that are being considered as part of this Inquiry. Nonetheless, the distinctions drawn as to when there is a legitimate need for privileged material in an investigation are instructive for the purposes of this Inquiry.

Is abrogation or modification necessary or desirable?

6.77 In IP 33, the ALRC posed a number of questions about whether abrogation or modification of client legal privilege was necessary or desirable. The comments in submissions and consultations highlighted the following concerns: that greater efficiency or effectiveness are not principled reasons for abrogation of the privilege; and that abrogation of the privilege would have an undesirable effect on the legal advice provided by lawyers and, therefore, on compliance. However, a number of submissions expressed the view that there was a limited set of special circumstances in which there was an overriding public interest in the availability of otherwise privileged material.

Would abrogation or modification achieve greater efficiency or effectiveness?

6.78 ASIC submitted that an abrogation or modification of the client legal privilege rules would achieve greater efficiency or effectiveness in the work of some federal investigatory agencies, including Royal Commissions, because it would assist agencies and Royal Commissions to understand 'a transaction that is not obvious on its face, and ultimately assist in quicker resolution of some investigations'.[104]

6.79 The CDPP submitted that it is particularly concerned about the impact that claims for client legal privilege can have on investigatory agencies' powers of investigation under search warrants and the prosecution process in general:

> It has become apparent to this office that the making of claims for legal professional privilege over documents during the execution of search warrants can be used as a tool to impede and delay the criminal investigation. Once a claim for legal professional privilege is made over the document, the document is essentially removed from consideration in the investigation until the claim for legal professional privilege is resolved. This can have the effect of denying the investigator access to crucial evidence in the investigation of criminal offences for substantial periods of time.[105]

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103 American Bar Association, 'Thompson Memo Changes Not Enough, ABA Says' (Press Release, 15 December 2006).

104 Australian Securities and Investments Commission, *Submission LPP 70*, 29 June 2007.

105 Commonwealth Director of Public Prosecutions, *Submission LPP 61*, 12 June 2007.

6.80 The Australian Crime Commission (ACC) made a submission in similar terms:

> There are cases where claims of the privilege have delayed, undermined and frustrated ongoing criminal ACC investigations and operations. Unless the parties cooperate, a claim of privilege over documents which the ACC wishes to see has the effect of putting those documents out of the agency's reach for significant periods. Where the ACC becomes tied up in protracted litigation, there may be a need to reassess and redirect its investigations. This can be exploited by others and used as a delaying tactic.[106]

6.81 However, a significant number of submissions did not agree that modification or abrogation of the privilege would achieve greater efficiency or effectiveness in the work of federal investigatory agencies.

6.82 The Law Council of Australia (Law Council) stated that while there may be some cases where there has been delay and frustration, this is a minority of cases, and greater evidence should be required before modification or abrogation of a fundamental right was proposed.[107] It did not accept the proposition that the effectiveness of federal investigations is hampered or diminished by client legal privilege.

> The Law Council wishes to emphasise, in responding to this question, that greater efficiency and effectiveness of investigation are not the only interests to be weighed in the balance. Nor are they the most important. Other interests to be weighed are the proper administration of justice and individual civil rights. A proper balancing of these interests must be achieved in each particular category of investigation in question.[108]

6.83 A number of submissions agreed that efficient resolution of claims was more likely to be of assistance to agencies than modification or abrogation of the privilege doctrine.[109]

> If the Commonwealth is concerned about inefficiencies arising from claims of privilege then it should focus its efforts on developing a fast track method for adjudicating those claims rather than stripping people of fundamental rights.[110]

What would be the other effects of abrogation?

6.84 The Law Council argued that the most likely consequence of abrogation of privilege would be a major change in the manner in which legal work is carried out,

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106 Australian Crime Commission, *Submission LPP 8*, 29 June 2007.
107 Law Council of Australia, *Submission LPP 26*, 4 June 2007.
108 Ibid.
109 National Legal Aid, *Submission LPP 52*, 13 June 2007; Australian Institute of Company Directors, *Submission LPP 43*, 8 June 2007; New South Wales Bar Association, *Submission LPP 41*, 5 June 2007, National Australia Bank Limited and others, *Submission LPP 30*, 4 June 2007.
110 BHP Billiton Mitsubishi Alliance, *Submission LPP 21*, 1 June 2007.

with possible negative consequences for the documentation of certain activities, particularly in commercial contexts.

> Even with the protection of privilege, clients are often reluctant to tell their lawyers the whole story. Without the assurance that communications will remain confidential, clients will become even more reluctant to speak openly. Such a fear about speaking openly is counter-productive to the provision of legal advice.[111]

6.85 Others agreed that if a client were concerned about the consequences of legal advice, they would brief their lawyer orally (rather than in writing) and ask that advice be given verbally as well.[112]

6.86 The Law Council submitted that this was the experience of several practitioners during the period between the Full Federal Court decision and the High Court decision in *Daniels*:

> while appeals in relation to *Daniels* were underway, the ACCC was urging corporations to adopt compliance programs that included systems of internal reporting of potential contraventions of the *Trade Practices Act 1974* and subsequent consultation with legal advisers. During that period, corporations and individual employees were reluctant to implement such reporting systems due to concerns that documents created with the intention of securing compliance, but with a dominant purpose of obtaining legal advice, would be used by the ACCC against the corporation. Accordingly, clients were reluctant to seek legal advice (or at least written advice) during that period.[113]

6.87 In contrast, ASIC observed that, having accessed and reviewed legally privileged material following the decision in *Yuill*, there was no discernible decrease after *Yuill* in the extent to which legal advice was sought and obtained by the entities that ASIC regulates. It noted, however, that this impression is not based upon any empirical study.[114]

6.88 Community legal centres shared a concern about the impact that modification could have on their clients.[115] One centre submitted that:

> Abrogation of client legal privilege could result in communications between lawyer and client no longer being confidential. This would have a huge impact on the way clients seek legal advice, and could result in a lower standard of access to justice.[116]

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111 Law Council of Australia, *Submission LPP 26*, 4 June 2007.

112 Australian Institute of Company Directors, *Submission LPP 43*, 8 June 2007; Fitzroy Legal Service, *Submission LPP 29*, 4 June 2007; BHP Billiton Mitsubishi Alliance, *Submission LPP 21*, 1 June 2007.

113 Law Council of Australia, *Submission LPP 26*, 4 June 2007, similar observations were made to the ALRC in one consultation: Regulatory lawyers of Clayton Utz, *Consultation LPP 13*, Sydney, 15 May 2007.

114 Australian Securities and Investments Commission, *Submission LPP 70*, 29 June 2007.

115 See, eg, Fitzroy Legal Service, *Submission LPP 29*, 4 June 2007.

116 Sussex Street Community Law Services Inc, *Submission LPP 15*, 30 May 2007.

6.89 Fitzroy Legal Service stated that the *Anti-Terrorism Act (No 2) 2005* (Cth), which removes client legal privilege in relation to AFP investigations into serious terrorist offences,[117] has left lawyers uncertain about what kind of advice to provide to clients facing AFP investigations and reluctant to commit to written instructions.[118]

6.90 The Law Council also noted that abrogation could discourage overseas companies from doing business in Australia.[119]

Is abrogation appropriate for some bodies?

6.91 The weight of submissions was that no different rationale for client legal privilege was evident in relation to federal investigatory bodies as a whole, nor should particular 'categories' of body be exempt.[120] The Australian Institute of Company Directors (AICD) submitted that 'the fundamental basis for client legal privilege does not change merely because of the function undertaken by particular agencies at any point in time'.[121]

6.92 Another submission stated that arguments based on the seriousness of the function of an agency—for example, enforcement functions compared with auditing functions—are not convincing.

> Arguably, the more serious the function, the more important the function to the general public, but also the more significant are the consequences of the investigation to the person or corporation being investigated.[122]

6.93 ASIC, however, took the view that any abrogation or modification of client legal privilege in relation to a body's information-gathering and enforcement powers should be made based upon specific consideration of those powers, the persons and entities subject to them, and the areas and markets that are being regulated.

> The decision to abrogate must reflect a balancing of the public interest that underpins client legal privilege as against other public interests, such as in having all relevant evidence available during an investigation and/or hearing of a proceeding. Where this balance lies depends on many factors, including the role and function of the

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117 *Anti-Terrorism Act (No 2) 2005* (Cth) sch 6, s 37QR(1)(c).

118 Fitzroy Legal Service, *Submission LPP 29*, 4 June 2007. A similar point was made by the Federation of Community Legal Centres (Vic) Inc, *Submission LPP 38*, 5 June 2007.

119 Law Council of Australia, *Submission LPP 26*, 4 June 2007. The potential impact of abrogation in Australia on international business dealings was also noted in the consultation with one stakeholder group: Regulatory lawyers of Clayton Utz, *Consultation LPP 13*, Sydney, 15 May 2007.

120 Australian Securities and Investments Commission, *Submission LPP 70*, 29 June 2007; Taxation Institute of Australia, *Submission LPP 54*, 15 June 2007; National Legal Aid, *Submission LPP 52*, 13 June 2007; Australian Institute of Company Directors, *Submission LPP 43*, 8 June 2007; New South Wales Bar Association, *Submission LPP 41*, 5 June 2007; Human Rights and Equal Opportunity Commission, *Submission LPP 28*, 4 June 2007; Law Council of Australia, *Submission LPP 26*, 4 June 2007; R Desiatnik, *Submission LPP 24*, 1 June 2007.

121 Australian Institute of Company Directors, *Submission LPP 43*, 8 June 2007.

122 I Temby, *Submission LPP 72*, 19 July 2007.

> Commonwealth body, the subject matter of its jurisdiction, the outcomes that are expected from that body and the role of the body within our economic and social structure. In ASIC's view this should be considered on a body-by-body basis.[123]

6.94 With respect to 'watchdog' bodies, such as the Inspector-General of Intelligence and Security (IGIS) and the Commonwealth Ombudsman, where client legal privilege had already been expressly abrogated, submissions noted that the focus of such bodies on the public accountability of government provides an appropriate logic for abrogation of privilege.

6.95 For example, the IGIS submitted, in support of the powers currently given to his office under the *Inspector-General of Intelligence and Security Act 1986* (Cth) (IGIS Act), that adequate accountability of government entities is vital for several reasons.

> These are neatly encapsulated in a quotation from the publication *Accountability in the Commonwealth Public Sector* by the Management Advisory Board and its Management Improvement Advisory Committee, No 11, June 1993:
>
> > Accountability is fundamental to good governance in modern, open societies. Australians rightly see a high level of accountability of public officials as one of the essential guarantees and underpinnings, not just of the kinds of civic freedoms they enjoy, but of efficient, impartial and ethical public administration. Indeed, public acceptance of government and the roles of officials depends upon trust and confidence founded upon the administration being held accountable for its actions.
>
> Given the importance of ensuring the proper accountability of public bodies, a strong argument can be made out to limit or remove the possibility of entities claiming client legal privilege when being lawfully reviewed by other parts of the executive arm of government.[124]

6.96 The Commonwealth Ombudsman agreed that the ability to access an agency's legal advice is of significant practical importance and necessary for the Ombudsman's statutory role to be satisfactorily fulfilled. For example, the legal advice given to an agency about the interpretation of its legislation may form part of the ordinary documentary background needed to understand fully the issues in a case.[125]

Royal Commissions

6.97 There were various submissions about whether client legal privilege should be abrogated in the context of Royal Commissions. Overall, there was support for abrogation of privilege in the case of public inquiries of public importance, such as Royal Commissions.[126] As was noted in the submission of the Human Rights and

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123 Australian Securities and Investments Commission, *Submission LPP 5*, 29 March 2007.
124 Inspector-General of Intelligence and Security, *Submission LPP 22*, 1 June 2007.
125 Commonwealth Ombudsman, *Submission LPP 47*, 12 June 2007.
126 For example, I Temby, *Submission LPP 72*, 19 July 2007; Australian Institute of Company Directors, *Submission LPP 43*, 8 June 2007; Corporate Tax Association, *Submission LPP 32*, 4 June 2007.

Equal Opportunity Commission (HREOC), 'there are some circumstances where the public interest in abrogating client legal privilege may be greater than the individual's interest in maintaining the privilege'.[127]

6.98 In contrast, the NSW Bar Association argued strongly against abrogation of client legal privilege in a 'forum-specific' manner, namely for Royal Commissions or other public inquiries.[128] Against the proposition that the establishment of a Royal Commission presupposed a 'countervailing public interest in the pursuit of truth', the NSW Bar Association submitted that:

> This assumption, however, would be deeply flawed. Royal Commissions and Special Commissions of Inquiry are discretionary creatures of executive government, not triggered by, or subject to, independent constitutional or legislative requirements. As Scott Prasser observes:
>
> > the executive government origin of public enquiries and their ad hoc quality poses special problems in explaining why, and predicting when, an inquiry will be appointed. A significant difficulty is that full access to all of the reasons for appointing a particular inquiry is not available to the public. Further, public inquiries are usually appointed under a range of motivations, including short-term political expediency entwined with the obtaining of more expert advice or expediting and even promoting community participation.[129]

6.99 The ACCC also disagreed that there was a stronger rationale for the abrogation of the privilege in relation to Royal Commissions. In its view 'the public interest in effective investigation and enforcement of the law is equally in the public interest'.[130]

6.100 The IGIS drew a distinction between Royal Commissions that were 'inquisitorial/investigatory' and those of a 'policy advisory' nature.[131] With respect to the former, he commented that:

> Such Royal Commissions will have been established because there is a matter of substantial public interest/concern. A great deal of public monies is usually expended. Ascertaining the truth is the fundamental purpose of having the Royal Commission. Such Royal Commissions are relatively unusual and abrogation of privilege would not impact to any significant degree on the instrumental rationales for client legal privilege—it would be most surprising if the possibility of a Royal Commission was on people's 'mental horizon' when conducting their affairs and obtaining legal advice. In any case, the public interest in Royal Commissions ascertaining the truth should be paramount.[132]

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127 Human Rights and Equal Opportunity Commission, *Submission LPP 28*, 4 June 2007.
128 New South Wales Bar Association, *Submission LPP 41*, 5 June 2007.
129 Ibid, citing S Prasser, *Royal Commissions and Public Inquiries in Australia*, 2006, [1.6].
130 Australian Competition and Consumer Commission, *Submission LPP 53*, 13 June 2007.
131 Inspector-General of Intelligence and Security, *Submission LPP 22*, 1 June 2007.
132 Ibid.

6.101 The IGIS expressed the view that Royal Commissions concerned mainly with policy issues, in contrast, 'should not, in practice, need to access material of the sort which might raise issues of client legal privilege'.[133]

6.102 The Law Council noted that there are fundamental differences between ordinary federal investigatory bodies and Royal Commissions. These include that Royal Commissions are:

- established under the executive arm of government, and derive their functions from their terms of reference which are issued by the Australian Government, whereas the powers and functions of bodies such as ASIC, ACCC and the ATO are established by an Act of Parliament with a standing brief;

- often established in response to political pressures and therefore may have a greater sense of urgency;

- not directed at building evidence for the purpose of prosecution. In some cases, prosecution or investigation may follow their recommendations, but prosecutions are not a direct consequence of the inquiry.[134]

6.103 Given the support in submissions in response to IP 33 for the abrogation of client legal privilege in Royal Commissions, the ALRC proposed in DP 73 that where a Royal Commission has been established to investigate a matter of public concern, Parliament should consider in each case whether client legal privilege should be abolished.[135] This proposal was based on the public interest in arriving at the truth in these special circumstances and would allow for the interests of justice in particular matters to be considered on a case-by-case basis.

6.104 In relation to other investigations undertaken by federal bodies, the ALRC proposed that abrogation should never be wholesale across an agency, but rather should be enacted by Parliament as special legislation on the basis of a particular investigation.[136]

6.105 The ALRC's preliminary view was that consideration of whether or not it is appropriate to abrogate client legal privilege should be based on a specific set of public interest criteria. In determining how the interests of justice should be balanced, the ALRC was influenced by the recommendations contained in the Queensland Law

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133 Ibid.
134 Law Council of Australia, *Submission LPP 26*, 4 June 2007.
135 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 6–1.
136 Ibid, Proposal 6–1.

Reform Commission's (QLRC) report on *Abrogation of the Privilege Against Self-Incrimination*[137] and the approach taken in the McNulty Memorandum in the US.

6.106 The proposed factors to be considered in determining whether abrogation could be justified were:

- the nature and gravity of the matters under consideration, including whether the issue is one of major public importance that has a significant impact on the community in general or on a section of the community. Without limiting the matters that might be considered of major public importance, this could include investigations, including covert investigations, into allegations of major criminal activity, organised crime or official corruption; serious misconduct by a public official; or matters of national security. Abrogation also may be appropriate where issues involve dangers to human life or human health; very serious damage to property or the environment; or significant economic detriment;

- whether the information sought can be obtained in a timely and complete way by using alternative means that do not require abrogation of client legal privilege; and *especially*

- the likelihood and degree to which the privileged information will benefit the Royal Commission or investigation, particularly where the legal advice itself is central to the issues being considered. This should involve consideration of whether the information obtained as a result of abrogation of the privilege will advance the relevant public interest in the 'truth' being established.[138]

Submissions and consultations

6.107 The ALRC's proposal received mixed reactions. Many submissions and consultations argued that, given its importance, client legal privilege never should be abrogated. Others submitted that client legal privilege should be abrogated for only certain agencies or powers, and not on an investigation by investigation basis. Finally, some submissions supported the ALRC's proposal to construct a principled basis for determining when client legal privilege should be abrogated, but questioned whether this was best achieved through enactment of the principles in an act of general application.

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137 In that report, the QLRC considered that 'abrogation [of the privilege against self-incrimination] may be justified if the information to be compelled as a result of the abrogation concerns an issue of major public importance that has a significant impact on the community in general or on a section of the community': Queensland Law Reform Commission, *Abrogation of the Privilege against Self-Incrimination: Final Report*, R 59 (2004), [6.50]–[6.51].

138 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 6–1.

Client legal privilege should never be abrogated

6.108 The Law Council reiterated its view that it does not believe that it is necessary to abrogate client legal privilege in any circumstances, submitting that:

- no empirical case has been made to justify the abrogation of the privilege in Royal Commissions, covert investigations, or in any other federal investigation;
- the public interest rationale for the privilege (as described by the ALRC) creates a stronger presumption against abrogation than exists for privileges and immunities based solely on individual rights;
- there has been no complaint that client legal privilege has prevented the truth from ultimately being reached in federal investigations and Royal Commissions, rather, concerns have chiefly arisen because of delays and a lack of clear policies and procedures; and
- the effect of abrogation is very difficult to quantify and therefore there is no basis for reaching a view that the behaviour of those seeking advice has not been affected in those circumstances where the privilege is already abrogated.[139]

6.109 The Law Society of NSW also strongly opposed any abrogation of the privilege. In its view:

> The restrictions on abrogation identified by the ALRC (such as 'special circumstances', 'major public importance', 'significant impact on the community' etc) will prove to be illusory and paper thin. If Parliament wanted to abrogate or modify privilege for a particular purpose, or to satisfy a particular enquiry, it would do so taking a pragmatic and not necessarily principled view.[140]

6.110 The Australian Corporate Lawyers Association (ACLA) expressed concern that the ALRC's approach to abrogation of the privilege on an investigation by investigation basis was too 'open ended' and would have the effect of a large scale winding back of the privilege.

> It is important that clients at the time of seeking confidential advice have sufficient certainty that their advice will remain confidential. That certainty is undermined if at some future time a 'major investigation' or a Royal Commission could override the confidentiality of those communications.[141]

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139 Law Council of Australia, *Submission LPP 94*, 1 November 2007.

140 Law Society of New South Wales, *Submission LPP 93*, 31 October 2007.

141 Australian Corporate Lawyers Association, *Submission LPP 83*, 31 October 2007. This view was shared by the NSW Bar Association: New South Wales Bar Association, *Consultation LPP 50*, Sydney, 4 December 2007.

6.111 Civil Liberties Australia (ACT) Inc (Civil Liberties Australia) submitted that it does not follow (as suggested by the ALRC's proposal) that abrogation of the privilege may be more readily justified when an investigatory body or court is dealing with matters of major public importance, 'rather, it will often be the case that the more serious the matter, the more important the retention of the privilege becomes'. In circumstances of serious crime, it submitted that the greater public interest lies in protecting rights and a citizen's access to a fair trial.[142]

Royal Commissions

6.112 The Australian Financial Markets Association was supportive of the proposal to allow Parliament to abrogate privilege, but expressed the view that this only should occur in the case of Royal Commissions, which would be presided over by a former judicial officer.[143]

6.113 The Law Council disputed the ALRC's contention that the particular nature of Royal Commissions meant that they should have greater access to all available material.

> Moreover, the Law Council is not aware of any Royal Commission in which it is claimed that the truth was not ultimately reached. Despite concerns that client legal privilege claims by AWB Ltd delayed proceedings by several months, Commissioner Cole made several findings and recommendations concerning the conduct of AWB Ltd and its officers. Commissioner Cole did not claim in any part of his final report to the Commonwealth that he did not ultimately obtain all information necessary to make his findings and recommendations. Nor did Commissioner Cole suggest that information or documents properly subject to client legal privilege may have assisted in more serious findings against AWB Ltd and its employees/directors. Accordingly, the chief complaint in the AWB Inquiry was that client legal privilege claims delayed proceedings.[144]

Difficulties with abrogation for particular investigations

6.114 ASIC accepted the reasoning behind the ALRC's proposal, although it considered that there are compelling public policy and practical reasons to abrogate client legal privilege generally in relation to the exercise of its coercive powers. However, ASIC expressed concern about the efficiency of the proposal in practical terms. In its view, investigations could be prejudiced by the delay that would be occasioned by having to seek the enactment of legislation to abrogate privilege for those investigations.[145]

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142 Civil Liberties Australia (ACT) Inc, *Submission LPP 86*, 1 November 2007.

143 Australian Financial Markets Association, *Submission LPP 95*, 2 November 2007. This view was shared by Westpac: Westpac Banking Corporation, *Submission LPP 85*, 1 November 2007.

144 Law Council of Australia, *Submission LPP 94*, 1 November 2007.

145 Australian Securities and Investments Commission, *Submission LPP 84*, 31 October 2007.

6.115 The ACCC also argued that allowing Parliament to legislate in relation to a particular investigation was not a realistic option.

> Major investigations are commonly subject to severe time constraints, as well as being highly sensitive and confidential. It would simply not be practical for an agency such as the ACCC to seek an abrogation, via Parliamentary processes, in relation to an investigation.[146]

6.116 APRA remained of the view that abrogation of client legal privilege for confidential non-curial investigations reflects an appropriate balancing of public interests. APRA also argued that the factors proposed for the abrogation for particular investigations or Royal Commissions are impractical. In APRA's view, the factors proposed would make it virtually impossible to get legislation passed abrogating the privilege in a time frame that would assist the investigation or Royal Commission.

> It is unlikely to be possible to demonstrate that the factors are satisfied until an investigation has already commenced. Given the time lag to get legislation passed the investigation or Royal Commission will either be substantially complete or substantially delayed before the legislation is enacted.[147]

6.117 The ACC told the Inquiry that the application of the privilege has resulted in protracted and complex litigation in relation to the special investigations undertaken by it and that complete or partial abrogation of the privilege would be the appropriate solution to these problems.[148] The ACC shared the ACCC's view that securing parliamentary authority for particular investigations would not work in the context of ACC special investigations which are often subject to time pressures and necessary secrecy.[149]

6.118 The CDPP submitted that it preferred a legislative model that abrogates privilege in respect of the exercise of certain powers that are conferred for the purpose of inquiries or investigations, rather than particular investigations. It argued that the parameters of an investigation may not be fully known when it commences and thus it would be difficult to know in what respect privilege was abrogated.[150]

6.119 The AFP submitted that, as a general proposition, it did not support the application of client legal privilege to investigations.[151]

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146 Australian Competition and Consumer Commission, *Submission LPP 92*, 26 October 2007.
147 Australian Prudential Regulation Authority, *Submission LPP 91*, 1 November 2007.
148 Australian Crime Commission, *Consultation LPP 47*, Sydney, 26 October 2007.
149 Ibid.
150 Commonwealth Director of Public Prosecutions, *Submission LPP 101*, 2 November 2007.
151 Australian Federal Police, *Submission LPP 115*, 29 November 2007.

6.120 ITSA argued that client legal privilege should be abrogated under the *Bankruptcy Act 1966* (Cth), to the extent that it would prevent a proper investigation of a debtor's 'examinable affairs' (as defined in the Act) for the benefit of creditors.[152]

The proposed criteria

6.121 A number of submissions and consultations expressed the view that there was a risk the proposed criteria could act as a 'road map' for governments seeking reasons to abrogate privilege, rather than as a set of conditions that must be met before abrogation could be considered.[153] The Law Council considered the criteria of 'special circumstances' a 'nebulous phrase'. It also expressed concern that if covert investigations were expressly identified as one type of investigation that could warrant abrogation, then the legislation would be creating an expectation that client legal privilege will routinely be abrogated in those contexts.[154]

6.122 The NSW Bar Association agreed that the term 'special circumstances' was insufficient to indicate that privilege should only be abrogated in the most exceptional circumstances.[155]

6.123 The Law Council further argued that in the case of Royal Commissions, the significant public pressure and need for political expediency would mean that governments will adopt a standard practice of abrogating privilege whenever a Royal Commission is established.[156] In the Law Council's view, the legislation should require Parliament to consider where agency practices to expedite the resolution of privilege claims have been unsuccessful, meaning that procedures to resolve privilege claims should be considered before abrogation is looked at as an option.[157]

6.124 The Law Council also disagreed with the second criterion proposed by the ALRC. In its view, the requirement for Parliament to consider 'whether the information sought can be obtained in a timely and complete manner using alternative means' rendered it easy to conclude that the information is not appropriately available by alternative means.[158]

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152 Insolvency and Trustee Service Australia, *Submission LPP 105,* 5 November 2007.

153 New South Wales Bar Association, *Consultation LPP 50,* Sydney, 4 December 2007; Allens Arthur Robinson, *Consultation LPP 43,* Sydney, 24 October 2007; Members of the South Australian Bar Association, *Consultation LPP 38,* Adelaide, 17 October 2007.

154 Law Council of Australia, *Submission LPP 94,* 1 November 2007.

155 New South Wales Bar Association, *Consultation LPP 50,* Sydney, 4 December 2007. This suggestion was also made by the Advisory Committee: Advisory Committee members, *Third Advisory Committee meeting,* 15 November 2007.

156 Law Council of Australia, *Submission LPP 94,* 1 November 2007. This view was shared by National Legal Aid: National Legal Aid, *Submission LPP 106,* 5 November 2007.

157 Law Council of Australia, *Submission LPP 94,* 1 November 2007.

158 Ibid.

6.125 Allens Arthur Robinson argued that, when coupled with political and regulatory pressure, 'that road map and the proposed considerations will lead to Parliament legislating to abrogate privilege more frequently'.[159]

Binding Parliament

6.126 A number of submissions and consultations expressed reservations with the proposal on the basis that setting out criteria by which Parliament may decide to abrogate client legal privilege under future acts is an attempt prospectively to restrain the legislative power of future parliaments, and thus may be unconstitutional.[160] As a general principle of law, Parliament cannot be bound by, nor can it bind, a future Parliament.[161]

ALRC's views

6.127 As discussed in Chapter 2, and above, the majority of submissions and consultations in this Inquiry endorsed the retention of the doctrine of client legal privilege in the context of federal investigations.

6.128 In IP 33, the ALRC asked questions to try to gauge the possible effect of abrogation of client legal privilege on the provision of legal services and on compliance. It was strongly contended in submissions and consultations that abrogation would have negative consequences in terms of clients not seeking legal advice or seeking only oral or undocumented advice.

6.129 It is hard to assess accurately the extent to which these claims are correct. In *Carter v Northmore Hale Davy & Leake*, Toohey J argued that the effect on openness of any inroad into client legal privilege is not something capable of assessment—although it must be taken into account.[162] The availability of client legal privilege has been so universal[163] that there are few examples that would allow the ALRC to predict confidently the effects of abrogation. ASIC has asserted that, despite privilege arguably being abrogated by implication under the ASIC Act, corporations still seek legal advice on the corporations law. The ALRC was told, however, that many lawyers practising in the corporations law area dispute ASIC's claim that privilege is abrogated and advise their clients not to produce privileged material.[164]

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159 Allens Arthur Robinson, *Submission LPP 107*, 5 November 2007.

160 Law Society of New South Wales, *Submission LPP 93*, 31 October 2007; New South Wales Bar Association, *Consultation LPP 50*, Sydney, 4 December 2007; Advisory Committee members, *Third Advisory Committee meeting*, 15 November 2007.

161 *McGrath v The Commonwealth* (1944) 69 CLR 156.

162 *Carter v Northmore Hale Davey & Leake* (1995) 183 CLR 121, 157.

163 See the discussion of client legal privilege in common law and civil law countries in Ch 3.

164 See Ch 5.

6.130 Auburn suggests that the scope of the privilege has changed a number of times over the centuries with little apparent effect on lawyer-client relations, citing the changes in Australian law before and after *Baker v Campbell.*[165] This may, however, be an overstatement of the effect of *Baker v Campbell*, as there is argument about whether it was a major shift in the law or simply a recognition of what many assumed was the common law position.[166]

6.131 Kendall has suggested that most arguments in favour of abrogation presume that the communication would take place regardless of whether privilege exists. In his view, in the absence of compelling empirical evidence that the existence of client legal privilege has no effect on client disclosures, it is unjustified to assume that there would be no effect.[167] The ALRC has been unable to locate any significant Australian or British empirical studies on client legal privilege. As noted above, empirical studies on privilege and confidentiality in the US have proven to be inconclusive.

6.132 In *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95), the ALRC recommended that, as a default position and in the absence of any clear, express statutory statement to the contrary, client legal privilege should exist in relation to all forms of inquiry by any regulator.[168] In ALRC 102, the ALRC affirmed this approach, and argued that abrogation only should occur where Parliament had considered and debated the circumstances where client legal privilege should not be available.[169]

6.133 These views have been confirmed again by the findings of this Inquiry. As outlined in Chapter 2, the ALRC supports the doctrine of client legal privilege as a fundamental principle of common law that facilitates compliance with the law. The ALRC agrees with the findings of the Dawson Review—that, in the course of ordinary enforcement and investigatory activities, the importance of the privilege in encouraging compliance overrides the benefits of abrogation to the regulator.[170] As such, any wholesale abrogation of the privilege in relation to federal investigations is not supported.

6.134 While a case can be made that client legal privilege claims do frustrate and delay investigations, the ALRC agrees with the views expressed in submissions and consultations that efficiency and effectiveness of investigations are not in themselves

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165 J Auburn, *Legal Professional Privilege: Law and Theory* (2000), 67.

166 I Turnbull, *Submission LPP 18*, 3 June 2007; R O'Connor, *Submission LPP 36*, 5 June 2007.

167 K Kendall, *Submission LPP 57*, 31 May 2007.

168 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), Rec 19–1.

169 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005), [14.69].

170 Australian Government Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act* (2003), Ch 13.

sufficiently good reasons for abrogation of the privilege. The frustrations evident in the examples given to this Inquiry by the CDPP may be seen to be due largely to a lack of clear processes for resolution of claims, rather than a fundamental problem with the doctrine itself.

6.135 The ALRC's view is that federal bodies could achieve greater efficiency and effectiveness in relation to claims of client legal privilege by addressing the significant issues and problems associated with the practices and procedures for making and resolving claims in federal investigations. These matters are addressed in Chapter 8.

6.136 Given the general support for the operation of the privilege, the ALRC has considered whether there may be any particular circumstances in which abrogation is appropriate.

6.137 In ALRC 95, the ALRC noted that:

> In the field of regulation, one crucial public interest is securing effective compliance or prosecutions. The policy question for the legislature is to decide in what circumstances public interest considerations should overrule human rights protection, and whether the regulation of particular activities mandates different considerations.[171]

6.138 As noted in Chapter 2, client legal privilege is not best described as an individual human right; rather it is facilitative of a broader, general right of access to justice. In this sense, client legal privilege is not a balancing of a private right against the public interest, but rather the balancing of two public interests. Therefore, the ALRC agrees with the view expressed by Brennan J in *Baker v Campbell* that client legal privilege already largely encompasses a balancing of the competing public interests.[172]

6.139 However, many submissions argued that the abrogation of client legal privilege was appropriate in very limited circumstances, where a higher public interest may exist. A number of commentators have expressed the view that 'invoking a language of rights does not per se … make out a case for absolutism'.[173]

6.140 The ALRC acknowledges the need to provide certainty within the doctrine. In *Attorney-General v Kearney*, Dawson J stated that:

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171 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), [18.21].

172 *Baker v Campbell* (1983) 153 CLR 52, 106.

173 A Paizes, 'Towards a Broader Balancing of Interests: Exploring the Theoretical Foundations of the Legal Professional Privilege' (1989) 106 *South African Law Journal* 109, 124. See also J Auburn, *Legal Professional Privilege: Law and Theory* (2000), 102.

> The policy which lies behind the doctrine views unrestricted communication between a lawyer and client upon professional matters as being necessary for the proper functioning of our legal system. If inroads could be made upon the privilege in individual cases by involving a 'higher public interest' its application would become uncertain and the policy behind it would be effectively undermined.[174]

6.141 There is, however, already some level of uncertainty in the operation of the privilege, because of the exclusionary rules.[175] When clients seek legal advice, they cannot know that, later, their privilege may be waived because of their actions, or that confidentiality may be breached in some other way.[176] Therefore, the fact that the privilege may not apply in some particular examples of federal investigations is unlikely to result in the 'chilling effect' feared by lawyers. It is the broader, overall application of the privilege that will promote client candour.

6.142 The ALRC is of the view that abrogation should only be legislated in circumstances in which there is a higher competing public interest in the availability of otherwise privileged information. This must be something considerably greater than the ordinary investigatory interests of a federal agency.

6.143 The ALRC has identified three examples where a higher public interest may warrant abrogation of the privilege: major investigations which fit specified criteria; Royal Commissions; and the oversight of public sector agencies.

Major inquiries

6.144 In this Inquiry, the ALRC has identified 42 federal bodies that have coercive information-gathering or related powers. As a general proposition, it is clear that most of those agencies do not require access to privileged material in order to perform their investigatory or enforcement functions. Amongst the agencies which responded to the ALRC's request for information regarding their coercive information-gathering powers, however, the ACCC, ASIC, and APRA argued that abrogation of the privilege was necessary in order for them to perform some of their functions.[177]

6.145 In Chapter 5, the ALRC expresses the view that the assessment of whether or not abrogation or modification of the privilege is warranted in a particular case should be undertaken with reference to consistent criteria, regardless of whether the

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174 *Attorney-General (NT) v Kearney* (1985) 158 CLR 500, 53.

175 Discussed in Ch 3.

176 J Auburn, *Legal Professional Privilege: Law and Theory* (2000), 146.

177 Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007; Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007; Australian Competition and Consumer Commission, *Submission LPP 53,* 13 June 2007. The Australian Transport Safety Bureau, Australian Pesticides Veterinary Medicines Authority and the Insolvency Trustee Service Australia, also argued for abrogation for certain powers: Australian Transport Safety Bureau, *Submission LPP 34,* 28 May 2007; Australian Pesticides and Veterinary Medicines Authority, *Submission LPP 45,* 6 June 2007; Insolvency and Trustee Service Australia, *Submission LPP 105,* 5 November 2007.

investigation or inquiry is being undertaken by a federal investigatory body or a Royal Commission.

6.146 It is not only Royal Commissions or special inquiries that undertake investigations of public importance and significance. Complex investigations with important social and economic ramifications are also undertaken by federal agencies such as the ACCC, ACC, ASIC and APRA. While not routinely dealing with matters where legal advice is central to the issues under consideration, other agencies may nonetheless conduct investigations into matters of public importance in which issues of access to privileged material may arise.

6.147 A further important criterion is whether the material which would be covered by client legal privilege goes to the very heart of the issues under consideration. For example, it was reported that the Victorian Director of Public Prosecutions has asked the ACC to investigate potential criminal conduct by lawyers in the British American Tobacco litigation.[178] In this case, claims of client legal privilege could affect severely the ability of the ACC to investigate these allegations—although it should be noted that the privilege belongs to British American Tobacco and not its lawyers. This is consistent with the views expressed by ASIC and the ACCC in submissions to this Inquiry, that legal advice may be central to determining whether there has been misconduct.

6.148 As noted above, in determining how the interests of justice should be balanced, the ALRC has been influenced by the recommendations contained in the QLRC's report on *Abrogation of the Privilege Against Self-Incrimination*[179] and the approach taken in the McNulty Memorandum in the US. The ALRC supports the view of the QLRC that:

> If it cannot be demonstrated that information obtained as a result of the exercise of coercive powers is likely to significantly protect or advance the relevant public interest, it is unlikely that the abrogation would be justified. Conversely, if it is clear that the abrogation is likely to substantially promote the public interest, it is more likely that the abrogation can be justified.[180]

6.149 The ALRC acknowledges that there may be some practical difficulties with the proposal to abrogate client legal privilege through an act of Parliament on an

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178 *McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 73; *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524; *British American Tobacco Australia Services Ltd v Cowell* (2003) 8 VR 571. See W Birnbauer 'Top Lawyers Face Scrutiny' *The Age* 19 August 2007, 6.

179 In that report, the QLRC considered that 'abrogation [of the privilege against self-incrimination] may be justified if the information to be compelled as a result of the abrogation concerns an issue of major public importance that has a significant impact on the community in general or on a section of the community': Queensland Law Reform Commission, *Abrogation of the Privilege against Self-Incrimination: Final Report*, R 59 (2004), [6.50]–[6.51].

180 Ibid, [6.52].

investigation by investigation basis. This particularly will be the case where the investigation is a covert one or involves a matter of urgency. Nonetheless, the ALRC does not consider that a case has been made out for a need to abrogate privilege on a body-by-body basis. In many cases, given the complexity of legislation which is administered by these agencies, the compliance rationale would tip the balance in favour of protection of the privilege rather than against it. The balance should depend upon the issue under investigation—including whether the issue is one of major public importance that has a significant impact on the community. For example, in the context of the James Hardie inquiry, it was argued that:

> a thorough investigation of the conduct of James Hardie, with proceedings brought where misconduct is found, is essential to maintaining community confidence in the Australian corporate regulatory regime.[181]

6.150 There should also be scope for privilege to be abrogated on the basis of a particular information-gathering power of a federal body. One exception to the argument above is the effect of client legal privilege on the major criminal investigations undertaken by the ACC. As noted in Chapter 4, the ACC has a range of coercive powers, including covert powers, which are used where ordinary law enforcement methods are considered unlikely to be effective. The ACC Board determines the use of these powers.[182] Chapter 8 discusses the complex issues that arise where a federal body is undertaking a covert investigation and notifying the target to allow an opportunity to claim privilege would be likely to prejudice that investigation. The ALRC is of the view that reforms to practice and procedure cannot adequately or completely address such circumstances, and that particular difficulties of covert investigations should be one of the relevant factors considered by the Australian Parliament in deciding whether to abrogate client legal privilege in a particular case. With respect to the ACC, these powers are available when the Board determines that the relevant criminal activity warrants a special investigation.[183] In many circumstances, these types of crimes will fall under the matters of public significance discussed below as warranting abrogation. On this basis, the ALRC is of the view that Parliament should consider abrogating client legal privilege under the special investigation provisions of the *Australian Crime Commission Act 2002* (Cth).

6.151 The ALRC has taken account of the concerns expressed in submissions and consultations that the proposed factors to be taken into consideration in determining whether the privilege should be abrogated could be viewed as a 'checklist for abrogation'. Given the importance the ALRC has placed on maintenance of the

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181 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 2004, 1 (P Costello—Treasurer), 1.

182 Australian Crime Commission, *Annual Report 2005–06*, 10; *Australian Crime Commission Act 2002* (Cth) ss 4, 7C.

183 *Australian Crime Commission Act 2002* (Cth), 7C.

privilege,[184] and the recommendation made in Chapter 5 that client legal privilege should always be deemed to apply in the absence of clear words to the contrary, it is the ALRC's view that it should be clear that abrogation only should be considered in *exceptional* circumstances (as opposed to 'special circumstances' in the original proposal). The ALRC also notes that, while there may be concerns that the factors could be a 'road map for abrogation', Parliament may presently legislate to abrogate privilege with no principled criteria articulated on which to base that decision.

6.152 The ALRC acknowledges that a legislative provision stating the basis on which a future Parliament could choose to abrogate client legal privilege would potentially raise the difficulty of 'entrenchment'. With some exceptions for constitutional provisions, it is generally the case that:

> A legislature cannot bind itself—whether as to subject matter or the manner and form of legislation—unless it is directed or empowered to do so by some 'higher law', that is, some (logically and historically) prior law not laid down by itself.[185]

6.153 The federal client legal privilege legislation recommended in Chapter 5 should therefore largely deal with the issues of practice and procedure outlined in Chapter 8, and not the criteria for abrogation. To make this position clearer, the ALRC has made a recommendation below which outlines the exceptional circumstances under which Parliament could consider abrogation of the privilege, but has not recommended that they be included in legislation.

6.154 Again, to emphasise the importance of the privilege, the ALRC has amended the final criteria to require consideration of the degree to which a lack of access to the privileged information will *hamper or frustrate* the operation of the investigation, rather than the degree to which the investigation would be assisted by the availability of the information. The ALRC believes that this will more clearly articulate to policy makers the need to abrogate privilege only where an investigation will be hampered to a significant degree.

Recommendation 6–1 In accordance with Recommendation 5–2, in the absence of any clear, express statutory statement to the contrary, client legal privilege should apply to the coercive information-gathering powers of federal bodies. However, where the Australian Parliament believes that exceptional circumstances exist to warrant a departure from the standard position, it can legislate to abrogate client legal privilege in relation to a particular investigation undertaken by a federal investigatory body, or a particular power of a federal investigatory body.

184 See Ch 2.
185 O Phillips, *Constitutional and Administrative Law* (5th ed, 1973), 75.

Any such legislative provision should take into account the following factors in determining whether client legal privilege may be abrogated:

(a) the subject of the investigation, including whether the inquiry concerns a matter (or matters) of major public importance that has (or have) a significant impact on the community in general or on a section of the community, or is a covert investigation;

(b) whether the information sought can be obtained in a timely and complete way by using alternative means that do not require abrogation of client legal privilege; and especially

(c) the degree to which a lack of access to the privileged information will hamper or frustrate the operation of the investigation and, in particular, whether the legal advice itself is central to the issues being considered by the investigation.

Royal Commissions

6.155 The ALRC considers that a strong case can be made to abrogate client legal privilege in some Royal Commissions. As canvassed above, the discovery of the truth has been described as a prime function of a Royal Commission.[186] Royal Commissions are established only where a particular area of public concern has been identified for which the usual investigations and proceedings would not suffice, and their purpose is to determine factual circumstances, report on the matters specified in the Letters Patent and make recommendations.

6.156 Client legal privilege is presently abrogated for Royal Commissions in New South Wales and Victoria. The ALRC received no evidence suggesting that this abrogation of the privilege in those jurisdictions had led to any problems.

6.157 The Law Council suggested in its submission to DP 73 that even though the ALRC has not heard any suggestions that there have been significant issues following the abrogation of the privilege in Royal Commissions in those states,

> there is simply no basis or foundation for reaching a view that that the behaviour of those seeking legal advice has not been affected, or that their willingness to either seek advice or disclose relevant information has not been diminished.[187]

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186 T Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (2006), Vol 1, [7.66].

187 Law Council of Australia, *Submission LPP 94*, 1 November 2007.

6.158 The ALRC finds the argument difficult to sustain that clients are not seeking legal advice or being free and frank with their lawyers on the basis that the subject matter on which they seek advice may, in the future, be the subject of a Royal Commission. In the ALRC's view, the rarity and seriousness of a Royal Commission is quite different from the ordinary operation of a regulator's powers, where a client is likely to be mindful that, for example, the ATO could be interested in their tax arrangements.

6.159 The ALRC agrees, however, with the submission of the IGIS and the comments of Commissioner Cole in the AWB Royal Commission, that the subject matter of every Royal Commission will not require abrogation of the privilege. Consistent with the importance of the privilege, abrogation should be minimised and limited to circumstances where it is both necessary and beneficial to a successful outcome for a particular Royal Commission.

6.160 Rather than a blanket abrogation of the privilege for Royal Commissions, the ALRC accepts the submission of the NSW Bar Association that consideration should be given to the importance of the public interest to which the information in question relates and whether abrogation reasonably could be expected to advance or protect that public interest.

6.161 In DP 73, the ALRC considered whether abrogation should be contemplated as part of the establishment of a Royal Commission through the Letters Patent (as recommended by Commissioner Cole), or through an individual Act of Parliament that abrogates the privilege in relation to a particular Royal Commission (a similar approach to the James Hardie inquiry).

6.162 The ALRC's preliminary view was that, given the importance of the privilege, any circumstances where client legal privilege is not to be available should be considered and debated by Parliament.

6.163 However, the ALRC recognises that there are practical and procedural difficulties with this approach. For instance, Royal Commissions are often established as a matter of some urgency and it may not be possible for legislation to be passed in the time frame required for the Commission to commence its work.

6.164 The ALRC also has been persuaded that, as Royal Commissions are essentially part of the function of the Executive arm of government, it is more appropriate for the Executive to have the discretion to determine when and how privilege should apply to a particular Commission. The ALRC therefore endorses the recommendation of Commissioner Cole, that there should be capacity in the *Royal Commissions Act* to permit the Governor-General, by Letters Patent, to determine that, in relation to the whole or a particular aspect of matters the subject of inquiry, client legal privilege should not apply. The criteria by which this should be determined should be the same

criteria as that on which abrogation could be deemed appropriate in other investigations, as outlined in Recommendation 6-1.

Recommendation 6–2 In accordance with Recommendation 5–2, in the absence of any clear, express statutory statement to the contrary, client legal privilege should apply to the coercive information-gathering powers of federal bodies. However, the Australian Parliament should amend the *Royal Commissions Act 1902* (Cth) to allow that, in exceptional circumstances, the Governor-General may, as part of the Letters Patent establishing the Royal Commission, state that it is not a reasonable excuse for the purposes of subsection 3(2B) or (5) of the Act for a person to refuse or fail to produce a document on the basis that the document is subject to client legal privilege.

The following factors should be taken into account in deciding whether client legal privilege may be abrogated:

(a) the subject of the Royal Commission of inquiry, including whether the inquiry concerns a matter (or matters) of major public importance that has (or have) a significant impact on the community in general or on a section of the community;

(b) whether the information sought can be obtained in a timely and complete way by using alternative means that do not require abrogation of client legal privilege; and especially

(c) the degree to which a lack of access to the privileged information will hamper or frustrate the operation of the Royal Commission and, in particular, whether the legal advice itself is central to the issues being considered by the Commission.

Government accountability

6.165 The ALRC agrees with the current policy of abrogation of client legal privilege for bodies which focus on the public accountability of government. As noted above, submissions to this Inquiry argued that adequate accountability of government entities is vital to ensure the proper functioning of democratic institutions. The rationales for the privilege of protecting the citizen against the incursions of the state and promoting compliance are not justifications for protecting advice received by a government body from investigation by an agency charged with ensuring its accountability.

6.166 Under the IGIS Act, a person is not excused from giving information or producing a document on the ground that it would disclose legal advice given to a

Minister, an agency, or an authority of the Commonwealth.[188] A similar provision exists under s 9(4)(ab) of the *Ombudsman Act 1976* (Cth) and s 96(1) of the *Law Enforcement Integrity Commissioner Act 2006* (Cth).

6.167 In IP 33, the ALRC expressed the view that these provisions only appear to cover the advice arm of the privilege, and that a claim for client legal privilege would seem to excuse a person from giving information or producing a document if the document fell within the litigation limb of the privilege.

6.168 In submissions, both the IGIS and the Commonwealth Ombudsman expressed concern about this limitation. The IGIS submitted that privilege in respect of the litigation arm also should be abrogated expressly.

> There could well be occasions when the Inspector-General should, to properly achieve the stated objectives of the IGIS Act, examine the compliance of agencies with the *Legal Services Directions* issued by the Attorney-General pursuant to section 55ZF of the *Judiciary Act 1903.* There has been significant growth in the number of litigation actions to which ASIO is a party or otherwise involved.[189]

6.169 The Commonwealth Ombudsman also agreed that this limitation would have the capacity to constrain an Ombudsman investigation as it may excuse an agency from explaining to the Ombudsman how it planned and conducted litigation, even if the litigation is or would have been connected to a matter subject to investigation.[190]

6.170 HREOC submitted that s 24(3) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) also should be amended, as it is cast in similar terms to the legislation above. Whilst HREOC does not use its coercive information-gathering powers frequently as a matter of practice, there are conceivable circumstances in which HREOC may wish to seek an agency's legal advice, such as in the context of a national inquiry into a human rights issue.[191]

6.171 The ALRC agrees that there is no reason why a distinction should be drawn between litigation and advice privilege for the purpose of abrogation in these circumstances. The ALRC considers that the IGIS Act, the *Ombudsman Act 1976*

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188 *Inspector-General of Intelligence and Security Act 1986* (Cth) s 18(6)(b). A similar provision also exists in the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 24(3), however, HREOC has advised this Inquiry that it does not consider that client legal privilege is abrogated under its Act, and that it does not seek legal advice as part of its investigatory functions: Human Rights and Equal Opportunity Commission, *Submission LPP 28,* 4 June 2007.

189 Inspector-General of Intelligence and Security, *Submission LPP 22,* 1 June 2007. The IGIS noted, however, that any abrogation in respect of litigation should not extend to any situation where both an agency and the Inspector-General are parties to a particular action, while recognising that such a situation was unlikely.

190 Commonwealth Ombudsman, *Submission LPP 47,* 12 June 2007.

191 Human Rights and Equal Opportunity Commission, *Submission LPP 99,* 2 November 2007.

(Cth), and the *Human Rights and Equal Opportunity Commission Act* should be amended to indicate that both arms of the privilege are covered by the abrogation.

Recommendation 6–3 The Australian Parliament should amend the *Inspector-General of Intelligence and Security Act 1986* (Cth), the *Ombudsman Act 1976* (Cth) and the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) to state that where client legal privilege cannot be claimed over legal advice given to a Minister, an agency or an authority of the Commonwealth, this abrogation applies to litigation privilege as well as advice privilege.

Review

6.172 A central theme of this Report is that many of the difficulties associated with claims of client legal privilege in federal investigations could be solved or alleviated if there were greater transparency and clearer guidelines and procedures, while still respecting the fundamental principle of client legal privilege.

6.173 However, the ALRC considers that the new federal client legal privilege legislation should include provision for a later review of the effectiveness of its provisions relating to the procedures for making and resolving privilege claims in federal investigations. That review should take place five years after the legislation comes into force. If significant issues related to the operation of client legal privilege claims still exist, thought should be given to whether there is a need for abrogation of the privilege to be reconsidered.

6.174 Given the significance of abrogation and the general desirability of maintenance of the privilege, the *Royal Commissions Act 1902* (Cth) should provide that, where client legal privilege has been abrogated or modified in a Royal Commission, the Commissioner must include within the report consideration of the degree to which the abrogation or modification has facilitated the effectiveness of the Royal Commission. This will help ensure that claims of the need for abrogation continue to be open to scrutiny and debate.[192]

192 It is noted there is some precedent for this approach. Following amendments that abolished derivative use immunity under s 597 of the *Corporations Law*, the (then) Australian Securities Commission was required to report to the Attorney General about the extent to which, and in what ways, the amending provisions assisted it in carrying out investigations and gathering information: see Ch 7.

Recommendation 6–4 Federal client legal privilege legislation should provide that, five years after it comes into force, a review is to be conducted of the effectiveness of its provisions relating to the procedures for making and resolving privilege claims in federal investigations.

Recommendation 6–5 The *Royal Commissions Act 1902* (Cth) should provide that, where client legal privilege has been abrogated or modified in a Royal Commission, the Commissioner must include within the report consideration of the degree to which the abrogation or modification has facilitated the effectiveness of the Royal Commission.

Other possible models of modification

Documents not related to representation

6.175 At common law, unless abrogated expressly or by necessary implication, the privilege against self-incrimination applies to any documents that an individual is required to produce.[193] However, some case law recognises that some documents can be considered to be 'real evidence', which is not protected by the privilege. For example, in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (*Caltex*), Mason CJ and Toohey J observed that there was a difference between requiring a person to testify as to their guilt, and requiring the production of documents already in existence that constitute evidence of guilt.[194]

6.176 In *Caltex*, McHugh J cited Lord Templeman in *Istel v Tully*[195] to the effect that:

> it was difficult to see why in civil proceedings the privilege against self-incrimination should be exercisable so as to enable a litigant to refuse relevant and even vital documents that are in his possession or power and which speak for themselves.[196]

6.177 In its report on *Abrogation of the Privilege against Self-Incrimination*, the QLRC found that one of the justifications for abrogation could be, in the case of information in documentary form, whether the document was in existence at the time the requirement to provide the information was imposed.[197]

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193 Queensland Law Reform Commission, *Abrogation of the Privilege against Self-Incrimination: Final Report*, R 59 (2004), 36. See *Sorby v Commonwealth* (1983) 152 CLR 281.

194 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 493. See also the discussion of approaches to the application of immunity (to documents and oral statements) in Ch 7.

195 *Istel v Tully* [1993] AC 45, 53.

196 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 555.

197 Queensland Law Reform Commission, *Abrogation of the Privilege against Self-Incrimination: Final Report*, R 59 (2004), 62–63.

6.178 In the US, pre-existing documents that must be kept as part of a requirement of a regulatory scheme, are not protected by the privilege against self-incrimination.[198] After considering the US case law, the New Zealand Law Commission similarly recommended that the privilege should not apply to pre-existing documents or real evidence. The fact that there is no compulsion at the time of creation minimises any likelihood of compulsion causing the evidence to be unreliable, or for the information to be created from an abuse of power.[199]

6.179 In IP 33, the ALRC asked whether a distinction should be drawn in the application of client legal privilege between documents or communications that relate to the representation of a client once investigation processes commence, and pre-existing documents. In particular, the ALRC was interested in hearing views about whether arguments supporting such a distinction in the context of the privilege against self-incrimination are applicable to client legal privilege.[200]

Submissions and consultations

6.180 In general, submissions and consultations were not supportive of drawing a distinction between communications that relate to the representation of a client once investigation processes commence, and pre-existing documents.

6.181 The Law Council argued that the underlying justifications for the privilege against self-incrimination are substantially different from those which underpin client legal privilege.

> The characterisation of the privilege against self-incrimination as a human right which is effectively designed to prevent a witness or party from causing prejudice to him or herself while assisting with enquiries on an unrelated matter makes it appropriate that the privilege should be limited to interviews and information given in the course of investigations. By contrast, client legal privilege, as a human right, exists in recognition of an individual's need for, and right to, obtain legal advice and representation.[201]

6.182 ASIC agreed with the premise that the privilege against self-incrimination is different from that of client legal privilege—and those principles that form the basis of the application of self-incrimination privilege should not be applied to any modification of client legal privilege. In ASIC's view, the principles underlying client legal privilege do not provide a basis for distinguishing between its application to:

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198 *Shapiro v United States* 335 US 1 (1948). See also New Zealand Law Commission, *The Privilege against Self-Incrimination: A Discussion Paper* (1996), 61.

199 New Zealand Law Commission, *The Privilege against Self-Incrimination: A Discussion Paper* (1996), 63.

200 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007), Question 6–5.

201 Law Council of Australia, *Submission LPP 26*, 4 June 2007. See also Victoria Legal Aid, *Submission LPP 55*, 14 June 2007.

- pre-existing documents that are produced during an inquiry or investigation; and

- oral information concerning pre-existing oral or documentary communications that is given during the course of an examination.[202]

6.183 The CDPP submitted that although this model was worth considering, a concern was how such a model would apply to offences that continue after the investigation commences. In such cases, documents and communications could fall within both categories, raising the possibility that the claim of client legal privilege in those cases may have to be litigated.[203]

6.184 Dr Ronald Desiatnik argued that a distinction of this kind would be unworkable, since privileged advice after the commencement of an investigation would often relate to pre-existing documents. He also argued that such a distinction would

> only serve to ensure the early commencement of the investigations, a myriad of questions of what constitutes the start of an investigation process, and unnecessary complexities (eg is the person to be dependent on the advice of the investigatory body as to when it commenced its investigation, in making a claim for privilege?[204]

6.185 ASIC and the ACCC agreed, however, that were client legal privilege to be abrogated, this should not include privileged documents and communications that arise in the course of an investigation related to a person's representation in that investigation.[205]

ALRC's views

6.186 The ALRC agrees that a number of practical difficulties arise with this approach to modification of client legal privilege. In the case of ongoing unlawful behaviour, such as behaviour constituting a breach of a continuous disclosure rule, there may be difficulty in determining what is prior conduct or communications for the purpose of this rule.

6.187 The ALRC also agrees that this distinction does not fit with the rationale for client legal privilege. If an aim of client legal privilege is to encourage compliance, rather than something closer to protecting against self-incrimination, then there is no meaningful distinction to be drawn between pre-existing documents and those created following the commencement of the investigation.

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202 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007.
203 Commonwealth Director of Public Prosecutions, *Submission LPP 61,* 12 June 2007.
204 R Desiatnik, *Submission LPP 24,* 1 June 2007.
205 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007; Australian Competition and Consumer Commission, *Submission LPP 53,* 13 June 2007.

6.188 In cases where client legal privilege is to be abrogated, however, on the basis of a higher public interest as outlined above in Recommendations 6–1 and 6–2, then this should not extend to documents and communications related to a person's representation in that investigation. This issue is discussed further in Chapter 7.

Qualified privilege

6.189 Under the common law, the lawyer-client relationship is the only one in which communications are completely protected from disclosure in court. However, the *Evidence Act 1995* (NSW) provides for a 'qualified' professional confidential relationship privilege.[206] In ALRC 102, the ALRC, NSW Law Reform Commission (NSWLRC) and the Victorian Law Reform Commission (VLRC) recommended that the Commonwealth *Evidence Act* adopt the professional confidential relationships privilege, following the model of the New South Wales Act.[207]

6.190 Under s 126A of the *Evidence Act 1995* (NSW), a 'protected confidence' for the purpose of the section means a communication made by a person in confidence to another person (the confidant):

> (a) in the course of a relationship in which the confidant was acting in a professional capacity, and
>
> (b) when the confidant was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law or can be inferred from the nature of the relationship between the person and the confidant.

6.191 Section 126B provides that:

> (1) The court may direct that evidence not be adduced in a proceeding if the court finds that adducing it would disclose:
>
> (a) a protected confidence, or
>
> (b) the contents of a document recording a protected confidence, or
>
> (c) protected identity information.
>
> (2) The court may give such a direction:
>
> (a) on its own initiative, or
>
> (b) on the application of the protected confider or confidant concerned (whether or not either is a party).
>
> (3) The court must give such a direction if it is satisfied that:

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206 *Evidence Act 1995* (NSW) pt 3.10 div 1A. The Norfolk Island *Evidence Act 2004* follows the NSW model and has a qualified confidential relationships privilege.

207 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005), Rec 15–1. The Commissions also recommended that the confidential relationships privilege should apply to pre-trial discovery and the production of documents in response to a subpoena.

> (a) it is likely that harm would or might be caused (whether directly or indirectly) to a protected confider if the evidence is adduced, and
>
> (b) the nature and extent of the harm outweighs the desirability of the evidence being given.
>
> (4) Without limiting the matters that the court may take into account for the purposes of this section, it is to take into account the following matters:
>
> (a) the probative value of the evidence in the proceeding,
>
> (b) the importance of the evidence in the proceeding,
>
> (c) the nature and gravity of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding,
>
> (d) the availability of any other evidence concerning the matters to which the protected confidence or protected identity information relates,
>
> (e) the likely effect of adducing evidence of the protected confidence or protected identity information, including the likelihood of harm, and the nature and extent of harm that would be caused to the protected confider,
>
> (f) the means (including any ancillary orders that may be made under section 126E) available to the court to limit the harm or extent of the harm that is likely to be caused if evidence of the protected confidence or the protected identity information is disclosed,
>
> (g) if the proceeding is a criminal proceeding—whether the party seeking to adduce evidence of the protected confidence or protected identity information is a defendant or the prosecutor,
>
> (h) whether the substance of the protected confidence or the protected identity information has already been disclosed by the protected confider or any other person.

6.192 Division 1A does not create a true privilege, but allows the court a discretion to direct that evidence not be adduced where it would involve the disclosure of a protected confidence.[208] The court must balance the matters set out in s 126B(4), including the probative value of the evidence in the proceeding and the nature of the offence, with the likelihood of harm to the protected confider in adducing the evidence, and then decide if it is appropriate to give a direction under the section.

> The evidence must be excluded if there is a likelihood that harm would be or might be caused, whether directly or indirectly, to the person who imparted the confidence and the nature and extent of that harm outweighs the desirability of having the evidence given or the documents produced.[209]

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208 *Evidence Act 1995* (NSW) s 126B. See also *Wilson v New South Wales* [2003] NSWSC 805, [18].

209 New South Wales, *Parliamentary Debates*, L Council, 1120 (J Shaw—Attorney General). See S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.11940].

6.193 A qualified privilege acknowledges that it may be in the interests of justice to protect the confidentiality of a particular relationship in the context of that matter. The fact that the privilege is qualified, and that parties are able to make an argument about why the material should be disclosed, allows a judge to exercise discretion and assess the interests of justice in the circumstances of each particular case.

6.194 A qualified privilege could address the need to avoid a 'one size fits all' approach to the difficulties raised by privilege claims, and may allow for interests of justice in particular matters to be considered. In a case like a James Hardie matter or a Royal Commission on an issue of public importance, a qualified privilege could allow the case to be made for access and those interests to be balanced against the rights of the individuals in those matters. A qualified privilege would be in line with the recommendation of the AWB Inquiry discussed above, where Commissioner Cole indicated that in some cases, depending on 'the issues the subject of the Royal Commission', the public interest should prevail over the private.[210]

6.195 Arguments against the adoption of a qualified privilege include that the 'balancing test' could be difficult to assess in some cases and that such a provision cannot guarantee confidentiality. A qualified privilege also creates uncertainty because whether or not the privilege applies cannot be known in advance of the court's ruling in each case. Client legal privilege affords an absolute protection because it always has been considered to be in the interests of justice that a client knows that certain disclosures to a lawyer will remain confidential.

Submissions and consultations

6.196 There was little support for a qualified privilege in submissions.[211] Keith Kendall submitted that the problem with statutorily modifying client legal privilege in this fashion is that it is 'likely to represent the thin end of the wedge'.[212]

6.197 The Law Society of NSW argued that there were many practical difficulties with the concept. It suggested that there is a difference between the absolute nature of client legal privilege (which requires certainty to operate) and other confidential relationships. The Law Society also argued that there was a very practical problem that such a claim cannot be determined at the investigation stage, and a court would be required to rule as to whether the privilege applied or not.[213]

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210 T Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (2006), [7.67].

211 Taxation Institute of Australia, *Submission LPP 54*, 15 June 2007; National Legal Aid, *Submission LPP 52*, 13 June 2007; NSW Young Lawyers, *Submission LPP 49*, 12 June 2007; R Desiatnik, *Submission LPP 24*, 1 June 2007.

212 K Kendall, *Submission LPP 57*, 31 May 2007.

213 Law Society of New South Wales, *Submission LPP 40*, 1 June 2007.

6.198 This view was shared by the ACCC, which submitted that a qualified privilege at the investigation stage is not a practical option, as it would require a court to rule on the question of public interest, resulting in potentially significant delays. The ACCC also argued that a qualified privilege would not be appropriate once the matter has proceeded beyond the investigation stage.

> A situation where privilege applies in an unqualified way at the non-curial stage, and in a qualified way at the curial stage would not assist investigations, as the ACCC would be unlikely to obtain the evidence required for use in subsequent proceedings in the first place.[214]

ALRC's views

6.199 There are several practical difficulties with adoption of a qualified privilege in the context of investigations. Whether a document is privileged or not could not be determined at the investigation stage, as it would require a court to rule on the question of public interest. This could serve to increase delay and uncertainty in investigations for both the agency and the party asserting privilege.

6.200 If lawyers were bound to tell a client that the court may conduct a balancing test on the admissibility of the communications at the time of providing legal advice, this could create a 'chilling effect' by discouraging candour on the part of clients.[215]

6.201 In addition, the undertaking of a 'balancing test' in the context of a federal investigation is substantially different from that undertaken by a court. The balancing exercise undertaken under Division 1A of the *Evidence Act* is between the public interest in having all material available to the court for determination and the private harm to the relationship between the confider and his or her adviser. In the context of client legal privilege, the balancing test would be between the public interest in facilitating the provision of confidential legal advice, and the public interest facilitating the investigation of wrongdoing. This balancing test should occur on a principled basis, as outlined in Recommendations 6–1 and 6–2.

6.202 Therefore, the ALRC's view is that a qualified privilege is not an appropriate model for dealing with claims of client legal privilege in the context of federal investigations.

Extension to other professionals

6.203 Chapter 2 considers the various rationales which are said to underlie the operation of client legal privilege. In IP 33, the ALRC asked whether, if a key rationale of the privilege is to encourage clients to seek professional advice on their legal rights

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214 Australian Competition and Consumer Commission, *Submission LPP 53*, 13 June 2007.
215 J Auburn, *Legal Professional Privilege: Law and Theory* (2000), 65.

and responsibilities, the doctrine should be extended to other professionals who, while not lawyers, provide what amounts essentially to legal advice.[216]

6.204 All of the submissions received by the ALRC in response to IP 33 concentrated on the issue of taxation advice and accounting advisers (although some submissions that were critical of any extension at times mentioned other professions). As noted later in this chapter, two submissions were received in response to DP 73 nominating industrial officers as a group warranting similar protection.[217] At present in Australia there is no other area where a non-lawyer may give legal advice that is not already covered by the privilege. As discussed below, patent attorneys are allowed the privilege under the *Patents Act 1990* (Cth).[218] The *Migration Act 1958* (Cth) distinguishes between immigration assistance and immigration *legal* assistance for the purpose of marking out the limits of permissible conduct for migration agents who are not qualified lawyers.[219]

6.205 In this Inquiry, the ALRC has not considered the more general issue of extending privilege to all other professional communications. In the report on *Uniform Evidence Law*, the ALRC, the NSWLRC and the VLRC supported adoption of a general qualified confidential relationships privilege that would cover other categories of confidential communications.[220] The present Inquiry is focused on the operation of client legal privilege in relation to federal investigatory bodies. While the ALRC will not be making broader recommendations on the extension of the privilege in other areas, it is within the Terms of Reference to look at client legal privilege in the particular context of federal investigations, and appropriate to consider whether privilege logically should be extended to clients who receive legal advice from other professionals that may fall within the ambit of federal coercive information-gathering powers.

‘Legal’ privilege

Why lawyers?

6.206 Whenever the question of client privilege arises for consideration, a natural question is to consider why the ‘privilege’ should apply only to the confidential relationship of lawyer and client and not to other confidential relationships. As early as 1597 Francis Bacon provided the following explanation for why the privilege should be one in relation to lawyers, not others:

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216 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007), [2.62].

217 Construction Forestry Mining and Energy Union (Construction and General Division), *Submission LPP 90*, 1 November 2007, Australian Council of Trade Unions, *Submission LPP 88*, 1 November 2007.

218 *Patents Act 1990* (Cth) ch 20.

219 *Migration Act 1958* (Cth), ss 276, 277, 280.

220 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005), Rec 15–1.

> The greatest trust between Man and Man is the trust of Giving Counsel: For in other confidences Men commit the parts of Life; their Lands, their Goods, their Children, their Credit, some particular Affair: but to such, as they make their Counsellors, they commit the whole, by how much the more they are obliged to all faith and integrity.[221]

6.207 The Law Reform Committee of England and Wales, in considering privilege in civil proceedings in 1967, offered the following reasoning for protecting lawyer-client relationships, rather than other relationships:

> What distinguishes legal advice from other kinds of professional advice is that it is concerned exclusively with rights and liabilities enforceable in law, ie in the ultimate resort by litigation in the courts or in some administrative tribunal. It is, of course, true that on many matters on which a client consults his solicitor he does not expect litigation and certainly hopes that it will not occur; but there would be no need for him to consult his solicitor to obtain *legal* advice unless there were *some* risk of litigation in the future in connection with the matter upon which advice is sought. As Lord Brougham pointed out, it is to minimise that risk by ensuring that he so conducts his affairs as to make it reasonably certain that he would succeed in any litigation which might be brought in connection with them, that the client consults his solicitor at all.[222]

6.208 In *Baker v Campbell*, the High Court endorsed this logic:

> The restriction of the privilege to the legal profession serves to emphasise that the relationship between a client and his legal adviser has a special significance because it is part of the function of the law itself. Communications which establish and arise out of that relationship are of their very nature of legal significance, something which would be coincidental in the case of other confidential relationships.[223]

Beyond lawyers?

6.209 State and territory legislation traditionally has restricted 'legal work' or 'legal practice' to qualified lawyers holding a current practising certificate.[224] Indeed, unauthorised legal practice amounts to an offence.[225] However, there are now express exceptions to this rule, including 'legal practice engaged in under the authority of a law of ... the Commonwealth'—for example, work of a legal nature performed by licensed tax agents and registered patent attorneys.[226]

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221 F Bacon, 'Of Counsel' *The Essays, or, Counsels, Civil and Moral of Sir Francis Bacon* (1691 ed) 53. The collection of essays was first published in 1597.

222 Law Reform Committee of England and Wales, *Privilege in Civil Proceedings* (1967), 9; cited in Australian Law Reform Commission, *Evidence*, ALRC 26 (1985), 495.

223 *Baker v Campbell* (1983) 153 CLR 52, 128. Australian Law Reform Commission, *Evidence*, ALRC 26 (1985), [877]; Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005), [14.43]–[14.48].

224 See, eg, *Legal Profession Act 2004* (NSW) s 14. See also Standing Committee of Attorneys-General, *National Legal Profession Model Bill* (2006), s 2.2.2(1).

225 *Legal Profession Act 2004* (NSW) s 14(1).

226 Ibid s 14(2)(a).

6.210 Legal practice has been defined in one case as:

> the advising of a particular person in a particular situation and the production of a document which affects legal rights and is tailored to the particular needs of that person.[227]

6.211 As 'lawyers' work', in the nature of advice on legal matters, is now performed by others, should client legal privilege apply in such circumstances and, if so, to what extent?[228]

6.212 The 'compliance rationale' for client legal privilege is discussed in Chapter 2—that is, clients can obtain the fullest legal advice only where the lawyer is in possession of all relevant facts, so the protection of communications encourages greater compliance with the law as the client is in the best position to be informed about what does (and does not) amount to complying conduct. This rationale has led some regulatory bodies, both in Australia and overseas, to adopt various measures to extend a privilege or concession to other professionals whose advice falls within these types of regulatory frameworks.

Comparative examples

United States

6.213 The widespread expansion of accounting firms into the arena of legal advice prompted the US Congress to pass legislation in 1998 amending the *Internal Revenue Code* to extend client legal privilege to federally authorised tax practitioners.[229] Section 7525 of the Code provides that:

> With respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent that the communication would be considered a privileged communication if it were between a taxpayer and an attorney.

6.214 'Tax advice' is given the broad meaning of 'advice which is in the individual's authority to practice'.[230] Some limitations are applied to the privilege. For example, the privilege may only be asserted in non-criminal tax matters brought by the Internal Revenue Service (IRS) or in a Federal Court.[231] It has no application to state matters. It

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227 *Australian Competition and Consumer Commission v Murray* (2002) 121 FCR 428, [94].

228 R Baxt, 'A Matter of Privilege' (1989) 60 *Chartered Accountant* 34, 35.

229 *Internal Revenue Service Restructuring and Reform Act 1998* (US): see K Kendall, 'Prospects for a Tax Advisors' Privilege in Australia' (2005) 1(3) *Journal of the Australasian Tax Teachers Association* 46, 56.

230 *Internal Revenue Code (1954)* 26 USC §§ 7525(3)(B).

231 Ibid §§ 7525(2).

also does not apply to any communications regarding participation in a corporate tax shelter.[232]

6.215 Concerns have been raised, however, regarding the scope of s 7525. The IRS has the discretion to choose civil or criminal action, giving rise to concerns about whether the availability of the privilege could influence that choice, and what happens if a civil proceeding becomes a criminal one at a later date.[233] There is also uncertainty about the definition of 'tax advice', as there are no clear guidelines as to the appropriate responsibilities of tax professionals. It has been suggested that the section should be construed as meaning that communications only will be protected if they would have been covered by client legal privilege if made by a client to a lawyer.[234]

New Zealand

6.216 In June 2005, the New Zealand Inland Revenue Department followed the US example and enacted a new statutory privilege for opinion on tax law by registered tax practitioners. This extension was aimed at 'promoting the efficient conduct of compliance with the law by allowing tax practitioners who give opinions on tax law to have a candid relationship with their clients'.[235]

6.217 The New Zealand scheme works as follows:

- The privilege applies only to opinions on tax law given at any time (whether before or after the filing of a tax return in respect of a tax period) by members of approved professional bodies.

- The privilege applies only if claimed by the taxpayer and only in respect of identified documents and information.

- If a document includes both an opinion on tax law and other information, the whole document will have to be provided, with any proper deletions of the material consisting solely of the opinion on tax law being clearly identified in the document. The balance of any document consisting of material that was not an opinion on tax law would not be privileged.

- If the Inland Revenue disputes the validity of a privilege claim, the privilege does not apply unless the claimant applies within one month for the

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232 Ibid §§ 7525(3)(B)(b).

233 K Kendall, 'Prospects for a Tax Advisors' Privilege in Australia' (2005) 1(3) *Journal of the Australasian Tax Teachers Association* 46, 58.

234 Ibid, 59.

235 New Zealand Inland Revenue Department, *Tax and Privilege: A Proposed New Structure: A Government Discussion Document—May 2002* (2002) <www.taxpolicy.ird.govt.nz/publications/index.php?catid=2> at 31 August 2007, 9.

determination by a District Court of what part, if any, is privileged because it is an opinion on tax law. This requires the taxpayer to provide the unedited document to the court for review.

- The privilege does not apply to advice designed to promote illegal activities; however it is not restricted to civil proceedings.[236]

6.218 Unlike the US model, the New Zealand approach does not use client legal privilege as the basis for the privilege.[237] Kendall argues that the US model of tying the tax privilege to common law client legal privilege means that any developments in the common law will affect the application of the provision. The New Zealand model deliberately separates the statutory tax privilege from the common law of client legal privilege so this consequence will not follow.[238]

United Kingdom

6.219 In the United Kingdom (UK), s 20B of the *Tax Management Act 1970* (UK) sets out the privilege for a tax adviser against the powers of the Inland Revenue Department to call for relevant documents belonging either to a taxpayer whose affairs are under scrutiny or to others. Under the provision, a tax adviser (who can be 'any person appointed to give advice about the tax affairs of another person') cannot be obliged to make available to tax authorities documents that are the adviser's property, and consist of communication between the adviser and either the client or another tax adviser of the client, the purpose of which is the giving or obtaining of tax advice.

6.220 The legislation sets out further exceptions in s 20B(11)–(12) for documents that contain information: explaining any tax return, accounts or other documents which the adviser has assisted the client in preparing for the tax authorities; or giving the identity or address of the taxpayer under investigation or any agent of the adviser, where this is not already known.

6.221 The new *Legal Services Act 2007* (UK),[239] makes a number of changes to the regulation of the legal profession, including permitting new business structures to be introduced into the legal services market—'alternative business structures'—allowing consumers to obtain legal services from a business entity employing both lawyers and non-lawyers. The Act allows clients of an alternative business structure to have the same privilege in their communications with authorised non-lawyers who provide legal

236 *Taxation Administration Act 1994* (NZ) s 20B.
237 K Kendall, 'Prospects for a Tax Advisors' Privilege in Australia' (2005) 1(3) *Journal of the Australasian Tax Teachers Association* 46, 62.
238 Ibid, 63.
239 The Act was passed on 30 October 2007.

advice within the practice as if they had received legal services from a lawyer.[240] The Act is a response to a number of reports produced in Britain looking at the efficiency and regulation of legal services and concern about unjustified restrictions of competition in the legal services market.[241]

6.222 Section 330 of the *Proceeds of Crime Act 2002* (UK) was amended to extend the ambit of client legal privilege to non-legal professional advisers, such as accountants, auditors and tax advisers. Section 330 creates a criminal offence of failure to disclose money laundering for persons in a regulated sector where that person has reasonable grounds for suspecting that another person is engaged in money laundering, and that information came to a person in the course of business in the regulated sector. Under this Act, legal advisers and 'other relevant professional advisers'[242] are exempt from the requirement to disclose the information where it was received in privileged circumstances.[243]

Australia

6.223 In Australia, as a general rule, only qualified lawyers may give legal advice.[244] However, there are some exceptions to this, for example, tax agents who are registered with the Tax Agents' Board may give advice on Commonwealth taxation law.[245] Registered patent attorneys also may give advice on patents law.[246]

6.224 In recognition of the type of advice offered by tax agents, and the benefits to compliance of free and frank advice, the ATO has issued an administrative guideline which allows certain types of advice prepared for the purpose of advising a client on taxation matters to be kept confidential between taxpayers and their professional accounting advisers. The ATO's *Access and Information Gathering Manual* states that:

> While recognising that the Commissioner has the statutory power to access most documents, he accepts that there is a class of documents which should, in all but exceptional circumstances, remain confidential to taxpayers and their professional accounting advisors. In respect of such documents, the Tax Office acknowledges that

240 *Legal Services Act 2007* (UK), s 190. Multi-disciplinary practices also exist in Australia, see for example, *Legal Profession Act 2004 (NSW)*, Pt 6. Client legal privilege does not extend, however, to advice provided by non-lawyers employed by the practice.

241 Office of Fair Trading (UK), *Competition in the Professions – A Report by the Director-General of Fair Trading* (2001); United Kingdom Department for Constitutional Affairs, *Competition and Regulation in the Legal Services Market* (2003); United Kingdom Department for Constitutional Affairs, *The Future of Legal Services: Putting Consumers First* (2005).

242 Defined as an accountant, auditor or tax adviser who is a member of a professional body for their respective professions, and where the body tests the competence of those seeking admission, and imposes professional and ethical standards for its members: *Proceeds of Crime Act 1992* (UK) s 330(14).

243 Ibid s 330(6).

244 See eg, *Legal Profession Act 2004* (NSW) s 14. See also Standing Committee of Attorneys-General, *National Legal Profession Model Bill* (2006), s 2.2.2(1).

245 *Income Tax Assessment Act 1936* (Cth) s 251L(1)(b).

246 *Patents Act 1990* (Cth) ch 20.

> taxpayers should be able to consult with their professional accounting advisors to enable full discussion in respect of their rights and obligations under tax laws and for advice to be communicated frankly.[247]

6.225 This approach is widely described as 'the accountants' concession'.[248] Similar to client legal privilege, the concession is available for advice prepared by an external professional accounting adviser who is independent of the taxpayer.[249]

6.226 Documents which record a taxation transaction or arrangement entered into by a taxpayer are considered 'source documents' and not covered by the concession. These include:

> papers prepared in connection with the conception, implementation and formal recording of a transaction or arrangement and which explain the setting, context and purpose of the transaction or arrangement.[250]

6.227 Examples of source documents include ledgers, journals, working papers for financial statements, profit and loss accounts, balance sheets and documents comprising a permanent audit file. Such documents will be freely sought by ATO officers. Some advice papers which are created contemporaneously with a relevant transaction or arrangement, may themselves represent a record of what has actually occurred because they shed light on the transaction or arrangement. These types of documents are considered 'restricted source documents' and will only be sought by the ATO in exceptional circumstances.[251]

6.228 Advice that is prepared solely for the purpose of advising a client on matters associated with taxation are covered by the concession, except where the advice forms an integral part of the conception or implementation of a transaction or arrangement. This is significantly more limited than client legal privilege, where the dominant purpose test applies.

6.229 The concession is also available for documents that are advice or advice papers that are 'non-source documents'—meaning, for example, that they do not materially contribute to an understanding of the client's tax strategy or relate to advice on arrangements that the tax payer has not put into place.

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247 Australian Taxation Office, *Access and Information Gathering Manual* <www.ato.gov.au> at 23 August 2007, [7.1.1].

248 Ibid, [1.19.6].

249 Ibid, [7.7].

250 Australian Taxation Office, *Guidelines to Accessing Professional Accounting Advisors' Papers* <www.ato.gov.au> at 3 December 2007, [2.1].

251 Ibid, [2.2].

6.230 Documents that otherwise would be covered by the concession may be requested by the ATO in exceptional circumstances. Under the ATO's *Guidelines to Accessing Professional Accounting Advisors Papers*,[252] senior ATO officers are authorised to approve the lifting of the concession where it has been claimed and the ATO is unable to ascertain from the documents provided 'the facts necessary to determine the taxation consequences of the particular transactions or arrangements'.[253] The concession may also be lifted in other circumstances where, for example, there are reasonable grounds to believe a fraud or evasion has taken place. Where a determination is made that exceptional circumstances exist, the ATO officer must give the person a copy of the decision to lift the concession. A decision under the ATO Guidelines is not reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).[254]

6.231 Again, this concession provides the taxpayer with less protection than would be the case with client legal privilege, as privilege applies regardless of the circumstances.[255] Kendall has noted that, as the Guidelines do not have the backing of statute, they do not provide additional legal rights to taxpayers—although they do create a legitimate expectation that the ATO will adhere to their terms.[256]

6.232 Patent attorneys are also afforded a privilege under the *Patents Act 1990* (Cth). Section 200(2) of the Act states that 'a registered patent attorney has the same extent of privilege over communications with their client in intellectual property matters as is afforded in ordinary solicitor-client relationships'.

Scope of the concessions

6.233 While the above arrangements resemble client legal privilege, their scope is far more restricted. They are based on one of the rationales of client legal privilege: namely, that allowing the free flow of information between client and adviser improves understandings of legal rights and responsibilities and promotes compliance. It has been argued by accountants and others that it should flow logically that, where legal advice is being provided by another professional person, such advice should also be given some protection from disclosure.[257]

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252 Ibid.

253 M Carmody, *A Question of Balance: Address to the American Club* (1999) <www.ato.gov.au/newsroom.asp> at 5 April 2007.

254 This is because the Guidelines are not an instrument made under the tax legislation and therefore a decision made under them is not a decision made under an enactment for the purpose of judicial review: *White Industries v Federal Commissioner of Taxation* [2007] FCA 511.

255 K Kendall, 'Prospects for a Tax Advisors' Privilege in Australia' (2005) 1(3) *Journal of the Australasian Tax Teachers Association* 46, 53.

256 Ibid, 52.

257 Institute of Chartered Accountants in Australia, *Submission LPP 1,* 14 March 2007.

Submissions and consultations

6.234 In IP 33, the ALRC asked whether the doctrine of client legal privilege should be extended to other professionals who, while not lawyers, provide what amounts essentially to legal advice.[258]

6.235 The Institute of Chartered Accountants in Australia (ICAA) submitted that, given the extension of privilege in other jurisdictions, the fact that Australia has not yet adopted a formal legislative framework extending client legal privilege to tax advice or opinions on tax law, 'suggests it is out of step with global concepts on tax administration and commercial reality'. The ICAA recommended enactment of a statutory regime recognising client legal privilege for accountants and tax agents which would 'be on an equal footing to client professional privilege currently afforded to lawyers in respect of curial and pre-curial contexts'.[259]

6.236 This view was shared by the Corporate Tax Association, which submitted that changes to the role of taxation advisers over time needed to be recognised.

> It needs to be borne in mind that the doctrine of legal professional privilege was developed many centuries ago, at a time when the provision of legal advice was the sole providence of lawyers. There was no accounting profession as such, with the role of bookkeepers confined mainly to the keeping of accounts and producing of non-public accounting reports. Moreover, there were few, if any, complex revenue laws about which people or entities needed advice. Much has changed over time, not only in relation to the complexity of business and related laws and regulations, but also to the provision of advice. Indeed, it has been the recognition by the ATO of the essential role played by the taxation profession that the administrative access guidelines … were developed. A number of other countries have recognised this anomaly, and have enacted what amounts to statutory legal professional privilege for taxation advisers.
>
> Given that the Commonwealth taxation law specifically authorises registered tax agents to provide legal advice on Commonwealth taxation law, the CTA submits that there is a compelling case for Australia to follow the lead of countries such as the US, New Zealand and the United Kingdom in this respect.[260]

6.237 The Australian Financial Markets Association argued that it is important to recognise that the privilege is that of the client, not that of their lawyer or accountant who provides tax advice.

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258 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007), 63.

259 Institute of Chartered Accountants in Australia, *Submission LPP 25*, 4 June 2007. This submission was supported by: Australian Financial Markets Association, *Submission LPP 67*, 22 June 2007; Business Coalition for Tax Reform, *Submission LPP 63*, 19 June 2007; National Institute of Accountants, *Submission LPP 59*, 20 June 2007; CPA Australia Ltd, *Submission LPP 44*, 14 June 2007. See also CPA Australia Ltd, *Submission LPP 98*, 2 November 2007.

260 Corporate Tax Association, *Submission LPP 32*, 4 June 2007.

> In this context, we believe clients should be given the choice between a lawyer and accountant for tax advice on matters that should be covered by client legal privilege. It is especially important that clients like small businesses and individuals should have access on this basis to accountants with whom they are more likely to have formed an ongoing client/adviser relationship over time. It is also important for business more generally that the market for privileged advice is not limited to a relatively small number of advisers and that they have a reasonable capacity to rely on internal advice for this purpose.[261]

6.238 Kendall submitted that the rationale of client legal privilege is not about the protection of client confidences *per se*, but ensuring that the legal system is able to function properly. This proper functioning is best served when legal advisers, as the bridge between persons subject to the legal system and the legal system itself, are fully apprised of the relevant facts. Therefore, the compliance rationale can be extended to the accounting profession, where, in practice, tax accountants play the same role as lawyers.[262]

6.239 Other stakeholders did not support any extension of the privilege beyond lawyers.[263] This view was based primarily on two reasons: first, that the rationale of the privilege depends on the giving of 'legal advice', which only should be given by lawyers;[264] and secondly, that other professionals were not subject to the same accountability as lawyers. The Law Council, while not commenting on the merits of extending the privilege, noted that:

> The acts of lawyers are subject to independent supervision by statutory agencies, as well as judicial oversight. In addition, lawyers as officers of the court owe a paramount duty to the court and the administration of justice. If privilege were to be extended to another profession, consideration needs to be given to whether the applicable regulatory regime is comparable to that governing lawyers.[265]

6.240 The Law Society of NSW agreed that:

> The fact that lawyers are officers of the Court and owe duties to the Court, imposes a degree of control upon the processes by which claims of privilege are made. Lawyers can be personally liable for costs incurred in mounting applications without any basis for doing so and also subject to professional misconduct procedures. These potential threats impose a degree of care and restraint upon lawyers in relation to making

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261 Australian Financial Markets Association, *Submission LPP 67,* 22 June 2007.

262 K Kendall, *Submission LPP 57,* 31 May 2007.

263 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007; National Legal Aid, *Submission LPP 52,* 13 June 2007; Australian Institute of Company Directors, *Submission LPP 43,* 8 June 2007.

264 I Turnbull, *Submission LPP 18,* 3 June 2007; Allens Arthur Robinson, *Submission LPP 107,* 5 November 2007.

265 Law Council of Australia, *Submission LPP 26,* 4 June 2007. The Law Council expressed similar views in its later submission: Law Council of Australia, *Submission LPP 94,* 1 November 2007.

> claims for privilege. Similar care may not be exercised by other categories of advisors.[266]

6.241 The Australian Government Solicitor submitted that the question of what, if any, concession should be granted in this area should be characterised not as an extension of client legal privilege, but as another head of privilege. Such a 'professional relationships' privilege should be discretionary, as under the *Evidence Act*.[267]

6.242 A number of submissions took the view that any concession in relation to tax advice should be provided for in legislation rather than in administrative guidelines. For example, the Taxation Institute of Australia submitted that Parliament should set the policy,

> rather than there being an administrative guideline which has an exception that results in a general belief amongst accountants that the concession will be withdrawn when it suits the ATO.[268]

6.243 The ICAA agreed that the fact that the ATO can lift the accountants' concession if it considers that 'exceptional circumstances' exist is a substantial limitation on its operation.[269] In its view, the criteria for what amounts to exceptional circumstances are broad and ill-defined. The ICAA also criticised the concession on the basis that it has a sole purpose test, as opposed to the dominant purpose test under client legal privilege law and was critical of the fact that decisions based on the Guidelines were not subject to judicial review.[270]

Protecting tax advice

6.244 In DP 73, the ALRC proposed that federal client legal privilege legislation should provide that a person who is required to disclose information under a coercive information-gathering power of a federal body is not required to disclose a document that is a tax advice document prepared for that person.[271] This proposal was based on the New Zealand model, set out above.

6.245 Under the proposal, a 'tax advice document' was defined as a confidential document created by an independent professional accounting adviser for the dominant

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266 Law Society of New South Wales, *Submission LPP 40*, 1 June 2007; see also Law Society of New South Wales, *Submission LPP 93*, 31 October 2007. A similar view was expressed by the CDPP: Commonwealth Director of Public Prosecutions, *Submission LPP 101*, 2 November 2007.

267 Australian Government Solicitor, *Submission LPP 50*, 13 June 2007.

268 Taxation Institute of Australia, *Submission LPP 54*, 15 June 2007. See also Confidential, *Submission LPP 48*, 12 June 2007.

269 This view was shared by the Australian Financial Markets Association, *Submission LPP 67*, 22 June 2007; Corporate Tax Association, *Submission LPP 32*, 4 June 2007.

270 Institute of Chartered Accountants in Australia, *Submission LPP 25*, 4 June 2007. See *White v Commissioner of Taxation* [2007] FCA 511, discussed above.

271 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 6–3.

purpose of providing that person with advice about the operation and effect of tax laws. It did not include 'source documents', such as documents which record transactions or arrangements entered into by a person (for example, formal books of account or ledgers). It was proposed that the advice had to be provided by an independent professional accounting adviser who is a registered 'tax agent' for the purpose of s 251L(1)(b) of the *Income Tax Assessment Act 1936* (Cth).[272]

6.246 An important feature of the proposal was that privilege claims in respect of 'tax advice documents' prepared by professional accounting advisers must be certified by lawyers (where certification is requested by a federal body). This aspect of the proposal is considered in Chapter 8, which deals with requirements for certification generally.[273]

Submissions and consultations

6.247 The proposal in DP 73 was overwhelmingly supported by accounting groups.[274] However, the proposed definition of an 'independent professional accounting adviser' and the definition of 'tax advice' attracted comment.

Definitions

6.248 In DP 73, the ALRC proposed that an 'independent professional accounting adviser', for the purpose of claiming the accountant-client privilege, must be a registered tax agent under the definition in the *Income Tax Assessment Act.* It was noted in submissions that, in many cases, tax agent registration occurs with the firm of accountants, with the principal or others as nominees as opposed to registration of individual agents. Nominees may then legally give tax advice under the Act.[275]

6.249 It was suggested to the ALRC that the proposal should be amended to allow that an independent professional accounting adviser must be a registered tax agent or a nominee or employee of a registered tax agent, who is a qualified tax accountant.[276]

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272 Ibid, Proposal 6–3.

273 See Recommendation 8–3.

274 Corporate Tax Association, *Submission LPP 100,* 2 November 2007; CPA Australia Ltd, *Submission LPP 98,* 2 November 2007; Business Coalition for Tax Reform, *Submission LPP 96,* 2 November 2007; Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007; National Institute of Accountants, *Submission LPP 87,* 1 November 2007; Institute of Chartered Accountants in Australia, *Submission LPP 82,* 31 October 2007. A similar point was also made by Westpac Banking Corporation: Westpac Banking Corporation, *Submission LPP 85,* 1 November 2007.

275 Corporate Tax Association, *Submission LPP 100,* 2 November 2007; CPA Australia Ltd, *Submission LPP 98,* 2 November 2007; Business Coalition for Tax Reform, *Submission LPP 96,* 2 November 2007; Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007; National Institute of Accountants, *Submission LPP 87,* 1 November 2007; Westpac Banking Corporation, *Submission LPP 85,* 1 November 2007; Institute of Chartered Accountants in Australia, *Submission LPP 82,* 31 October 2007.

276 Institute of Chartered Accountants in Australia, *Submission LPP 82,* 31 October 2007; National Institute of Accountants, *Submission LPP 87,* 1 November 2007.

6.250 The ALRC also received a number of submissions expressing concerns about the proposed requirement that a lawyer certify claims to tax advice privilege, where required. These concerns are discussed in Chapter 8.

6.251 The CDPP argued that accountants giving advice about law, as allowed under the *Taxation Administration Act*, is not the same thing as giving 'legal advice'.

> An opinion about tax law is only legal advice if it resulted from the application of legal skill, but if it did not then it is merely advice.[277]

6.252 The ICAA submitted that the definition of a 'tax advice document' should be amended to include:

- the client's communication to the tax agent requesting the tax advice, together with any other documents giving instructions in respect of it;
- drafts or working papers created in the course of preparing advice (but recognising the distinction between a 'tax advice document' and 'source documents');
- a copy, summary or other record of the advice created by the client or another party where the advice, if prepared by a lawyer, would be privileged if copied, summarised or otherwise recorded; and
- a record of oral advice whether prepared by the tax adviser or client.[278]

6.253 The ICAA further argued that, given that a record of oral advice should be a 'tax advice document'

> it must follow that neither the tax agent nor the client should be compelled to disclose oral advice under questioning under section 264 (1)(b) of the Income Tax Assessment Act or under any other Commonwealth statutory power where a lawyer who had given the same advice could not be so compelled.[279]

Perspective of federal bodies

6.254 In the CDPP's view, it is unclear whether a privilege for tax advice documents would have the effect of increasing compliance with the law. The CDPP submitted that such a privilege would frustrate the detection of revenue fraud and that 'the detection,

277 Commonwealth Director of Public Prosecutions, *Submission LPP 101*, 2 November 2007.
278 Institute of Chartered Accountants in Australia, *Submission LPP 89*, 1 November 2007.
279 Ibid.

prosecution, conviction and punishment of persons who defraud the revenue promotes compliance with the law'.[280]

6.255 The ATO considered that the current accountants' concession 'functions effectively and provides meaningful protection to the confidentiality of tax advice documents':

> The Tax Office has not been alerted to any specific evidence (from professional bodies, or otherwise) that the concession is not operating effectively in practice, or that there is a particular need for the administrative concession to be enshrined in legislation.[281]

6.256 However, the ATO agreed with the ALRC's proposal that a statutory privilege, if enacted, should follow a model similar to that currently used in New Zealand. It preferred the New Zealand approach of creating a separate privilege for tax advice, rather than trying to incorporate tax advice into the category of communications that are privileged under client legal privilege, as this would create a number of conceptual and practical difficulties.[282]

6.257 The ATO noted that New Zealand's *Taxation Administration Act 1994* requires certain factual information to be disclosed in respect of a claim for tax opinion privilege. For example, people can be required to disclose tax contextual information in relation to a tax advice document. The ATO considered that:

> this would be a useful feature to incorporate into any regime that may be introduced for tax advice privilege in Australia. The Tax Office is generally uninterested in the substance of legal or taxation advice provided to a taxpayer, but often requires access to the factual information underlying such advice in order to properly carry out its audit activities.[283]

6.258 While the ATO agreed with the examples of source documents in DP 73, such as transactional documents in the form of ledgers and journals, the ATO considered that it would be useful to clarify that source documents (or copies of source documents) will not be protected in any circumstances, even where they are given to a tax agent for the purpose of obtaining tax advice.[284]

6.259 The ATO also suggested that the proposal adopt the section of the US scheme that specifically excludes communications regarding participation in potential tax shelters from being protected from production. Otherwise, the ATO considered that that:

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280 Commonwealth Director of Public Prosecutions, *Submission LPP 101,* 2 November 2007.
281 Australian Taxation Office, *Submission LPP 81,* 29 October 2007.
282 Ibid.
283 Ibid.
284 Ibid.

- it would be practically impossible for it to determine whether the privilege should apply in relation to advice about a particular taxation scheme without being able to access the relevant communications, and

- the privilege could be misused to facilitate the mass marketing of tax effective schemes.[285]

6.260 The ATO also asked the ALRC to consider whether it should adopt the current limitation in the accountant's concession whereby the concession can be lifted where 'exceptional circumstances' exist.[286]

6.261 APRA expressed no view on the proposal, on the basis that it was restricted to tax agents giving tax advice. It opposed any extension of privilege to accountants and other finance professionals such as actuaries 'as APRA's performance of its supervisory functions is dependent on access to such advice'.[287] ASIC submitted that, although it had concerns about the impact on its investigations, it accepted the reasoning underlying the proposal.[288]

6.262 The ACC argued that, while the privilege may be helpful in a regulatory context, the serious organised crime investigated by the ACC often involves the investigation of complex financial arrangements including advice on taxation law. As such, the creation of a tax advice privilege would impact on the effectiveness of ACC special investigations.[289]

6.263 ITSA expressed concern about the extension of privilege to accountants in the particular context of investigations into a debtor's affairs.

> In the ordinary course, a debtor will have had contact with an accountant or financial adviser prior to their bankruptcy. Such an adviser may provide information to the debtor on methods of transferring assets to avoid their obligations to creditors … If a bankrupt were able to claim that these communications were privileged, investigations into and successful prosecution of these and other bankruptcy offences would be significantly impeded.[290]

6.264 The Insolvency Practitioners Association agreed that tax liabilities are often a central issue in the insolvency of a company. It opposed the extension of privilege to accountants, even if limited as proposed.[291]

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285 Ibid.
286 Ibid.
287 Australian Prudential Regulation Authority, *Submission LPP 91*, 1 November 2007.
288 Australian Securities and Investments Commission, *Submission LPP 84*, 31 October 2007.
289 Australian Crime Commission, *Consultation LPP 47*, Sydney, 26 October 2007.
290 Insolvency and Trustee Service Australia, *Submission LPP 62*, 20 June 2007.
291 Insolvency Practitioners Association, *Submission LPP 109*, 6 November 2007.

6.265 While noting the limitations on the proposed tax advice privilege, namely that the privilege would not apply where a tax advice document was created in relation to the commission of a fraud or offence, ITSA stated that:

> While those limitations may overcome the potential for bankrupts to claim the proposed privilege over documents relevant to bankruptcy offences, they may not assist the trustee in relation to the clawback provisions.[292] This is because it is not necessary to establish 'fraud' on behalf of the bankrupt to recover property under the provisions.[293]

Extension to other professions

6.266 The ALRC received a number submissions arguing that privilege should be extended to other professions as well as tax accountants.

6.267 The Australasian Compliance Institute expressed the view that records of compliance systems required special protection:

> An essential feature of compliance programs is often the preparation of compliance reports in respect of compliance failures. In order for these reports to be effective, it is necessary that they deal with compliance failures fully and frankly. The Institute notes that a difficulty with this is the potential for self-incrimination, as currently these kinds of reports are not subject to legal professional privilege. Given the public benefits of effective compliance programs, the Institute proposes that there should be a rebuttable presumption of privilege protecting an organisation from production to a Commonwealth body or a court of reports made by a person for legitimate compliance purposes.[294]

6.268 Two submissions argued that client legal privilege should be expanded to include union industrial officers. The ACTU stated that the case for privilege to be extended to industrial officers was equally strong as the case of a tax advice privilege. Industrial officers (who may or may not be legally qualified) have a right to appear on behalf of unions and their members in the Industrial Relations Court of Australia and the Federal Court and Federal Magistrates Court.[295]

> Thus the situation may arise where an industrial officer may act as counsel in superior and inferior courts but his or her advice to his or her 'client' and case preparation may be required to be disclosed to his or her adversary, but not the other way around if the adversary is represented by a legal practitioner.[296]

6.269 The ACTU acknowledged the problem that only lawyers (and certain others) can give legal advice. However it argued that:

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292 Sections 120 and 121 of the *Bankruptcy Act 1966* (Cth) make void against the trustee transfers made by the bankrupt prior to bankruptcy for less than market value consideration or to defeat creditors.

293 Insolvency and Trustee Service Australia, *Submission LPP 105,* 5 November 2007.

294 Australasian Compliance Institute, *Submission LPP 79,* 26 October 2007.

295 *Workplace Relations Act 1996* (Cth) s 854.

296 Australian Council of Trade Unions, *Submission LPP 88,* 1 November 2007.

> This is not an insurmountable problem … if the substance of the advice goes to the industrial and employment rights and obligations of the receiver of the advice, and is confined to matters over which an industrial officer may litigate or act upon, then that is a boundary within which industrial officer advice can be circumscribed. [297]

6.270 The Construction Forestry Mining and Energy Union (Construction and General Division) endorsed the view of the ACTU, arguing that 'there is no sound policy reason why material should have a different status depending on whether the union officers were or were not qualified legal practitioners'.[298]

6.271 The Intellectual Property Research Institute of Australia (IPRIA) argued that the meaning of s 200(2) of the *Patents Act*, discussed above, is unclear. IPRIA stated that the meaning of the section has not been judicially explained to date and, in particular, expressed concern that a 2004 decision of the Federal Court found that Australian patent attorney privilege only attaches to communications between a client and a patent attorney registered in Australia, and not an attorney registered overseas.[299]

6.272 The Law Council recommended that a further review be undertaken of the need to create a different form of privilege for tax advisers and other similar professional relationships.[300]

ALRC's views

6.273 As noted above, in *Baker v Campbell*, Dawson J justified the restriction of client legal privilege to members of the legal profession on the basis that:

> The restriction of privilege to the legal profession serves to emphasise that the relationship between a client and his legal advisor has a special significance because it is part of the functioning of the law itself. Communications which establish and arise out of that relationship are of their very nature of legal significance, something which would be coincidental in the case of other confidential relationships.[301]

6.274 The ALRC agrees that the purpose of client legal privilege is different from that of other confidential relationships. It is not the protection of confidences that creates public interest rationale for client legal privilege, but the effect that protection of legal advice has on the operation of the legal system. However, as discussed in Chapter 2, the basis of the protection is the promotion of full and frank disclosure for the purpose of obtaining legal advice (and legal services in litigation).

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297 Ibid.

298 Construction Forestry Mining and Energy Union (Construction and General Division), *Submission LPP 90*, 1 November 2007.

299 Intellectual Property Research Institute of Australia, *Submission LPP 104*, 5 November 2007. See *Eli Lilley v Pfizer Ireland* (2004) 137 FCR 573.

300 Law Council of Australia, *Submission LPP 94*, 1 November 2007.

301 *Baker v Campbell* (1983) 153 CLR 52, 128.

6.275 The ALRC considers the 'compliance rationale' to be a significant part of the modern basis for the doctrine of client legal privilege in serving the administration of justice. It follows from this reasoning that where legal advice is lawfully being given in a similar context by a non-lawyer, then the privilege should extend to the provision of that advice as well. As with client legal privilege, the privilege belongs to the client, and relates to protection of the legal advice supplied to them, not the profession of person providing the advice.

6.276 Australian taxation law is complex, and the self-assessment system requires tax payers to have a good understanding of their rights and obligations before they can make an assessment of their tax liability. This justifies why the tax legislation makes allowance for accountants to give legal advice on taxation law and the ATO has provided an administrative concession to tax accountants. The ALRC is also influenced by the fact that, on the basis of this reasoning, tax advice is covered by a privilege under US, UK and New Zealand legislation.

6.277 The ALRC therefore recommends that federal client legal privilege legislation should provide that a person who is required to disclose information under a coercive information-gathering power of the Commissioner of Taxation is not required to disclose a document that is a tax advice document prepared for that person. If the ALRC's recommendation in ALRC 102—that the privilege provisions of the *Evidence Act* be extended to pre-trial proceedings—is adopted, then consideration could be given to the inclusion of a similar provision in that Act.[302]

6.278 The ALRC supports the New Zealand model of creating a separate 'tax advice privilege', rather than simply extending client legal privilege to accountants giving tax advice. This will allow Parliament greater control over the operation and scope of the tax advice privilege. Under the common law, client legal privilege is a dynamic doctrine that has adapted and extended over time. Linking an accountants' advice to client legal privilege could lead to extensions of the protection afforded to the advice provided by tax accountants that are inconsistent with its rationale. The ALRC also considers there should be some additional restrictions placed on the operation of the tax advice privilege, which are discussed below.

6.279 Following the New Zealand model, the dominant purpose test is proposed. This means that communications that are made for the dominant purpose of providing tax advice will be protected. What constitutes the 'dominant purpose' of the advice should be determined in accordance with the definition applied in client legal privilege matters.[303] The ALRC considers that there should be an exception for advice given in

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302 See Ch 3. Regardless of the adoption of that recommendation, the ALRC proposes inclusion of the accountants' privilege in federal privilege legislation, as this legislation would deal with the procedural matters associated with the application of the privilege in federal investigations: see Ch 8.

303 See Ch 3.

furtherance of a crime or fraud, adopting the position in the *Evidence Act*. The tax advice must be confidential. As is the case with client legal privilege, a taxpayer should not be able to claim privilege over advice that he or she has not kept confidential.

6.280 The ALRC supports drawing a distinction between source and advice documents, as is presently the case under the current ATO accountants' concession. This is consistent with the principles of client legal privilege, under which privilege does not generally attach to evidence of transactions such as contracts or conveyances, even where these are provided to a lawyer for advice or for use in litigation.[304] The ALRC agrees with the submission of the ATO, that the legislation should clarify that source documents, will not be protected in any circumstances, even where they are given to a tax agent for the purpose of obtaining advice.

6.281 The ALRC is also supportive of the provision in the New Zealand legislation which does not apply the privilege to contextual information provided for the purpose of providing tax advice. It should be very clear in the operation of this privilege that only the advice itself will be protected, and not any other information that may form part of the accountant's file or briefing. The legislation should state that no privilege should apply to 'tax contextual information' given for the purpose of providing tax advice. 'Tax contextual information' should be defined as information about:

- a fact or assumption that has occurred or is postulated by the person creating the tax advice document;
- a description of a step involved in the performance of a transaction that has occurred or is postulated by the person creating the tax advice document; or
- advice that does not concern the operation and effect of tax laws.

6.282 In line with submissions received, the ALRC has amended its original proposal to allow that an independent professional accounting adviser must be a registered 'tax agent' or a nominee or employee of a registered tax agent, who is a qualified tax accountant.

6.283 The ALRC notes the concerns expressed by ITSA, that privilege could be claimed over an accountant's advice that would assist in the investigation of bankruptcy offences. It further notes the concerns of the ACC regarding the difference between regulatory matters and the types of very serious crime it investigates. As outlined above, the ALRC is recommending the creation of a privilege for tax advice on the basis that it is consistent with the compliance rationale for client legal privilege

304 *Baker v Campbell* (1983) 153 CLR 52, 86; R Desiatnik, *Legal Professional Privilege in Australia* (2nd ed, 2005), 29.

and can be justified given the complexity of taxation law. The ALRC is, however, keen not to replicate the much broader protection offered by client legal privilege and does not wish to create barriers to the investigation of offences outside the areas of general compliance with taxation laws. The ALRC notes that the US, United Kingdom and New Zealand models apply the privilege to the information-gathering powers of the Internal Revenue Service (US) and the Inland Revenue Departments (UK and NZ) respectively. The ALRC similarly recommends that the tax advice privilege should be available only against the information gathering powers of the Commissioner of Taxation. This should serve as an appropriate limitation on the operation of the privilege and will not affect the investigatory powers of other agencies.

6.284 The ALRC notes that this could create issues in cross-agency investigations, where information gathered by one agency cannot be shared with another. In Chapter 5, where this issue is discussed, the ALRC expresses the view that while harmonisation of privilege rules is desirable, there are difficulties in prescribing a 'one-size fits all' rule to be applied inflexibly to all federal bodies—regardless of their particular exigencies or indeed the exigencies of particular inquiries or investigations.

6.285 The ALRC has noted the ATO's support for the adoption of part the US model which excludes communications regarding participation in potential tax avoidance schemes from being protected. In the ALRC's view, this kind of advice already should be covered by the general fraud or crime exception (which is not a feature of the US model). The ALRC understands that there have been some difficulties with this provision in the US. Given that most tax advice concerns methods by which tax payers can minimise their tax, there has been confusion about the breadth of the exception and its meaning.[305]

6.286 Claims that a document is a 'tax-advice' document for the purpose of the privilege must be made in accordance with the procedure set out in Recommendations 8–3 to 8–15. As noted above, the ALRC has recommended an additional protection that a federal body may request that a lawyer certify that there are reasonable grounds for a claim of client-accountant privilege. Whether advice meets the dominant purpose test is often a matter of some complexity, and should be determined and certified by a lawyer rather than an accountant. This additional protection also removes the difficulty of whether accounting professional bodies have sufficient sanctions to address improper claims, by placing the responsibility for certifying there are reasonable grounds for the making of the claim on a lawyer. The details of this additional requirement are part of the recommendations on a uniform procedure for claiming privilege contained in Chapter 8. Issues regarding the professional accounting bodies are also discussed in Chapter 9.

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305 K Kendall, 'Prospects for a Tax Advisors' Privilege in Australia' (2005) 1(3) *Journal of the Australasian Tax Teachers Association* 46, 55.

6.287 The ALRC has noted the submissions of the ACTU and the CFMEU, but is not persuaded at this time that a case has been made to create a privilege for industrial officers. Whilst they might represent clients and give information on the law, industrial officers are not permitted to give legal advice in the same manner as tax accountants.[306] It is the fact that the same advice can be given by accountants and lawyers on taxation law that the ALRC sees as the crucial factor in the extension of privilege to tax advice. Similarly, the ALRC does not believe that a case has been made out to protect the advice of compliance professionals, especially when a considerable part of that advice could involve non-legal considerations.

6.288 The ALRC also has noted the submission of IPRIA regarding the application of client legal privilege to patent attorneys. In the absence of any case law to the contrary, the ALRC considers it may be assumed, based on the wording of the *Patents Act*, that the full entitlements of client legal privilege apply to patent attorneys. As it does not concern the information-gathering powers of a federal regulatory body, it would be outside the Terms of Reference of this Inquiry for the ALRC to comment on the availability of the privilege to patent attorneys registered outside Australia.

Recommendation 6–6 Federal client legal privilege legislation should provide that a person who is required to disclose information under a coercive information-gathering power of the Commissioner of Taxation is not required to disclose a document that is a tax advice document prepared for that person.

A 'tax advice document' should be defined as a confidential document created by an independent professional accounting adviser for the dominant purpose of providing that person with advice about the operation and effect of tax laws.

A 'tax advice document' does not include 'source documents', such as documents which record transactions or arrangements entered into by a person (for example, formal books of account or ledgers). Source documents, even where given to a tax agent for the purpose of obtaining tax advice, will not be protected by the privilege.

An independent professional accounting adviser must be a registered 'tax agent' for the purpose of s 251A of the *Income Tax Assessment Act 1936* (Cth) or a nominee or employee of a registered tax agent, who is a qualified tax accountant.

No privilege should apply to 'tax contextual information' given for the purpose of providing tax advice. 'Tax contextual information' is information about:

306 It should also be noted that many industrial officers are, in fact, legally trained.

(a) a fact or assumption that has occurred or is postulated by the person creating the tax advice document;

(b) a description of a step involved in the performance of a transaction that has occurred or is postulated by the person creating the tax advice document;

(c) advice that does not concern the operation and effect of tax laws.

No privilege should apply where a tax advice document is created in relation to the commission of a fraud or offence or the commission of an act that renders a person liable to a civil penalty; or where the person or the accounting adviser knew or ought reasonably to have known that the document was prepared in furtherance of a deliberate abuse of power.

Claims that a document is a tax advice document must be made in accordance with the procedures set out in Recommendations 8–3 to 8–5. Resolution of claims should be in accordance with the procedures set out in Recommendations 8–6, 8–7, 8–11 and 8–14.

Claims that a document is a tax advice document may be required to be certified by a lawyer in accordance with the procedures set out in Recommendation 8–3.

7. Safeguards

Contents

Introduction

7.1 The Terms of Reference ask the ALRC to consider whether it would be desirable to introduce or clarify statutory safeguards where client legal privilege is modified or abrogated, with a view to harmonising any such safeguards across the Commonwealth statute book.

7.2 This chapter considers existing safeguards; those that might be put in place if client legal privilege were abrogated or modified; and whether harmonisation of safeguards is necessary or desirable. In particular, the chapter raises issues about whether restrictions should be placed on the use of privileged communications obtained by compulsion, and whether the privilege should remain available against third parties.

Representation of a client in an investigation

7.3 A person's ability to seek and receive legal advice in responding to the coercive powers of a federal body is a significant safeguard in ensuring informed compliance with the requirements imposed by those powers. Legal advice may prevent a person from incurring penalties as a result of non-compliance. Moreover, where a person is the target of a federal investigation, representation in that process can help to ensure that his or her interests are properly protected and that informed decisions are made about how to proceed.[1]

7.4 Representing a client in an investigation may involve giving advice about how to respond to a notice requiring the production of documents or information; or representing a client at a compulsory examination. For example, a person's lawyer may be present during an examination under the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act), and is entitled to address the inspector and examine his or her client on matters in respect of which the client has been examined by an inspector.[2] For the purpose of representing a client in an investigation, a lawyer might also take notes of the client's instructions or prepare a chronology of events.

7.5 Where privilege is abrogated by express words or necessary implication, there is some uncertainty about whether the abrogation covers communications that relate to the representation of the client in an investigation or advice given concerning the investigation itself—as distinct from privileged communications that relate to the actual matter under investigation.

7.6 Ashley Black has stated that, as a matter of practice, the Australian Securities and Investments Commission (ASIC) does not typically seek to exercise its investigatory powers under the ASIC Act to obtain access to documents relating to the representation of a client in an investigation.[3]

7.7 However, the ALRC understands that there have been occasions when federal bodies have sought access to such documents. Professor Warren Pengilley notes that:

> A conference participant said publicly that the ACCC had issued [a notice under s 155 of the *Trade Practices Act 1974* (Cth)]. This was complied with only to be met by a second s 155 notice requesting production of the advice the client was given in replying to the first s 155 notice.[4]

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1 In Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89 (2000), [5.9]–[5.10], the ALRC noted the importance of legal representation to the client and to the legal system, for example in increasing the likelihood of matters being settled by consent and reducing the time and costs of litigation.

2 *Australian Securities and Investments Commission Act 2001* (Cth) s 23. See also *Australian Crime Commission Act 2002* (Cth) s 25A(2), which provides for legal representation at an examination.

3 A Black, 'Representation of Clients in Investigations by the Australian Securities & Investments Commission' (2005) (June–August) *Commercial Law Quarterly* 16, 19.

4 W Pengilley, 'Daniels: Legal Professional Privilege Against the ACCC Unanimously Upheld in the High Court' (2002) 18(7) *Trade Practices Bulletin* 93, 98.

7.8 If one accepts the argument that a federal body should be allowed access to privileged material in order to achieve greater efficiency in investigations, then it has been suggested that this argument is at its:

- *strongest* when it concerns access to advice given while events under investigation were occurring; and

- *weakest* when it concerns access to confidential communications or material tending to disclose confidential communications made or prepared for the purpose of representing a party in the investigation itself—because this material is not, in any sense, part of the 'matter' under investigation.[5]

7.9 Black has expressed the view that the compulsory disclosure of communications relating to the representation of the client in an ASIC investigation would involve a fundamental threat to a person's right to legal representation in connection with an investigation.[6] Nicholas Korner has also expressed the view that the compulsory disclosure of such communications undermines, and is inconsistent with, the right to legal representation.[7]

7.10 In *Commonwealth of Australia v Frost*, Ellicot J held that a person who was granted leave to appear before a Board of Accident Inquiry pursuant to reg 291(4) of the *Air Navigation Regulations 1947* (Cth) was entitled to claim client legal privilege in relation to documents that were brought into existence for the sole purpose of being used to enable legal advisers to represent that person before the Board. Ellicot J considered that preserving this type of privilege was an incident of the statutory right to legal representation.

> In my opinion, the right to legal representation before the Board, which reg 291(5) expressly confers, carries with it the right to claim legal professional privilege. …
>
> If the person represented could not in strict confidence instruct his solicitor, confer with solicitor and counsel, receive advice and obtain and supply to counsel the proofs of witnesses for the purposes of his representation before the Board the value of the right to representation must be seriously diminished.[8]

7.11 Where privilege is abrogated, there is precedent for a distinction to be drawn between advice relating to the investigation itself and advice relating to the subject

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5 See N Korner, 'The Role of Procedural Fairness in ASC Proceedings—Do the Rules Go Far Enough?' (Paper presented at Corporations Law Workshop, Wollongong, 18–20 November 1994), 118–119.

6 A Black, 'Representation of Clients in Investigations by the Australian Securities & Investments Commission' (2005) (June–August) *Commercial Law Quarterly* 16, 19.

7 N Korner, 'The Role of Procedural Fairness in ASC Proceedings—Do the Rules Go Far Enough?' (Paper presented at Corporations Law Workshop, Wollongong, 18–20 November 1994), 119.

8 *Commonwealth of Australia v Frost* (1982) 41 ALR 626, 632, 633. See also *Three Rivers District Council v Governor and Company of Bank of England* [2005] 1 AC 610, mentioned in Ch 3.

matter of the investigation. In the context of discussing enforcement of cartel laws in Germany, commentators have stated that:

> The concept of legal privilege in Germany is not as broad as under the EU rules. Attorney-client communication at the premises of the undertaking under investigation is only protected by legal privilege if the communication specifically relates to the ongoing investigation (defence correspondence). The [Federal Cartel Office] will have full access to advice that was given before the initiation of proceedings relating to the conduct under investigation.[9]

Submissions and consultations

7.12 In the Issues Paper in this Inquiry, *Client Legal Privilege and Federal Investigatory Bodies* (IP 33), the ALRC asked if client legal privilege were to be abrogated or modified, whether there should be a distinction drawn between privileged communications relating to the representation of a client in the investigation process (to remain protected from disclosure), and privileged communications that relate to the subject matter of the investigation.[10]

7.13 In response to IP 33, some stakeholders expressed opposition to such a distinction being drawn, on the basis that they opposed any modification or abrogation of client legal privilege.[11] The Taxation Institute of Australia submitted that, in general, no such distinction should be drawn, but that it 'should depend upon the particular circumstances'.[12]

7.14 Other stakeholders supported the protection of privileged documents relating to the representation of a client in the investigation,[13] including on the basis that it was important to maintain the integrity of the process.[14] The Law Society of New South Wales (NSW) submitted that:

> Irrespective of the presence or absence of a right to representation, communications relating to advising or representing a client in relation to an investigation should

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9 A Rinne, T Siebert and A Walz, *The European Antitrust Review 2007: A Global Competition Review Special Report—Germany: Cartels* (2007) Global Competition Review <www.globalcompetitionreview.com/ear/germany_cartels.cfm> at 30 August 2007.

10 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007), Question 6–1.

11 Victoria Legal Aid, *Submission LPP 55,* 14 June 2007; Law Council of Australia, *Submission LPP 26,* 4 June 2007; R Desiatnik, *Submission LPP 24,* 1 June 2007.

12 Taxation Institute of Australia, *Submission LPP 54,* 15 June 2007. See also Insolvency and Trustee Service Australia, *Submission LPP 62,* 20 June 2007, which expressed the view that in the context of bankruptcy, 'the circumscribing of the information-gathering powers [under the *Bankrutpcy Act 1966* (Cth)] by reference to the debtor's 'examinable affairs' provides an appropriate balance between the disclosure of information which would allow for a full investigation of a debtor's financial affairs and that which would tend to interfere with the conduct of proceedings unrelated to those affairs'.

13 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007; Australian Competition and Consumer Commission, *Submission LPP 53,* 13 June 2007.

14 D Jackson, J Sheahan and R Kelly, *Consultation LPP 32*, Sydney, 14 June 2007.

> remain privileged, notwithstanding any abrogation or modification of privilege so far as it relates to the original subject matter.[15]

7.15 A number of stakeholders commented on the difficulty—or arbitrariness—of drawing a distinction between advice relating to the investigation itself and advice relating to the subject of the investigation.[16] The Australian Government Solicitor (AGS) submitted that, although the distinction appeared 'generally workable',

> a practical shortcoming with the distinction could arise where the conduct which is the subject of the investigation is on-going, or, at least, where the conduct continues after an investigation into it has commenced. Undue subtlety may come into play in trying to apply the distinction.[17]

7.16 Similarly, the Commonwealth Director of Public Prosecutions (CDPP) expressed concern about how the distinction would accommodate offences that continue after the investigation commences.

> In such cases documents and communications may fall within both categories which raises the possibility that the claim of client legal privilege in those cases may have to be litigated to determine whether the privilege applies or not.[18]

7.17 The Australian Competition and Consumer Commission (ACCC) submitted that it

> would be content with a regime whereby privilege is retained in documents or communications relating to the representation of a client from the time the ACCC makes the client aware of the investigation. The ACCC realises that where it is investigating past conduct, such material is generally not part of the 'matter' under investigation. Insofar as such material may fall within that description (for example, where the conduct is ongoing or for proposed mergers), the ACCC is prepared to accept a practical solution whereby, even in these cases, privilege remains available from the point where the ACCC makes the client aware of the investigation.[19]

7.18 In the Discussion Paper in this Inquiry, *Client Legal Privilege and Federal Investigatory Bodies* (DP 73), the ALRC proposed that federal client legal privilege legislation should provide that, if another federal statute expressly abrogates or modifies client legal privilege, such abrogation or modification does not extend to legal advice that relates to the investigation itself, or to the representation of the client in the investigation, provided that, or to the extent that, the investigation concerns offences

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15 Law Society of New South Wales, *Submission LPP 40,* 1 June 2007.

16 Commonwealth Director of Public Prosecutions, *Submission LPP 61,* 12 June 2007; Australian Government Solicitor, *Submission LPP 50,* 13 June 2007; Law Council of Australia, *Submission LPP 26,* 4 June 2007.

17 Australian Government Solicitor, *Submission LPP 50,* 13 June 2007.

18 Commonwealth Director of Public Prosecutions, *Submission LPP 61,* 12 June 2007.

19 Australian Competition and Consumer Commission, *Submission LPP 53,* 13 June 2007.

alleged to have been committed prior to the commencement of the investigation.[20] The proposal was formulated in this way to address the concerns expressed by stakeholders about how the distinction would accommodate offences that continued after the investigation commenced.

7.19 Some stakeholders expressed support for the proposal.[21] However, a number of stakeholders expressed only qualified support for the proposal, insofar as they submitted that the proposal should not be expressed to be limited to offences committed prior to the commencement of the investigation.[22] The Law Council of Australia (Law Council), the Law Society of NSW and National Legal Aid all submitted that Proposal 7–1 should exclude the words '*provided that or to the extent that, the investigation concerns offences alleged to have been committed prior to the commencement of the investigation*'.[23]

7.20 Each of these stakeholders expressed the view that clients should be equally entitled to claim client legal privilege where an investigation concerns offences alleged to have been committed after an investigation into it has commenced. For example, National Legal Aid submitted that:

> This is essential because otherwise people may be dissuaded from seeking advice or providing full and frank disclosure in relation to ongoing conduct.[24]

7.21 Australian Financial Markets Association submitted:

> This proposal will provide legal clarity and appropriate protection for clients who are the subject of current investigation. However, [Australian Financial Markets Association] regards it as appropriate that offences committed in the past that remain current at the time an investigation commences should be protected by client legal privilege.[25]

7.22 Westpac Banking Corporation (Westpac) submitted that:

> Even though the alleged offences may be continuing after the commencement of the investigation, it should be possible for [client legal privilege] to be retained for advice

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20 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 7–1.

21 Allens Arthur Robinson, *Submission LPP 107,* 5 November 2007; Commonwealth Director of Public Prosecutions, *Submission LPP 101,* 2 November 2007; Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007; Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007; R Desiatnik, *Consultation*, Sydney, 26 October 2007. The Australian Federal Police submitted that it would not object to the proposal: Australian Federal Police, *Submission LPP 115,* 29 November 2007.

22 National Legal Aid, *Submission LPP 106,* 5 November 2007; Law Council of Australia, *Submission LPP 94,* 1 November 2007; Law Society of New South Wales, *Submission LPP 93,* 31 October 2007; Westpac Banking Corporation, *Submission LPP 85,* 1 November 2007. See also Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007.

23 National Legal Aid, *Submission LPP 106,* 5 November 2007; Law Council of Australia, *Submission LPP 94,* 1 November 2007; Law Society of New South Wales, *Submission LPP 93,* 31 October 2007.

24 National Legal Aid, *Submission LPP 106,* 5 November 2007.

25 Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007.

> in relation to an investigation so long as the advice solely relates to the investigation and is brought into existence for the sole purpose of being used to enable legal advisers to represent their client.[26]

7.23 Westpac also submitted that there needed to be clarification of

> the extent to which client legal privilege would be abrogated or modified where an investigation does not, at least initially, concern 'offences' as such. For example, sometimes investigations are initiated in relation to a set of events or circumstances without any specific allegations of an offence having been committed by the entity being investigated. [Client legal privilege] should equally apply to advice relating to these types of investigations.[27]

7.24 AGS reiterated its view that the distinction between privileged communications relating to the representation of a client in the investigation and privileged communications relating to the subject matter of the investigation appeared to be 'generally workable' but noted that:

> Undue subtlety in trying to apply the distinction could emerge as advice as to the conduct and the investigation itself would be to some degree intermingled as to be very difficult to separate one from the other. … The distinction might be criticised for having a fairly arbitrary effect depending on the point in time at which the investigation commenced.[28]

ALRC's views

7.25 It is important that persons be able freely to seek legal advice concerning their response to federal coercive powers, and, where necessary or appropriate, to seek legal representation in federal investigations.[29] This is a significant aspect of the fairness of an investigation process—increasing the likelihood that persons are properly informed about their obligations, and that their rights are properly protected.

7.26 The ALRC considers that, as a matter of principle, any abrogation or modification of client legal privilege should be limited to abrogation or modification concerning advice on the subject matter of an investigation as opposed to advice on, or representation in, the investigation itself. This principle should be legislatively affirmed.

7.27 Having regard to the views expressed in submissions, the ALRC considers that this important principle ought to apply regardless of whether an investigation concerns offences or conduct allegedly committed prior to, or after, the commencement of an

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26 Westpac Banking Corporation, *Submission LPP 85,* 1 November 2007.
27 Ibid.
28 Australian Government Solicitor, *Submission LPP 113,* 5 November 2007.
29 The ALRC recommends in Ch 8 that federal bodies develop and publish their policies and procedures in relation to notifying persons that they may wish to seek independent legal advice or legal representation in this regard: see Rec 8–22.

investigation. Of course, it will be easier to apply the distinction where an investigation concerns past completed conduct—for example, a one-off contravention of a particular statute alleged to have been committed on a particular day.

7.28 It may be more difficult to apply the distinction where an investigation concerns alleged offences that continue after the commencement of an investigation. For example, a federal investigation concerning alleged illegal fundraising may involve a series of separate but related offences committed before and after the commencement of the investigation. However, perceived difficulties in application are not reason enough to deny the benefit of the safeguard to persons receiving advice on investigations concerning continuing offences or offences allegedly committed following the commencement of an investigation. Provided that the dominant purpose of legal advice is to advise a person in relation to the investigation itself, then that advice ought to be protected, notwithstanding any abrogation of client legal privilege in relation to the subject matter of the investigation.

7.29 The ALRC notes that Westpac suggested the introduction of a sole purpose test in this regard—protecting legal advice relating to an investigation concerning conduct that continues or occurs after the commencement of an investigation provided that the sole purpose of that advice is to advise on the investigation and not on the subject matter of the investigation.[30] However, the ALRC considers that it would be confusing to adopt a sole purpose test in this context, given that the common law on the doctrine of client legal privilege is now settled, having shifted from the sole purpose test to the dominant purpose test.[31]

7.30 Consequently, the ALRC has amended Proposal 7–1 to remove the proviso that the investigation concerns offences committed prior to the commencement of the investigation. In so doing, the ALRC also has addressed the concern expressed by Westpac that the benefit of this safeguard should equally apply to investigations that may not involve alleged offences.

Recommendation 7–1 Federal client legal privilege legislation should provide that, if another federal statute expressly abrogates or modifies client legal privilege, such abrogation or modification does not extend to legal advice that relates to the investigation itself, or to the representation of the client in the investigation.

30 Westpac Banking Corporation, *Submission LPP 85,* 1 November 2007.
31 See Ch 3.

Restrictions on the use of privileged information

7.31 An important issue in relation to client legal privilege is determining the use to which privileged information, obtained by coercion, can be put if privilege were to be abrogated or modified.

7.32 At one end of the spectrum, it is possible for no restrictions to be placed on the use of privileged information obtained by coercion. For example, the *James Hardie (Investigations and Proceedings) Act 2004* (Cth), which abrogates privilege, does not contain any provisions restricting the use of otherwise privileged material.[32] The Act provides that a claim of client legal privilege in relation to 'James Hardie material' does not prevent that material from being admissible in a 'James Hardie proceeding'.[33] The Explanatory Memorandum to the James Hardie (Investigations and Proceedings) Bill 2004 states that:

> Authorised persons, including ASIC and the DPP, will be able to obtain materials that would otherwise be subject to legal professional privilege and use them for the purposes of certain investigations and proceedings.[34]

7.33 The *Evidence Act 1958* (Vic), which abrogates client legal privilege in Royal Commissions established in Victoria, does not expressly restrict the use to which otherwise privileged information produced to a Royal Commission can be put.[35]

7.34 At the other end of the spectrum, there are two broad types of statutory provisions that limit the use of privileged communications obtained through the exercise of coercive powers. The first type is a provision conferring what is known as 'use immunity'. This usually limits the use of the information in any subsequent criminal or civil penalty proceedings against the person who provided the information, except in proceedings in relation to the falsity of the evidence itself.

7.35 The second type of provision is one conferring 'derivative use immunity'. This is wider than use immunity, in that it also renders inadmissible in subsequent proceedings any evidence obtained as a result of the person having disclosed or provided a privileged communication. Therefore, any documents obtained or witnesses identified as a result of the information having been provided are not admissible against the person compelled to answer.[36]

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32 The *James Hardie (Investigations and Proceedings) Act 2004* (Cth) is also discussed in Ch 5.

33 See Ibid s 4(4). 'James Hardie material' and 'James Hardie proceeding' are defined in s 3.

34 Explanatory Memorandum, James Hardie (Investigations and Proceedings) Bill 2004 (Cth), [1.3].

35 *Evidence Act 1958* (Vic) s 19C(D). Restricting use of privileged information in Royal Commissions of inquiry is discussed further below.

36 See P Sofronoff, 'Derivative Use Immunity and the Investigation of Corporate Wrongdoing' (1994) 10 *Queensland University of Technology Law Journal* 122, 122.

7.36 Since few federal statutes expressly abrogate client legal privilege, express use or derivative use immunity provisions in this context are comparatively rare. Such provisions are more commonly found in the context of federal laws that abrogate the privilege against self-incrimination.[37] It may therefore be useful to draw upon experiences relating to the application of the immunities where the privilege against self-incrimination is abolished—and this is done later in this chapter.

7.37 Where client legal privilege is taken to have been impliedly removed, it may mean that no use immunity is expressly conferred.[38] As noted in *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95), this leads to the curious result that statutes expressly removing client legal privilege may contain greater protections than statutes interpreted as impliedly removing the privilege.[39] Hence, persons subject to coercive information-gathering powers may have different levels of protection afforded to them depending on whether privilege is removed expressly or by implication, without any policy rationale for the difference in treatment.[40]

Legislation conferring use immunity

7.38 Examples of use immunity provisions in the context of the abrogation of client legal privilege can be found in the *Proceeds of Crime Act 2002* (Cth), the *Inspector-General of Intelligence and Security Act 1986* (Cth) (IGIS Act), and the ASIC Act. Each of these is addressed below.

Proceeds of Crime Act 2002 (Cth)

7.39 A person is not excused from providing certain property tracking records pursuant to an order made by a magistrate under s 202 of the *Proceeds of Crime Act 2002* on the ground that the records would disclose information that is the subject of client legal privilege.[41] However, in the case of a natural person, the record is not admissible in criminal proceedings against the person, except in respect of specified offences under the *Criminal Code* concerning the production of false or misleading information or documents.[42]

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37 See, eg, *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 96; *Australian Crime Commission Act 2002* (Cth) s 30(4), (5); *Australian Securities and Investments Commission Act 2001* (Cth) s 68; *Retirement Savings Account Act 1997* (Cth) s 117; *Medicare Australia Act 1973* (Cth) s 8S.

38 See, however, discussion below on *Australian Securities and Investments Commission Act 2001* (Cth) s 76(1)(d).

39 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), [19.52].

40 The ALRC has recommended that federal client legal privilege legislation should provide that, in the absence of clear, express words to the contrary, client legal privilege applies to the coercive information-gathering powers of federal bodies, thereby removing abrogation by necessary implication. See Rec 5–2.

41 *Proceeds of Crime Act 2002* (Cth) s 206(1)(c).

42 See Ibid s 206(2).

Inspector-General of Intelligence and Security Act 1986 (Cth)

7.40 A person is not excused from providing documents or information to the Inspector-General of Intelligence and Security (IGIS) on the grounds that to do so would disclose legal advice to a minister, agency or authority of the Commonwealth.[43] However, the information or documents are not admissible in evidence against the person in any court or in any proceedings except in prosecutions for specified offences, including:

- an offence against s 18 of the IGIS Act which requires the giving of information or the production of documents;
- attempting, inciting or conspiring to commit an offence against s 18 of the IGIS Act;
- being an accessory after the fact in relation to an offence against s 18 of the IGIS Act; and
- offences against the *Criminal Code* concerning the production of false or misleading information or documents.[44]

Australian Securities and Investments Commission Act 2001 (Cth)

7.41 The ASIC Act provides that a statement that a person makes at a compulsory examination is inadmissible against the person in a proceeding if:

- the statement discloses matter in respect of which the person could claim client legal privilege; and
- the person objects to the admission of evidence of the statement.[45]

Legislation conferring derivative use immunity

7.42 The *Inspector-General of Taxation Act 2003* (Cth) contains an example of a provision conferring both use and derivative use immunity. Under s 16(1) of that Act a tax official is not excused from giving information, producing a document, or answering a question on the ground that to do so would disclose material that is protected against disclosure by client legal privilege. However, s 16(2) provides that neither:

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43 See *Inspector-General of Intelligence and Security Act 1986* (Cth) s 18(6), which is discussed in Ch 5 as an example of a provision that partially abrogates or modifies client legal privilege.

44 See Ibid s 18(6).

45 See *Australian Securities and Investments Commission Act 2001* (Cth) s 76(1)(d).

- the information or answer given or the document produced; nor

- any information, document or thing obtained as a direct or indirect consequence of giving the information or answer or producing the document;

is admissible against the person in proceedings, other than in proceedings for specified offences, including providing false or misleading information or documents or obstructing a Commonwealth public official.

Types of proceedings to which immunity provisions apply

7.43 Use and derivative use immunity provisions only prohibit the use of privileged evidence obtained from a person by a coercive information-gathering power against that person. They do not prevent a federal investigatory body from using the privileged information against another person or entity in subsequent proceedings, subject to the general rules of evidence.

7.44 Use and derivative use immunity provisions typically apply to subsequent criminal proceedings and any proceedings for the imposition of a penalty, such as civil penalty proceedings. Immunity provisions do not usually apply to civil proceedings that do not seek the imposition of a penalty, so they do not affect civil proceedings initiated by federal investigatory bodies seeking injunctive or declaratory relief, restraining orders or asset-freezing orders.[46]

7.45 The issue of whether immunity provisions apply to banning or disqualification orders has arisen in the context of the abrogation of the privilege against exposure to a penalty. In *Australian Securities Commission v Kippe*, the Federal Court held that the purpose of a proceeding to impose a banning order was to protect the public and not to punish the person in respect of whom the order was sought—and therefore answers in respect of which an examinee had claimed the privilege against exposure to a penalty could be used against the examinee in that proceeding.[47]

7.46 In *Rich v Australian Securities & Investments Commission*, the High Court stated that *Kippe* should be overruled, and held that an order seeking the disqualification of a person from managing a company did impose a penalty, albeit not a pecuniary one. The High Court stated that a proceeding seeking relief may both protect the public and also penalise the person against whom relief is granted.[48]

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46 Compare *Royal Commissions Act 1923* (NSW) s 17(2) and *Evidence Act 1958* (Vic) s 19C(2) where use immunity is conferred on all types of civil proceedings. See also *Royal Commissions Act 1902* (Cth) s 7C.

47 *Australian Securities Commission v Kippe* (1996) 67 FCR 499.

48 *Rich v Australian Securities & Investments Commission* (2004) 220 CLR 129, [30]–[37].

7.47 On 20 August 2007, the Corporations Amendment (Insolvency) Bill 2007—which abrogates the privilege against exposure to a penalty in relation to banning orders and disqualifications—received assent.[49]

7.48 In the Second Reading of that Bill, the then Parliamentary Secretary to the Treasurer, the Hon Christopher Pearce MP, stated that:

> The government will legislate to restore the longstanding position that the privilege against exposure to a penalty does not apply in proceedings where ASIC is seeking disqualification or banning orders and no other penalty.[50]

Use and derivative use immunities considered

7.49 If safeguards restricting the use of privileged communications obtained by coercion were to be introduced in the event of abrogation or modification of client legal privilege, questions arise about the precise form of those safeguards; in particular, if an immunity were to be conferred, which form it should take.[51]

7.50 In the 1990s, a number of arguments were made for and against the conferral of derivative use immunity in the context of the abrogation of the privilege against self-incrimination in relation to investigations conducted by the then Australian Securities Commission (ASC), the predecessor to ASIC. These arguments are addressed below. In IP 33, the ALRC asked whether such arguments are applicable in considering the application of derivative use immunity in the context of any possible abrogation of client legal privilege.[52] As noted below, ASIC expressed the view that the arguments are of direct relevance.[53]

7.51 The *Australian Securities Commission Act 1989* (Cth) (ASC Act), a predecessor to the ASIC Act, originally contained a provision conferring:

- derivative use immunity in respect of oral statements obtained under compulsion or the signing of a record of examination; and

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49 The relevant provision will commence operation on 31 December 2007.

50 Commonwealth, *Parliamentary Debates*, House of Representatives, 31 May 2007, 3 (C Pearce—Parliamentary Secretary to the Treasurer), 4.

51 In Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), Rec 19–3, the ALRC recommended that where legislation abrogated or modified client legal privilege, a default use immunity provision should apply in the absence of any clear express statutory statement to the contrary. In Australian Law Reform Commission, *Integrity: But Not By Trust Alone—AFP & NCA Complaints and Disciplinary Systems*, ALRC 82 (1996), Rec 57, the ALRC recommended that derivative use immunity apply in relation to the abrogation against self-incrimination in investigations of complaints against the Australian Federal Police and the (then) National Crime Authority (NCA).

52 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007), [7.30].

53 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007.

- use immunity in respect of the production of books pursuant to a compulsory power;

where the statement, signing the record or the production of books had the tendency to incriminate the person giving the information or producing the documents or to make him or her liable to a penalty.[54]

Benefits of derivative use immunity in the ASC Act

7.52 Potential benefits of conferring a derivative use immunity in these circumstances included:

- encouraging disclosures, making persons more likely to cooperate during examinations, because they knew they had the protection of the immunity;[55]
- protecting against an investigatory body misusing its powers;[56]
- giving meaningful protection to direct use immunity—because any attempt to admit as evidence in criminal proceedings the indirect consequences of the person giving the information or document would undermine the protection granted in respect of the answer itself;[57] and
- ensuring an appropriate balance between the interests of the state and individual liberties.[58]

Criticisms of derivative use immunity in the ASC Act

7.53 The inclusion of a derivative use provision in the ASC Act was strongly criticised by the then ASC, as well as the CDPP.[59] The ASC and CDPP claimed that the practical effect of the derivative use immunity provision was 'to place insurmountable obstacles in the way of successful prosecutions'.[60]

7.54 In a combined submission to the Joint Statutory Committee on Corporations and Securities (JSCCS), the ASC and CDPP argued for the removal of derivative use immunity, submitting that:

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54 *Australian Securities Commission Act 1989* (Cth) s 68 (since repealed).
55 See J Kluver, *Report on Review of the Derivative Use Immunity Reforms* (1997), [3.52]–[3.53].
56 See Ibid, [3.67].
57 See J Longo, 'The Powers of Investigation of the Australian Securities Commission: Balancing the Interests of Persons and Companies Under Investigation with the Interests of the State' (1992) 10 *Company and Securities Law Journal* 237, 242 (referring to a view of the Law Institute of Victoria).
58 See Ibid, 237, 251.
59 P Sofronoff, 'Derivative Use Immunity and the Investigation of Corporate Wrongdoing' (1994) 10 *Queensland University of Technology Law Journal* 122, 123. See also Parliament of Australia—Joint Statutory Committee on Corporations and Securities, *Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law* (1991).
60 Parliament of Australia—Joint Statutory Committee on Corporations and Securities, *Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law* (1991), [1.12].

> Should any prosecution of a person so compelled arise the prosecutor must prove that the evidence being advanced was not gained directly or indirectly from the answers or documents obtained where the privilege against self-incrimination was claimed by the person being examined.[61]

7.55 The CDPP stated that:

> If there is an examination, every piece of evidence collected after that examination will be subject to debate … that is going to unduly complicate trials, make them prolix, there will be hearings within hearings to determine just when the document was obtained, whether its use was derivative, et cetera.[62]

7.56 The ASC considered that the provision conferring derivative use was an 'absurdity' because:

> [Section 38 of the ASC Act] confers a power and section 68 establishes dire consequences for exercising it … because you then cannot use the material you find as a result of the answer to the question.[63]

7.57 The ASC highlighted the following predicament where oral explanation of a transaction was required because it was not documented:

> In the course of investigating the matter, we asked the simple question of one of the parties: 'Did you in fact come to any agreement concerning your shares with X?' The unfortunate position is that when the answer to that is, 'Yes, I did. We discussed it on two occasions; the nature of the agreement was to this effect', we cannot thereafter use not only the evidence of the person subject to examination but also the evidence of X to whom he refers.[64]

7.58 The view was expressed that the derivative use provision rendered the ASC's investigatory power

> a poisoned chalice—since you get the investigative power and if you use it you kill off your ability to bring a criminal action in some cases.[65]

7.59 Other arguments against derivative use immunity, identified in John Kluver's *Report on Review of the Derivative Use Immunity Reforms*,[66] include that:

- a person might cooperate in an examination simply to achieve a considerable forensic advantage for himself or herself—namely to ensure that any information or document derived from the information provided was thereby

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61 See Ibid, [1.13]–[1.14].
62 See Ibid, [3.5.1].
63 See Ibid, [3.14].
64 See Ibid, [3.4.4].
65 See Ibid, [4.12].
66 J Kluver, *Report on Review of the Derivative Use Immunity Reforms* (1997).

rendered inadmissible in any later criminal or penalty-exposing proceedings against the person;[67] and

- the application of the immunity can have arbitrary or anomalous outcomes. The immunity only protects the examinee, not any other person who might also be incriminated in consequence of the information provided in the examinee's answer. Any document or other thing obtained as a direct or indirect result of the examinee's answer could still be used against another person, subject to evidentiary rules. The order in which persons were examined could therefore fundamentally affect the potential benefit of the derivative use immunity for particular examinees.[68]

The abolition of derivative use immunity in the ASC Act

7.60 The JSCCS recommended that s 68 of the ASC Act and s 597(12) of the (then) *Corporations Law* be amended to remove the derivative use immunity provisions.[69] In so doing it accepted the ASC's evidence that

> the immunity applying to the production of documents and the derivative immunity applying to oral evidence curtail the ASC's investigatory powers to an extent that seriously limits its capacity to discharge the responsibilities placed on it by Parliament.[70]

7.61 Following the recommendations of the JSCCS, the *Corporations Legislation (Evidence) Amendment Act 1992* (Cth) abolished the derivative use immunity previously available under s 597 of the *Corporations Law* and s 68 of the ASC Act. The Explanatory Memorandum to the Corporations Legislation (Evidence) Amendment Bill 1992 stated that derivative use immunity placed an

> excessive burden on the prosecution to prove beyond a reasonable doubt the negative fact that an item of evidence (of which there may be thousands in a complex case) has not been obtained as a result of information subject to the use immunity.[71]

7.62 The amending Act also required that a report be made to the Attorney-General by 1997 about the extent to which, and in what ways, the amending provisions helped the ASC in carrying out investigations and gathering information.[72]

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67 Ibid, [3.54].
68 See Ibid, [3.71]–[3.74].
69 See Parliament of Australia—Joint Statutory Committee on Corporations and Securities, *Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law* (1991), [4.20].
70 Ibid, [4.11].
71 Explanatory Memorandum, Corporations Legislation (Evidence) Amendment Bill 1992 (Cth), 1.
72 See *Corporations Legislation (Evidence) Amendment Act 1992* (Cth) s 10.

7.63 In May 1997, Kluver concluded that the provisions removing derivative use immunity had

> greatly assisted the ASC in its enforcement of the national scheme laws, primarily by increasing the Commission's ability to more fully and expeditiously utilise its power to conduct compulsory oral examinations. …
>
> The amendments have also assisted the ASC in initiating early injunctive or other civil protective proceedings to preserve assets or otherwise limit or reduce the financial harm arising from suspected wrongdoing.[73]

7.64 Kluver also expressed support for the retention of 'direct' use immunity,[74] noting that it provided protection to examinees without significantly impeding the ASC's investigative and enforcement functions.[75]

Application of immunities to document production and oral statements

7.65 Federal provisions that contain use or derivative use immunity provisions—either in the context of the abrogation of client legal privilege or self-incrimination—take differing approaches to the application of that immunity to documents and oral statements.

7.66 For example, the ASIC Act only gives use immunity to persons in relation to the making of an oral statement or the signing of a record, and not to the production of documents.[76] In this regard, the JSCCS recommended that the then ASC Act be amended to remove use immunity with regard to the fact that a person has produced a document, where production might tend to incriminate that person.[77]

7.67 In contrast, the *Medicare Australia Act 1973* (Cth)—in the context of the abrogation of the privilege against self-incrimination—confers use and derivative use immunity in relation to both the production of documents and the giving of information pursuant to Medicare Australia's coercive information-gathering power under the Act.[78]

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73 See J Kluver, *Report on Review of the Derivative Use Immunity Reforms* (1997), 1–2.
74 Ibid, 3.
75 Ibid, [3.89].
76 *Australian Securities and Investments Commission Act 2001* (Cth) s 76(1)(d) concerning use immunity in respect of a privileged statement made at an oral examination is discussed above. See also s 68 in relation to use immunity in respect of statements and signing of records of examination which might tend to incriminate a person or make him or her liable to the imposition of a penalty.
77 Parliament of Australia—Joint Statutory Committee on Corporations and Securities, *Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law* (1991), [4.20].
78 See *Medicare Australia Act 1973* (Cth) s 8S.

7.68 In *Environment Protection Authority v Caltex Refining Co Pty Ltd*, Mason CJ and Toohey J stated:

> It is one thing to protect a person from testifying as to guilt; it is quite another thing to protect a person from the production of documents already in existence which constitute evidence of guilt … [Documents] are in the nature of real evidence which speak for themselves as distinct from testimonial oral evidence which is brought into existence in response to an exercise of investigatory power or in the course of legal proceedings.[79]

7.69 In IP 33, the ALRC expressed interest in hearing views about whether a distinction should be drawn in the application of the immunities to the production of documents and the making of oral statements—in particular, whether arguments supporting such a distinction in the context of the privilege against self-incrimination have any force in the context of client legal privilege. Stakeholders' views on this are set out separately below.

Royal Commissions of inquiry

7.70 As discussed in Chapter 4, Royal Commissions of inquiry normally are established only where a particular area of public concern has been identified. Their purpose is to determine factual circumstances, report on the matters specified in the Letters Patent (terms of reference) and make recommendations.

7.71 The discovery of the truth has been described as a prime function of a Royal Commission.[80] However, while the pursuit of the truth may be a compelling argument for the abrogation of privilege in Royal Commissions, does the argument have any force in considering the issue of whether use or derivative use immunity should apply?

7.72 In this regard, it is important to note that the responsibility for implementing the recommendations of a Royal Commission may fall on other Commonwealth investigatory bodies. The application of a use or derivative use immunity on privileged evidence obtained by compulsion by a Royal Commission might significantly frustrate the ability of other federal bodies to bring proceedings to seek redress in respect of improper or unlawful conduct identified by the Royal Commission.[81]

7.73 The *Royal Commissions Act 1923* (NSW) abrogates client legal privilege but confers a use immunity that applies in any civil or criminal proceedings against the person.[82] In contrast, while the *Evidence Act 1958* (Vic) has a specific provision conferring use immunity in the context of the abrogation of self-incrimination,[83] the

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79 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 493.

80 T Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (2006), Vol 1, [7.66].

81 Views of stakeholders on whether immunities should apply to Royal Commissions of inquiry, if client legal privilege were to be abrogated, are set out below.

82 See *Royal Commissions Act 1923* (NSW) s 17(2).

83 See *Evidence Act 1958* (Vic) s 19C(2).

statute is silent on the question of immunity in the context of the abrogation of client legal privilege.[84]

7.74 In *X v Australian Prudential Regulation Authority*,[85] the High Court decided that the use by the Australian Prudential Regulation Authority (APRA) of the evidence of X and Y[86] before the HIH Royal Commission did not contravene s 6M of the *Royal Commissions Act 1902* (Cth).[87]

7.75 Following the HIH Royal Commission, APRA issued notices to X and Y under the *Insurance Act 1973* (Cth), requiring them to show cause why they should not be disqualified from holding positions in Australia as senior managers or agents of a foreign general insurer. The 'show cause' notices were based on APRA's preliminary view that X and Y were not 'fit and proper' persons for those roles. APRA formed its preliminary view having regard to X and Y's involvement in the HIH transactions and their evidence given to the HIH Royal Commission. The High Court stated:

> The evidence that X and Y gave at the Royal Commission may provide some, or even all, of the material which APRA may consider, and upon which it may rely, in giving effect to the regulatory provisions of the *Insurance Act*. Any disadvantage suffered by X or Y, as a consequence of the proper application of those regulatory provisions, would not be 'for or on account of' his attendance at the Royal Commission or the evidence he gave.[88]

7.76 It has been suggested that the High Court's decision is of significance for clarifying the proper interpretation of s 6M of the *Royal Commissions Act 1902* (Cth) and the use of evidence obtained during Royal Commissions by regulatory authorities in genuine discharge of their statutory functions.[89]

Submissions and consultations

Application of immunities

7.77 In IP 33, the ALRC asked if client legal privilege were to be abrogated or modified, whether any safeguards should be put in place—in particular, whether use or derivative use immunity should be conferred.[90]

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84 See Ibid s 19D.

85 *X v Australian Prudential Regulation Authority* (2007) 232 ALR 421.

86 X and Y were two senior managers of an international reinsurance business based in Germany.

87 *Royal Commissions Act 1902* (Cth) s 6M provides that a person who uses, causes or inflicts any violence, punishment, damage, loss or disadvantage to any person for or on account of the person having appeared as a witness before a Royal Commission; or any evidence given by him or her before any Royal Commission, is guilty of an indictable offence.

88 *X v Australian Prudential Regulation Authority* (2007) 232 ALR 421, [59].

89 Sparke Helmore Lawyers, *High Court Challenge to Regulator's Use of Royal Commission Evidence Unsuccessful* (2007) <www.sparke.com.au/sparke/news/publications.jsp> at 10 April 2007.

90 See Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007), Question 7–2.

7.78 In response to IP 33, submissions and consultations were divided on the issue of immunities. Some stakeholders that opposed abrogation of client legal privilege also expressed opposition to safeguards in the form of either of the immunities.[91] For example, the NSW Bar Association submitted that:

> An abrogation of the privilege before a range of federal investigative agencies coupled with a use immunity would effectively amount to a destruction of the privilege itself. …
>
> The fact that the privileged communication could still be used in other proceedings and by other parties, once it was publicly disclosed, or that the very same federal investigative agency could still use it as a basis to generate further or other evidence from which a charge could be made against the client, means the client would be most reluctant to engage in the full sharing of information characteristic of the lawyer-client relationship.
>
> A related problem is that, once the client's communication is disclosed, it may be able to be used against the client in proceedings where the client is a witness and not a party and thus unable to assert any use immunity. …
>
> Further, it has not been established that the addition of a derivative use immunity can overcome the above problems with a mere use immunity or that it is broadly acceptable.[92]

7.79 On the other hand, the Law Council submitted that if there were to be abrogation of client legal privilege, safeguards had to be put in place and either use or derivative use immunity should apply.[93] Similarly, National Legal Aid submitted that it would support the introduction of 'appropriate safeguards' in the event client legal privilege was abrogated or modified, and that such safeguards had to be considered on a case by case basis.[94]

7.80 ASIC suggested the adoption of a safeguard other than an immunity. It submitted that:

> Instead we suggest a balanced approach to the use of otherwise privileged material may be achieved by applying legal privilege as a qualified privilege in court proceedings.[95]

7.81 ASIC explained its support of such an approach in the following way:

> ASIC's use in enforcement actions of materials otherwise covered by client legal privilege should be limited to court proceedings, and should be subject to the

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91 See, eg, New South Wales Bar Association, *Submission LPP 41,* 5 June 2007; R Desiatnik, *Submission LPP 24,* 1 June 2007; New South Wales Public Defenders Office, *Consultation LPP 31*, Sydney, 12 June 2007.

92 New South Wales Bar Association, *Submission LPP 41,* 5 June 2007. The NSW Bar Association also emphasised the 'related but distinct' rationales for client legal privilege and the privilege against self-incrimination, submitting that client legal privilege should be more closely protected than the privilege against self-incrimination.

93 Law Council of Australia, *Submission LPP 26,* 4 June 2007.

94 National Legal Aid, *Submission LPP 52,* 13 June 2007.

95 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007.

> discretion of a judge. That is, if ASIC wishes to rely on the material as evidence in a civil or criminal proceeding, it will be admissible only if a judge exercises a discretion based on the evidential value of the material and the detriment that may be suffered by a claimant.[96]

7.82 Set out below is a summary of the views of stakeholders on the application of each of the immunities.

Use immunity

7.83 In response to IP 33, some stakeholders expressed a preference for the conferral of use immunity in the event that client legal privilege is abrogated—on the basis that it represented a more practical limitation than derivative use immunity. For example, the CDPP submitted that:

> While this office is of the view that use immunity would be a more practical limitation than derivative use immunity … , this office must also point out that there are obvious disadvantages to the prosecution if use immunity applies in that the prosecution is unable to use the communication that was previously privileged in evidence. The impact that this would have on prosecutions would depend on the individual facts of the case.[97]

7.84 The ACCC submitted that:

> If legal professional privilege was to be abrogated in relation to s 155 notices [issued under the *Trade Practices Act 1974* (Cth)] the ACCC would not consider the implementation of a use immunity provision to be inappropriate, provided such a provision was clearly restricted in application to the use of the information in subsequent criminal proceedings.[98]

7.85 In contrast, ASIC submitted:

> Given that access to legally privileged material may be critical to undertaking some enforcement actions, ASIC believes that, should there be an abrogation/modification of legal privilege, a use immunity should not be applied in that context.[99]

7.86 In IP 33, the ALRC said that it was interested in hearing whether the conferral of use immunity (in respect of those statutes that have abrogated or modified client

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96 Ibid. Victoria Legal Aid also expressed support for judicial discretion to admit or exclude privileged information to operate as a safeguard if client legal privilege were to be abrogated or modified: Victoria Legal Aid, *Submission LPP 55,* 14 June 2007.

97 Commonwealth Director of Public Prosecutions, *Submission LPP 61,* 12 June 2007. See also I Turnbull, *Submission LPP 18,* 3 June 2007.

98 Australian Competition and Consumer Commission, *Submission LPP 53,* 13 June 2007.

99 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007.

legal privilege), has stymied the conduct of investigations conducted under those statutes.[100] In this regard, the IGIS submitted that:

> Section 18(6) of the IGIS Act provides for use immunity and I can say confidently that this has not been an inhibition to effective investigation in my experience.
>
> Arguably, use immunity provides additional incentive for a person to cooperate …
>
> In my view, it is intuitively fair that use immunity be available if the normal right concerning self-incrimination is not available.[101]

Derivative use immunity

7.87 In response to IP 33, submissions and consultations were divided between those who supported the conferral of derivative use immunity—either in specific contexts[102] or more generally,[103] including as a default protection[104]—and those who opposed derivative use immunity.[105]

7.88 The Law Society of NSW submitted that:

> Consistent with a view that the privilege ought not be abrogated or limited (save, perhaps, in certain very narrow and well defined circumstances involving a clearly paramount public interest) derivative use immunity ought to apply as a default protection.[106]

7.89 NSW Young Lawyers expressed the view that:

> If client legal privilege was abrogated or modified, anything less than applying derivative use immunity would fail to protect the person's fundamental common law right to claim client legal privilege.[107]

7.90 Victoria Legal Aid agreed with the benefits identified in IP 33 for conferring derivative use immunity—including that it encouraged disclosures, protected against investigatory bodies misusing their powers, and ensured an appropriate balance between the interests of the state and individuals.[108]

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100 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007), [7.28].

101 Inspector-General of Intelligence and Security, *Submission LPP 22,* 1 June 2007.

102 Australian Pesticides and Veterinary Medicines Authority, *Submission LPP 45,* 6 June 2007; Australian Transport Safety Bureau, *Submission LPP 34,* 28 May 2007.

103 Victoria Legal Aid, *Submission LPP 55,* 14 June 2007; NSW Young Lawyers, *Submission LPP 49,* 12 June 2007; Law Society of New South Wales, *Submission LPP 40,* 1 June 2007.

104 Law Society of New South Wales, *Submission LPP 40,* 1 June 2007.

105 See, eg, Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007; Commonwealth Director of Public Prosecutions, *Submission LPP 61,* 12 June 2007; Australian Competition and Consumer Commission, *Submission LPP 53,* 13 June 2007; I Turnbull, *Submission LPP 18,* 3 June 2007; B McKillop, M Kumar and F Beaupert, *Consultation LPP 16*, Sydney, 21 May 2007.

106 Law Society of New South Wales, *Submission LPP 40,* 1 June 2007.

107 NSW Young Lawyers, *Submission LPP 49,* 12 June 2007.

108 Victoria Legal Aid, *Submission LPP 55,* 14 June 2007.

7.91 The Australian Transport Safety Bureau submitted that:

> A derivative use immunity provision is appropriate in the context of the [*Transport Safety Investigation Act 2003* (Cth) (TSI Act)] where the exercise of the powers is not meant to apportion blame or assist with determining liability, but is for the purpose of improving transport safety in the future. [109]

7.92 In contrast, a number of federal bodies—as well as other stakeholders—expressed opposition to derivative use immunity. For example, the IGIS submitted that:

> Derivative use immunity is not provided for in the IGIS Act and I see no reason to contemplate its introduction into the Act.[110]

7.93 The ACCC submitted that it

> would be strongly opposed to a derivative use immunity provision, which would prevent it from using any evidence obtained as a result of the provision or disclosure of a privileged communication in subsequent legal proceedings. Such a provision would clearly affect the ACCC's ability to use privileged information obtained in its investigation where it would otherwise assist in proving a contravention of the [*Trade Practices Act*].[111]

7.94 ASIC submitted that:

> If derivative use immunity applies, an investigatory body may restrict its ability to undertake enforcement action by compelling the production of otherwise privileged information at an early stage of an investigation. This is because, in doing so, a body exposes itself to the risk of a challenge in relation to material subsequently gathered on the basis that that material was obtained as a result of derivative use of the privileged material. Such a challenge may not ultimately succeed, but the risk of it being made and consequent delays to an investigation would make a prudent regulator cautious about accessing such material. …
>
> The submissions, findings and recommendations that were made in the 1990s that derivative use immunity should not apply in the context of the abrogation of the privilege against self-incrimination pursuant to s 68 of the ASC Law are directly relevant to any consideration of abrogating client legal privilege in combination with a derivative use immunity. That relevance is not based on the principles underlying the two privileges being the same, but on the practical difficulties that would be created by the application of a derivative use immunity.[112]

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109 Australian Transport Safety Bureau, *Submission LPP 34,* 28 May 2007.

110 Inspector-General of Intelligence and Security, *Submission LPP 22,* 1 June 2007.

111 Australian Competition and Consumer Commission, *Submission LPP 53,* 13 June 2007.

112 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007. Another stakeholder agreed with the proposition that derivative use immunity placed 'insurmountable obstacles to prosecution': I Turnbull, *Submission LPP 18,* 3 June 2007.

7.95 The AGS noted that derivative use immunity 'by depriving a document of any evidentiary value' would in many cases 'so derogate from the effect of abrogation of the privilege as to render the abrogation as of little or no value'.[113]

7.96 The ALRC's views on the application of the immunities are set out below.

Scope of immunities

Application of immunities to corporations and individuals

7.97 In IP 33, the ALRC asked whether, if use or derivative use immunity were to be introduced as a safeguard in the event of client legal privilege being abrogated or modified, a distinction should be drawn between the application of the immunities to corporations and individuals.[114]

7.98 IP 33 noted that there are some differences in the consequences of protecting individuals and corporations from having privileged information obtained by coercion used against them in criminal proceedings. These differences flow from the fact that many of the sentences that can be imposed on natural persons following a criminal conviction cannot be imposed on corporations.

7.99 Submissions and consultations strongly supported the application of the immunities to both individuals and corporations, in the event that the immunities were introduced as a safeguard.[115] Stakeholders expressed the view that a distinction between individuals and corporations should not be made mainly on the basis that the rationales for the privilege—in particular the compliance rationale—applied equally to corporations as it did to individuals.

7.100 For example, ASIC submitted that:

> Given that the principal rationale that underlies client legal privilege is equally applicable to natural persons and corporations, there is no basis, as a matter of principle, for corporations to have a lesser entitlement to immunities than natural persons.[116]

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113 Australian Government Solicitor, *Submission LPP 50,* 13 June 2007. A similar view was expressed by the CDPP: Commonwealth Director of Public Prosecutions, *Submission LPP 61,* 12 June 2007. Academics from the University of Sydney Law School also noted that derivative use immunity could 'shut off useful evidence': B McKillop, M Kumar and F Beaupert, *Consultation LPP 16*, Sydney, 21 May 2007.

114 See Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007), Question 7–3(a), [7.45]–[7.49]. In Ch 3, the ALRC addresses the related issue of whether client legal privilege should apply only to natural persons and not corporations.

115 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007; Victoria Legal Aid, *Submission LPP 55,* 14 June 2007; Taxation Institute of Australia, *Submission LPP 54,* 15 June 2007; NSW Young Lawyers, *Submission LPP 49,* 12 June 2007; Australian Institute of Company Directors, *Submission LPP 43,* 8 June 2007; Law Council of Australia, *Submission LPP 26,* 4 June 2007.

116 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007. NSW Young Lawyers expressed a similar view: NSW Young Lawyers, *Submission LPP 49,* 12 June 2007.

7.101 Victoria Legal Aid expressed support for conferring immunity on both corporations and individuals, noting that:

> whilst the liberty of the corporation itself is not at stake, the liberty of individual corporate officers may be.[117]

7.102 The Law Society of NSW expressed the view that:

> The arguments in favour of differential application of the privilege and consequential safeguards as between corporations and individuals do not seem particularly strong. Contrast the position regarding privilege against self-incrimination.[118]

Application of immunities to document production and oral statements

7.103 In IP 33, the ALRC asked, if use or derivative use immunity were to be introduced as a safeguard in the event of client legal privilege being abrogated or modified, whether a distinction should be drawn between the application of the immunities to the production of documents and the making of oral statements.[119]

7.104 The majority of submissions and consultations that addressed this issue expressed the view that no such distinction should be made.[120] For example, the Law Council submitted that such a distinction 'may result in less advice being committed to written form, particularly on sensitive matters'.[121] The Law Society of NSW expressed the view that:

> It seems contrary to principle, and to common sense, for the privilege and any consequential protections to apply only to statements and not to documents.[122]

Harmonisation of approach

7.105 In IP 33, the ALRC raised the question whether it is legitimate to have one type of immunity apply across the range of federal statutes if privilege were to be abrogated or modified, or whether different investigatory contexts justify the application of different types of immunity.[123] In particular, IP 33 asked if distinctions should be drawn:

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117 Victoria Legal Aid, *Submission LPP 55,* 14 June 2007.

118 Law Society of New South Wales, *Submission LPP 40,* 1 June 2007.

119 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007), Question 7–3(b).

120 See, eg, Victoria Legal Aid, *Submission LPP 55,* 14 June 2007; Taxation Institute of Australia, *Submission LPP 54,* 15 June 2007; Law Society of New South Wales, *Submission LPP 40,* 1 June 2007; Law Council of Australia, *Submission LPP 26,* 4 June 2007; Regulatory lawyers of Clayton Utz, *Consultation LPP 13*, Sydney, 15 May 2007.

121 Law Council of Australia, *Submission LPP 26,* 4 June 2007. Victoria Legal Aid expressed a similar view: Victoria Legal Aid, *Submission LPP 55,* 14 June 2007.

122 Law Society of New South Wales, *Submission LPP 40,* 1 June 2007.

123 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007), [7.56].

- among federal bodies, depending upon the functions that they perform?
- between federal agencies exercising coercive powers and Royal Commissions of inquiry?
- between federal investigations conducted in public, and those conducted in private?[124]

Different approaches based on function?

7.106 In response to IP 33, submissions and consultations were divided, with some supporting the application of immunities across the range of federal bodies—irrespective of the functions performed by those bodies[125]—and some suggesting instead that the issue of safeguards should be considered on a case by case basis.[126]

7.107 The Law Society of NSW expressed the view that it would be 'worthwhile if the need to develop a functional taxonomy of investigative agencies can be avoided'.[127] Similarly, NSW Young Lawyers submitted that:

> The immunities should apply in the same manner regardless of the functions of the Commonwealth bodies. … There is no guarantee that a document produced or statement provided to a Commonwealth body exercising a compliance function will not be used by a Commonwealth body exercising an enforcement function. If these safeguards were not in place, the person would not be encouraged to cooperate with the Commonwealth body for fear of future action being taken against them.[128]

7.108 However, National Legal Aid submitted that:

> Any modification/abrogation of the privilege should be on a case by case basis taking into account the functions of the agency and the subject matter. The question of safeguards should be dealt with accordingly.[129]

Royal Commissions

7.109 There was a divergence of opinion concerning the application of the immunities to Royal Commissions, if client legal privilege were to be abrogated in that context. For example, the Law Council submitted that if privilege were to be abrogated or

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124 Ibid, Question 7–3(c)–(e).

125 See, eg, Victoria Legal Aid, *Submission LPP 55,* 14 June 2007; NSW Young Lawyers, *Submission LPP 49,* 12 June 2007; Law Society of New South Wales, *Submission LPP 40,* 1 June 2007.

126 National Legal Aid, *Submission LPP 52,* 13 June 2007. See also Law Council of Australia, *Submission LPP 26,* 4 June 2007.

127 Law Society of New South Wales, *Submission LPP 40,* 1 June 2007.

128 NSW Young Lawyers, *Submission LPP 49,* 12 June 2007.

129 National Legal Aid, *Submission LPP 52,* 13 June 2007.

modified specifically for Royal Commissions, use or derivative use immunity should apply.[130] The Law Society of NSW expressed the view that:

> wider rather than narrower immunities should apply in the case of Royal Commissions as opposed to Commonwealth agencies exercising coercive powers, the James Hardie example notwithstanding.[131]

7.110 Other stakeholders maintained that if privilege were to be abrogated or modified in the context of a Royal Commission, then there should be no restrictions on the use to which otherwise privileged information obtained by the Royal Commission could be put, and cautioned against the use of immunity provisions in such a context.[132]

7.111 One stakeholder submitted that:

> Where the privilege does not apply to the investigation leading to, and the conduct of a commission of public importance, the privilege [should] also be lost in relation to any related proceedings, in the way that the *James Hardie Act* has done. It would make the work of commissions of public importance appear somewhat futile if their findings could not be successfully acted upon because material available to them was not then admissible in subsequent court proceedings.[133]

7.112 Similarly, ASIC submitted that it

> envisages that, in some cases, its investigations would be helped by any legally privileged information which a Royal or other Special Commission may be able to obtain if client legal privilege were abrogated in relation to those Commissions. Accordingly, ASIC believes that caution should be exercised in considering the application of any immunities to information obtained by Royal Commissions or other Special Commissions of Inquiry.[134]

Default safeguard: judicial discretion to admit evidence

7.113 In DP 73, the ALRC did not propose either a use immunity provision or a derivative use immunity provision as a default safeguard in the event that client legal privilege was abrogated and a federal statute was silent about the use to which otherwise privileged information could be put.[135]

7.114 Rather, the ALRC proposed that federal client legal privilege legislation should provide that in the absence of any clear, express statutory statement to the contrary,

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130 Law Council of Australia, *Submission LPP 26,* 4 June 2007.
131 Law Society of New South Wales, *Submission LPP 40,* 1 June 2007.
132 I Temby, *Submission LPP 72,* 19 July 2007; Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007; Hon T Cole, *Consultation LPP 9*, Sydney, 1 March 2007.
133 I Temby, *Submission LPP 72,* 19 July 2007.
134 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007.
135 See Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), [7.12].

where federal legislation abrogates the application of client legal privilege to the exercise of a federal coercive information-gathering power:

(a) a federal body that seeks to rely on otherwise privileged information as evidence in any court proceedings must apply to the court for permission to do so;

(b) the court will have a general discretion to allow use of the information as evidence, balancing the public interest in allowing the information to be used against a consideration of whether the use of that information would be unfairly prejudicial to a party; and

(c) a federal body is precluded from using otherwise privileged information against the holder of the client legal privilege in any administrative penalty proceedings.[136]

7.115 This proposal was supported by some stakeholders.[137] Allens Arthur Robinson supported the proposal but noted that:

> There may be significant grounds for dispute as to where the proper balance between public interest and unfair prejudice (referred to in 7–2(b)) may lay. Accordingly, we suggest it might be helpful for further indicia to be outlined in relation to these matters.[138]

7.116 Some stakeholders expressed concern about the uncertainty of outcome associated with adopting a judicial discretion to admit privileged information.[139] Stakeholders also expressed concern about the proposed factors that the court would be required to balance.[140] The CDPP, while expressing support for a mechanism that allowed for the use of otherwise privileged information in court proceedings against the subject of the proceedings, submitted that it had concerns about the proposed model:

> It is … difficult to see room for a judicial discretion, in principle, with respect to client legal privilege. …. A judicial discretion could only be apt where Parliament

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136 Ibid, Proposal 7–2.

137 Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007; Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007; Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007. The AFP submitted that it would not object to this proposal: Australian Federal Police, *Submission LPP 115,* 29 November 2007. NSW Young Lawyers supported that part of the proposal requiring the federal body to apply to court for permission to rely on otherwise privileged information as evidence. However, it did not support the use of otherwise privileged information as evidence in any court proceedings except in criminal proceedings in respect of the falsity of the evidence itself: NSW Young Lawyers, *Submission LPP 116,* 1 November 2007.

138 Allens Arthur Robinson, *Submission LPP 107,* 5 November 2007.

139 National Legal Aid, *Submission LPP 106,* 5 November 2007; Commonwealth Director of Public Prosecutions, *Submission LPP 101,* 2 November 2007; Law Council of Australia, *Submission LPP 94,* 1 November 2007; New South Wales Bar Association, *Consultation LPP 50*, Sydney, 4 December 2007.

140 Australian Government Solicitor, *Submission LPP 113,* 5 November 2007; Commonwealth Director of Public Prosecutions, *Submission LPP 101,* 2 November 2007; Law Council of Australia, *Submission LPP 94,* 1 November 2007.

> decides that, with respect to a particular statutory scheme, the public interest *may* be better served by abrogation than by maintaining client legal privilege *depending on matters that are better able to be assessed by a court than by Parliament*. Such matters, in our view, are limited to: the importance of each privileged communication to the court proceedings that the coercive powers under the relevant legislative scheme relate to. This is a different test to the one proposed. …
>
> Judicial consideration of unfair prejudice normally relates to evidence whose reliability or cogency is in question, and, generally speaking, evidence is considered to be unfairly prejudicial when it can be taken to be more detrimental to a party's case than it actually is. There is already a general discretion to exclude such evidence whether it is privileged or not. There does not appear to be any basis for specific judicial consideration of unfair prejudice with respect to client legal privilege material. A more relevant test would consider the probative value of the evidence.[141]

7.117 AGS submitted:

> Unlike other situations in which a public interest test is applied by the court, for example, in a decision to uphold a claim of public interest immunity or to exclude evidence alleged to be illegally obtained—where the court evaluates the claim against factors extraneous to the proceedings … the situation here requires the court to exercise the discretion only based upon factors that bear upon the proceedings themselves.
>
> … the notion of what would be unfairly prejudicial can only draw its colour from the connection of the information to the matters in issue in the proceedings. If this is the case, the public interest test will inevitably reflect a judgment of the evidential worth of the information.[142]

7.118 The Law Council submitted:

> The assessment of the 'public interest in allowing the information to be used' is likely to be problematic. Courts are imperfectly equipped to deal with matters involving an assessment of the public interest where no guidance is provided in legislation as to what factors the court is to take account. …
>
> Likewise, it is unclear what is meant by the 'unfairly prejudicial' in this context. …
>
> If the safeguard in Proposal 7–2 is to be effective, then it should be reformulated in terms which have recognisable meaning, and which pay proper regard to the importance of protecting privileged communications. A suitable mechanism might be a presumption against use, which could be displaced where the otherwise privileged evidence reveals matters constituting serious misconduct, or conduct which has a serious adverse impact on the rights of others, and which is not likely to be proved by any other means.[143]

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141 Commonwealth Director of Public Prosecutions, *Submission LPP 101,* 2 November 2007. More generally, the CDPP expressed concern that the proposed safeguard should not hamper Parliament's ability to legislate for the abrogation of client legal privilege without any limitation on the use of that material.

142 Australian Government Solicitor, *Submission LPP 113,* 5 November 2007.

143 Law Council of Australia, *Submission LPP 94,* 1 November 2007.

7.119 The Law Council also submitted that derivative use immunity should apply as a default safeguard.[144] It stressed the importance of having such a provision in place where privilege is abrogated by the exercise of covert powers—such as covert 'B-party' warrants created under the *Telecommunications (Interception) Amendment Act 2006* (Cth).[145] The Law Council noted the recommendations made by the Senate Legal and Constitutional Legislation Committee in relation to the provisions of the Telecommunications (Interception) Amendment Bill 2006 (Cth) that agencies should be prevented from using material uncovered when exercising a B-party warrant, where the material revealed bona fide communications, inter alia, between a lawyer and client, and that

> the Bill be amended to introduce defined limits on the use and derivative use of material collected by B-party warrants.[146]

Notification of application of safeguards

7.120 In DP 73, the ALRC proposed that federal client legal privilege legislation should provide that where client legal privilege has been abrogated in respect of any federal coercive information-gathering power, federal bodies should be required to notify persons the subject of such powers, as well as those who produce information on a voluntary basis, about whether any safeguards apply to the use of otherwise privileged information in subsequent proceedings.[147]

7.121 This proposal was generally supported.[148] AGS submitted that:

> A body exercising coercive powers should give information to persons against whom the powers are being exercised explaining the powers' source, and the obligations to which the powers' exercise gives rise. …
>
> We see it as beneficial, in identifying the source of the coercive power in question to refer also to those provisions of the source legislation that qualify the exercise of the powers including those that create safeguards.[149]

7.122 APRA submitted that it agreed with the proposal but considered that

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144 Civil Liberties Australia also expressed the view that any abrogation of privilege in relation to a criminal investigation should be accompanied by a derivative use immunity provision: Civil Liberties Australia (ACT) Inc, *Submission LPP 86,* 1 November 2007.

145 B-party warrants 'enable agencies to obtain an interception warrant for communications of an associate of a person of interest': Parliament of Australia—Senate Legal and Constitutional Legislation Committee, *Provisions of the Telecommunications (Interception) Amendment Bill* (2006), 5.

146 See Ibid recs 22, 23; Law Council of Australia, *Submission LPP 94,* 1 November 2007.

147 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 7–3.

148 NSW Young Lawyers, *Submission LPP 116,* 1 November 2007; Allens Arthur Robinson, *Submission LPP 107,* 5 November 2007; National Legal Aid, *Submission LPP 106,* 5 November 2007 Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007; Law Council of Australia, *Submission LPP 94,* 1 November 2007; Law Society of New South Wales, *Submission LPP 93,* 31 October 2007; Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007 Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007.

149 Australian Government Solicitor, *Submission LPP 113,* 5 November 2007.

> failure to comply with this obligation should not invalidate an otherwise proper exercise of the power or use of the material so produced.[150]

7.123 The Hon John Hannaford, formerly NSW Attorney General, and now an examiner with the Australian Crime Commission (ACC), submitted that:

> Proposal 7–3 should apply where there has been a modification of [client legal privilege] not just where client legal privilege has been abrogated. However, the codification of such a proposal will only generate a further level of statutory challenge. Where an organisation such as the ACC is subject to oversight by a Parliamentary Committee, it should be left to such a Committee to satisfy itself that the principles that underpin such a recommendation of the ALRC are satisfactorily implemented.[151]

Public versus private investigations

7.124 The general theme that emerged from submissions in response to IP 33 was that no distinction should be drawn between the application of the immunities to federal investigations conducted in public and those conducted in private, but that additional safeguards should be introduced to protect privileged information given in a public investigation.[152]

7.125 For example, the Law Society of NSW expressed the view that:

> It might be thought that any proposal that lesser protections should apply to proceedings conducted in public view could have a counter-productive effect, leading to the possibility of perceived 'show trials' were evidence obtained by Royal Commissions over otherwise valid objections later used to secure convictions.[153]

7.126 NSW Young Lawyers submitted that:

> For investigations conducted in public, there is usually strong media presence that gives rise to an expectation to deal with illegal or unlawful conduct that is uncovered during an investigation. There is a significant risk that the media will influence the conduct of the proceedings.
>
> The public interest is not affected by whether the investigation is conducted in private or public. Ultimately, the applicability of the immunities should not be varied to align with the current public interest issue that the media is focusing on.[154]

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150 Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007.
151 J Hannaford, *Submission LPP 114,* 19 November 2007.
152 See Victoria Legal Aid, *Submission LPP 55,* 14 June 2007; NSW Young Lawyers, *Submission LPP 49,* 12 June 2007; Law Society of New South Wales, *Submission LPP 40,* 1 June 2007; Law Council of Australia, *Submission LPP 26,* 4 June 2007.
153 Law Society of New South Wales, *Submission LPP 40,* 1 June 2007.
154 NSW Young Lawyers, *Submission LPP 49,* 12 June 2007.

7.127 Victoria Legal Aid submitted that:

> We support conferring the immunity in all investigations. However, as an additional safeguard, we suggest that in public hearings [information subject to a claim for client legal privilege] should be provided in camera.[155]

7.128 ASIC agreed that:

> Any detriment a claimant of privilege may suffer due to an abrogation or modification of client legal privilege may be reduced if the disclosure of the privileged information is restricted. Such a requirement may be imposed for both Royal Commissions and court proceedings.[156]

7.129 In DP 73, the ALRC proposed that where federal client legal privilege is abrogated or modified in a federal investigation that takes place in a public setting—such as a Royal Commission—evidence that may disclose communications subject to client legal privilege should be presented in-camera or may be subject to a non-publication order.[157]

7.130 This proposal was generally supported.[158] Members of the South Australian Bar Association noted, in particular, the importance of providing for a non-publication order and expressed the view that the substance of the ALRC's proposal should be provided for in legislation.[159] Concern was expressed that in-camera hearings should not be made mandatory, nor become the norm in practice.[160]

ALRC's views

7.131 The ALRC considers that if client legal privilege is abrogated or modified in respect of any federal investigation, the ordinary presumption should be that safeguards ought to be implemented—in one form or another—to protect the use to which otherwise privileged information can be put. A consideration of specific factors (addressed below) may operate to displace that presumption.

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155 Victoria Legal Aid, *Submission LPP 55,* 14 June 2007. The Law Council expressed a similar view: Law Council of Australia, *Submission LPP 26,* 4 June 2007.

156 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007.

157 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 7–4.

158 NSW Young Lawyers, *Submission LPP 116,* 1 November 2007; Allens Arthur Robinson, *Submission LPP 107,* 5 November 2007; National Legal Aid, *Submission LPP 106,* 5 November 2007; Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007; Law Council of Australia, *Submission LPP 94,* 1 November 2007; Law Society of New South Wales, *Submission LPP 93,* 31 October 2007; Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007; Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007. The AFP submitted that it would not object to the proposal: Australian Federal Police, *Submission LPP 115,* 29 November 2007.

159 Members of the South Australian Bar Association, *Consultation LPP 38*, Adelaide, 17 October 2007.

160 Advisory Committee members, *Third Advisory Committee meeting*, 15 November 2007.

Harmonisation

7.132 The ALRC is of the view that attempting to prescribe a 'one-size fits all' approach to safeguards—regardless of the functions or exigencies of the particular federal investigatory body, or indeed the exigencies of particular inquiries or investigations—is fraught with difficulties. This is consistent with the view expressed by the ALRC in Chapter 5 concerning the difficulties in establishing a uniform approach to the application of client legal privilege.

7.133 As discussed previously in this Report, federal bodies with coercive information-gathering powers operate in vastly different areas and there are important differences in their aims, functions, operations and powers.[161] Significantly, while some bodies have enforcement functions, others do not, and of those bodies possessing enforcement functions there are noteworthy differences in their policies and practices concerning resort to enforcement activity.

7.134 Consequently, if privilege is or were to be abrogated, the safeguards that may be appropriate and practical in the context of some federal investigations—for example those conducted by an oversight body, such as the IGIS—may not be appropriate in the context of other investigations, such as those conducted by a Royal Commission of inquiry.

7.135 The divergence of stakeholders' views on the application of the immunities is also testimony to the difficulties of attempting to adopt a uniform approach to safeguards. For example, the ACCC supported use immunity in certain proceedings, while ASIC did not.

7.136 The recommended adoption of a default safeguard provision in the event that client legal privilege is abrogated (discussed below) may, however, introduce an appropriate degree of uniformity, without impeding flexibility of approach where warranted.

Relevant factors to be considered

7.137 As discussed in Chapter 6, the ALRC envisages that any abrogation of client legal privilege will occur only in a few exceptional circumstances—not as a matter of course. Therefore, the issue of what safeguards, if any, should apply in a particular federal investigation where privilege is abrogated should similarly arise only in exceptional circumstances. If circumstances are found to warrant the abrogation of the privilege, consideration will have to be given to whether it is appropriate for the application of any particular safeguard to render nugatory the effect of abrogation.

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161 The different investigatory contexts of federal bodies are set out in Ch 4 and discussed more generally in Ch 5.

7.138 The factors relevant to a consideration of whether, and which, safeguards should be applied in the event of an abrogation or modification of the privilege overlap, to some degree, with the factors relevant to considering whether the public interest in a particular case warrants the abrogation or modification of the privilege.[162] These factors, which are not exhaustive, include:

- the federal body's role and functions;
- the nature and gravity of the matters under consideration, including whether the investigation concerns an issue of major public importance that has a significant impact on the community in general or on a section of the community; and
- the likelihood and degree to which the privileged information will benefit any action, including enforcement action, to be taken as a result of the investigation, particularly where legal advice is central to the issues being considered.[163]

Enactment of a default provision

7.139 In order to give effect to the presumption that, where client legal privilege is abrogated or modified, safeguards should apply to protect the use to which otherwise privileged information can be put, the ALRC is of the view that federal client legal privilege legislation should contain a default safeguard provision—the form of which is addressed below.

7.140 The ALRC envisages that the default provision will operate in the same way as the default provision proposed in Chapter 5 (preserving the application of client legal privilege to the coercive powers of federal investigatory bodies), in that it can be displaced only by express words conveying a contrary approach. The ability to displace the default provision ensures that an appropriate degree of flexibility is retained with respect to the application of safeguards—recognising the exigencies of different investigatory contexts.

7.141 The default provision will only apply where past or future federal legislation that abrogates or modifies privilege is silent on the issue of use of otherwise privileged information.[164] It is not intended to displace existing provisions conferring use or derivative use immunity—such as those in the IGIS Act, the *Proceeds of Crime Act 2002* and the *Inspector-General of Taxation Act 2003*—in respect of which no particular criticisms have been levelled in the context of this Inquiry.

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162 See discussion in Ch 6.

163 The Law Council suggested that there were other relevant factors in this regard: Law Council of Australia, *Submission LPP 94,* 1 November 2007.

164 One Advisory Committee member commented that it is possible that legislation abrogating privilege is silent on the use of otherwise privileged information because Parliament's intention is to allow for the use of otherwise privileged information. In such circumstances, in the absence of an express amendment authorising unrestricted use, the default provision would apply.

7.142 Similarly, the existence of a default provision is not intended to deter Parliament, in the event that client legal privilege is abrogated in particular instances in the future, from deciding to impose a use immunity or derivative use immunity provision in respect of otherwise privileged information or making a decision not to impose any restrictions on use having regard to the particular circumstances under consideration. However, the ALRC would expect, as a general principle, that the circumstances in which privilege would be abrogated with no accompanying restrictions on use would be exceptional, especially where privileged information is obtained covertly.[165]

Choosing between use immunity and derivative use immunity as a default provision

7.143 As a general proposition, the ALRC considers that the default safeguard should be one that is 'low to mid range' on the spectrum of safeguards. Therefore, the ALRC does not support the adoption of derivative use immunity (which is broader in application than use immunity) as a default provision—despite the fact that the ALRC considers that the application of a derivative use immunity may be appropriate in the context of investigations conducted by some federal bodies, such as the Inspector-General of Taxation.

7.144 The ALRC is mindful of the criticisms made of derivative use immunity by the then ASC, the CDPP and the JSCCS in the context of its application to the privilege against self-incrimination in ASC investigations. The ALRC tends to agree that derivative use immunity can operate as a 'poisoned chalice',[166] present genuine practical obstacles to enforcement action, and render virtually worthless the effect of abrogation of privilege.

7.145 Consequently, the ALRC supports use immunity as a more appropriate default safeguard than derivative use immunity. ALRC 95 recommended that, where legislation abrogated or modified client legal privilege, a default use immunity provision should apply in the absence of any clear express statutory statement to the contrary.[167]

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165 As noted in Ch 5, an alternative option for reform—identified in the final stages of the Inquiry—would be to have the default provision incorporated as a rule of interpretation of Commonwealth Acts and delegated legislation, in the absence of express provision to the contrary. However, the ALRC did not have the opportunity to consult on this option and thus feels unable to make a recommendation in this regard.

166 Parliament of Australia—Joint Statutory Committee on Corporations and Securities, *Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law* (1991), [4.12], referred to above.

167 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), Rec 19–3.

Choosing between use immunity and judicial discretion to admit evidence as a default provision

7.146 The ALRC has some reservations about the arbitrary nature in which a use immunity provision might operate where client legal privilege—as opposed to the privilege against self-incrimination—is abrogated. As noted above, a use immunity provision typically limits use of privileged information in any subsequent criminal or civil penalty proceedings against the person who provided the information, except in proceedings in relation to the falsity of the evidence itself. In the context of the privilege against self-incrimination, by definition, people can only 'self-incriminate' themselves—so there is a rationally consistent basis for limiting the use of the information against the person who provided it.

7.147 Similarly, where a person who is the holder of client legal privilege in a communication produces that communication in response to a federal investigatory coercive power, there is a rational basis for adopting the position that the privileged information cannot be used against that person. However, in responding to the coercive powers of federal investigatory bodies, a person other than the holder of the privilege may produce a document containing a communication subject to client legal privilege. As noted previously in this Report, information may be compelled not only from persons suspected of wrongdoing, but also from persons or entities who happen to have information or documents that may be relevant to an investigation into the conduct of others.[168] In such cases, it appears meaningless to confer a safeguard on the person who produced the information.

7.148 Therefore, the ALRC is of the view that if a use immunity provision were to be adopted as a default provision, careful attention would need to be given to its drafting, to make it clear that the information the subject of the claim could not be used against the *holder* of the privilege. In DP 73, the ALRC expressed interest in hearing views about whether the statutes that currently confer use immunity in the context of the abrogation of client legal privilege need to be clarified in this respect.[169] No views were offered on this issue.

7.149 The ALRC has some reservations about proposing a default use immunity provision in the context of an abrogation of client legal privilege in Royal Commissions of inquiry. The ALRC notes the concerns expressed by some stakeholders that the work of Royal Commissions could be rendered futile if their recommendations could not be acted upon because of an inability to use otherwise privileged information. Of course, whether the work of any particular Royal Commission would be compromised would depend upon the extent to which use of information the subject of client legal privilege was central to the ability to mount action to implement that Royal Commission's recommendations. Presumably, if the

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168 See discussion on third parties in Ch 8.

169 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), [7.126].

Australian Parliament considers that abrogation of privilege in a particular Royal Commission of inquiry is warranted, having regard to the fact that legal advice itself is central to the issues being considered, then it is likely to be equally important for other federal bodies to be able to use that legal advice in any subsequent action.

7.150 The ALRC is of the view that a feasible and preferable alternative to conferring absolute use immunity in criminal and civil proceedings, as a default safeguard provision, is to allow a judicial discretion to limit the use as evidence in criminal or civil proceedings of otherwise privileged information obtained pursuant to the exercise of a federal coercive information-gathering power that abrogates privilege. This approach would require a federal body to apply to a court if it wishes to rely on otherwise privileged information as evidence in any court proceedings. This would equally apply to federal bodies wishing to use, as evidence, privileged information that they had obtained pursuant to their coercive powers, as well as federal bodies, wishing to use, as evidence, privileged information provided to a Royal Commission of inquiry.

7.151 In DP 73, the ALRC expressed the view that the court should have a general discretion to admit the use of otherwise privileged information, balancing the public interest in allowing the information to be used against a consideration of whether the particular use of that information would be unfairly prejudicial to a party.[170] In adopting that approach, the ALRC noted that it had received some support in submissions, and was consistent with that recently recommended by the New Zealand Law Commission.[171]

7.152 However, having regard to the views expressed in submissions and consultations in response to DP 73, the ALRC has reformulated its proposed judicial discretion safeguard. The ALRC now considers that there should be a presumption against use of the evidence, which is able to be displaced in the court's discretion, having regard to the following factors:

- the public interest in limiting the effects of the abrogation of an important common law right;
- whether the otherwise privileged information was obtained pursuant to the exercise of a covert investigatory power; and
- the probative value of the otherwise privileged evidence, including whether it reveals matters tending to constitute serious misconduct or conduct which has a

170 See Ibid, [7.129].

171 Ibid; New Zealand Law Commission, *Search and Surveillance Powers*, Report 97 (2007), rec 12.19 states that 'the court should have the discretion to give directions that are necessary to limit the use made of any privileged information that is obtained as a result of the exercise of an enforcement power'.

serious adverse impact on the community in general or on a section of the community.

7.153 With respect to the Law Council's submission, that a relevant factor should be whether the otherwise privileged information is not likely to be proved by any other means, the ALRC considers that it would be extremely difficult for a federal body to establish this negative fact affirmatively in court proceedings.

7.154 The ALRC considers that the above judicial discretion is an appropriate safeguard to be applied in the event that client legal privilege is abrogated or modified in a particular Royal Commission.[172]

7.155 As the judicial discretion to admit evidence is limited to civil and criminal proceedings, it needs to be supplemented by a default residual use immunity provision barring the use of otherwise privileged information in administrative penalty proceedings.

7.156 Importantly, the discretionary safeguard that is recommended differs from the qualified privilege approach discussed in Chapter 6, and rejected by the ALRC as an option for reform. A qualified privilege acknowledges that it may be in the interests of justice to protect the confidentiality of a particular relationship in the context of a matter. In a case where client legal privilege is expressly abrogated by statute, the Australian Parliament already has made the decision that, in the context of the application of a particular federal investigatory power, the public interest in obtaining privileged information outweighs any harm that might be done to the relationship between a lawyer and a client. Protecting the relationship between a lawyer and client is therefore not the premise on which the judicial discretionary safeguard is founded.

7.157 The benefit of adopting use immunity as a safeguard is that it promotes certainty of approach—pursuant to the ALRC's model, the privileged information will not be able to be used against the privilege holder in subsequent proceedings. The provision can make it clear that the proceedings include criminal, civil and administrative penalty proceedings. The restriction against the use of the information is inflexible, however, not catering for the particular circumstances of any case.

7.158 In contrast, adopting a judicial discretion to admit privileged information in civil and criminal proceedings has the disadvantage of being uncertain in outcome, but the advantage of flexibility—acknowledging that in particular cases where the Australian Parliament has decided in the public interest to abrogate client legal privilege, there also may be a public interest to allow use of that information as evidence in criminal or civil proceedings.

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172 See Ch 6 and Rec 6–2.

7.159 Therefore, while ALRC 95 recommended a general default use immunity provision to apply to criminal, civil and administrative penalty proceedings—in the context of a broader inquiry on federal civil and administrative penalties—in the context of this focused inquiry on client legal privilege, the ALRC has identified a judicial discretion to admit privileged information in court proceedings as a preferable alternative to conferring use immunity in civil and criminal proceedings, as a default safeguard. The ALRC recommends that adoption of the judicial discretion be supplemented by a more limited use immunity provision—aimed to prevent the use of otherwise privileged information in administrative penalty proceedings—the latter being consistent with the approach in ALRC 95.

7.160 In the event that use immunity or derivative use immunity is applied as a safeguard in any particular case, the ALRC sets out below its views on the scope of those immunities.

Application of immunities to corporations and individuals

7.161 The ALRC agrees with the strong views expressed by stakeholders that if use or derivative use immunity were to be conferred in the event that client legal privilege were abrogated or modified, then no distinction should be made in the application of the immunities to corporations and individuals.

7.162 This is consistent with the ALRC's views (expressed in Chapter 3) that client legal privilege should be available to both individuals and corporations. Given that the rationales for the privilege are equally applicable to individuals and corporations, it is philosophically coherent to refrain from drawing a distinction in the application of the immunities on the basis of whether the privilege belongs to a natural person. While the privilege against self-incrimination applies only to individuals and not corporations, the rationale for the privilege against self-incrimination is distinct from the rationale for client legal privilege.

Application of immunities to document production and oral statements

7.163 The ALRC considers that if use or derivative use immunity were to be conferred in the event that client legal privilege is abrogated or modified, then no distinction should be made in the application of the immunities to the production of documents and the making of oral statements containing communications subject to client legal privilege.

7.164 The ALRC is persuaded by the views of a majority of stakeholders on this issue. As noted in Chapter 6, it has been suggested that one of the effects of abrogating client legal privilege might be to chill legal communications or to render it less likely that lawyers will provide written, as opposed to oral, advice. The ALRC considers that the application of use or derivative use immunity to the production of documents containing communications subject to client legal privilege would go some way

towards negating the concern that the abrogation of client legal privilege will provide a strong disincentive for lawyers to record their legal advice.

Notification of application of safeguards

7.165 In Chapter 8, the ALRC expresses the view that federal bodies should be required to notify persons the subject of coercive information-gathering powers, as well as those who provide information on a voluntary basis, whether or not client legal privilege applies to the exercise of a particular power or to the production of information on a voluntary basis.[173] This does not entail a federal body giving advice about whether or not privilege applies to any particular communication or document but only whether client legal privilege is available as an excuse for not producing documents or information in complying with any given information-gathering power.

7.166 Consistent with that approach, when client legal privilege has been abrogated or modified, it is important for persons to know about whether and what safeguards apply to the use of their otherwise privileged information in any subsequent proceedings. Federal bodies should be required to notify persons whether legislation permits the unrestricted use of otherwise privileged information in subsequent proceedings or whether any of the following safeguards apply to an abrogation of client legal privilege: a judicial discretion to admit otherwise privileged information in court proceedings, or a use or derivative use immunity.

7.167 The precise manner of notification should not be prescribed in legislation. The ALRC considers that it is best to retain some flexibility in this regard.[174]

Public versus private investigations

7.168 The ALRC agrees with the views expressed by stakeholders that additional safeguards need to be put in place to protect the dissemination of privileged information disclosed in a federal investigation that takes place in a public setting—especially in light of the fact that public investigations—such as high profile Royal Commissions—can generate a great deal of publicity. The ALRC notes, in this regard, that a Royal Commission has power to direct that evidence be taken in private in certain situations.[175]

7.169 Taking into account the views expressed on Proposal 7–4, and the fact that the ALRC has made a recommendation that the *Royal Commissions Act 1902* be amended to allow privilege to be abrogated in particular Royal Commissions if specified criteria are met,[176] the ALRC considers that the *Royal Commissions Act* should contain a commensurate amendment that a relevant factor to be considered by a Royal Commissioner in making an order that evidence be disclosed in camera or be subject to

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173 See discussion in Ch 8 on 'Notification of application of privilege' and Rec 8–1.
174 The ALRC's views on manner of notification are set out more fully in Ch 8.
175 See *Royal Commissions Act 1902* (Cth) s 6D(2), (3).
176 See Rec 6–2.

a non-publication order is that the evidence may or will disclose communications subject to client legal privilege.

Recommendation 7–2 Federal client legal privilege legislation should provide that, in the absence of any express statutory statement concerning the use to which otherwise privileged information can be put (for example, provisions conferring use immunity or derivative use immunity or authorising unrestricted use of otherwise privileged information), where federal legislation abrogates the application of client legal privilege to the exercise of a federal coercive information-gathering power the following default provision should apply:

(a) a federal body that seeks to rely on otherwise privileged information as evidence in any court proceedings must apply to the court for permission to do so;

(b) there should be a presumption against use of the evidence which is able to be displaced in the court's discretion, having regard to the following factors:

  (i) the public interest in limiting the effects of the abrogation of an important common law right;

  (ii) whether the otherwise privileged information was obtained pursuant to the exercise of a covert investigatory power; and

  (iii) the probative value of the otherwise privileged evidence, including whether it reveals matters tending to constitute serious misconduct or conduct which has a serious adverse impact on the community in general or on a section of the community; and

(c) a federal body is precluded from using otherwise privileged information against the holder of client legal privilege in any administrative penalty proceedings.

Recommendation 7–3 Federal client legal privilege legislation should provide that where client legal privilege has been abrogated or modified in respect of any federal coercive information-gathering power, federal bodies should be required to notify persons the subject of such powers, as well as those who produce information on a voluntary basis, about whether any safeguards apply to the use of otherwise privileged information in subsequent proceedings.

Recommendation 7–4 If Recommendation 6–2 is adopted, the *Royal Commissions Act 1902* (Cth) should be amended to provide that a relevant factor to be considered by a Royal Commissioner in making an order that evidence be disclosed in camera or be subject to a non-publication order is that the evidence may or will disclose communications subject to client legal privilege.

Availability of privilege against third parties

7.170 If privilege were to be abrogated or modified, should privilege remain available against third parties, despite not being available against a federal investigatory body? Should the fact that a statutory provision abrogates the privilege in response to the coercive information-gathering power of a federal body mean that the communications can become available to other parties wishing to have access to them? There is authority for the proposition that the production of communications under compulsion does not, of itself, constitute a waiver of client legal privilege.[177]

7.171 Some Commonwealth statutes abrogating or modifying client legal privilege contain provisions limiting the extent of the abrogation or modification. For example:

- The *Law Enforcement Integrity Commissioner Act 2006* (Cth) provides that the fact that a person is not excused from answering a question or producing a document on the ground that it would disclose certain types of legal advice or communications protected by client legal privilege, does not otherwise affect a claim of privilege that anyone may make in relation to that answer or document.[178]

- The *Inspector-General of Taxation Act 2003* (Cth) provides that information or documents do not cease to be the subject of client legal privilege merely because they are given or produced in response to a statutory request or requirement.[179]

- The *James Hardie (Investigations and Proceedings) Act* 2004 (Cth), which abrogates client legal privilege in relation to 'James Hardie material', provides that the Act does not otherwise abrogate or affect the law relating to client legal privilege.[180] It also provides that, if apart from the Act, material would have been privileged for the purposes of s 42(1) of the *Freedom of Information Act 1982* (Cth), s 33(2) of the *Archives Act 1983* (Cth), or s 197(2) of the *Proceeds*

177 See *Australian Competition & Consumer Commission v George Weston Foods Ltd* (2003) 129 FCR 298; *Woollahra Municipal Council v Westpac Banking Corporation* (1992) 33 NSWLR 529.
178 *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 96(6).
179 *Inspector-General of Taxation Act 2003* (Cth) s 18.
180 See, eg, *James Hardie (Investigations and Proceedings) Act 2004* (Cth) s 6. 'James Hardie material' is defined in s 3.

of Crime Act 2002 (Cth), then for the purposes of those subsections material is still taken to be privileged from production in legal proceedings.[181]

7.172 The *Royal Commissions Act 1902* (Cth) provides that a Royal Commission record or material referred to in a Royal Commission record does not cease to be the subject of a claim for client legal privilege merely because a person or body has custody of the record, or is given access to the records under regulations or a direction under the *Archives Act 1983* (Cth).

7.173 The *Inspector-General of Taxation Act 2003* prohibits the Inspector-General from including in his or her reports to the minister and in annual reports information produced that is the subject of client legal privilege or is derived from information or a document that is the subject of privilege.[182]

7.174 Federal investigatory bodies may be subject to statutory duties of confidentiality or secrecy.[183] However, there are several ways in which a federal investigatory body in possession of material obtained under compulsion may be called upon to produce or release that information. A federal investigatory body may:

- be issued with a subpoena to produce documents;[184]
- receive a statutory request for release of information;[185]
- be requested to release information pursuant to the *Freedom of Information Act 1982* (Cth);
- be required to disclose communications in order to discharge the prosecution's duty of disclosing material which the prosecution intends to use to prove its case or affects the credibility or reliability of any witness, as well as the duty of disclosing unused material;[186] or

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181 Ibid s 5.

182 *Inspector-General of Taxation Act 2003* (Cth) s 27.

183 See, eg, *Australian Securities and Investments Commission Act 2001* (Cth) s 127; *Australian Prudential Regulation Authority Act 1998* (Cth) s 56.

184 For example, an accused person may issue a subpoena to the federal investigatory body that conducted the investigation which led to charges being laid against him or her.

185 See, eg, *Australian Securities and Investments Commission Act 2001* (Cth) s 25, which allows ASIC to release a transcript of a compulsory examination together with a copy of any related book to a person's lawyer if the lawyer satisfies ASIC that the person is carrying on or is contemplating in good faith a proceeding to which the examination related. ASIC may impose conditions on the release of the information. See also Ibid s 127, which authorises ASIC to release information of its own volition or where it has been requested to do so.

186 The prosecution's duty of disclosure is considered further below.

- be a party to a Memorandum of Understanding (MOU) with other Commonwealth or state bodies, which provides for the exchange of information—although an MOU does not provide a legal basis for the disclosure of information. Its operation is dependent upon the use or disclosure being authorised by law or statute.[187]

7.175 The Administrative Review Council (ARC), in a draft report on the coercive information-gathering powers of federal bodies, recommended that 'issues of privilege and immunity need to be taken into consideration when releasing information to another agency.'[188]

7.176 In relation to the prosecution's duty of disclosure, referred to above, the CDPP's *Statement on Prosecution Disclosure* provides that the prosecution should disclose to the defence all unused material in its possession, unless it is considered that client legal privilege should be claimed in respect of the material.[189] However, it is not clear whether the exception applies only to material in respect of which the investigatory body—as opposed to a third party—could claim privilege.

7.177 In *R v McLaughlin*, Judge David of the District Court of South Australia made the following comments concerning the use of a transcript of interview produced on compulsion to ASIC, in respect of which receivers maintained a claim for client legal privilege:

> In my view the relevant sections of the ASIC Act make it clear that legal professional privilege is abrogated to the extent of the relevant documents being handed over to ASIC for the purposes of further investigation. I find that there is clear implication that privilege is further abrogated to allow the material to be handed over to the … [CDPP]. … I find there is a further clear implication that the [CDPP] would be allowed to have the material inspected by the defence in any action pursuant to procedures of disclosure in criminal trials.[190]

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187 See, eg, Australian Prudential Regulation Authority and Australian Taxation Office, *Memorandum of Understanding Between the Australian Prudential Regulation Authority and the Australian Taxation Office*, 16 April 1999, [4.2], which provides that: 'The agencies agree that, subject to legislative provisions, information available to one agency which is relevant to the responsibilities of the other agency will be shared as requested. … This will be subject to … any conditions which the provider of the information might place upon the use or disclosure of the information, such as claims of legal professional privilege'.

188 Administrative Review Council, *Government Agency Coercive Information-Gathering Powers [Draft Report]* (2007), Principle 21.

189 See Commonwealth Director of Public Prosecutions, *Statement on Prosecution Disclosure* <www.cdpp.gov.au/Prosecutions/Disclosure/> at 10 April 2007, [4.2].

190 *R v McLaughlin* [2004] SADC 86, [20]. Judge David held that the transcript could be viewed by the defendant and his counsel 'for the purpose of the forthcoming trial but the abrogation of legal professional privilege is confined to that purpose and will go no further': Ibid, [21].

Practices of federal bodies

7.178 In IP 33, the ALRC expressed interest in hearing about the practices and policies of federal investigatory bodies in relation to maintaining privilege against third parties.[191]

7.179 The federal investigatory bodies that provided information to the ALRC in this regard included those in respect of which client legal privilege has been expressly abrogated.[192] They also included ASIC, which has taken the view that certain of its powers abrogate client legal privilege.[193]

7.180 David Vos, the current Inspector-General of Taxation noted:

> The [*Inspector-General of Taxation Act 2003* (Cth)] provides the Tax Office and taxpayers with the basis to maintain privilege against third parties … This is despite the fact that they have provided privileged information to my office. In the case of privileged information obtained from the Tax Office, the privilege will also be maintained where I have referred to that information in my reports to Government. As an additional safeguard, the secrecy provisions prevent my office's disclosure of protected information to third parties.[194]

7.181 Similarly, Ian Carnell, the current IGIS stated:

> If necessary, the privilege could be maintained against third parties because the Inspector-General and the staff of the office cannot be compelled to disclose information (see in particular s 34 of the IGIS Act). This has not arisen as a practical issue in the experience of this office.[195]

7.182 ASIC informed the ALRC about its approach to protecting privileged information from third parties in each of the contexts raised in IP 33:

> In considering whether to release legally privileged material, ASIC places considerable weight upon the submission made by the claimants of legal privilege and upon the fact that legal privilege applies to the material. Accordingly, notwithstanding that ASIC may be authorised by statute to release legally privileged information, it will only do so in very limited circumstances and where it is satisfied that:
>
> (i) it is necessary to achieve the purpose of the release; and
>
> (ii) there are no other appropriate avenues pursuant to which the proposed recipients of the information should seek to obtain the information.

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191 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007), [7.74].

192 Namely the Inspector-General of Taxation and the IGIS.

193 See Ch 5. As noted in Ch 1, from 3 December 2007, ASIC notifies persons who are subject to its compulsory powers that they are not required to provide documents or information that are subject to a valid claim for privilege.

194 Inspector-General of Taxation, *Submission LPP 13,* 16 May 2007.

195 Inspector-General of Intelligence and Security, *Submission LPP 22,* 1 June 2007.

> If ASIC were to release legally privileged information its practice would be to impose strict conditions which limit the use of the information and prevent its disclosure beyond officers of the agency to which it was disclosed.
>
> **Duty of disclosure in criminal matters**
>
> ASIC believes that the prosecution's obligations of disclosure are subject to claims of legal professional privilege.
>
> Accordingly, in the absence of a court order, if ASIC holds legally privileged material, ASIC (via the prosecution) will not disclose those documents to the defence but will merely provide … a description of those documents and will notify the defence that the disclosure of the documents is precluded by legal professional privilege.
>
> **Subpoenas for production in civil and criminal matters**
>
> Where ASIC receives a subpoena for the production of legally privileged documents, it is obliged to and does produce those documents to the court. However, those documents are produced in a separate bundle and are identified as being subject to a claim of legal professional privilege. …
>
> It is ASIC's practice, upon receipt of a subpoena, to notify the persons who are entitled to claim legal professional privilege of the fact that the subpoena has been issued to ASIC and that ASIC is required to produce the privileged documents. ASIC does so in order to enable those persons to take any action which they consider necessary in order to assert their claim of privilege. In doing so, those persons may seek to have the documents excused from production to the court or if the documents have already been produced, they may seek orders precluding access to them.[196]

7.183 Medicare Australia, the Australian Communications and Media Authority (ACMA), and APRA also provided information in this regard. Medicare Australia informed the ALRC that 'while [it] was unaware of examples where the issue has arisen, as a matter of principle, Medicare Australia would seek to maintain privilege against third parties'.[197]

7.184 ACMA submitted that:

> Subject to compliance with its statutory and legal obligations, ACMA would generally maintain privilege in respect of any information which it receives as a result of the exercise of its coercive powers, against third parties (for instance, if privilege was waived for the purposes of giving information to ACMA). It is noted however, that to date, ACMA has not had to deal with a request to release such information under a legislative provision or in relation to a criminal matter.[198]

196 Australian Securities and Investments Commission, *Submission LPP 5,* 29 March 2007.
197 Medicare Australia, *Submission LPP 6,* 10 April 2007.
198 Australian Communications and Media Authority, *Submission LPP 20,* 29 May 2007.

7.185 APRA stated that the issue of providing privileged material to third parties has only arisen rarely.

> APRA's practice has been not to produce such material unless consent has been obtained from the party concerned or, at least, that the party has had the opportunity to comment on the proposed release. …
>
> APRA accepts its duty of disclosure in criminal matters would require it to disclose the existence of all information in its possession. As yet, no policy has been required prescribing how to deal with issues of confidentiality, whether privileged or otherwise, in response to APRA's obligations in criminal matters.[199]

Trends in the United States

7.186 Chapter 6 discusses the trends in the United States (US) for government agencies to seek waiver of client legal privilege from companies under investigation. Judicial opinions in the US have diverged in relation to the question of whether a disclosure of privileged information to a government agency constitutes a waiver against third parties.

7.187 Since 1978, the United States Courts of Appeal have been divided on the issue of selective waiver—that is, allowing a corporation or person to disclose confidential communications to a particular party—such as a government agency—and limit the scope of the waiver to that particular party only. The three different positions adopted by the courts are:

- selective waiver is permissible;
- selective waiver is never permissible; and
- selective waiver is permissible only in situations where the government has, prior to the disclosure, signed a binding confidentiality agreement with the corporation.[200]

7.188 One commentator has stated that:

> Although the attorney-client privilege is ordinarily waived by disclosure of privileged information to a third party, a circuit split exists over whether waiver occurs when disclosure is made to the government. The Eighth Circuit has held that the attorney-client privilege is waived only with respect to the government, and the DC Circuit

199 Australian Prudential Regulation Authority, *Submission LPP 74,* 6 July 2007.

200 Z Dostart, 'Selective Disclosure: The Abrogation of the Attorney-Client Privilege and the Work Product Doctrine' (2005–06) 33 *Pepperdine Law Review* 723, 734. See also A Pinto, 'Cooperation and Self-Interest Are Strange Bedfellows: Limited Waiver of the Attorney-Client Privilege Through Production of Privileged Documents in a Government Investigation' (2003–04) 106 *West Virginia Law Review* 359, 368.

> takes the position that the disclosure of privileged information to any third party, including the government, destroys the privilege.[201]

7.189 The US trends have to be assessed in context, however. The disclosure of privileged information to federal bodies is not typically pursuant to the exercise of a federal investigatory power that abrogates client legal privilege—but rather, as outlined in Chapter 6, pursuant to practices and policies of federal bodies to require 'voluntary disclosure' of such information.

Submissions and consultations

Availability of privilege against third parties

7.190 In IP 33, the ALRC asked, if client legal privilege were to be abrogated or modified, whether it should remain available against third parties—for example, in response to a subpoena issued to the federal body or pursuant to a statutory request for release of that information.[202]

7.191 The clear majority of submissions in response to IP 33 that addressed this question supported client legal privilege being maintained against third parties in the event that it is abrogated in any federal investigation—many stating that the public interest considerations that might warrant the abrogation of the privilege in the context of a federal investigation had no or minimal application to third parties.[203]

7.192 For example, the Law Council submitted that:

> The Law Council does not support abrogation or modification of [client legal privilege]. However, in the event that it is abrogated or modified as against the Commonwealth, the Law Council strongly supports the retention of [the privilege] against third parties. Legislative abrogation or modification … would be only for the purpose of facilitating the activities of coercive investigative bodies. It should not follow that the privilege should also disappear in other situations in which it is currently available. Statutory provisions should expressly provide that, despite any such abrogation or modification … all other protections of client legal privilege must remain. The destruction of the privilege for one purpose does not justify the removal of the privilege for other unrelated purposes.[204]

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201 Z Dostart, 'Selective Disclosure: The Abrogation of the Attorney-Client Privilege and the Work Product Doctrine' (2005–06) 33 *Pepperdine Law Review* 723, 734.

202 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007), Question 7–4.

203 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007; Australian Corporate Lawyers Association, *Submission LPP 66,* 22 June 2007; Victoria Legal Aid, *Submission LPP 55,* 14 June 2007; Taxation Institute of Australia, *Submission LPP 54,* 15 June 2007; Australian Government Solicitor, *Submission LPP 50,* 13 June 2007; Law Society of New South Wales, *Submission LPP 40,* 1 June 2007; Law Council of Australia, *Submission LPP 26,* 4 June 2007.

204 Law Council of Australia, *Submission LPP 26,* 4 June 2007. Similarly, the Taxation Institute of Australia expressed the view that 'it was critically necessary that there be a raft of provisions available to preserve the privilege [against third parties]': Taxation Institute of Australia, *Submission LPP 54,* 15 June 2007.

7.193 The Law Society of NSW expressed the view that:

> What may stand as an argument at the margin for abrogating or limiting client legal privilege based on the competing public interests at stake in Commonwealth investigations does not carry the same weight in favour of third parties, except perhaps in the case of the requirement that the Commonwealth investigatory bodies discharge any prosecutorial duties they may have by disclosing material upon which they intend to rely in order to prove their case.[205]

7.194 The AGS submitted that the jurisprudential basis for the abrogation or modification of the privilege not affecting the availability of the privilege against third parties 'would seem to be strong':

> To treat the abrogation of client legal privilege for the exercise of a coercive power as a constructive or implied waiver of the privilege would seem a far reaching measure in itself and go beyond any need served by the coercive power. The High Court's decision in *Johns v Australian Securities Commission*,[206] in our view, affords firm support for the proposition that information obtained by coercive powers remains confidential in the hands of the acquiring agency, only to be used as provided for under the legislation conferring those powers.[207]

7.195 In DP 73, the ALRC proposed that federal client legal privilege legislation should provide that, in the absence of any clear, express statutory statement to the contrary, where other federal legislation abrogates or modifies client legal privilege in federal investigations that abrogation or modification does not affect the holder of the privilege from maintaining privilege against a third party.[208]

7.196 This proposal was generally supported.[209] For example, the Law Council described the proposal as 'sensible' and submitted that:

> However, there would need to be careful attention given to the drafting of any legislative provision to ensure that it protected all communications revealed as a consequence of the abrogation. For example, it would need to extend to communications which the revealing party produces voluntarily in order to place other communications in context.[210]

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205 Law Society of New South Wales, *Submission LPP 40,* 1 June 2007.

206 *Johns v Australian Securities Commission* (1993) 178 CLR 408, 423–424.

207 Australian Government Solicitor, *Submission LPP 50,* 13 June 2007.

208 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 7–5.

209 NSW Young Lawyers, *Submission LPP 116,* 1 November 2007; Allens Arthur Robinson, *Submission LPP 107,* 5 November 2007; National Legal Aid, *Submission LPP 106,* 5 November 2007; Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007; Law Council of Australia, *Submission LPP 94,* 1 November 2007; Law Society of New South Wales, *Submission LPP 93,* 31 October 2007; Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007; Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007. The AFP submitted that it would not object to the proposal: Australian Federal Police, *Submission LPP 115,* 29 November 2007.

210 Law Council of Australia, *Submission LPP 94,* 1 November 2007.

7.197 The CDPP also submitted that care would need to be taken in formulating the provision, noting that 'with respect to material that it provided to the CDPP in a brief of evidence for the purpose of prosecution, the CDPP may fall into the category of 'third party'.[211]

7.198 The Australian Corporate Lawyers Association (ACLA), while supporting the proposal, did not agree that the position should be open to change by legislation.[212] Westpac welcomed the proposal and submitted that it should be clarified that 'other third parties' includes other investigatory bodies; and widened to include circumstances where privilege has been voluntarily waived in respect of information provided to a federal body on a confidential basis for a specific matter.[213]

Prosecution statement on disclosure

7.199 In DP 73, the ALRC proposed that the CDPP should amend its *Statement on Prosecution Disclosure* to make it clear that the exception of disclosing unused privileged information to the defence applies irrespective of whether the privilege holder is the federal investigatory body that refers the matter to the CDPP, or a party that produced information to that federal investigatory body in the course of its investigation.[214]

7.200 This proposal was supported by a variety of stakeholders.[215] However, the CDPP opposed the proposal on the basis that it did not think such clarification was needed. It submitted:

> The *Statement* clearly indicates that the prosecution must disclose to the defence all unused material unless an exception applies, and there is no reason to read into the Statement a distinction between an investigating agency and a third party with respect to a claim of client legal privilege.[216]

ALRC's views

7.201 As a general principle, the ALRC considers that client legal privilege should remain available against third parties when it is abrogated in respect of a federal investigatory body's powers. A private litigant, for example, should not be able to gain a forensic advantage over another party to litigation by being able to access privileged information produced on compulsion to a federal investigatory body—when it would not otherwise be able to have access to such information.

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211 Commonwealth Director of Public Prosecutions, *Submission LPP 101,* 2 November 2007.

212 Australian Corporate Lawyers Association, *Submission LPP 83,* 31 October 2007.

213 Westpac Banking Corporation, *Submission LPP 85,* 1 November 2007.

214 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 7–6.

215 National Legal Aid, *Submission LPP 106,* 5 November 2007; Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007; Law Council of Australia, *Submission LPP 94,* 1 November 2007; Law Society of New South Wales, *Submission LPP 93,* 31 October 2007; Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007; Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007.

216 Commonwealth Director of Public Prosecutions, *Submission LPP 101,* 2 November 2007.

7.202 The ALRC agrees with the proposition that the higher public interests that may warrant an abrogation of client legal privilege in a federal investigation are unlikely, or less likely, to warrant an outright abrogation of the privilege against third parties. This is particularly so if one considers that a third party might wish to use the privileged information produced to a federal investigatory body for purposes unrelated to the investigation.

7.203 Therefore, the ALRC is of the view that federal client legal privilege legislation should include a default provision that—in the absence of any clear, express words to the contrary—where other federal legislation abrogates or modifies the privilege in federal investigations, that abrogation or modification does not affect the holder of the privilege from maintaining privilege against a third party.

7.204 Federal bodies should take appropriate steps to protect privileged information that they obtain during their investigations, from disclosure to third parties.[217] The ALRC supports the practices—adopted by some federal bodies that made a submission to this Inquiry—of seeking the consent of privilege holders before releasing or producing their privileged information or giving notification about any proposed release or production to enable them to take steps to protect their position.

7.205 As a general proposition, the ALRC considers that client legal privilege should also remain available against all third parties—irrespective of whether they are private litigants or other federal bodies. However, where the third party is another federal body different policy considerations may come into play. The issues of maintaining the privilege against third parties—especially where those third parties are federal bodies—and of use of otherwise privileged information are interrelated. For example, the default discretionary safeguard provided for in Recommendation 7–2 envisages that there may be circumstances in the public interest where a federal body may be able to use otherwise privileged material produced to a Royal Commission, assuming that privilege is abrogated in respect of an inquiry being undertaken by a Royal Commission.[218] In those circumstances, that federal body would not be considered a third party against whom the privilege could be maintained and, if the matter were being pursued criminally, nor would the CDPP fall into such a classification. Careful attention therefore will need to be taken in drafting the precise words of a legislative provision implementing the ALRC's recommendation to reflect the relationship between these two issues.

7.206 The ALRC remains of the view that it would be beneficial if the CDPP amended its *Statement on Prosecution Disclosure* to make it clear that the exception of disclosing unused privileged information to the defence applies irrespective of whether

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217 This is discussed further in the section below on practices and procedures.

218 See Rec 6–2, and discussion above on restrictions on use of privileged information.

the privilege holder is the federal investigatory body that refers the matter to the CDPP, or a party that produced information to that federal investigatory body in the course of its investigation. Increased clarity in this respect may prove to be of particular utility in guiding federal investigatory bodies whose powers may become subject to an abrogation of client legal privilege about their duties of disclosure.[219]

Recommendation 7–5 Federal client legal privilege legislation should provide that, in the absence of an express statutory statement to the contrary, where federal legislation abrogates or modifies client legal privilege in federal investigations that abrogation or modification does not affect the holder of the privilege from maintaining privilege against a third party.

Recommendation 7–6 The Commonwealth Director of Public Prosecutions (CDPP) should amend its *Statement on Prosecution Disclosure* to make it clear that the exception of disclosing unused privileged information to the defence applies irrespective of whether the privilege holder is the federal investigatory body that refers the matter to the CDPP, or a party that produced information to that federal investigatory body in the course of its investigation.

Practice and procedure

7.207 Questions arise about whether particular practices and procedures need to be developed and implemented by federal investigatory bodies in the event that client legal privilege is abrogated or modified in respect of their powers.

7.208 Chapter 8 discusses a number of general issues of practice and procedure, including notification by federal bodies of whether client legal privilege applies to their coercive information-gathering powers, and making and resolving claims for client legal privilege. It also contains a number of recommendations directed towards the development and publication of practices and procedures by federal investigatory bodies about their approaches to various aspects of client legal privilege, and addresses the general benefits of developing and publishing policies. The section in this chapter on practice and procedure is therefore to be read as a complement to the fuller exposition of this topic in Chapter 8.[220]

7.209 In the specific context of considering safeguards where privilege is abrogated or modified, there is a question about how a federal body that receives privileged information pursuant to the exercise of a coercive power should manage and record that information. This issue is of particular importance where there are legislative

219 Ch 6 sets out the factors that the ALRC considers relevant in making any decision to abrogate client legal privilege.

220 See, in particular, those parts of Ch 8 headed 'Notification of application of privilege' and 'Other policies and procedures', and Recs 8–1, 8–2, 8–22(a).

restrictions on the use of that information, or despite the production of privileged information, the privilege is not taken to have been lost against third parties.

7.210 In this respect, it is relevant to note that ASIC's covering letter to recipients of certain notices under the ASIC Act states that the person's claim for privilege will be recorded on registration of the documents.[221]

Submissions and consultations

7.211 In IP 33, the ALRC asked, if client legal privilege were to be abrogated or modified, whether federal investigatory bodies should be required to develop and publish their policies in relation to accurately informing persons of their position, and managing and recording the documents or communications received in respect of which a claim for privilege has been made.[222]

7.212 In relation to the question about 'accurately informing persons of their position', IP 33 asked, if a statute were to abrogate or modify the application of client legal privilege to the exercise of a federal information-gathering power, whether it should be incumbent on the federal body exercising that power to notify the subjects of that power whether:

- and to what extent, the privilege has been abrogated or modified;
- the abrogation or modification applies to privileged communications relating to the representation of the client in the investigation process;
- use or derivative use immunity applies; and
- the privilege remains available as against third parties?[223]

7.213 The clear majority of submissions that addressed these questions expressed support for federal bodies to develop and implement such practices and to publish their

221 Australian Securities and Investments Commission, *Submission LPP 5,* 29 March 2007.
222 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007), Question 7–5.
223 Ibid, [7.76].

policies in this regard.[224] The Law Council submitted that such measures were 'imperative'.[225]

7.214 A number of stakeholders commented, in particular, on the desirability of, or even necessity for, procedures being put in place for managing and recording any document or communication received, in respect of which a privilege claim has been made. For example:

- Victoria Legal Aid submitted that federal bodies should 'implement appropriate document management systems to protect the confidentiality of [privileged] information';[226]

- the Law Society of NSW stated that 'it was essential that privileged communications be carefully segregated and managed';[227] and

- the Law Council noted that:

  > The retention of [client legal privilege] against third parties would be ineffectual if a Commonwealth body did not develop practices and procedures requiring that documents the subject of a privilege claim be clearly identified as such, and be kept separately from other documents.[228]

7.215 The Law Society of NSW also supported the development of a protocol addressing the return of privileged information by federal investigatory bodies.[229]

7.216 In DP 73, the ALRC proposed that if client legal privilege is abrogated or modified in respect of any federal body with coercive information-gathering powers, that federal body should be required to:

(a) implement appropriate document management systems to ensure that documents the subject of a client legal privilege claim are:

  (i) clearly identified and recorded as such;

  (ii) stored and managed appropriately; and

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224 Victoria Legal Aid, *Submission LPP 55,* 14 June 2007; Taxation Institute of Australia, *Submission LPP 54,* 15 June 2007; National Legal Aid, *Submission LPP 52,* 13 June 2007; Law Society of New South Wales, *Submission LPP 40,* 1 June 2007; Law Council of Australia, *Submission LPP 26,* 4 June 2007; R Desiatnik, *Submission LPP 24,* 1 June 2007. ASIC expressed support for the development and publication of such policies 'once the issues concerning client legal privilege raised in the Issues Paper have been solved': Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007. See also Australian Government Solicitor, *Submission LPP 50,* 13 June 2007.

225 Law Council of Australia, *Submission LPP 26,* 4 June 2007.

226 Victoria Legal Aid, *Submission LPP 55,* 14 June 2007.

227 Law Society of New South Wales, *Submission LPP 40,* 1 June 2007.

228 Law Council of Australia, *Submission LPP 26,* 4 June 2007.

229 Law Society of New South Wales, *Submission LPP 40,* 1 June 2007.

(iii) returned, as soon as possible, to the person who produced them; and

(b) publish its policies and procedures in this regard.[230]

7.217 This proposal was generally supported.[231] For example, the Australian Financial Markets Association stated that 'the document management procedures proposed are welcome'.[232] A number of stakeholders who supported the proposal also submitted that it should be amended to require federal bodies to restrict access to otherwise privileged information to persons involved in the relevant investigation.[233]

7.218 Members of the South Australian Bar Association expressed the view that federal legislation should require federal bodies to implement document management systems and publish their policies.[234]

ALRC's views

Notification obligations

7.219 In Chapter 8, the ALRC expresses the view that federal bodies should be required to notify persons:

- whether or not client legal privilege applies to the exercise of a coercive information-gathering power or to the voluntary production of information; and
- that they may wish to seek independent legal advice concerning their response to a coercive information-gathering power.[235]

7.220 Earlier in this chapter, the ALRC recommends that federal bodies should be required to notify persons whether any safeguards apply to the use of otherwise privileged information in subsequent proceedings.[236]

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230 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 7–7.

231 National Legal Aid, *Submission LPP 106,* 5 November 2007; Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007; Law Council of Australia, *Submission LPP 94,* 1 November 2007; Law Society of New South Wales, *Submission LPP 93,* 31 October 2007; Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007; Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007.

232 Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007.

233 Ibid; Law Council of Australia, *Submission LPP 94,* 1 November 2007; Law Society of New South Wales, *Submission LPP 93,* 31 October 2007.

234 Members of the South Australian Bar Association, *Consultation LPP 38*, Adelaide, 17 October 2007.

235 See Recs 8–1, 8–22. In Ch 8 the ALRC also expresses the view that federal bodies should be required to develop and publish policies concerning the manner of notification: see Rec 8–2.

236 Rec 7–3.

7.221 The ALRC is of the view that the above recommendations are sufficient to ensure that persons are informed of their position concerning the production and use of information subject to a client legal privilege claim in the event that the privilege is abrogated or modified.

Recording, managing and returning documents the subject of a claim

7.222 The ALRC considers that, if client legal privilege is abrogated or modified, it should be incumbent on federal bodies to implement appropriate document management systems to ensure that documents the subject of a privilege claim are:

- clearly identified or recorded as such;
- stored and managed appropriately—for example, this might entail keeping such documents separate from ones in respect of which no claim is made, to the extent that this is reasonably practicable, and restricting access to privileged information 'on a need to know basis' within federal investigatory bodies;[237] and
- returned to the person who produced them as soon as that can be done, having regard to the exigencies of the investigation and any action that is to be taken as a result of the investigation.

7.223 Clearly identifying and/or segregating privileged information is essential to ensure that a federal body can take appropriate steps to prevent the disclosure of that information to third parties in respect of whom the privilege is not taken to have been waived.

7.224 However, the ALRC considers that it would be too prescriptive to impose a legislative requirement that federal bodies implement document management systems for the handling of documents subject to a privilege claim, and publish their policies in this regard. Further, as noted in Chapter 8, the ALRC recognises that there may be aspects of policy and procedure that some federal bodies do not wish to publish for sensitive operational reasons, and that it may be appropriate for abridged versions to be made public.

Recommendation 7–7 If client legal privilege is abrogated or modified in respect of any federal body with coercive information-gathering powers, that federal body should:

(a) implement appropriate document management systems to ensure that documents the subject of a client legal privilege claim are:

237 See, eg, S Marsic and L Inge, *Government Law Group—Managing Confidential Information* (2007) Australian Government Solicitor.

(i) clearly identified or recorded as such;

(ii) stored and managed appropriately, including restricting access to persons in the federal body involved in the relevant investigation; and

(iii) returned, as soon as practicable, to the person who produced them; and

(b) publish its policies and procedures in this regard.

8. Practice and Procedure

Contents

Introduction

8.1 A strong theme that emerged in this Inquiry is the need to address the significant issues and problems associated with the practices and procedures for making and resolving client legal privilege claims in federal investigations. Existing practices and procedures have been criticised for being inadequate, inconsistent or uncertain—causing delay and hindering access by federal bodies to information not the subject of a claim for privilege.

8.2 It is important to distinguish criticisms concerning client legal privilege claims from general criticisms of federal investigatory practices. For example, stakeholders have expressed concerns about the onerous nature of electronic information requests or that broadly worded notices issued by federal bodies have the capacity to require the production of privileged material that is only peripherally relevant to the actual transactions under investigation.

8.3 This chapter addresses a number of issues concerning the practices and procedures for making and resolving client legal privilege claims in federal investigations. It discusses the respective obligations of persons the subject of coercive information-gathering powers, and the federal bodies exercising those powers. The chapter contains a mix of legislative and policy-based recommendations aimed at achieving transparency, clarity and uniformity in procedures, as well as reducing delay.

Notification of application of privilege

8.4 Arguably, before a person can make a claim for client legal privilege in response to a federal coercive information-gathering power, he or she ought to be aware of whether or not the legislation under which the power is being exercised preserves, modifies or abrogates the privilege.

8.5 In the Issues Paper in this Inquiry, *Client Legal Privilege and Federal Investigatory Bodies* (IP 33), the ALRC asked whether federal bodies should be required to provide accurate information to persons of their position concerning privilege, when that information should be given, and in what manner.[1] For example, should notices to produce documents—or the covering letter to such documents—state expressly whether or not the privilege applies to the exercise of the coercive powers the subject of the notice? Should persons, who are the subject of compulsory oral questioning, be informed up-front as to whether or not they can claim client legal privilege?

1 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007), [5.43].

8.6 Prior to considering judicial commentary, and the views of stakeholders on this issue, it is convenient to canvass the actual practices of federal bodies concerning notification of whether the privilege applies to their coercive powers.

Practices of federal bodies

8.7 The ALRC wrote to approximately 40 federal bodies with coercive information-gathering powers and asked whether they make the recipients of notices, concerning the exercise of a compulsory power, aware of their rights in relation to client legal privilege. The responses to this question revealed inconsistent practices in this regard.

Examples of notification

8.8 Few federal bodies notify persons about whether or not privilege applies to the exercise of their coercive information-gathering powers; although it is often the case that notice is given only in respect of the exercise of particular powers—and not across the range of a federal body's coercive information-gathering powers. The manner in which persons are notified varies.

8.9 Some federal bodies provide notification about the application of client legal privilege by providing recipients of notices with a copy of the relevant legislative provisions concerning privilege.[2] For example, notices issued by the Australian Competition and Consumer Commission (ACCC) under s 155 of the *Trade Practices Act 1974* (Cth) (TPA) are accompanied by a copy of s 155.[3] As mentioned in Chapter 5, s 155(7B) states that a person is not required to produce a document that would disclose privileged information.

8.10 In other instances, notification is provided in the notice setting out the coercive power,[4] or in the covering letter to a notice. Letters enclosing notices issued by the Australian Securities and Investments Commission (ASIC) to persons who are not lawyers, pursuant to its investigative powers under ss 30–33 of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act), state expressly that the recipient is not excused from producing documents on the ground that the documents may contain information which is privileged. The covering letter to such notices contains a statement to the following effect:

> You are not excused from producing documents on the ground that the documents may contain information that is subject to legal professional privilege. If you believe

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2 Australian Commission for Law Enforcement Integrity, *Submission LPP 69,* 20 July 2007; Australian Competition and Consumer Commission, *Submission LPP 2,* 14 March 2007.

3 Australian Competition and Consumer Commission, *Submission LPP 2,* 14 March 2007.

4 For example, notices issued under s 255 of the *Superannuation Industry (Supervision) Act 1993* (Cth) contain a statement that only a lawyer is entitled to refuse to comply with a requirement under the notice concerning a privileged communication made by or to the lawyer in his or her capacity as such: Australian Securities and Investments Commission, *Submission LPP 5,* 29 March 2007.

> that any of the documents contain information which is subject to legal professional privilege, you should prepare a list which identifies each document you claim is privileged and include the list when producing the books to ASIC. The claim of privilege will be recorded on registration of the documents.[5]

8.11 Where a notice is issued to a lawyer under ss 30–33 and s 49(3) of the ASIC Act, the covering letter informs the lawyer of his or her right to refuse to produce information if it would involve disclosing a client's privileged communication.[6]

8.12 The Australian Taxation Office's *Access and Information-Gathering Manual* (the ATO Manual) instructs Australian Taxation Office (ATO) officers that at the time of giving a person a notice or, at the very latest, at the time of entering premises, they are to hand out and explain Charter Booklet No 9, *Fair Use of Our Access and Information-Gathering Powers*. That booklet states:

> You'll be given reasonable opportunity at any time to consult with your advisers. We will respect your right to claim legal professional privilege for certain communications between you and your barrister or solicitor.[7]

8.13 The Office of the Australian Building and Construction Commissioner stated:

> All witnesses who are served with a *Notice to attend and answer questions* under section 52(e) of the [*Building and Construction Industry Improvement Act 2005*] receive a covering letter setting out in plain English the requirements of the Notice. The covering letter clearly states that the examination will be held in line with the [*Guidelines in Relation to the Exercise of Compliance Powers in the Building and Construction Industry*] which are available from the contact officer upon request. … [Client legal privilege] is covered in the Guidelines.[8]

8.14 A number of federal bodies stated that they provide notification to persons about the application of client legal privilege when exercising search warrant powers.[9] ASIC, for example, stated that search warrants issued pursuant to s 3E of the *Crimes Act 1914* (Cth)—whether in respect of searches of legal premises, non-legal premises or the

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5 Australian Securities and Investments Commission, *Submission LPP 5,* 29 March 2007. See also G Healy and A Eastwood, 'Legal Professional Privilege and the Investigative Powers of the Australian Securities and Investments Commission' (2005) 23 *Company and Securities Law Journal* 375, 376. As noted in Ch 1, from 3 December 2007, ASIC's policy is that people who are subject to its compulsory powers will be explicitly notified that they are not required to provide documents or information that are subject to a valid claim for client legal privilege. People who make such a claim are requested to provide specific details of the material over which the claim is made and the basis of the claim: Australian Securities and Investments Commission, *Correspondence*, 11 December 2007; Australian Securities and Investments Commission, *Correspondence*, 12 December 2007.

6 Australian Securities and Investments Commission, *Submission LPP 5,* 29 March 2007.

7 Australian Taxation Office, *Access and Information Gathering Manual* <www.ato.gov.au> at 23 August 2007, [6.64]; Australian Taxation Office, *Taxpayers' Charter: Fair Use of Our Access and Information Gathering Powers* (2007) <www.ato.gov.au/content/downloads/N2559book9web.pdf> at 23 August 2007, 5.

8 Office of the Australian Building and Construction Commissioner, *Submission LPP 33,* 4 June 2007.

9 Australian Customs Service, *Submission LPP 56,* 13 June 2007; Australian Pesticides and Veterinary Medicines Authority, *Submission LPP 45,* 6 June 2007; Medicare Australia, *Submission LPP 6,* 10 April 2007; Australian Securities and Investments Commission, *Submission LPP 5,* 29 March 2007.

person—contain a statement endorsing the right of the person to make claims for client legal privilege, and attach guidelines about client legal privilege claims.[10]

8.15 Medicare Australia stated that:

> A person who has consented to a search of their premises will generally not be made expressly aware of their rights in relation to legal professional privilege. [But] where a person has consented to a search of premises under s 8X [of the *Medicare Australia Act 1973*] … Medicare Australia investigators would be expected to provide the person with [a copy of the guidelines setting out the procedures for making a privilege claim in respect of the searches of legal premises and/or non-legal premises].[11]

Examples of non-notification

8.16 Many federal bodies do not notify the recipients of notices issued under coercive information-gathering powers about their rights to claim client legal privilege.[12] Federal bodies expressed diverse reasons for adopting this approach.

8.17 Some federal bodies were of the view that such notification would constitute the provision of legal advice and was therefore inappropriate.[13] Others expressed concern that notification would lead to the withholding of information. The Australian Transport Safety Bureau (ATSB) stated that it

> has held the concern that specifically advising of any potential right to claim legal professional privilege may result in significant information about the contributing factors of an accident being withheld. Again, though, we emphasise that we exercise our powers in a context different to many other investigatory agencies.[14]

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10 Australian Securities and Investments Commission, *Submission LPP 5,* 29 March 2007. Search warrant guidelines are discussed separately below.

11 Medicare Australia, *Submission LPP 6,* 10 April 2007.

12 Australian Prudential Regulation Authority, *Submission LPP 74,* 6 July 2007; Australian Government Office of the Privacy Commissioner, *Submission LPP 71,* 29 June 2007; Comcare, *Submission LPP 64,* 14 June 2007; Insolvency and Trustee Service Australia, *Submission LPP 62,* 20 June 2007; Australian Government Department of Immigration and Citizenship, *Submission LPP 46,* 12 June 2007; Australian Transport Safety Bureau, *Submission LPP 34,* 28 May 2007; Australian Transaction Reports and Analysis Centre, *Submission LPP 31,* 4 June 2007; Human Rights and Equal Opportunity Commission, *Submission LPP 28,* 4 June 2007; Australian Communications and Media Authority, *Submission LPP 20,* 29 May 2007; Great Barrier Reef Marine Park Authority, *Submission LPP 17,* 1 June 2007; Officers from the Australian Security Intelligence Organisation and the Inspector-General of Security and Intelligence, *Consultation LPP 34*, Sydney, 26 June 2007.

13 Australian Government Office of the Privacy Commissioner, *Submission LPP 71,* 29 June 2007; Human Rights and Equal Opportunity Commission, *Submission LPP 28,* 4 June 2007.

14 The ATSB noted that its seeks to avoid apportioning blame or determining liability in its investigations: Australian Transport Safety Bureau, *Submission LPP 34,* 28 May 2007. See also discussion of the ATSB's functions in Ch 4.

8.18 The Great Barrier Reef Marine Park Authority submitted that:

> In the ordinary course of the exercise of [its] powers, circumstances have not yet arisen whereby there has been a need for recipients to be made aware of their rights in relation to legal professional privilege.[15]

8.19 The Australian Prudential Regulation Authority (APRA) stated that it was not aware of any obligation on its part to notify persons about the possibility that a claim for privilege may be available. It expressed the view that 'the exercise of what rights and entitlements are available is a matter for the recipient of the relevant notice'.[16]

8.20 In contrast to ASIC's position concerning the issue of notices under the ASIC Act, ASIC does not refer to client legal privilege in notices that it issues under the *Corporations Act 2001* (Cth). ASIC recognises that privilege applies to its powers under that Act.

> ASIC does not, as a matter of practice, seek legally privileged information pursuant to its Corporations Act powers, and, in our experience, such information is not provided to ASIC in answer to Corporations Act notices.[17]

8.21 The notices that ASIC issues requiring a person to appear for an examination pursuant to s 19 of the ASIC Act do not contain any direct reference to client legal privilege.[18] ASIC stated that:

> Unless the application of legal professional privilege is raised by the examinee and/or the examinee's lawyer, no direct reference is made to legal professional privilege in the preamble to a s 19 examination.
>
> If an examinee refuses to answer a question and/or asserts that he/she is entitled to refuse to answer a question on the basis of legal professional privilege, then it is ASIC's practice to respond to the examinee as follows:
>
> > ASIC considers that the case that deals with the question of legal professional privilege in relation to ASIC notices is *Corporate Affairs Commission (NSW) v Yuill*. That case means that you are not able to refuse to answer the question even if the answer discloses information subject to legal professional privilege. Accordingly, I direct you to answer the question.
> >
> > (Should the examinee continue to refuse to answer the question) ... I note for the record that you have claimed that you are not obliged to answer my question because to do so would disclose information subject to legal professional privilege. ASIC does not accept that you may validly refuse to answer my question, even if the answer would disclose information subject to legal professional privilege. ASIC will consider whether to seek an order that you answer this question and it reserves all of its rights to do so. If ASIC

15 Great Barrier Reef Marine Park Authority, *Submission LPP 17,* 1 June 2007.

16 Australian Prudential Regulation Authority, *Submission LPP 74,* 6 July 2007.

17 Australian Securities and Investments Commission, *Submission LPP 5,* 29 March 2007.

18 Notices under s 49(3) of the ASIC Act similarly do not contain an express reference to client legal privilege: see Ibid.

> obtains such an order, it will be necessary to complete this examination at a later time. Otherwise, I propose to continue with this examination.[19]

8.22 Similarly, the standard introductory remarks for an examination under s 155(1)(c) of the TPA do not contain specific information concerning the rights of the recipient in relation to privilege.[20]

8.23 The Australian Transaction Reports and Analysis Centre (AUSTRAC) stated that it does not currently make recipients of notices concerning the exercise of powers under the *Financial Transaction Reports Act 1988* (Cth) aware of their rights in relation to client legal privilege, but noted that:

> The provisions under the [*Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth)] are relatively new and the notice forms and policies in regard to them are still being formulated.[21]

8.24 The nature of covert coercive information-gathering powers precludes the giving of notification about whether client legal privilege applies to the exercise of those powers.[22]

Should federal bodies be required to give notification?

8.25 The common law, other inquiries and stakeholders in this Inquiry have expressed varying views on whether a federal body should be required to notify the subjects of coercive powers about whether client legal privilege applies to the exercise of a coercive power.

8.26 In *Fieldhouse v Commissioner of Taxation*, Lockhart J stated that:

> The citizen is plainly at risk, whether through ignorance or otherwise, of being denied a fundamental right to assert a claim for legal professional privilege. There is I think much to commend the view that when issuing notices under s 264 [of the *Income Tax Assessment Act 1936* (Cth)] it would be appropriate for the Commissioner to insert a paragraph or two in the notice drawing the attention of the recipient to his rights with respect to legal professional privilege so that at least he is alerted to them and can take whatever steps he wishes to obtain legal advice.[23]

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19 Ibid. As mentioned above, from 3 December 2007, ASIC's policy is that people who are subject to its compulsory powers will be explicitly notified that they are not required to provide information subject to a valid claim for privilege.

20 Australian Competition and Consumer Commission, *Submission LPP 2,* 14 March 2007.

21 Australian Transaction Reports and Analysis Centre, *Submission LPP 31,* 4 June 2007.

22 Officers from the Australian Security Intelligence Organisation and the Inspector-General of Security and Intelligence, *Consultation LPP 34*, Sydney, 26 June 2007. See also *Carmody v Mackellar* (1997) 76 FCR 115, discussed in Ch 5.

23 *Fieldhouse v Commissioner of Taxation* (1989) 25 FCR 187, 200.

8.27 Though not strictly a case in the context of federal investigations, the decision of the Full Court of the Federal Court in *SZHWY v Minister for Immigration and Citizenship* supports the principle of notifying a person about his or her rights concerning client legal privilege.[24] The Federal Court quashed a decision of the Refugee Review Tribunal because the Tribunal had asked an applicant for review to divulge the content of a conversation with his legal representative without informing him of his right to claim client legal privilege. Lander J stated:

> In my opinion, the Tribunal was under an obligation to advise the [applicant] that he was entitled to refuse the questions which the Tribunal asked of him if they were to disclose the contents of a confidential communication with his lawyer for the purpose of obtaining or giving legal advice or assistance or for use in the proceedings before the Tribunal. …
>
> In my opinion, the Tribunal, when conducting its inquiry and in the exercise of its inquisitorial function, should advise a person of their right to claim … legal professional privilege if it appears that a question asked of the person may give rise to a legitimate claim of that privilege.[25]

8.28 The Administrative Review Council (ARC), in its draft report on the coercive information-gathering powers of federal bodies, has recommended that if client legal privilege is available, federal bodies should indicate this in the notice setting out the power or in related correspondence.[26]

8.29 In response to IP 33, academics from the University of Sydney Law School expressed the view that it was important for federal bodies to let persons know of their right to claim privilege.[27] Similarly, BHP Billiton Mitsubishi Alliance submitted that protocols governing federal bodies should provide for:

> The holder of the information to be informed by the relevant body of the holder's legal rights and obligations. Included in this should be notification that the holder is not obliged to hand over material that is subject to client legal privilege.[28]

8.30 On the other hand, the Australian Government Solicitor (AGS) expressed the view that:

> It must be remembered that, with the exercise of coercive powers, the investigatory body responsible has made a judgment that it needs to invoke the powers. This will, in some cases, have, in turn, involved a judgment that the prospect of the person holding those documents volunteering them otherwise is poor. Particularly in the latter case, requirements that involve the need to forewarn persons against whom those powers are to be exercised of potential legal considerations, such as the making of privilege claims, may not only prove needlessly tedious, but may also, by encouraging the

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24 *SZHWY v Minister for Immigration and Citizenship* [2007] FCAFC 64.

25 Ibid, [75]; [77]. See also [163] where Rares J expressed the view the Tribunal committed a jurisdictional error.

26 Administrative Review Council, *Government Agency Coercive Information-Gathering Powers [Draft Report]* (2007), Principle 13.

27 B McKillop, M Kumar and F Beaupert, *Consultation LPP 16*, Sydney, 21 May 2007.

28 BHP Billiton Mitsubishi Alliance, *Submission LPP 21,* 1 June 2007.

> persons concerned to clarify all these considerations, only facilitate delay or obstruction on their part in responding. Overall, this could finish up reducing the utility of the powers themselves.[29]

8.31 In the Discussion Paper in this Inquiry, *Client Legal Privilege and Federal Investigatory Bodie*s (DP 73), the ALRC proposed that federal client legal privilege should require federal bodies with coercive information-gathering powers—the exercise of which raise, or are likely to raise, the issue of the application of the privilege—to notify persons the subject of those powers, as well as those who provide information on a voluntary basis, whether or not client legal privilege applies to:

- the exercise of a particular power; and
- the voluntary production of information.[30]

8.32 This proposal was generally supported in submissions and consultations.[31] For example:

- The Australian Financial Markets Association submitted that the notification procedures proposed are 'appropriate and reasonable'.[32]
- National Legal Aid submitted that:

  > The notification should be brought to the direct attention of persons and explain as far as possible in plain English its meaning and effect.[33]

- AGS submitted that:

  > In … its submission on the Issues Paper, [AGS] had questioned the merit of the notification requirement of the type proposed here. However, on consideration of the Discussion Paper, for the purposes of facilitating a successful resolution of the mediation processes of the type supported in … the proposals for resolving privilege claims, [AGS] would support a general notification requirement.[34]

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29 Australian Government Solicitor, *Submission LPP 50,* 13 June 2007.

30 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 8–1.

31 See, eg, Australian Government Solicitor, *Submission LPP 113,* 5 November 2007; National Legal Aid, *Submission LPP 106,* 5 November 2007; Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007; Law Society of New South Wales, *Submission LPP 93,* 31 October 2007; Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007. The Australian Federal Police (AFP) submitted that it would not object to this proposed measure: Australian Federal Police, *Submission LPP 115,* 29 November 2007.

32 Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007.

33 National Legal Aid, *Submission LPP 106,* 5 November 2007.

34 Australian Government Solicitor, *Submission LPP 113,* 5 November 2007.

- The Law Council of Australia (Law Council) agreed with the substance of the proposal but, in light of its opposition to abrogation of client legal privilege, submitted that the emphasis of the proposal should be to require a positive obligation on federal bodies to notify persons that their powers do not override client legal privilege. Further, it submitted that the notification should include informing persons that they do not need to produce communications which are subject to privilege, although they may need to identify such documents.[35]

8.33 On the other hand, APRA expressed the view that notification should only be necessary where privilege has been abrogated and the recipient is unlikely to seek legal advice before responding to the notice. APRA noted that the institutions regulated by it are of a 'sufficient size and sophistication' to be able to obtain legal advice on the application of privilege.[36]

8.34 A confidential submission queried the extension of the proposal to the voluntary production of information.[37]

8.35 The ALRC's views on whether a federal investigatory body should be required to give notification of the application of client legal privilege are set out below.

Manner of notification

8.36 As the discussion above bears out, the federal bodies that provide notification about the application of privilege do so in various ways.

8.37 In DP 73, the ALRC proposed that federal bodies with coercive information-gathering powers—the exercise of which raise or are likely to raise the issue of the application of client legal privilege—should develop and publish policies in relation to the manner of notifying persons whether the privilege applies to the exercise of their information-gathering powers and to the voluntary production of information.[38]

8.38 This proposal was generally supported;[39] although APRA expressed the view that if there were legislative clarification of the application of client legal privilege, APRA should not be required to publish policies and procedures about how it notifies persons about their entitlement to claim privilege.[40]

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35 Law Council of Australia, *Submission LPP 94,* 1 November 2007. Identifying documents the subject of a claim is discussed in the section on making privilege claims.

36 Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007.

37 Confidential, *Submission LPP 108,* 14 November 2007.

38 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 8–2.

39 National Legal Aid, *Submission LPP 106,* 5 November 2007; Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007; Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007. The AFP submitted that it would not object to this proposed measure: Australian Federal Police, *Submission LPP 115,* 29 November 2007.

40 Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007.

8.39 Both the Law Council and the Law Society of NSW supported the proposal, provided that the notification given by a federal investigatory body is served on, or delivered personally to, the person the subject of the information-gathering power. General notification, such as by information posted on a federal body's website, was said to be insufficient.[41]

8.40 Members of the South Australian Bar Association expressed the view that the ALRC's proposal should be the subject of legislation.[42] However, the Law Council supported the ALRC's approach in not prescribing the form of notification in legislation and allowing for flexibility in this regard, although it expressed the view that it was desirable, to the extent possible, for federal bodies to adopt a uniform approach in developing guidelines. The Law Council also expressed the view that it would not generally be acceptable for federal investigatory bodies simply to provide recipients of notices with a copy of relevant legislative provisions in relation to client legal privilege as a means of notifying them about their rights.[43]

ALRC's views

Notification

8.41 As discussed elsewhere in this Report, the High Court has held that client legal privilege is an important common law right.[44] The ALRC considers that it is important, in order for persons to exercise the right to claim privilege, that they are notified by the federal body exercising a coercive information-gathering power about whether or not client legal privilege applies to that power. This does not entail a federal body giving advice about whether or not privilege applies to any particular communication or document—only whether client legal privilege is available as an excuse for not producing documents or information in complying with any given information-gathering power.

8.42 If the privilege applies, persons will be alerted to their ability to make a claim and to withhold the production of privileged documents. The ALRC envisages that notification by a federal body that client legal privilege applies to a coercive information-gathering power would make it clear that a person need not produce privileged communications. But even if the privilege is abrogated, persons should be notified that, while they may not withhold documents or information on the basis of client legal privilege, they should still indicate which documents would have been the subject of a privilege claim. In such cases, the federal body can take any appropriate

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41 Law Council of Australia, *Submission LPP 94,* 1 November 2007; Law Society of New South Wales, *Submission LPP 93,* 31 October 2007.

42 Members of the South Australian Bar Association, *Consultation LPP 38*, Adelaide, 17 October 2007.

43 Law Council of Australia, *Submission LPP 94,* 1 November 2007.

44 See discussion on *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 in Ch 5.

steps to safeguard that material—for example, to protect it from disclosure as against third parties.[45]

8.43 The ALRC considers that such notification—in addition to promoting clarity of approach—is an aspect of fairness.[46] The need for fairness arises particularly—but not exclusively—in respect of unrepresented persons who are the subject of coercive powers.[47] In the context of litigation, the Commonwealth and its agencies are obliged under its own rules to act as 'model litigants', fairly, with complete propriety, and in accordance with the highest professional standards in handling claims and litigation brought by or against them.[48] In the ALRC's view, there is a strong argument that comparable standards of fairness should be applied to the Commonwealth and its agencies in conducting investigations.

8.44 The ALRC is not persuaded by the argument made in a submission that notification should only be provided where (a) privilege is abrogated; and (b) in the federal body's opinion, the recipient is unlikely to obtain legal advice before responding to a notice.[49] First, such an approach ignores the important role that notification may play in preventing persons from producing privileged information because they are unaware of a right to claim client legal privilege in responding to a coercive power which does not abrogate privilege. Second, a federal body's opinion may be ill-founded; but even where there is a reasonable basis for such an opinion, it may not accurately predict the actions of the recipient of a notice. Therefore, persons who do not, in fact, obtain legal advice prior to answering a notice when a federal body believed that they would do so, nonetheless would have lost the benefits of being notified by the federal body.

8.45 It is important that the information provided by federal bodies to persons about their right to claim privilege is accurate. Given that, following the decision in *Daniels*, ASIC's position—that client legal privilege is abrogated in respect of its powers under the ASIC Act—has been questioned,[50] there may be an issue about whether it is appropriate for ASIC to state unequivocally in its covering letters to notices issued to non-lawyers under ss 30–33 of the ASIC Act that client legal privilege is not available.[51]

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45 Safeguards are discussed in Ch 7.

46 The issue of clarity is considered in Ch 5.

47 The issue of unrepresented persons is considered below.

48 *Legal Services Direction 2005: Appendix B—The Commonwealth's Obligation to Act as a Model Litigant*.

49 See Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007.

50 See discussion in Ch 5 on the implications of *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

51 As noted above, from 3 December 2007, ASIC's policy is that persons who are subject to its compulsory powers will be notified expressly that they are not required to produce documents or information subject to a valid claim for client legal privilege.

8.46 It is also important, as noted by many stakeholders in this Inquiry, that the notification given by federal bodies is in plain English.

8.47 One qualification to the ALRC's views that federal bodies should be required to give such notification is that, in the interests of practicality, such an obligation should be imposed only on those federal bodies that exercise coercive information-gathering powers which raise or are likely to raise the application of client legal privilege. If a particular coercive information-gathering power is unlikely to bring privileged information within its ambit—for example, the powers of the Australian Fisheries Management Authority (AFMA) to examine equipment capable of being used for fishing, or search premises for documents relating to the receiving of fish,[52] the obligation to give notification will not arise.

8.48 The ALRC also considers that persons who produce information or documents on a voluntary basis—where such information or documents could have been sought pursuant to a coercive information-gathering power—also should be notified whether client legal privilege applies to the voluntary production of information. As discussed in Chapter 4, many federal bodies seek information from persons on a cooperative basis—preferring to encourage voluntary compliance with requests for information.[53]

8.49 A person who chooses to cooperate in a federal investigation should not be prejudiced by not being told about their rights concerning privilege. For example, if a person is served with a notice pursuant to s 155 of the TPA in an investigation being conducted by the ACCC, that person is not required to produce documents the subject of a claim for client legal privilege. If the person is prepared to produce documents to the ACCC in the absence of a notice, the ACCC should let that person know that if the information were sought on a compulsory basis, a claim for client legal privilege would be available. Of course, it is always open to a person to produce privileged information to a federal body on a voluntary basis—just as a person may choose to waive privilege in responding to a coercive power which preserves its application.

8.50 The ALRC supports the approach taken by Medicare Australia in providing information about client legal privilege to persons who consent to searches under s 8X of the *Medicare Australia Act 1973* (Cth).

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52 *Fisheries Management Act 1991* (Cth) s 84(1)(f),(h)(ii). See discussion of AFMA in Ch 4.

53 These bodies include the ACCC, APRA, the ATO, the Commonwealth Ombudsman, the Human Rights and Equal Opportunity Commission and the Inspector-General of Taxation. The ATO noted that claims for privilege can be made in many circumstances, including when a tax officer requests information or documents from a taxpayer on a cooperative basis: see Australian Taxation Office, *Submission LPP 65,* 22 June 2007.

Manner of notification

8.51 The ALRC considers that it would be too prescriptive to require all federal bodies to provide notice only in one particular way. Depending on the type of power that is being exercised, notification could be done in one of the following ways:

(a) in the notice setting out the coercive power, or in the covering letter to such notice;

(b) in the search warrant, or in an attachment to the search warrant;

(c) in a letter requesting information to be produced on a voluntary basis;

(d) by providing a copy of the relevant section of the legislation which abrogates, modifies or preserves the privilege at the time a notice setting out the coercive power is issued or a search warrant is exercised; or

(e) in the case of information sought orally, by informing the person prior to the commencement of questioning.

8.52 As a general proposition, the ALRC considers that federal bodies ought to provide notification in the actual notice or related correspondence (the approach in (a) above), as opposed to merely providing the recipient with a copy of the relevant section of the legislation concerned with the application of client legal privilege (the approach in (d) above). Of course, it would be appropriate for federal bodies to supplement any notification that they give in a notice or related correspondence with extracts of relevant legislative provisions.

8.53 However, the ALRC considers that it is best to allow flexibility in this regard. Accordingly, while supporting a legislative duty on the part of federal bodies to provide the requisite notification, the ALRC recommends that federal bodies develop and publish their own practices and procedures in relation to the precise manner of notification that they adopt.

8.54 The ALRC agrees with the views expressed by the Law Council and Law Society of NSW that general notification by a federal body—for example by posting information on its website—would be insufficient. Consequently, the ALRC has slightly modified its original proposal to make it clear that the policies and procedures to be developed by federal bodies in relation to notification in this context are intended to deal with the issue of notifying persons the subject of coercive information-gathering powers, and not the world-at-large.

Recommendation 8–1 Federal client legal privilege legislation should require federal bodies with coercive information-gathering powers—the exercise of which raise, or are likely to raise, the issue of the application of the privilege—to notify persons the subject of those powers, as well as those who provide information on a voluntary basis, whether or not client legal privilege applies to:

(a) the exercise of a particular power; and

(b) the voluntary production of information.

Recommendation 8–2 Federal bodies with coercive information-gathering powers—the exercise of which raise, or are likely to raise, the issue of the application of client legal privilege—should develop and publish policies and procedures in relation to the manner of notifying persons the subject of those powers whether the privilege applies to the exercise of such information-gathering powers and to the voluntary production of information.

Making a privilege claim

Background

8.55 As stated in Chapter 3, client legal privilege must be claimed in order to be applied. A party making a claim of privilege must provide the party seeking disclosure with sufficient information to allow it to make a decision about whether the claim for privilege could be supported.[54] However, those who make privilege claims in federal investigations are not generally subject to legislative requirements to provide details of their claims to federal bodies.[55]

Policies of federal bodies

8.56 Unlike many federal bodies, the ATO has policies and procedures setting out how persons should make client legal privilege claims in its investigations. The ATO Manual sets out what a person claiming privilege should do.[56] Drawing on principles

54 *National Crime Authority v S* (1991) 29 FCR 203, 211. See also *Barnes v Commissioner of Taxation* [2007] FCAFC 88, [18], which stated that 'the authorities emphasise the need for focused and specific evidence in order to ground a claim for legal professional privilege'. On the facts of that case, the Full Federal Court (at [19]) held that the evidence supporting the privilege claim was 'manifestly insufficient and [did] not establish any basis for [the] claim of privileges.'

55 The lack of transparency of privilege claims is discussed below.

56 Australian Taxation Office, *Access and Information Gathering Manual* <www.ato.gov.au> at 23 August 2007, [6.22], [6.6.49]–[6.6.50].

established by the common law, the ATO's policy in relation to persons claiming privilege is that the person should:

- make it clear that the claim is being made—a vague assertion of the privilege is insufficient;
- provide the ATO with enough information to enable it to decide whether to accept or resist the claim;
- justify the claim—resort to a verbal formula is insufficient;
- provide evidence of all the elements of the relevant limb of privilege for each document for which privilege is claimed, and specify the features of each document, including its date;[57] and
- not make a blanket claim—that is, assert that all documents in a room or cabinet are privileged without examining the documents to verify their claim. However, a person does not make a blanket claim where they refuse access to all documents until they have established whether they are privileged.[58]

8.57 The ATO has proformas that it requests persons claiming privilege to complete for each individual claim—although it acknowledges that they are not compelled to do so.[59] There are separate proformas for claims made in respect of:

- communications in documents prepared by in-house legal advisers;
- communications in attachments to a primary document; and
- copies of original documents.[60]

8.58 In addition, under the guidelines agreed between the Commissioner of Taxation and the Law Council in relation to the exercise of the ATO's access powers at lawyers' premises in circumstances where a claim of client legal privilege is made (ATO Guidelines),[61] where a lawyer asserts privilege in response to the exercise of a coercive information-gathering power by the ATO on a lawyer's premises, a list of the documents in respect of which privilege is claimed is to be made. That list is to contain a number of specific details, including:

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57 Ibid, [6.2.2].
58 Ibid, [6.6.49]–[6.6.50].
59 See Ibid, [6.6.18], [6.6.26], [6.6.31]–[6.6.32].
60 Australian Taxation Office, *Submission LPP 65,* 22 June 2007.
61 See Australian Taxation Office, *Access and Information Gathering Manual* <www.ato.gov.au> at 23 August 2007, App B.

- the nature and date of each document;
- the exact number of documents and pages contained in the documents withheld;
- the identity of the person who prepared or signed the document, and to whom it was directed;
- a physical description of each document—for example, typed or handwritten;
- whether the document is an original or photocopy;
- the grounds on which privilege is claimed in respect of each document; and
- the person in whose name the claim is made.[62]

8.59 APRA stated that there have been very few claims made for privilege in its investigations but that usually where such a claim is made, a fairly detailed description of documents subject to the claim is provided—either in support of the claim or at APRA's request.[63]

Privilege claims in litigation

8.60 In considering what the processes should be for making client legal privilege claims in response to the coercive information-gathering powers of federal bodies, it is useful to consider, by analogy, the processes that exist in relation to the making of such claims in the context of discovery obligations in litigation.

8.61 In the Federal Court, a party giving discovery is required to:

- list all documents which have been in its possession, custody or power;
- describe each document, or in the case of a group of documents of the same nature describe the group, sufficiently to enable the document or group to be identified; and
- where the party claims that any document is privileged from production, sufficiently state the grounds of privilege.[64]

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62 See Ibid, App B, [23].
63 Australian Prudential Regulation Authority, *Submission LPP 74,* 6 July 2007.
64 *Federal Court Rules 1979* (Cth) O 15, r 6(2)–(4).

8.62 Form 22 of the Federal Court Rules envisages the listing of privileged documents, and verification on oath by the party. It reads in part:

> 1. The party has in his possession, custody or power the documents enumerated in Schedule 1.
>
> 2. The documents enumerated in Part 2 of Schedule 1 are privileged from production on the ground–
>
> (a) as to documents numbered 4–7 inclusive, that (state the ground);
>
> (b) as to documents 8 and 9, that (state the ground).

8.63 However, the New South Wales (NSW) Bar Association submitted that, in its experience, 'typically a party does not list privileged documents individually, unless vigorously pressed to do so'.[65]

8.64 Where the party making the list of documents has a solicitor in the proceeding, the solicitor is required to certify that, according to instructions received, the list and the statements in the list are correct.[66]

8.65 The *Uniform Civil Procedure Rules 2005* (NSW) require a party giving discovery to identify any document that is claimed to be privileged and to specify the circumstances under which the privilege is claimed to arise.[67] The list is to be accompanied by a supporting affidavit, in which the deponent is to state, in respect of any document that is claimed to be privileged, the facts relied on as establishing the existence of the privilege.[68] If the party giving discovery has a solicitor, the list also must be accompanied by a solicitor's certificate of advice.[69]

8.66 In general terms, other court rules governing discovery also require a party making a privilege claim to describe or identify privileged documents (whether individually or by reference to a group); state the basis of the claim on oath; and have the list certified by a lawyer if the party is represented.[70]

Issues and problems

8.67 Submissions and consultations in response to IP 33 revealed a number of issues and problems concerning the making of privilege claims. These included:

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65 New South Wales Bar Association, *Submission LPP 41,* 5 June 2007.

66 *Federal Court Rules 1979* (Cth) O 15, r 6(8).

67 *Uniform Civil Procedure Rules 2005* (NSW) r 21.3(2)(d). Rule 21.3(2)(b) allows documents to be described by group.

68 Ibid r 21.4(2).

69 Ibid r 21.4(3).

70 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 29.04, Form 29B; *Supreme Court Rules* (NT) rr 21.03, 21.04, Form 29A; *Court Procedure Rules 2006* (ACT) rr 607–609, Form 2.23; *Uniform Civil Procedure Rules 1999* (Qld) rr 217(3)(c), 226; *Rules of the Supreme Court 1971* (WA) O 26 rr 4, 15A.

- that persons are not always given an opportunity to make a claim;[71]
- a lack of consistency in the manner in which claims are made;
- a lack of transparency in claims;
- the need to address blanket claims of privilege;
- over-claiming of privilege;[72]
- over-use of masking of documents;
- to a lesser degree, 'warehousing' and 'privileging';[73] and
- concerns about waiving privilege in the process of making a claim.[74]

8.68 Some of these issues are considered in more detail below.

Lack of opportunity to make a claim

8.69 The circumstances in which information can be required to be produced vary in significant respects. Persons the subject of a coercive power may have some time within which to produce documents or information. For example, some statutes stipulate a minimum period within which documents are to be produced.[75] In other circumstances, information must be produced immediately. This may be the case where statutory notices to produce documents require production forthwith or within 24 hours, or where documents are sought to be seized during a search.

8.70 Whether a person has been allowed a reasonable opportunity to make a claim for privilege may be more of a contentious issue in the context of the execution of searches. BHP Billiton Mitsubishi Alliance stated that:

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71 See, eg, Fitzroy Legal Service, *Submission LPP 29,* 4 June 2007; BHP Billiton Mitsubishi Alliance, *Submission LPP 21,* 1 June 2007.

72 See, eg, New South Wales Bar Association, *Submission LPP 41,* 5 June 2007. National Legal Aid also expressed the view that there were issues in relation to 'inappropriate' privilege claims: National Legal Aid, *Submission LPP 52,* 13 June 2007.

73 New South Wales Bar Association, *Submission LPP 41,* 5 June 2007. 'Warehousing and privileging' are discussed in Ch 9.

74 See, eg, Law Council of Australia, *Submission LPP 26,* 4 June 2007. Issues concerning abuse of privilege claims are also considered in Ch 9.

75 See, eg, *Insurance Contracts Act 1984* (Cth) ss 11C, 11D (at least 30 days' notice to be given); *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) s 158; *Medicare Australia Act 1973* (Cth) s 8Q (at least 14 days' notice to be given).

> Federal investigatory bodies are in a position where they are able to demand access to information in circumstances where the relevant individual or corporation is denied the ability to obtain legal advice as to whether access should be denied.[76]

8.71 The ATO Manual states that an ATO officer exercising access powers is required to give the custodian of documents an adequate opportunity to claim privilege, unless there is no realistic possibility of privilege being applicable.[77] A reasonable opportunity to allow a person to make a claim has been described as going beyond a mere obligation to respond reasonably to a claim when made.[78]

8.72 In *Oke v Commissioner of the Australian Federal Police*, the evidence established that a search was carried out in several rooms of the premises prior to the arrival of the occupant's solicitor despite the occupier's assertion that there were privileged documents on site.[79] Further, the occupier's solicitor was not permitted to inspect documents sought to be seized by the Australian Federal Police (AFP) officers prior to inspection by them in order to determine whether a claim for privilege legitimately could be made. Mansfield J concluded that such inappropriate behaviour on the part of the AFP no doubt resulted in the solicitor making a blanket claim for privilege, and that:

> The transcript recording of the execution of the … warrant reveals that, although the AFP officers were aware of an occupier's right to claim privilege over documents which may prima facie appear to fall within the warrant's terms, they had a limited understanding of what was required to give meaning to that right.[80]

Lack of transparency in claims

8.73 IP 33 raised the question whether those subject to notices, search warrants or other coercive-information gathering powers should be required to: (a) notify a federal body that documents the subject of a privilege claim have been withheld; and (b) provide the federal body with details of those documents.[81]

8.74 Submissions and consultations in response to IP 33 revealed that some federal bodies experience difficulties in testing privilege claims because those subject to coercive powers sometimes do not alert the federal body of the existence of a claim or, when claims are made, insufficient details are provided.[82]

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76 BHP Billiton Mitsubishi Alliance, *Submission LPP 21,* 1 June 2007. See also Fitzroy Legal Service, *Submission LPP 29,* 4 June 2007.

77 Australian Taxation Office, *Access and Information Gathering Manual* <www.ato.gov.au> at 23 August 2007, [6.2.3], [6.6.4]–[6.6.11].

78 *Question of Law Reserved (No 1 of 1998)* (1998) 70 SASR 281, 290; *Kennedy v Baker* (2004) 135 FCR 520, [99].

79 *Oke v Commissioner of Australian Federal Police* (2007) 168 A Crim R 503, [121].

80 Ibid, [122].

81 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007), [5.55].

82 See, eg, Australian Taxation Office, *Submission LPP 65,* 22 June 2007; Australian Competition and Consumer Commission, *Submission LPP 53,* 13 June 2007.

8.75 The Australian Communications and Media Authority (ACMA) submitted that greater transparency is required in the making of client legal privilege claims to federal bodies in answer to their coercive information-gathering powers.

> While legitimate claims for [privilege] are an essential right for clients communicating with their legal representatives, at times, it is not obvious that the claim is appropriate or proper in the circumstances.[83]

8.76 The ACCC expressed concern that:

> in the context of responding to s 155 notices, there is scope to claim legal professional privilege without a proper basis and that, from time to time, … improper claims have been made. …
>
> Sometimes … parties claiming legal professional privilege over documents do not alert the ACCC to a claim of privilege being made at all. … Documents are provided in response to a s 155 notice without reference to the fact that other documents have not been produced upon the basis of a claim for privilege. Alternatively, the party producing documents may simply assert that privilege has been claimed over documents without providing a schedule of those documents or any details about them or the claim (such as the nature of the communication or the relevant parties). It is the ACCC's experience that, when notice recipients are asked for an explanation of the basis upon which privilege is claimed, the response has been that there is no legal obligation to provide such information …
>
> As a result, … in most cases, the ACCC is not in a position to determine whether such claims are properly made.[84]

8.77 The ACCC provided the following case studies to illustrate its point.[85]

CASE STUDY ONE

Company A responded to a s 155 notice by supplying a large number of documents (approximately 32 folders). A considerable number of these were masked in whole or in part. The documents were labelled as 'privileged' or 'redacted'.

The supply of the documents came with a cover letter that stated '*documents to which Company A claims to have legal professional privilege have been either excluded or masked (where only part of the document is privileged)*'. A list of excluded documents was not provided, nor was any further information or explanation given relating to the grounds of the privilege. ….

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83 Australian Communications and Media Authority, *Submission LPP 20,* 29 May 2007.
84 Australian Competition and Consumer Commission, *Submission LPP 53,* 13 June 2007.
85 Ibid.

ACCC staff discovered that documents that were masked were also provided in unmasked form (identical documents). This revealed that some of the claims of legal professional privilege made by Company A had been invalid.

ACCC staff raised concern about the way in which Company A had complied and in response, Company A relinquished claims of privilege over some of the documents. However, when initially pressed for an explanation for each claim of privilege, Company A stated that 'it does not consider that it is under a legal obligation to provide such information'. The information provided by Company A to explain the basis for [its] claims for privilege was so vague and general that it was of no assistance to ACCC staff in determining whether they should seek the release of the documents in court.

CASE STUDY TWO

[This example] demonstrates the … 'random' way the ACCC might discover an improper claim for privilege. It involved the investigation of allegations of an anti-competitive agreement between Company B and Company C. Company B claimed privilege over documents (or part of documents) that it provided to the ACCC pursuant to a s 155 notice. A s 155 notice in similar terms was also served upon Company C. The documents produced by Company C included complete copies of the documents over which privilege had been claimed by Company B. This revealed that some of the claims of legal professional privilege made by Company B were not soundly based.

8.78 The ATO submitted that:

> A major problem that arises concerning the making of a claim for [privilege] in response to an exercise of our information-gathering powers is that claims often provide very little information and do not provide us with sufficient details to decide whether the documents would even be relevant to our compliance activities …
>
> The Tax Office considers that [its proformas] have gone some way in helping to resolve [privilege] disputes. However, in practice, we find that taxpayers often refuse to complete the forms where their claim for [privilege] relates to a large number of documents. Whilst the forms have some basis in law insofar as the common law prescribes that a claim for [privilege] must be in proper form and expose sufficient facts to justify the claim, we cannot compel taxpayers to complete the forms.[86]

8.79 However, the Taxation Institute of Australia expressed the view that the ATO's regime for making a valid claim of privilege is unworkable and onerous, requiring the

86 Australian Taxation Office, *Submission LPP 65,* 22 June 2007.

completion of multiple proforma documents 'for each and every document over which a claim for privilege is made'.[87]

Lack of consistency in providing particulars of claims

8.80 The difficulties encountered by the ACCC in obtaining particulars of privileged information contrasts with that of APRA—which, as stated above, noted that in most cases where a claim of privilege is made, a detailed description of the documents is provided to APRA.

8.81 There is an enormous disparity in the approaches taken by persons subject to federal coercive powers to justify their claims of privilege. At one end of the spectrum, persons choosing to cooperate within the ATO's framework provide the details requested in the ATO's proformas in respect of each document for which they make a claim. At the other end of the spectrum, persons fail to inform the ACCC of the fact that documents are withheld on the basis of privilege.

Blanket claims

8.82 The ATO submitted that there is a major problem with claimants making 'blanket claims' of privilege—alleging that all documents in a room or in their possession are privileged without examining the documents to verify the claim.

> We consider that blanket claims should not be permitted, and that a specific claim for privilege should be made in respect of each and every document.[88]

8.83 ASIC submitted that:

> Blanket claims of privilege are unhelpful because they do not identify the particular documents in respect of which privilege is claimed and the basis of the claim. Accordingly, they provide limited assistance in resolving privilege claims or in allowing them to be tested. However, … provision for them may be necessary where it is not possible to expeditiously review and make privilege claims over documents, particularly those that may be stored electronically.[89]

Over-masking

8.84 The NSW Bar Association submitted:

> Masking most frequently occurs not in respect of primary privilege claims, but in respect of secondary or derivative claims: a summary of legal advice in one sentence

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87 Taxation Institute of Australia, *Submission LPP 54,* 15 June 2007. Another stakeholder group noted that the ATO required more information than a court would require to uphold a claim for privilege: Regulatory lawyers of Clayton Utz, *Consultation LPP 13*, Sydney, 15 May 2007.

88 Australian Taxation Office, *Submission LPP 65,* 22 June 2007.

89 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007.

> in a 10-page board paper, extracts of a conversation with a solicitor in a client's longer file note etc …
>
> Over-masking is likely to be the product either of an attempt to widen a privilege claim inappropriately or of a caution bred of a lack of understanding about how appropriately to mask a document.[90]

Waiver

8.85 The ATO and the Law Council noted that there was a concern among the subjects of coercive information-gathering powers that providing extensive information about a client legal privilege claim (such as completing an ATO proforma) could amount to a waiver of privilege.[91]

Submissions and consultations on reform options

8.86 The Australian Corporate Lawyers Association (ACLA) submitted that there would be 'value in putting greater focus on the processes by which [client legal privilege] claims are made and on the accountabilities of those … by whom they are made'.[92]

8.87 Other stakeholders made specific suggestions about improving the processes by which privilege claims are made, and these are discussed below.

Provision of particulars

8.88 There was strong support in submissions and consultations in response to IP 33—from federal bodies and the legal profession—for requiring claimants, when responding to federal coercive powers, to provide details of the communications in respect of which they claim privilege.[93]

8.89 ACMA submitted that requiring a claimant to provide a detailed description of the documents in respect of which a privilege claim is made would significantly assist a federal body in determining whether a claimant was properly resisting disclosure.

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90 New South Wales Bar Association, *Submission LPP 41,* 5 June 2007. See also Members of the Victorian Bar, *Consultation LPP 21*, Melbourne, 25 May 2007.

91 Australian Taxation Office, *Submission LPP 65,* 22 June 2007; Law Council of Australia, *Submission LPP 26,* 4 June 2007. See also Members of the Victorian Bar, *Consultation LPP 21*, Melbourne, 25 May 2007.

92 Australian Corporate Lawyers Association, *Submission LPP 66,* 22 June 2007.

93 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007; Australian Taxation Office, *Submission LPP 65,* 22 June 2007; Australian Competition and Consumer Commission, *Submission LPP 53,* 13 June 2007; New South Wales Bar Association, *Submission LPP 41,* 5 June 2007; Law Society of New South Wales, *Submission LPP 40,* 1 June 2007; Australian Communications and Media Authority, *Submission LPP 20,* 29 May 2007; New South Wales Public Defenders Office, *Consultation LPP 31*, Sydney, 12 June 2007; G Healy and A Eastwood—Freehills, *Consultation LPP 30*, Sydney, 12 June 2007. The Law Council submitted that claimants should provide descriptions of documents if the federal body requested them to do so: Law Council of Australia, *Submission LPP 26,* 4 June 2007.

> For example, a document description that indicated an advice from Counsel to a client might be sufficient to satisfy the regulator that … the claim for privilege in respect of that document was legitimate.[94]

8.90 The ATO submitted that there should be a mandated process for claiming client legal privilege and that this process should

> - prescribe minimum details that must be provided by the claimant in support of a claim—this should be a level of detail that allows federal investigatory agencies to decide whether to accept or reject a claim …
> - require persons who make claims in respect of communications with in-house legal advisers to provide additional details about the communication. This will assist agencies to assess the independence of the in-house adviser and ascertain the capacity in which he or she provided the advice …
> - prohibit blanket claims; and
> - clarify that complying with minimum disclosure requirements would not result in a common law waiver of [privilege].[95]

8.91 The ACCC submitted that privilege claimants should be required to identify to a regulator the privilege claims which are made and the basis for those claims. The ACCC supported a legislative requirement that claimants provide a number of specific details—as set out in the ATO Guidelines—including the nature and date of each document, the identity of the person who prepared or signed the document and to whom it was directed, and whether the document is an original or photocopy.[96]

8.92 The Australian Institute of Company Directors (AICD) also supported a legislative mechanism as a way of addressing the lack of consistency in the making of privilege claims.

> It is inappropriate to rely on guidelines as the basis for making claims because:
>
> - not all agencies make guidelines, and they differ. This is of particular concern in multi-task forces;
> - as they are voluntary, the consequences of non-compliance by the agency are uncertain; [and]
> - they can be easily changed by administrative process potentially without consultation, and grant too much power and/or discretion to the regulator.[97]

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94 Australian Communications and Media Authority, *Submission LPP 20,* 29 May 2007.
95 Australian Taxation Office, *Submission LPP 65,* 22 June 2007.
96 Australian Competition and Consumer Commission, *Submission LPP 53,* 13 June 2007.
97 Australian Institute of Company Directors, *Submission LPP 43,* 8 June 2007.

8.93 The NSW Bar Association expressed support for amendment to Federal Court and Supreme Court discovery rules requiring the listing of documents brought into existence prior to the commencement of litigation

> by reference to date, type, author and recipient of the document, or if this information is not available, a sufficient description of the document, and [for] the facts relied upon for the existence of the privilege [to be] identified as specifically as possible on a document by document basis.[98]

8.94 It submitted that:

> While the requirement that a party specify the grounds for a claim for privilege may appear to adequately expose the basis of the privilege claim for testing and may also provide the necessary discipline for the claimant, we consider that the utility of this requirement may be undermined to the extent that documents over which a claim for privilege is made are not listed individually. [99]

8.95 ASIC submitted that guidelines to assist in making claims would be useful.[100] APRA noted that where it has been provided with descriptions of documents 'such descriptions … [have] enabled a fairly well informed decision to be made'.[101]

8.96 In DP 73, the ALRC proposed a procedure for the making of privilege claims in federal investigations. Key elements of that procedure included that a federal body:

- must provide a person with a reasonable opportunity to claim client legal privilege; and
- may, in its discretion, request particulars of client legal privilege claims, including
  - (i) a sufficient description of the documents containing the privileged communications either individually or by bundle where the documents are of the same or similar nature;
  - (ii) an identification of privileged communications prepared by in-house counsel;
  - (iii) details about the independence of in-house counsel; and
  - (iv) identification of any 'tax advice documents' (defined in Proposal 6–3) prepared by a professional accounting adviser.[102]

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98 New South Wales Bar Association, *Submission LPP 41,* 5 June 2007.
99 Ibid.
100 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007.
101 Australian Prudential Regulation Authority, *Submission LPP 74,* 6 July 2007.
102 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 8–3.

8.97 The proposal to provide persons with a reasonable opportunity to claim privilege and to allow a federal body to request particulars of a client legal privilege claim was generally supported,[103] although stakeholders made submissions on the detail of the balance of the proposal. For example:

- the Australian Financial Markets Association submitted that the procedure proposed for the making of claims was 'appropriate and reasonable';[104]

- the ACCC submitted that Proposal 8–3, together with other proposals made in DP 73 in relation to practice and procedure, would 'assist in identifying improper claims of privilege' as well as 'testing' claims of privilege;[105] and

- the ATO submitted that it was

> very supportive of the ALRC's [proposals] prescribing a mandatory mechanism for the making of [client legal privilege] claims. We consider that this process will enable federal agencies to more easily assess the veracity of a claim for privilege, and help to address significant delays to the Tax Office's compliance activities.[106]

8.98 Submissions highlighted the need for the proposal to clarify whether the particulars had to be provided with each claim or only on the request of a federal body,[107] and whether it was intended to cover the provision of particulars of claims where documents are *not* produced in response to the exercise of a coercive information-gathering power by a federal body.[108]

Particulars of privileged communications

8.99 Stakeholders supported the proposal for claimants to specify the grounds on which privilege is claimed, but there was some uncertainty about the level of detail that

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103 For example, National Legal Aid, *Submission LPP 106,* 5 November 2007; Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007; Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007; Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007; Institute of Chartered Accountants in Australia, *Submission LPP 82,* 31 October 2007; Members of the South Australian Bar Association, *Consultation LPP 38*, Adelaide, 17 October 2007. The AFP submitted that it would not object to the proposed measure: Australian Federal Police, *Submission LPP 115,* 29 November 2007.

104 Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007.

105 Australian Competition and Consumer Commission, *Submission LPP 92,* 26 October 2007.

106 Australian Taxation Office, *Submission LPP 81,* 29 October 2007.

107 Law Council of Australia, *Submission LPP 94,* 1 November 2007.

108 Australian Competition and Consumer Commission, *Submission LPP 92,* 26 October 2007.

would be considered sufficient to describe privileged communications.[109] The fields of description that stakeholders submitted ought to be provided to a federal body variously included:

- the date;
- type of communication;
- author;
- recipient;
- position of author/recipient;
- nature of the document; and
- dominant purpose.[110]

8.100 ASIC did not support allowing documents of the same or similar nature to be described by bundle because such an approach would 'undermine the rigour that a privilege claimant should exercise in assessing whether each document satisfies the requirements of attracting client legal privilege'.[111] ASIC also submitted that the proposal should:

- require a privilege claimant to provide details of the facts relied upon as giving rise to the claim; and
- be extended to cover privilege claims over oral communications. Specifically, if requested, a person should provide 'details of the date, time, parties to, location of, and means by which the communication took place'.[112]

Particulars concerning in-house counsel

8.101 There was strong opposition in submissions and consultations to requiring claimants, on the request of a federal body, to identify privileged communications prepared by in-house counsel, and to provide particulars of the independence of in-

109 See, eg, Allens Arthur Robinson, *Submission LPP 107,* 5 November 2007; Law Council of Australia, *Submission LPP 94,* 1 November 2007; Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007.

110 Allens Arthur Robinson, *Submission LPP 107,* 5 November 2007; Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007.

111 Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007.

112 Ibid.

house counsel.[113] Unsurprisingly, such opposition was expressed by in-house counsel and groups representing in-house counsel, but opposition also was expressed by private law firms and legal representative bodies.

8.102 Strong themes that emerged from submissions and consultations in expressing overall opposition to mandatory provision of particulars concerning in-house counsel include that:

- There is no justification for presuming that in-house counsel are not sufficiently independent or are of lesser independence than external lawyers.[114] For example, Sue Laver, in-house counsel for Telstra Corporation submitted:

  > All lawyers, whether employed in corporate roles, or in firms or at the bar seek to be paid for the work they do. No principle has been advanced to support a proposition that in-house counsel (who are usually employed on a salary) are more susceptible [to act under 'dictation' from their client or to face a conflict of interest] than their colleagues employed in firms, or at the bar (who are usually retained on hourly rates).[115]

- As a matter of course, particulars of independence should not have to be provided to federal bodies, although where the issue arises in a particular circumstance, a federal body may choose to seek such information.[116] For example, the Law Council submitted:

  > A general requirement to provide details about counsel's independence may be unnecessary in a particular case, and may well be onerous and wasteful of resources, particularly in an urgent situation. …
  >
  > The Law Council suggests that a presumption as to the independence of an in-house counsel be established to ensure, that prima facie, an in-house counsel is treated in the same way as any other legal adviser … If the investigating agency decides to question the independence of counsel … [it] should be required to provide a notice to that effect, setting out its reasons for doing so.

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113 Allens Arthur Robinson, *Submission LPP 107,* 5 November 2007; Law Council of Australia, *Submission LPP 94,* 1 November 2007; Westpac Banking Corporation, *Submission LPP 85,* 1 November 2007; Australian Corporate Lawyers Association, *Submission LPP 83,* 31 October 2007; Australian Corporate Lawyers Association, *Consultation LPP 46*, Sydney, 26 October 2007; Allens Arthur Robinson, *Consultation LPP 43*, Sydney, 24 October 2007. However, the Law Society of NSW did not oppose the requirement that communications involving in-house counsel be identified, although it objected to a general requirement to provide particulars about in-house counsel's independence: Law Society of New South Wales, *Submission LPP 93,* 31 October 2007.

114 See, eg, S Laver, *Submission LPP 110,* 7 November 2007; Allens Arthur Robinson, *Submission LPP 107,* 5 November 2007; Australian Corporate Lawyers Association, *Submission LPP 83,* 31 October 2007.

115 S Laver, *Submission LPP 110,* 7 November 2007.

116 Allens Arthur Robinson, *Submission LPP 107,* 5 November 2007; Law Council of Australia, *Submission LPP 94,* 1 November 2007; Law Society of New South Wales, *Submission LPP 93,* 31 October 2007.

> The [claimant] would then provide details of the independence of their in-house legal advisers … [117]

- There is uncertainty about the level of detail that would be required in providing 'sufficient' details of independence. Concern was also expressed that the relevant test should not be that the details are 'sufficient' in the opinion of the federal body, because the federal body's requirements may be unreasonable.[118]

- The appropriate focus should be on whether the person is a lawyer, acting as a lawyer and what the dominant purpose of the advice is.[119] For example, Allens Arthur Robinson submitted that:

> The dominant purpose of a communication is far more likely to be prima facie determinative of whether the document is privileged than considerations as to an in-house [counsel's] independence. For instance, simply because an in-house [counsel] is sufficiently independent at a theoretical level, does not mean that all communications between that person and their internal clients will be privileged.[120]

8.103 Similarly, Sue Laver submitted:

> The mere provision of information regarding the reporting lines of an in-house counsel, the holding of a practising certificate, titles or roles held will not provide an agency with information to assess in the particular circumstances whether a particular advice is privileged. At best it may provide a level of comfort to the agency that the person who is employed by the client was acting as a lawyer, giving legal advice. This is not 'independence'. It is purely fulfilling a requirement of the 'test' for client legal privilege, namely was the advisor acting as a lawyer.[121]

Identification of 'tax advice documents'

8.104 The general theme that emerged from submissions was that, if privilege were extended to 'tax advice documents' prepared by professional accounting advisers, then it was appropriate for such documents to be identified.[122]

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117 Law Council of Australia, *Submission LPP 94,* 1 November 2007. See also Westpac Banking Corporation, *Submission LPP 85,* 1 November 2007, which expressed the view that requiring details of independence was unnecessary in light of the proposal that a claimant specify the grounds on which privilege is claimed. It also noted that, under the ALRC's proposal, a federal body could obtain extra comfort by requesting verification and certification of claims made.

118 Law Society of New South Wales, *Submission LPP 93,* 31 October 2007. See also National Legal Aid, *Submission LPP 106,* 5 November 2007.

119 See, eg, Australian Corporate Lawyers Association, *Submission LPP 83,* 31 October 2007.

120 Allens Arthur Robinson, *Submission LPP 107,* 5 November 2007.

121 S Laver, *Submission LPP 110,* 7 November 2007.

122 See, eg Law Council of Australia, *Submission LPP 94,* 1 November 2007; Law Society of New South Wales, *Submission LPP 93,* 31 October 2007. Tax advice documents are defined in Rec 6–6.

Verification on oath and certification of claim

8.105 In response to IP 33, stakeholders also expressed some support for privilege claims made to federal bodies to be verified on oath and/or certified by lawyers—as is the practice in relation to discovery. ACMA stated that, depending on the nature of a claim and the nature of the investigation, it may seek an affidavit from a claimant about the nature of the documents the subject of a claim.[123]

8.106 The ACCC submitted that where the claim is made by a lawyer on behalf of a client, the lawyer should be required to verify on oath that

> he or she has reviewed all documents in respect of which the claim for privilege has been made and is satisfied that the claim is a proper one; and secondly, that he or she is satisfied that none of the documents in respect of which the claim has been made come within the fraud or crime exception to legal professional privilege.[124]

8.107 The NSW Bar Association supported a similar approach. It submitted that the senior solicitor with carriage and control of the matter should certify, at the time of making a privilege claim, that each privilege claim is supported by reasonable grounds, and that the grounds for each claim have been identified.

> Such a certificate could be analogous in form and status to certificates given by a practitioner under section 347(b) of the *Legal Profession Act 2004* (NSW) … warranting reasonable prospects of success in respect of proceedings.[125]

8.108 In DP 73, the ALRC proposed, as part of its procedure for making client legal privilege claims in federal investigations, that a federal body, in its discretion, could request:

- the person making the claim to verify the claim on oath or affirmation; and
- the claimant's lawyer to certify that, having reviewed the documents the subject of the privilege claim, in his or her opinion there are reasonable grounds for the making of the claim.[126]

Verification

8.109 The proposal concerning verification was generally supported by the same stakeholders, mentioned above, that supported the ALRC's approach in providing a

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123 Australian Communications and Media Authority, *Submission LPP 20,* 29 May 2007.
124 Australian Competition and Consumer Commission, *Submission LPP 53,* 13 June 2007.
125 New South Wales Bar Association, *Submission LPP 41,* 5 June 2007.
126 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 8–3.

mechanism for the making of claims in federal investigations. Only the following few stakeholders specifically commented on that part of the ALRC's proposal dealing with the verification of claims:

- The Law Society of NSW submitted that it did not oppose the requirement to verify the particulars of a privilege claim on the request of a federal body.[127]

- APRA supported the proposal 'subject to any such verification being acknowledged as not conclusive'.[128]

- The Law Council submitted that a federal investigatory body should only require verification of a claim in 'exceptional circumstances' because unlike a court, such a body 'is not the arbiter of a client legal privilege claim and does not stand in the same position as a court.'[129]

Certification

8.110 Some stakeholders supported that part of the ALRC's proposal dealing with certification of claims, including on the basis that it would assist lawyers in resisting pressure from their clients to make improper claims.[130] Allens Arthur Robinson submitted that federal bodies should have the option of requesting certification of privilege claims without requesting particularisation of those claims.

> In many instances the preparation of a list of the type outlined in Proposal 8–3(b), given the volume of documents which are sometimes the subject of a regulator's request, could be extremely onerous in terms of time and cost. We think there would be merit in a presumption that regulators would first only request lawyer certification and that only in circumstances where certification proved inadequate for the regulator's purpose, a list could be required. … A presumption of that type would for the majority of cases obviate the cost associated with preparing what would, very often, be lengthy lists in relation to claims for privilege which are relatively uncontroversial but where the regulator simply wants peace of mind that the request has been properly complied with.[131]

8.111 A strong theme that emerged in submissions was that any certification provided by a lawyer of a client's privilege claim should state that, *based upon the client's instructions*, in the lawyer's opinion there are reasonable grounds for making the

127 Law Society of New South Wales, *Submission LPP 93,* 31 October 2007.
128 Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007.
129 Law Council of Australia, *Submission LPP 94,* 1 November 2007.
130 See, eg, Allens Arthur Robinson, *Consultation LPP 43*, Sydney, 24 October 2007. However, members of the South Australian Bar Association expressed reservations about the certification process: Members of the South Australian Bar Association, *Consultation LPP 38*, Adelaide, 17 October 2007.
131 Allens Arthur Robinson, *Submission LPP 107,* 5 November 2007.

claim.[132] The Law Council also expressed the view that a request for certification of a privilege claim should only be made in exceptional circumstances.[133]

8.112 More specifically, the requirement under the ALRC's proposed regime, that privilege claims in respect of 'tax advice documents' prepared by professional accounting advisers be certified by lawyers (where certification is requested by a federal body), was opposed by professional accounting bodies. Opposition was expressed on various grounds, including that: it would incur greater expense for a client; was a task within the skills of tax agents; and there was adequate regulation of the profession to guard against the making of improper claims.[134]

8.113 The Institute of Chartered Accountants submitted:

> We see this particular requirement for certification by a lawyer as being unwarranted in a pre-curial federal investigation. Certification by a tax agent or its nominee or employee is sufficient and provides for sufficient accountability to guard against improper claims. …
>
> The proposed statutory regime recognising client professional privilege for tax agents should be on an equal footing to client professional privilege currently afforded to lawyers.[135]

8.114 The National Institute of Accountants submitted that the proposed requirement 'defeats any purpose in having such an extension of the privilege as the client will still need to seek additional legal advice'.[136]

Waiver

8.115 In DP 73, the ALRC proposed that federal client legal privilege legislation should specify that providing a description of the documents or bundle of documents in accordance with legislative requirements of itself will not amount to a waiver of privilege.[137]

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132 Law Council of Australia, *Submission LPP 94,* 1 November 2007; Law Society of New South Wales, *Submission LPP 93,* 31 October 2007; Australian Corporate Lawyers Association, *Submission LPP 83,* 31 October 2007.

133 Law Council of Australia, *Submission LPP 94,* 1 November 2007.

134 National Institute of Accountants, *Submission LPP 87,* 1 November 2007; Institute of Chartered Accountants in Australia, *Submission LPP 82,* 31 October 2007.

135 Institute of Chartered Accountants in Australia, *Submission LPP 82,* 31 October 2007.

136 National Institute of Accountants, *Submission LPP 87,* 1 November 2007.

137 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 8–4.

8.116 This proposal received widespread support.[138] For example, the Australian Financial Markets Association submitted that it provided clarity.[139] No opposition to the proposal was expressed in submissions or consultations.

Time limits

8.117 In response to IP 33, ASIC and the ATO expressed the need for time limits to be set within which claimants are to provide details of client legal privilege claims in response to the coercive information-gathering powers of federal bodies.

8.118 In this regard, the ATO submitted that the process for making a claim should

> prescribe statutory time periods within which details of a claim must be provided, or allow for a longer period where this is agreed to in writing by the relevant federal investigatory agency and the claimant.[140]

8.119 ASIC submitted that details of privilege claims should be provided within time limits that are defined but may be flexible depending upon the particular circumstances.[141] It noted that flexibility was necessary to take into account the fact that documents the subject of privilege claims may be voluminous or mixed amongst large amounts of non-privileged documents covered by the coercive power.

8.120 In DP 73, the ALRC proposed that federal client legal privilege should specify that the particulars of documents subject to a claim for privilege are to be provided to the federal body within the time frame defined by that body, which must be reasonable having regard to the circumstances of each particular request for information. The proposal set out examples of the types of factors that may be relevant.[142]

8.121 This proposal was generally supported.[143] Some stakeholders supported the proposal, but noted that other factors may be relevant.[144] For example, the Law Council submitted:

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138 National Legal Aid, *Submission LPP 106,* 5 November 2007; Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007; Law Council of Australia, *Submission LPP 94,* 1 November 2007; Law Society of New South Wales, *Submission LPP 93,* 31 October 2007; Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007; Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007. The AFP submitted that it would not object to the proposed measure: Australian Federal Police, *Submission LPP 115,* 29 November 2007.

139 Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007.

140 Australian Taxation Office, *Submission LPP 65,* 22 June 2007.

141 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007.

142 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 8–5.

143 Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007; Australian Competition and Consumer Commission, *Submission LPP 92,* 26 October 2007; Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007; Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007. The AFP submitted that it would not object to the proposed measure: Australian Federal Police, *Submission LPP 115,* 29 November 2007.

144 National Legal Aid, *Submission LPP 106,* 5 November 2007; Law Council of Australia, *Submission LPP 94,* 1 November 2007; Law Society of New South Wales, *Submission LPP 93,* 31 October 2007.

> This proposal is supported in principle, but the factors listed are insufficient and may lead to instances of injustice. There may be significant prejudice to a party under investigation, where the federal body requesting information specifies a very short time-frame for production of details of a client legal privilege claim. … [A]ny adverse effect on the client and its resources in responding urgently should be included as a relevant factor.[145]

8.122 ASIC submitted that the proposal should be extended to cover time limits for complying with requests for verification and certification of privilege claims.[146]

Failure to provide particulars

8.123 In DP 73, the ALRC proposed that federal client legal privilege legislation should provide that, where a person fails to comply with a federal body's request to provide particulars of communications in respect of which privilege is claimed, the federal body may apply for a declaration that the privilege is not maintainable unless particulars are provided to the court forthwith, or within a designated time determined at the discretion of the court.[147]

8.124 Opinions in submissions and consultations were divided. Some stakeholders expressed support for the proposal,[148] and suggested that it be extended to cover a failure to verify a claim.[149] APRA supported the principle underlying the proposal, but submitted that:

> A federal body should be able to apply to a court for the declaration if the particulars are not provided at the time the privilege is claimed, rather than having to request the particulars when the claim is made.[150]

8.125 Other stakeholders suggested modifications to the proposal. The Law Council submitted that the court ought to be given a broad discretion to hold, where appropriate, that, despite a failure to comply, a declaration that privilege is not maintainable should not be given.[151] The Law Society of NSW, while supporting 'the tenor' of the proposal, also expressed the view that the court ought to be given a broad discretion of this nature.[152]

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145 Law Council of Australia, *Submission LPP 94,* 1 November 2007.
146 Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007.
147 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 8–6.
148 National Legal Aid, *Submission LPP 106,* 5 November 2007; Australian Competition and Consumer Commission, *Submission LPP 92,* 26 October 2007. The AFP submitted that it would not oppose the proposed measure: Australian Federal Police, *Submission LPP 115,* 29 November 2007.
149 Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007. See also Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007.
150 Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007.
151 Law Council of Australia, *Submission LPP 94,* 1 November 2007.
152 Law Society of New South Wales, *Submission LPP 93,* 31 October 2007.

8.126 The Australian Crime Commission (ACC) expressed a preference for a 'self-executing' mechanism, which would entitle a federal body to regard a privilege claim as having been waived if particulars were not provided on request.[153] ASIC noted that the benefits of such a self-executing mechanism

> would be to increase the likelihood that claimants would more diligently comply with their obligation to provide particulars because they would not be provided with a second opportunity within which to satisfy that requirement. Further, it would avoid the costs and delays associated with litigation.[154]

8.127 However, ASIC noted that the benefit of the ALRC's proposal 'is that it avoids the possibility that a person may lose their claim of … privilege through, for example, mere inadvertence'.[155]

8.128 The Commonwealth Director of Public Prosecutions (CDPP) opposed the proposal because it places the onus on a federal body to progress a matter when a claimant has failed to comply with a time limit. It submitted that:

> A preferable approach is to put the onus on the claimant to obtain a court order before the expiry of the time limit that extends the time for compliance. In the absence of such an order, once the time limit expires the investigative body may access the documents and privilege is lost.[156]

8.129 The Hon John Hannaford opposed the proposal on the basis that 'it introduced an unnecessary and additional step for all parties in resolving [privilege] claims'.[157]

8.130 In DP 73, the ALRC expressed interest in hearing views about whether its approach needed to be modified in the context of search warrants—in particular, whether there is a stronger argument in that framework for a failure by a claimant to provide particulars within the requisite time frame to lead to the *automatic* consequence that an investigatory body can take possession of the documents in respect of which no particulars were provided. No views were offered in this respect.

Failure by lawyer to certify claim on request

8.131 In DP 73, the ALRC proposed a mechanism in federal client legal privilege legislation to deal with the failure by a lawyer to certify a claim for privilege upon the federal body's request. The proposed mechanism involved:

- the federal body informing a claimant of the lawyer's lack of certification and the consequences of the failure to certify (as set out below);

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153 Australian Crime Commission, *Consultation LPP 47*, Sydney, 26 October 2007.
154 Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007.
155 Ibid.
156 Commonwealth Director of Public Prosecutions, *Submission LPP 101,* 2 November 2007.
157 J Hannaford, *Submission LPP 114,* 19 November 2007.

- allowing the federal body to apply for a declaration that unless the court otherwise orders, if certification is not made within the time provided by the court, the claim for privilege is not maintainable; and

- allowing the person to apply to the court for a declaration that privilege applies despite the lack of certification.[158]

8.132 A number of stakeholders submitted that they would support—or not oppose—the proposal if it were modified to require a federal body first to notify the lawyer that it intends to inform the claimant of the lawyer's failure to certify and to allow that lawyer an opportunity to respond.[159] These stakeholders also submitted that any information provided by the federal body to the claimant concerning the lawyer's failure to certify should also be copied to the claimant's lawyer.

8.133 Members of the South Australian Bar Association suggested that the proposal be modified to specify what the lawyer was certifying.[160]

8.134 ASIC noted that an alternative approach to this proposal

> may be that a federal body should be entitled to regard the privilege claim as having been waived if certification has not, in the absence of a reasonable excuse, been provided. That approach would be to increase the likelihood that claimants would more diligently comply with their obligation to obtain and provide certification. Further, it would avoid the costs and delays associated with litigation.[161]

8.135 However, ASIC noted that the benefit of the ALRC's proposal is that it protects a person from losing a claim of privilege through mere inadvertence.[162]

8.136 Other stakeholders, however, expressed opposition to the proposal on various grounds.[163] The CDPP opposed it because it places the onus on a federal body to progress the matter, diverting resources from the investigation.[164] APRA submitted that the proposal was unnecessary because certification does not resolve a dispute over

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158 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 8–6.

159 National Legal Aid, *Submission LPP 106,* 5 November 2007; Law Council of Australia, *Submission LPP 94,* 1 November 2007. See also Law Society of New South Wales, *Submission LPP 93,* 31 October 2007.

160 Members of the South Australian Bar Association, *Consultation LPP 38*, Adelaide, 17 October 2007. The AFP submitted that it would not object to the proposed measure.

161 Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007.

162 Ibid.

163 J Hannaford, *Submission LPP 114,* 19 November 2007; Commonwealth Director of Public Prosecutions, *Submission LPP 101,* 2 November 2007; Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007.

164 Commonwealth Director of Public Prosecutions, *Submission LPP 101,* 2 November 2007.

whether privilege applies.[165] Hannaford also submitted that the proposal was unnecessary and would entail 'wasted expenditure'.[166]

ALRC's views

Establishing a procedure for the making of claims

8.137 The ALRC considers that federal client legal privilege legislation should provide a mechanism for the making of privilege claims in federal investigations. The ALRC's proposed statute of general application provides an appropriate vehicle to establish uniform procedures for making claims.

8.138 Court rules do not provide an appropriate vehicle for the making of privilege claims in federal investigations because there may not be any court proceedings on foot arising from an investigation—nor may there ever be. The experience of federal bodies—in particular the ACCC and ATO—suggests that guidelines of themselves are inadequate because, in the absence of legislative compulsion, some persons consider that they are justified in their refusal to provide particulars of their privilege claims. However, as discussed below, the ALRC considers that federal body policies have a role to play in complementing the proposed legislative scheme for making a claim of privilege.[167]

8.139 The lack of clear and consistent practices surrounding the making of client legal privilege claims in federal investigations needs to be addressed. The absence of a process requiring transparent claims may encourage blanket claims, over-claiming privilege, over-masking or otherwise arguably inappropriate claims—thereby hindering the ability of federal bodies to access material relevant to their investigations.

8.140 It is unsatisfactory that federal bodies may not be made aware of the fact that allegedly privileged material has been withheld from production. It is important for federal bodies to be able to satisfy themselves that claims of client legal privilege appear to have a proper basis. Increasing the transparency of claims may have the salutary effect of decreasing the likelihood of inappropriate claims—and therefore maximising the production of relevant non-privileged material to federal investigatory bodies pursuant to their coercive powers. It may also reassure such bodies that client legal privilege claims are being appropriately made.

Obligations of federal bodies and claimants

8.141 The mechanism for making a claim should set out the respective obligations of federal bodies and claimants. Federal bodies must give persons a reasonable opportunity to make a claim.

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165 Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007.
166 J Hannaford, *Submission LPP 114,* 19 November 2007.
167 See discussion on 'Other policies and procedures' below and Rec 8–22.

8.142 The ALRC considers that, in order to enjoy the benefit of an important right—as the ability to make a claim of client legal privilege is—claimants must be prepared to meet certain obligations in demonstrating their entitlement to exercise that right. Court discovery rules provide a precedent for creating obligations on those who make privilege claims to provide details of their claims.

8.143 The ALRC agrees with the approach supported by a number of stakeholders that claimants should be required to provide details of privileged communications withheld from federal bodies. Under the ALRC's approach, a person who does not produce documents to a federal body on the basis that they are subject to a privilege claim will nonetheless be required to provide particulars of that claim if the federal body so requests. Not every federal body in respect of the exercise of each of its coercive information-gathering powers will necessarily require particulars of privileged information withheld from production. Whether a federal body does so may depend on its nature, the particular investigation that it is undertaking, and the power that it is exercising. Accordingly, in order to achieve an appropriate degree of flexibility, the ALRC recommends that claimants be obliged to provide certain particulars of privileged communications only when a federal body has requested them.[168]

8.144 Where particulars are requested, claimants should be required to specify the grounds on which privilege is claimed and the facts relied upon as giving rise to the claim. For example, it is envisaged that a relevant fact would be the capacity in which an in-house counsel was acting at the time of giving advice.

8.145 In addition, where claims are made in respect of communications in documents, claimants, on the request of the federal body, should be required to describe the documents, either individually or by bundle, sufficiently to enable the document or bundle to be identified.[169] Allowing for description by bundle in appropriate circumstances is consistent with the approach taken in court discovery rules. There is merit in the argument that the obligations to be imposed on persons responding to federal coercive powers concerning the particularisation of claims should not, as a general proposition, be more onerous than those required by court discovery rules.

8.146 Taking into account views expressed in submissions and consultations, the ALRC agrees that there needs to be some guidance about the types of particulars that

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168 The New Zealand Law Commission has recommended that statutory privilege procedures set out a process to require privilege claims to be particularised, subject to the right of the privilege claimant to apply to the court for relief or directions where particular circumstances preclude adequate particularisation: see New Zealand Law Commission, *Search and Surveillance Powers*, Report 97 (2007) [12.61], recs 12.14, 12.29.

169 Examples of bundles are 'drafts one to four of document X' or 'letters from A to B (in-house counsel) between 1 January 1999 and 30 January 1999 concerning advice on Project C'.

would need to be given to satisfy the requirement of sufficiency of detail. The ALRC considers that the following details of written communications should be provided:

- date of the document;
- the nature of the document and the type of communication. This would entail describing, for example, whether the document is:
    - a letter of advice,
    - a file note of a conversation recording legal advice,
    - a draft affidavit,
    - a tax advice document, as defined in Recommendation 6–6, prepared by a professional accounting adviser, or
    - copies of any such documents;
- the names and description of the position of the authors and recipients of the privileged communications. This would involve indicating that an author or recipient is, for example:
    - a partner of a specified law firm,
    - a solicitor employed in a specified law firm,
    - in-house counsel for a specified company,
    - a barrister retained to act for a particular client, or
    - the managing director of a particular company.

8.147 The above approach places external lawyers and in-house counsel on the same footing. Communications prepared by in-house counsel will need to be indicated—as will communications prepared by solicitors or barristers.

8.148 As noted above, in DP 73 the ALRC proposed that where a federal body requested particulars of a claim, a claimant had to provide sufficient details about the independence of any in-house counsel who had prepared or was involved in communications the subject of a privilege claim. This approach is consistent with that adopted in *Telstra Corporation Limited* v *Minister for Communications, Information Technology and the Arts (No 2)* by Graham J, who noted that Telstra had not led any evidence

> to establish the role which the various legal practitioners performed within Telstra. In particular, no evidence has been advanced to disclose the measure of independence of the legal practitioners in question and their ability to provide impartial legal advice, given the roles that they have had to perform.[170]

8.149 However, taking into account the views expressed in submissions and consultations, the ALRC is persuaded that details of the independence of in-house counsel should not be required, as a matter of course, whenever a federal body requests particulars of a claim. The appropriate focus is on eliciting the grounds of the claim, which would entail an articulation of the dominant purpose of the creation of the communication, and the facts relied upon for making the claim. However, if independence becomes an issue in a particular case, a federal body should have scope to test the issue.

8.150 A federal body should equally be able to request particulars of privilege claims in respect of oral communications. This is especially important to federal bodies, such as ASIC, which have the power to examine persons on oath or affirmation. If a federal body requests particulars of claims made in respect of oral communications, the claimant should provide details of the date, time, parties to, location and means by which the communication took place.

8.151 The ALRC's approach also addresses concerns expressed about the making of blanket claims. Where a federal body requests particulars of privilege claims, they will have to be provided.

8.152 The ALRC's views about the consequences of a person failing to provide particulars are addressed separately below.

Verification and certification

8.153 Where a person makes a privilege claim in a federal investigation, and a federal body has requested particulars of that claim, the federal body, if it so chooses, should be able to require the person to verify his or her claim on oath or affirmation. This is consistent with the obligations imposed on claimants in court discovery processes.

8.154 In addition, where a person is legally represented in a federal investigation or has otherwise received advice in relation to making a privilege claim, the federal body may request that the lawyer certify that, having reviewed the documents the subject of

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170 *Telstra Corporation Limited v Minister for Communications, Information Technology and the Arts (No 2)* [2007] FCA 1445, [12]. This case is also discussed in Ch 3. It has been reported that, following the decision in *Telstra*, 'companies are moving to set up "independence protocols"' that 'are to be embedded in lawyers' employment contracts and will contain an acknowledgement by the company that their lawyers' duties to the court are paramount to any obligations to their employer': M Drummond and R Nickless, 'In-house Privilege Rules', *Australian Financial Review* (Sydney), 12 October 2007, 57.

a privilege claim, in his or her opinion, based on the client's instructions, there are reasonable grounds for the making of the claim.

8.155 The ALRC is of the view that there is merit in allowing a federal body to request certification of privilege claims without first having to request particularisation of the communications over which privilege is claimed. A theme that emerged in the Inquiry was that relationships of trust develop between certain federal regulators and the lawyers who typically represent the regulated community. In these instances, a federal body may choose not to request the preparation of particulars of privileged communications, a process that may be time consuming, and which, in the context of particular investigations may be relatively uncontroversial. However, the federal body may nonetheless choose to satisfy itself that, where documents have been withheld from production on the grounds of privilege, proper consideration has been given to the basis of the privilege claims by requiring certification by lawyers.

8.156 Equally, where a federal body seeks particulars of a privilege claim, it may not always need that claim to be verified or certified. Whether it does so may depend on a number of factors, including the nature of the investigation, and the person who is the subject of the coercive information-gathering power. Therefore, to achieve an appropriate degree of flexibility, the ALRC recommends that claimants and their lawyers be required to verify and certify claims only where the federal body has requested them to do so. As discussed below, it may be appropriate for policies on the making of privilege claims of individual federal bodies to address the circumstances in which those bodies will request verification or certification of claims.[171]

8.157 It is the ALRC's view that the verification and certification processes serve the salutary function of focusing attention by claimants and their lawyers on the merits of the claims for privilege—increasing the likelihood that possibly inappropriate claims are eliminated at an early stage.[172]

8.158 In certifying that, based on the client's instructions, there are reasonable grounds for a privilege claim a lawyer, in effect, will also be expressing the view that:

- none of the documents the subject of the claim are subject to the fraud and crime exception to the privilege; and

- if portions of documents are privileged, a claim has been made only in relation to those specific portions.[173]

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171 See discussion on 'Other policies and procedures' below and Rec 8–22.

172 Ch 9 makes a number of proposals designed to reduce the risk of inappropriate privilege claims being made by lawyers.

173 This also addresses the issue of appropriate use of masking.

8.159 Verification and certification may engender trust on the part of a federal body as to the legitimacy of the claims being made—thereby possibly reducing the need to dispute privilege claims.

8.160 The model for making privilege claims recommended by the ALRC recognises the proposed extension of client legal privilege to tax advice provided by professional accounting advisers in response to the coercive powers of the Commissioner of Taxation.[174] However, it only allows lawyers to certify such claims—recognising that advice about the 'dominant purpose' of a communication is legal advice which a professional accounting adviser is not qualified to give, unless that person is also a lawyer. As noted in Chapter 6, the meaning of the dominant purpose under the tax advice privilege will derive from the common law doctrine of client legal privilege. Similarly, whether the tax advice privilege has been waived, or whether the fraud and crime exception applies to it, will be determined by common law principles, in respect of which accountants are not qualified to give legal advice.

8.161 The ALRC notes the opposition expressed by accounting bodies about lawyers certifying tax advice documents prepared by professional accounting advisers. To the extent that opposition is expressed on the basis that certification is within the skills of accounting advisers, the ALRC's view remains that, because, as a matter of law, professional accounting advisers are not qualified to provide legal advice about client legal privilege, it is inappropriate for them to certify such claims. That is the central and essential reason for requiring certification to be undertaken by lawyers. Arguments about the comparative ethical and disciplinary regimes of accountants and lawyers are not pertinent in this context. A highly ethical professional accounting adviser, subject to a strict professional disciplinary regime, remains nonetheless unqualified to give legal advice about the doctrine of privilege. However, the existence of high ethical standards and an appropriate professional disciplinary regime are relevant in the context of professional accounting advisers being the initial 'gatekeepers' to the claim being made, especially where a federal body does not request a lawyer to certify privilege claims made in respect of tax advice documents.[175]

8.162 Further, as emphasised elsewhere in this Report, the intended beneficiaries of the ALRC's recommended extension of client legal privilege to certain tax advice documents prepared by professional accounting advisers are the *clients* who obtain such advice—not the accountants who provide it. Therefore, in this particular context, arguments about placing accountants and lawyers on the 'same footing' are beside the point.

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174 See Rec 6–6.

175 The education and regulation of accounting advisers is addressed in Ch 9.

8.163 The ALRC's views on the consequences of a lawyer failing to provide certification are set out separately below.

Waiver

8.164 Taking into account support expressed in submissions and consultations, the ALRC remains of the view that federal client legal privilege legislation should make it clear that providing a description of documents or a bundle of documents in accordance with legislative requirements will not of itself amount to a waiver of client legal privilege.

8.165 However, the ALRC envisages that the details provided should be able to be used by a federal body to dispute the claim.

Time limits

8.166 It is impossible for legislation to specify a time period within which persons in all federal investigations making a claim for privilege are to provide particulars of privileged documents, or are to verify or certify such claims, where requested by federal bodies.

8.167 Each federal body should have the discretion to set reasonable time frames for the provision of particulars of privileged information, or the verification or certification of such claims, depending on the circumstances of each particular request for information. The types of factors that might be considered in determining a reasonable time frame include:

- the number of documents that a claimant is required to review;
- the need to access and identify electronically-stored documents;
- whether the information is required pursuant to the exercise of a search warrant (or a search without warrant);
- the urgency and seriousness of the investigation being conducted by the federal body;
- any adverse effect on the claimant and the claimant's resources in responding to an urgent request; and
- the time frame for production of documents pursuant to the coercive power.

8.168 The above factors are not intended to be exhaustive. The final factor mentioned recognises that persons subject to coercive information-gathering powers may be faced with competing deadlines. There may be a deadline for the production of information sought under a particular power—whether the deadline is statutorily imposed or determined at the discretion of the federal body—in addition to the deadline imposed

by the federal body for the provision of particulars of privileged information (where such particulars have been requested).

8.169 From a practical perspective, federal investigatory bodies presumably would want to have access to non-privileged information as soon as possible—in order to advance their investigations. The production of non-privileged information should not be delayed by requirements to provide particulars of privileged information. Therefore the ALRC envisages that, in general terms, the time limit set by a federal body for the provision of particulars of privileged information would not be earlier than the time limit set for compliance with the power.

8.170 A privilege claimant may require a greater period of time in order to sort through voluminous material in order to identify that which must be produced and that over which client legal privilege may be claimed. In such circumstances, it remains open to the federal body to seek to negotiate with the claimant to produce non-privileged material in stages as and when it is identified as not being privileged.

Failure by claimant to provide particulars or to verify a privilege claim

8.171 A claimant may fail to comply with a federal body's request to provide particulars by not providing any particulars, or by providing, in the federal body's view, inadequate particulars.

8.172 The claimant's failure may be due to a range of reasons. The time frame designated by the federal body in the first instance may have been unrealistic; the claimant may be unrepresented and not understand the nature of the obligation to provide particulars; or, more cynically, the claimant may be aware that the particulars will not support his or her claim, or he or she is seeking to frustrate or delay the federal investigation.

8.173 In broad terms, the same can be said of a person's failure to verify a claim. The claimant may not understand the obligation to verify or may be unprepared to verify a claim which he or she knows to be ill-founded.

8.174 Because the failure to provide particulars or to verify a claim may be due to a range of reasons, it is necessary to have a process that can deal with failure in a flexible manner, depending on the particular circumstances. An automatic self-executing mechanism which deprives a person of the right to claim privilege in the absence of having provided particulars when requested by a federal body has the appeal of being time and cost efficient. However, it may operate unjustly, causing persons to lose the benefit of an important privilege through no fault of their own or because of mere inadvertence.

8.175 Therefore the ALRC is of the view that federal client legal privilege legislation should provide that where a person fails to comply with a federal body's request to provide particulars of communications in respect of which privilege is claimed or to verify such claims the federal body may apply for a declaration that privilege is not maintainable unless particulars or verification of the claims are provided forthwith or within a designated time determined at the discretion of the court.

8.176 The ALRC does not seek to detract from the court's broad discretion not to make the declaration sought. The court may have regard to a range of factors in determining what is reasonable—including the time that the federal body gave the claimant to provide the particulars, the urgency of the federal body's inquiry, and the quantity of documents in respect of which particulars or verification are sought. The court may order a timetable for the particulars to be provided in stages. For example, particulars relating to documents about a certain transaction under investigation may be ordered to be produced by a particular date; and particulars relating to documents relating to another transaction under investigation by the federal body may be ordered to be produced by a later date.

8.177 However, under this approach, it would be open to the court to consider that the time frame originally provided by the federal body to provide particulars was reasonable, and in the absence of justification by the claimant for why he or she did not provide any particulars within that time, to order the claimant to provide the details forthwith—which could effectively mean an order for production within 24 hours.

8.178 If a person fails to produce the particulars within the time frame designated by the court, the court's declaration that the privilege claim is not maintainable would take effect. This would mean that the legislation containing the coercive power would have the effect of requiring production of the documents (in respect of which a non-maintainable claim had been made) to the federal body (assuming those documents fell within the scope of the power).

8.179 While the ALRC's recommendation has taken into account stakeholders' views that it should also allow a federal body to apply for a declaration where a claimant fails to verify a claim, it must be stressed that this is merely an option available to a federal body. A federal body may opt not to seek a declaration in such circumstances. For example, where particulars have been provided to the federal body, but not verified as requested, the federal body is likely to have enough information upon which to decide whether it wishes to challenge a privilege claim—the information being the particulars provided plus the fact of non-verification. If the federal body decides to challenge the privilege claim, rather than press for a non-conclusive verification of the claim, it may prefer to proceed directly to the dispute resolution processes discussed later in this chapter.[176] The ALRC envisages that on a cost/benefit analysis, the benefits of seeking

176 See Rec 8–11.

a declaration concerning a failure to verify would only outweigh the costs where the failure to verify is accompanied by a failure to provide particulars.

Failure by lawyer to certify claim on request

8.180 A lawyer may fail to certify a client's legal privilege claim for a number of reasons. At one end of the spectrum, he or she may be negligent or reckless. At the other end, he or she may have genuine reservations about a client's claim that properly preclude him or her from certifying that there are reasonable grounds for the making of the claim.[177] It is important that any process seeking to address the failure of a lawyer to certify a claim does not prejudice a claimant who has engaged a negligent lawyer.

8.181 Further, it must be emphasised that a federal body that has requested certification of privilege claims—in the terms set out in Recommendation 8–3—may not wish to press for certification where it has not been provided. For example, in circumstances where particulars have been provided to the federal body, it may have enough information upon which to make a decision whether to dispute any privilege claim. The fact that a claim has not been certified on request may be a persuasive factor in a federal body's decision to dispute a claim. It would be open under the ALRC's recommendation for a federal body to proceed directly to the dispute resolution processes, discussed later in this chapter.[178] So, for example, pursuant to Recommendation 8–11, the federal body would have the option of notifying the claimant that it disputes a claim and that the claimant has 14 days (or such other time agreed to or ordered by the court) within which to commence proceedings to establish the claim. Such an approach recognises that certification of claims is not conclusive of whether or not privilege applies, and also allows the federal body, where it considers appropriate, to shift the onus back onto the claimant to establish the claim.

8.182 However, if a federal body wishes to pursue the issue of a lack of certification of privilege claims, the ALRC considers that this should involve the following steps:

- If the federal body is aware of the identity of the claimant's lawyer, it should notify the lawyer that it intends to inform the claimant of the lawyer's failure to certify.

- The federal body should inform the claimant that the lawyer has not certified some or all of the claims, if it appears to the federal body that the claimant may not be aware of this. In addition, the federal body should inform the claimant about the consequences of non-certification. In the ALRC's view, the consequences should be that:

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177 Ch 9 discusses the proposed consequences of a lawyer making a certification without reasonable grounds.
178 See Rec 8–11.

- the federal body may apply to the court for a declaration that, unless the court otherwise orders, if certification is not made within the time provided by the court, the claim for privilege is not maintainable; and

- the claimant may apply to the court for a declaration that privilege applies despite the lack of certification.

8.183 Further, if a federal body is to be given legislative sanction to request certification of privilege claims by lawyers, there should be disciplinary consequences for a lawyer who fails to certify a privilege claim, on the request of a federal body, in the absence of reasonable grounds.[179] Reasonable grounds for failure to certify would include that the lawyer did not believe that there was a proper basis for the making of the claim and could therefore not certify them. In addition, there should be disciplinary consequences for lawyers who certify privilege claims in the absence of reasonable grounds.[180]

Recommendation 8–3 Federal client legal privilege legislation should provide a mechanism for the making of privilege claims in federal investigations. Those provisions should include a requirement that persons be given a reasonable opportunity to claim privilege, and if a federal body requests particulars of privileged communications not produced pursuant to a coercive information-gathering power, that:

(a) the person specify:

  (1) the grounds on which client legal privilege is claimed; and

  (2) the facts relied upon as giving rise to the claim;

(b) where claims are made in respect of communications contained in documents:

  (1) the person making the claim describes the documents or in the case of a bundle of documents of the same or similar nature, describe each bundle, sufficiently to enable the document or bundle to be identified including details of the following:

    (i) date of the document;

179 This is discussed in Ch 9.
180 This is discussed in Ch 9.

(ii) the nature of the document and the type of communication (for example tax advice documents, defined in Recommendation 6–6, prepared by a professional accounting adviser should be indicated); and

(iii) the names and positions of the authors and recipients of the communications (for example, X—partner in Y Law Firm; B—in-house counsel for C Limited);

(2) if a federal body so requests:

(i) the particulars of the privileged documents and the basis for the claims are to be verified on oath or affirmation by the person making the claim; and/or

(ii) where the person is legally represented in the federal investigation or has otherwise received legal advice in relation to making a claim for privilege, the person's lawyer is to certify that having reviewed the documents the subject of a privilege claim, that in his or her opinion, based on the client's instructions, there are reasonable grounds for the making of the claim. A federal body may request such certification by a lawyer in the absence of requesting particularisation of the communications over which privilege is claimed; and

(c) where the claims are made in respect of oral communications, the person making the claim should provide details of the date, time, parties to, location and means by which the communication took place.

Recommendation 8–4 Federal client legal privilege legislation should specify that providing a description of the documents or bundle of documents in accordance with legislative requirements of itself will not amount to waiver of the privilege.

Recommendation 8–5 Federal client legal privilege legislation should specify where a federal body has requested particulars of documents subject to a claim for privilege, or the verification or certification of privilege claims, those particulars, verification or certification are to be provided to the federal body within the time frame defined by that body, which must be reasonable having regard to the circumstances of each particular request. The types of factors that may be relevant include:

(a) the number of documents that a claimant is required to review;

(b) the need to access and identify electronically-stored documents;

(c) whether the information is required pursuant to the exercise of a search warrant (or a search without warrant);

(d) the urgency and seriousness of the investigation being conducted by the federal body;

(e) the time frame for production of documents pursuant to the coercive power; and

(f) any adverse effect on the claimant and the claimant's resources in responding urgently.

Recommendation 8–6 Federal client legal privilege legislation should provide that where a person fails to comply with a federal body's request to provide particulars of communications in respect of which privilege is claimed or to verify such claims the federal body may apply for a declaration that privilege is not maintainable unless particulars or verification of the claims are provided to the court forthwith or within a designated time determined at the discretion of the court.

Recommendation 8–7 Federal client legal privilege legislation should provide that where a federal body requests that any claims for client legal privilege made by a person be certified by his or her lawyer (in the terms set out in Recommendation 8–3), and the lawyer fails to certify any or all of the privilege claims made by that person, if the federal body wishes to pursue the issue, the following steps apply:

(a) the federal body, if it is aware of the identity of the person's lawyer, should notify the lawyer that it intends to inform the person of the lawyer's failure to notify;

(b) the federal body should inform the person that the lawyer has not certified some or all of the claims (if it appears that the person may not be aware of this fact) and of the consequences of failure to certify (as set out below);

(c) the federal body may apply to the court for a declaration that, unless the court otherwise orders, if certification is not made within the time provided by the court, the claim for privilege is not maintainable; and

(d) the person may apply to the court for a declaration that privilege applies despite the lack of certification.

If the federal body does not wish to press the issue of failure to certify, it can invoke the dispute resolution processes set out in Recommendation 8–11.

Unrepresented persons

Background

8.184 The ALRC has previously considered the particular difficulties faced by unrepresented litigants.[181] In the context of this Inquiry, consideration needs to be given to the issues that arise in relation to persons who are unrepresented in the investigation process. In IP 33, the ALRC sought feedback about what these issues might be.[182]

8.185 Coercive information-gathering powers may be exercised against persons who do not receive advice concerning the exercise of those powers or who are not represented. Persons may be unrepresented for a variety of reasons. For example, they may choose to act without representation or they may not be able to afford it. Such persons may have privileged information or documents but may not understand, or be aware of, their rights in relation to making a claim for privilege. That is, they may not be aware of whether a claim for client legal privilege is a reasonable excuse for not producing information to a federal body pursuant to a coercive power.

8.186 Sussex Street Community Law Service Inc submitted that:

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181 See, eg, Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89 (2000), Ch 5. See also Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), Ch 13, which considered the situation of unrepresented persons at a sentencing hearing.

182 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007), Question 5–3.

> An issue we face as a Community Legal Centre is the fact that there is a lack of access to justice for a large proportion of our community. When dealing with Centrelink a majority of their customers would not seek legal advice or assistance when faced with an investigation, so they are generally in the situation that they have not received legal advice in relation to their rights in an investigation.[183]

8.187 The Taxation Institute of Australia submitted:

> There is no evidence which suggests that bodies exercising coercive information-gathering powers are inclined to 'go easy' or to assist [an unrepresented] person in understanding their rights.[184]

8.188 As a consequence of not knowing their rights, unrepresented persons may produce privileged material to a federal body in response to a coercive power—including to a body that recognises that its statutory powers do not override privilege. Production in such circumstances may potentially prejudice a person's position—particularly where a federal body interprets the production of privileged material as constituting waiver.

8.189 IP 33 noted that s 103(3) of the *Taxation Administration Act 2003* (WA)[185] provides a model that could be applied in cases where privileged information is produced by a person who is unaware of his or her rights concerning the making of a claim for privilege. The section applies where no claim of privilege is made in respect of a document produced to the Commissioner of State Revenue, but it is apparent on examination of the document by the Commissioner or investigator that material in the document is, or is likely to be, protected by privilege. In those circumstances, it becomes the duty of the Commissioner or an investigator to separate the document from those in respect of which no claim is made and to refrain from using the document for any purpose.[186]

8.190 There is precedent for investigatory bodies addressing in guidelines the receipt of material considered to be subject to a claim for client legal privilege where no claim is made. The Serious Fraud Office, in the United Kingdom, for example, sets out in its Operational Handbook a procedure to be followed in such cases:

> If no [client legal privilege] claim has been made but there is doubt as to the status of the material, the case controller should ask the Divisional Assistant Director to appoint a [Serious Fraud Office (SFO)] lawyer unconnected with the case to examine the material and advise on its status.
>
> If [client legal privilege] status is confirmed, the material must be returned immediately to the person entitled to it.
>
> If it appears that the material might be covered by [client legal privilege] but the SFO lawyer is unable to confirm the status of the material without obtaining further

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183 Sussex Street Community Law Service Inc, *Submission LPP 15,* 30 May 2007.
184 Taxation Institute of Australia, *Submission LPP 54,* 15 June 2007.
185 This section is discussed in more detail at [8.243] below.
186 See also *Taxation Administration Act 2003* (WA) s 103(2).

> information, the Case controller must alert the person entitled to the material and seek an agreed method of resolution.[187]

8.191 Section 120 of the uniform Evidence Acts protects confidential communications and confidential documents made by an unrepresented litigant for the dominant purpose of preparing for or conducting that litigation. There is no equivalent statutory protection given to confidential communications and documents made by an unrepresented person in preparing for examinations or interviews conducted as part of federal investigations or in preparing to comply with other types of coercive information-gathering orders.[188] IP 33 sought information from federal bodies about whether, as a matter of practice, they ever seek such material from unrepresented persons as part of their investigation processes.[189] The ALRC did not receive any information in this regard.

Submissions and consultations

8.192 As discussed above in the section dealing with notification of application of privilege, there was some support in submissions and consultations in response to IP 33 for requiring federal bodies exercising coercive information-gathering powers to notify persons about whether or not client legal privilege applies to the exercise of those powers.[190]

8.193 Some stakeholders addressed the issue of informing persons about their right to seek legal assistance. Sussex Street Community Law Service Inc supported a requirement that investigatory bodies, as a matter of natural justice, inform a person under investigation that they have a right to legal assistance.[191] The Law Society of NSW submitted that:

> It would seem unnecessary to impose a regime which requires people to obtain legal advice and incur legal costs unnecessarily if the treatment of the privilege is non-contentious.[192]

8.194 There was some support for a model based on s 103(3) of the *Taxation Administration Act 2003* (WA), to address the production of privileged material by

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187 United Kingdom Government Serious Fraud Office, *Operational Handbook* <www.sfo.gov.uk/handbook/> at 15 August 2007.

188 As noted by the Australian Council of Trade Unions, there is equally no statutory protection where parties are represented by non-lawyers, such as industrial officers: Australian Council of Trade Unions, *Submission LPP 88,* 1 November 2007

189 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007), [5.20]. Issues concerning the production of documents to a federal body relating to the representation of a client in the investigation process are discussed in Ch 7.

190 BHP Billiton Mitsubishi Alliance, *Submission LPP 21,* 1 June 2007; B McKillop, M Kumar and F Beaupert, *Consultation LPP 16*, Sydney, 21 May 2007.

191 Sussex Street Community Law Service Inc, *Submission LPP 15,* 30 May 2007.

192 Law Society of New South Wales, *Submission LPP 40,* 1 June 2007.

unrepresented persons.[193] The Law Society of NSW submitted that it was a 'useful' model;[194] although the Law Council noted that:

> There is currently little practical experience or feedback about how this section may operate in practice. … The efficacy of the procedure would depend to a large extent on the expertise of the investigator in determining what may be privileged.[195]

8.195 The Law Society of NSW also submitted that:

> Regardless of whether a legislative model can be agreed, agencies should be required to produce uniform guidelines setting out their requirements and a process for review by the person or entity coerced.[196]

8.196 Although not in the specific context of addressing the particular needs of unrepresented persons, the NSW Bar Association submitted that uniform protocols for federal investigatory bodies should include a provision that:

> where it reasonably appears to the responsible officer within the federal investigative agency that client legal privilege may exist in relation to a document or communication coming into the hands of the agency then the agency must take reasonable steps to notify the client (either directly or through an available lawyer for the client) and give that client the opportunity to claim privilege before further inspecting or using the document.[197]

8.197 NSW Young Lawyers expressed support for a provision protecting the confidential communications and documents prepared by an unrepresented person in preparing for examinations or interviews conducted in federal investigations or in preparing to comply with other types of coercive information-gathering powers.[198]

8.198 In DP 73, the ALRC proposed that federal bodies should develop and publish their policies and procedures for addressing apparent unintentional disclosures by unrepresented persons of material likely to be subject to a claim of client legal privilege, particularly the circumstances in which they recognise such persons should be given an opportunity to seek legal advice about whether to claim or waive the privilege.[199] The scope of the proposal was limited to federal bodies with coercive information-gathering powers, the exercise of which raise, or are likely to raise, the issue of the application of client legal privilege.

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193 NSW Young Lawyers, *Submission LPP 49,* 12 June 2007; Law Society of New South Wales, *Submission LPP 40,* 1 June 2007; Law Council of Australia, *Submission LPP 26,* 4 June 2007.

194 Law Society of New South Wales, *Submission LPP 40,* 1 June 2007.

195 Law Council of Australia, *Submission LPP 26,* 4 June 2007.

196 Law Society of New South Wales, *Submission LPP 40,* 1 June 2007.

197 New South Wales Bar Association, *Submission LPP 41,* 5 June 2007.

198 NSW Young Lawyers, *Submission LPP 49,* 12 June 2007.

199 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 8–8.

8.199 This proposal received support in submissions and consultations.[200] For example, the Australian Financial Markets Association submitted that it was 'fair and reasonable';[201] and ASIC supported the development of such policies and procedures 'once the application of client legal privilege to the information-gathering powers of federal bodies has been clarified'.[202]

8.200 Allens Arthur Robinson supported the proposal, but submitted that it should be extended to clients who are represented, on the basis that 'inadvertent disclosures by lawyers are not unheard of and could, in certain circumstances, significantly prejudice the interests of a client'.[203] The Law Council also submitted that legislation should provide that an unintentional disclosure does not lead to waiver.[204]

8.201 APRA, on the other hand, opposed the proposal. It submitted that:

> It is very rare that persons responding to APRA would not have legal representation or the means to retain legal representation. Accordingly APRA considers the development and publication of such policies and procedures to be an unnecessary diversion of resources.[205]

8.202 The AFP submitted that it would object to a legislative requirement to publish its policies and procedures on any issue.[206]

ALRC's views

Preventing unintentional disclosure of privileged material by unrepresented persons

8.203 The ALRC considers that other recommendations made in this Report will be of particular benefit in preventing the unintentional disclosure of privileged material by unrepresented persons. These include, in particular, the recommendations requiring federal bodies to notify persons about whether client legal privilege applies to the exercise of a coercive power or the voluntary production of information.[207]

8.204 The ALRC also makes a number of recommendations directed to the development and publication of policies by federal bodies with coercive information-gathering powers. One of those recommendations is aimed at policies in relation to

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200 National Legal Aid, *Submission LPP 106,* 5 November 2007; Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007; Law Council of Australia, *Submission LPP 94,* 1 November 2007; Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007.

201 Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007.

202 Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007.

203 Allens Arthur Robinson, *Submission LPP 107,* 5 November 2007.

204 Law Council of Australia, *Submission LPP 94,* 1 November 2007.

205 Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007.

206 Australian Federal Police, *Submission LPP 115,* 29 November 2007.

207 See Recs 8–1, 8–2.

notifying persons that they may wish to seek independent legal advice about responding to a coercive power—which could include advice about the application of the privilege to a particular communication—or, if applicable, seek legal representation.[208] Such policies should address the circumstances in which federal bodies will give such notice. Relevant factors may include:

- whether the person the subject of the power is the subject of the investigation;
- whether the person the subject of the power is known to be unrepresented;
- the type of power being exercised;
- the nature of the investigation; and
- whether the statute conferring the power confers a right to legal representation in an interview or examination.[209]

Addressing unintentional disclosure of privileged material by unrepresented persons

8.205 The ALRC considers that there may be situations in which the receipt of privileged material from an unrepresented person—in respect of which no claim for privilege is made—places an obligation on the federal body to take reasonable steps to contact the person to allow that person a reasonable opportunity to seek legal advice about whether to claim or waive the privilege.

8.206 The ALRC is of the view, however, that it would be unduly prescriptive and onerous to place such a requirement on all federal bodies in all instances—without regard to the particular circumstances of each case. For example, considerations of fairness may not require a federal body to contact an unrepresented person to allow him or her an opportunity to seek legal advice where:

- the federal body notified the person that:
  - client legal privilege applied to the exercise of its coercive information-gathering power; and
  - he or she could seek independent legal advice or legal representation;
- the unrepresented person is not the target of the federal body's investigation; and

208 See Rec 8–22.
209 See, eg, *Australian Securities and Investments Commission Act 2001* (Cth) s 23.

- the privileged information produced by the unrepresented person does not prejudice that person's position.

8.207 Consequently, the ALRC supports a flexible approach, requiring federal bodies with coercive information-gathering powers—the exercise of which raise or are likely to raise the issue of the application of client legal privilege—to develop and publish their policies concerning the manner in which they deal with apparent unintentional disclosures of privileged material by unrepresented persons. The policies should address the circumstances in which they recognise that such persons should be given an opportunity to seek legal advice about whether to claim or waive privilege.

8.208 The ALRC is not persuaded that there is a need for a legislative provision to state that unintentional disclosure does not amount to waiver.[210] The common law provides a suitable vehicle to define the parameters of waiver of privilege—both within and outside the context of federal investigations.

Extension of privilege in s 120 Evidence Act

8.209 The ALRC does not make any recommendation to protect the confidential communications and documents of unrepresented persons in preparing to comply with federal investigatory powers. As a matter of principle, it is difficult to reconcile such an approach with the underlying rationale for client legal privilege.[211]

Recommendation 8–8 Federal bodies with coercive information-gathering powers—the exercise of which raise, or are likely to raise, the issue of the application of client legal privilege—should develop and publish their policies and procedures for addressing apparent unintentional disclosures by unrepresented persons of material likely to be subject to a claim of client legal privilege, particularly the circumstances in which they recognise such persons should be given an opportunity to seek legal advice about whether to claim or waive the privilege.

Third parties

Background

8.210 Different issues may arise in relation to privilege depending upon from whom information is compelled. As noted in Chapter 4, depending on the circumstances, information may be compelled not only from persons suspected of wrongdoing, but

210 Waiver is discussed in Ch 3.
211 See Ch 2.

also from persons or entities who happen to have information or documents that may be relevant to an investigation into the conduct of others. For example, information or documents may be sought from a person's lawyer, accountant, service providers, employer, business associates, friends or family.

8.211 Where the information is sought from a person's lawyer, that lawyer is likely to be in a comparatively sound position to facilitate the making of a privilege claim on behalf of his or her client, where appropriate. However, where a person other than a person's lawyer—such as a person's relative (X)—holds documents belonging to another (Y) that may record privileged communications, questions arise as to whether:

- the giving of the information by Y to X waived the privilege;
- X can inadvertently waive Y's right to claim privilege;[212]
- X is aware that any documents in his or her possession may be privileged; and
- X is in a position to take steps to protect Y's privileged information.

8.212 Key issues will include the circumstances in which a person came to hold the documents of another and the relationship between the two persons.[213]

8.213 The ability of a person holding documents on behalf of another to take steps to protect privileged information may be restricted by statutory secrecy provisions. In some cases a person who is the subject of a coercive information-gathering power is prohibited from disclosing that fact. For example, a person may be prohibited from disclosing the fact that he or she has been required to produce documents to the ACC[214]—although a lawyer may make a disclosure for the purpose of obtaining the agreement of another person to the lawyer answering a question or producing a document at an examination.[215]

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212 This issue was identified by the Law Council: see Law Council of Australia, *Submission LPP 26,* 4 June 2007.

213 R Desiatnik, *Submission LPP 24,* 1 June 2007.

214 Proceedings in the Federal Court of Australia between the ACC and MM and DD concern notices issued by the ACC as part of 'Project Wickenby'—a cross-agency taskforce investigating tax fraud and money laundering—to an accountancy firm that was prohibited from notifying its clients that their files had been seized because of the ACC's secrecy provisions. On 19 December 2007, the Federal Court held that the notices issued by the ACC were not invalid simply by reason of the fact that clients of the accountancy firm were not afforded the opportunity of asserting privilege in respect of documents required by the notices to be produced. Nor was any such notice invalid simply by reason of the fact that the Examiner who decided to issue it did not have regard to the possibility that a person other than the recipient of it may be the holder of the privilege: *MM v Australian Crime Commission* [2007] FCA 2026, [45].

215 See *Australian Crime Commission Act 2002* (Cth) s 29A. Section 29B(1) provides that failure to comply with a non-disclosure order carries a maximum penalty of $2,200 or imprisonment for one year.

8.214 In *Rio Tinto Ltd v Commissioner of Taxation*, Sundberg J stated:

> It may be that a party to whom privileged documents are provided, in circumstances that are not inconsistent with the maintenance of the privilege, has a general or limited right to assert that privilege on behalf of any person. …
>
> Where a document which is privileged, or alleged to be privileged, in the hands of the client for whom it was prepared, is then provided to a third party, the party claiming privilege bears the burden of proving that the provision of that document to the third party did not waive privilege. … An ex post facto request by the client for the third party to maintain the privilege does not discharge the burden.[216]

8.215 Dr Sue McNicol has expressed the view that a person other than the holder of the privilege can claim the privilege.

> The only person who can waive the privilege is the 'holder' of the privilege. The holder of the privilege is, however, not necessarily the person who claims, invokes or exercises the privilege.[217]

Submissions and consultations

8.216 While submissions and consultations in response to IP 33 identified the issues concerning the compulsion of material from third persons, few of them suggested any reform options. The AGS submitted that:

> there must be a proper limit to what action a federal body can reasonably be expected to take in anticipation of the possibility that information or documents which the body is seeking through the exercise of coercive powers are subject to client legal privilege. This is regardless of whether the person in whose favour the privilege subsists is the holder of the information … or whether the holder be some other person.[218]

8.217 The Law Society of NSW suggested that there be penalties imposed on federal bodies where they used privileged information without giving an opportunity for a claim of privilege to be made.

8.218 Others expressed the view that a federal body should not take unfair advantage of a privilege holder in these circumstances,[219] and that fairness could require the claimant to be notified that potentially privileged information had been sought and provided an opportunity to make a privilege claim.[220]

8.219 In DP 73, the ALRC proposed that federal client legal privilege legislation should provide that, other than in covert investigations, where a federal body receives

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216 *Rio Tinto Ltd v Commissioner of Taxation* (2006) 235 ALR 127, [26]–[27].
217 S McNicol, *Law of Privilege* (1992), 13. See also 21, 467.
218 Australian Government Solicitor, *Submission LPP 50,* 13 June 2007.
219 E Magner, *Consultation LPP 17*, by phone, 22 May 2007.
220 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007.

apparently privileged information from a person other than the privilege holder (the notice recipient)—pursuant to the exercise of a coercive power that does not abrogate client legal privilege—the federal body should take reasonable steps to give the privilege holder an opportunity to establish that privilege had not been waived by the privilege holder's provision of the information to the notice recipient.[221]

8.220 This proposal received some support in submissions and consultations.[222] The Australian Financial Markets Association submitted that it

> placed a fair and reasonable onus on federal bodies to ensure that appropriate protection and opportunity to claim privilege is afforded to a privilege holder who may not be aware that privileged information is being disclosed during [an] … investigation.[223]

8.221 However, it also expressed the view, as did Westpac Banking Corporation (Westpac), that there should be a presumption that privilege has not been waived and that the onus should be on the federal body to prove otherwise.[224]

8.222 The Law Council and the Law Society of NSW expressed strong opposition to the exclusion of covert investigations from the scope of the proposal.[225] However, they both supported the principle of requiring a federal body to take reasonable steps to give a privilege holder an opportunity to establish that privilege has not been waived by the privilege holder's provision of the information to the notice recipient.[226]

ALRC's views

Pre-production obligations

8.223 The ALRC's recommendation to require federal bodies to notify persons about whether client legal privilege applies to the exercise of a coercive power may assist in alerting the recipients of notices required to produce documents belonging to another of the ability to claim privilege in relation to the production of those documents.[227] For example, if the recipient of a notice is a firm of accountants with an in-house counsel, that counsel could undertake to identify potentially privileged information belonging to a client that falls within the terms of the notice, and, where not legislatively prohibited from doing so, seek instructions from the client in relation to making a claim.

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221 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 8–9.

222 For example, Confidential, *Submission LPP 108,* 14 November 2007; National Legal Aid, *Submission LPP 106,* 5 November 2007; Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007;

223 Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007.

224 Ibid, Westpac Banking Corporation, *Submission LPP 85,* 1 November 2007.

225 Law Council of Australia, *Submission LPP 94,* 1 November 2007; Law Society of New South Wales, *Submission LPP 93,* 31 October 2007.

226 Law Council of Australia, *Submission LPP 94,* 1 November 2007; Law Society of New South Wales, *Submission LPP 40,* 1 June 2007.

227 See Rec 8–1.

However, not all 'third party' notice recipients will possess comparable levels of legal knowledge.

Post-production obligations—covert investigations

8.224 Different considerations come into play once a federal body receives potentially privileged information from a person other than the holder of the privilege in circumstances where a claim has not been made. In particular, complex issues arise where:

- a federal body is undertaking a covert investigation;
- potentially privileged information belonging to a covert target is produced pursuant to a coercive power by a person other than the target;
- the person producing the information is prohibited by secrecy provisions from notifying the target about the production of documents—or to give the target an opportunity to claim privilege; and
- the federal body considers that notifying the target to allow an opportunity to claim privilege would be likely to prejudice the investigation.

8.225 The ALRC is of the view that reforms to practice and procedure cannot adequately or completely address such circumstances, and that the exigencies of covert investigations should be one of the relevant factors considered by the Australian Parliament in deciding whether to abrogate client legal privilege in a particular case.[228]

8.226 Taking into account views expressed on Proposal 8–9, the ALRC now considers that federal bodies should not be given a blanket exemption in all covert investigations from the requirement to give privilege holders an opportunity to claim privilege when they receive apparently privileged information from a person other than the privilege holder or the privilege holder's lawyer. The mere fact that an investigation is covert may not, of itself, warrant exemption. Regard should be had to the particular circumstances of each covert investigation. For example, where the privilege holder is not a target of a covert investigation, nor closely affiliated with the target, a federal body may consider that there is an appropriate point in the timespan of the investigation where allowing that person an opportunity to claim privilege would not prejudice the investigation. However, the legislation should recognise that there may be circumstances where it would be reasonable for a federal body to take no steps. Relevant factors to be considered in this regard include those of the type listed at [8.224] above, which address the exigencies of covert investigations.

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228 See Recs 6–1, 6–2. Abrogation is discussed in Ch 6.

Post-production obligations—overt investigations

8.227 In overt investigations there is a stronger case for ensuring that privilege holders are given an opportunity to establish their claims in circumstances where a federal body compulsorily obtains their privileged information from other persons (the notice recipients). While the provision of the privileged information by privilege holders to the notice recipients may have resulted in the waiver of the privilege, this is not necessarily the case—for example, where the notice recipient is merely a storage provider.

8.228 In the ALRC's view, in such circumstances a federal body should be required to take reasonable steps to allow privilege holders an opportunity to establish that their privilege was not waived by the giving of the privileged information to the notice recipients. The ALRC considers that such an approach is consistent with the concept of a 'model investigator'. Such an obligation may also act as a safeguard in ensuring that federal bodies do not unfairly issue notices to parties with the specific intention of accessing information that, if sought from the privilege holder, would be likely to be subject to a claim for privilege.

8.229 In overt investigations there ought not to be any prohibitions on the notice recipient seeking instructions from the privilege holder about any privilege claims prior to producing documents to the federal body. Where such a course of action is taken by the notice recipient, it will be unlikely, or at least less likely, that the federal body will receive from the notice recipient the privilege holder's privileged information.

8.230 In circumstances where privilege holders establish that privilege was not waived by the provision of privileged information to the notice recipients, the production by a notice recipient of the privileged information to the federal body should not prevent the privilege holder from being entitled to relief, for example, in the form of an injunction restraining the federal body from using the privileged information or adducing it in evidence.[229]

8.231 The ALRC is not persuaded that there is a need to legislate in relation to the onus of establishing waiver. The common law is an appropriate vehicle for the enunciation of such principles generally—whether within or outside the context of federal investigations.

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229 See, by analogy, *Australian Competition & Consumer Commission v George Weston Foods Ltd* (2003) 129 FCR 298.

Recommendation 8–9 Federal client legal privilege legislation should provide that, where a federal body receives apparently privileged information from a person other than the privilege holder (the notice recipient) or the privilege holder's lawyer, pursuant to the exercise of a coercive power that does not abrogate client legal privilege the federal body should take steps that are reasonable in the circumstances to give the privilege holder an opportunity to establish that privilege had not been waived by the privilege holder's provision of the information to the notice recipient. The legislation should recognise that there may be circumstances where it would be reasonable for a federal body to take no steps. Relevant factors to be included in this regard include:

(a) the nature of the investigation, in particular whether or not it is covert;

(b) whether the privilege holder is a covert target of the investigation; and

(c) whether the federal body considers, on reasonable grounds, that notifying the privilege holder to allow such an opportunity would be likely to prejudice the investigation.

Resolving privilege disputes

Background

Practices of federal bodies

8.232 Many federal bodies do not have any standard procedures for resolving privilege claims. This is sometimes due to the fact that issues of client legal privilege do not typically arise in their investigations. A number of federal bodies informed the ALRC that no claims of privilege had been made in their investigations in their corporate memory,[230] nor had they ever challenged a claim for privilege asserted in respect of the exercise of their coercive powers.[231]

8.233 Medicare Australia stated that it was aware of only one case in which privilege was raised during the execution of a search.[232] Similarly, the Inspector-General of

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230 See, eg, Australian Pesticides and Veterinary Medicines Authority, *Submission LPP 45,* 6 June 2007; Great Barrier Reef Marine Park Authority, *Submission LPP 17,* 1 June 2007; Australian Quarantine and Inspection Service, *Submission LPP 16,* 29 May 2007.

231 See, eg, Australian Government Office of the Privacy Commissioner, *Submission LPP 71,* 29 June 2007; Comcare, *Submission LPP 64,* 14 June 2007; Centrelink, *Submission LPP 35,* 17 July 2007; Human Rights and Equal Opportunity Commission, *Submission LPP 28,* 4 June 2007; Australian Communications and Media Authority, *Submission LPP 20,* 29 May 2007.

232 Medicare Australia, *Submission LPP 6,* 10 April 2007.

Intelligence and Security stated that he was aware of only one instance in which client legal privilege was an issue in the context of the powers under s 18 of the *Inspector-General of Intelligence and Security Act 1986* (Cth).[233]

8.234 Comcare informed the ALRC that it has no current procedure for resolving claims because, to date, this has been unnecessary.[234] The National Offshore Petroleum Safety Authority stated that, in its short period of existence, it had not been challenged by privilege issues in its major investigations.[235]

8.235 AUSTRAC submitted that:

> Reflecting the absence of any challenges on the ground of client legal privilege, AUSTRAC has not established practices and procedures to deal with such a challenge should it arise in response to the exercise of a coercive information-gathering power, nor does it have any policies or manuals that set out its practice in relation to client legal privilege. However, as AUSTRAC progressively implements the [anti-money laundering/counter-terrorism financing] reforms and mounts an expanded compliance audit program across a broader range of reporting entities, it will keep the matter of client legal privilege under close review.[236]

8.236 Only a very few federal bodies appear to have formal policies and practices concerning the resolution of privilege disputes.[237] Notably, the ATO has developed and published guidelines concerning procedures to be adopted in relation to resolving claims for client legal privilege made in response to the exercise of its information-gathering powers. The ATO Manual summarises the law relating to the ATO's statutory powers for gaining access to information and describes how the ATO exercises those powers.

8.237 The ATO Manual encourages a consultative approach to resolving claims of privilege. Tax officers are to work with claimants to develop a procedure for resolving privilege claims.[238] Further, tax officers are encouraged to consult generally with a person before exercising notice powers—which may result in negotiation to resolve privilege issues before a notice is sent.[239]

8.238 The ATO Manual identifies an inspection process as a means of resolving claims for privilege. The process allows for the ATO and the claimant each to

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233 Inspector-General of Intelligence and Security, *Submission LPP 22,* 1 June 2007.
234 Comcare, *Submission LPP 64,* 14 June 2007.
235 National Offshore Petroleum Safety Authority, *Submission LPP 23,* 1 June 2007.
236 Australian Transaction Reports and Analysis Centre, *Submission LPP 31,* 4 June 2007.
237 Search warrant guidelines containing such dispute resolution models are addressed separately below. Some federal bodies stated that they were prompted by the ALRC Inquiry to develop policies or review their operational procedures in this regard.
238 See Australian Taxation Office, *Access and Information Gathering Manual* <www.ato.gov.au> at 23 August 2007, [6.6.9].
239 See Ibid, [6.6.12].

nominate a person to inspect documents and agree whether or not privilege applies. The ATO has devised an Inspection Agreement template.[240]

8.239 Where the ATO decides to resist or refuse a claim for privilege, some of its options are:

- instituting proceedings for injunctive or declaratory relief;
- seeking independent third party review or arbitration; or
- resolution by an independent mediator.[241]

8.240 In addition, as mentioned above, the ATO Guidelines—agreed to between the Commissioner of Taxation and the Law Council—address the exercise of the ATO's access powers at lawyers' premises in circumstances where a claim of client legal privilege is made.[242]

8.241 Insolvency and Trustee Service Australia (ITSA) has produced a document entitled *Official Receiver Best Practice Statement*, which sets out the procedure to be followed where a claim for privilege is made in respect of the exercise of certain of the Official Receiver's coercive powers under the *Bankruptcy Act 1966* (Cth). In relation to powers under s 77A to access books and premises, the document sets out the following procedure:

> Where the occupier claims that books are subject to legal professional privilege, the owner of the books should, in the presence of the Official Receiver, place them in envelopes or boxes and seal them, and give them to the Official Receiver. The Official Receiver cannot determine whether the claim is validly raised.
>
> In those circumstances, the Official Receiver will retain the sealed records and make arrangements with the parties for the claim to be determined by the Court.[243]

Statutory procedures

8.242 Given that federal legislation conferring coercive powers is usually silent on the issue of privilege, it is rare for such legislation to make provision for the procedures to be adopted in resolving claims for privilege. One notable exception is the *Royal Commissions Act 1902* (Cth), which is discussed in Chapter 5.

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240 See Ibid, Ch 6.

241 See Ibid, [6.6.38]. The ATO considers that Australian Government Solicitors or a firm of solicitors would be suitable third parties.

242 See Ibid, App B.

243 Insolvency and Trustee Service Australia, *Official Receiver Best Practice Statement—Exercise of Official Receiver's Powers to Assist Trustees* (2007), [2.12]. See also [3.11], which is expressed in similar terms in relation to the Official Receiver's powers under *Bankruptcy Act 1966* (Cth) s 77C.

8.243 An example of a state provision which sets out a procedure for the resolution of privilege claims is s 103 of the *Taxation Administration Act 2003* (WA).[244] That provision:

- requires a person to produce an 'official document' to the Commissioner of State Revenue or an investigator when required to do so, whether or not the document would be subject to client legal privilege;
- requires the documents the subject of a claim to be separated from other documents and to be retained in a sealed container;
- prohibits the Commissioner or investigator from viewing, accessing or otherwise dealing with the privileged material;
- empowers the Commissioner or the person who claims privilege to apply to the Supreme Court or a judge for a declaration that privilege does or does not apply to the documents provided;
- empowers the Commissioner to apply to the Supreme Court or a judge for an order to extinguish privilege where it applies; and
- requires that privileged documents be returned to the person making the claim where the court declares that privilege applies or refuses to make an order to extinguish it.

Issues and problems

Delay, costs, lack of uniformity and clarity

8.244 Central concerns raised in this Inquiry are the significant delays and costs in resolving client legal privilege claims[245] and the lack of clear, uniform and expeditious processes to deal with privilege disputes—which have adverse impacts on the subjects of coercive powers as well as on the efficiency of federal investigations. These central concerns were seen to be interrelated—for example, delays are partly attributed to the fact that there is a lack of clear and expeditious processes.

8.245 The Law Council expressed the view that:

> The development of effective practices and procedures to resolve privilege claims is a more appropriate response to [federal] agency concerns regarding the use of [client legal privilege] rather than modifications to, or abrogation of, [the privilege].[246]

8.246 The ACCC expressed concern about the lack of an effective procedure for adjudicating client legal privilege claims at the non-curial stage:

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244 This provision is also considered at [8.189] above.
245 Issues of delay caused by privilege claims are discussed in Ch 6.
246 Law Council of Australia, *Submission LPP 26,* 4 June 2007.

> At present, there is no forum, other than a court, where the proper basis for a claim can be determined. Therefore, even where there is a basis for considering that a claim for privilege has been improperly made, the delay caused by disputing the claim can significantly frustrate investigations.[247]

8.247 The AICD submitted that a key problem for its members is

> that a claim for privilege is likely to result in protracted negotiations with the investigatory body or involve legal proceedings, both of which, particularly the latter, are likely to be highly expensive and time consuming.[248]

8.248 The CDPP gave an example of a case where, following an execution of a search warrant, documents in respect of which privilege were claimed were held at the Federal Court registry on the basis that the applicants had to commence action establishing their privilege claim within a certain period of time.

> No action in relation to legal professional privilege was commenced and the documents remained in the Federal Court Registry for years, denying the investigators access to the documents. Eventually, the investigators sought access to the documents and the applicants made no attempt to enforce their claim of [privilege]. The documents were used in the trial of [three] accused for conspiracy to defraud the Commonwealth. All [three] were convicted.
>
> In this case it appears that there was a strong argument that [privilege] did not actually apply to the documents because [they] were brought into existence to facilitate the fraud. This issue was never determined by the court because the applicants did not commence an action in the Federal Court to uphold their claim to [privilege].[249]

Onus of establishing claim

8.249 Part of the lack of clarity in resolving disputes centres around issues of onus of proof. Submissions and consultations revealed that there was some disagreement among stakeholders in relation to which party bears the onus where a federal body disputes a claim of client legal privilege.[250]

8.250 In the guidelines governing search warrants agreed to by the Law Council and the AFP in 1997, the onus is on the person who claims client legal privilege to institute proceedings within a set time to establish the privilege claim.[251]

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247 Australian Competition and Consumer Commission, *Submission LPP 75,* 14 August 2007.

248 Australian Institute of Company Directors, *Submission LPP 43,* 8 June 2007. Similar concerns were expressed by the Taxation Institute of Australia: see Taxation Institute of Australia, *Submission LPP 54,* 15 June 2007.

249 Commonwealth Director of Public Prosecutions, *Submission LPP 61,* 12 June 2007.

250 This is discussed further below.

251 See Australian Federal Police and Law Council of Australia, *General Guidelines Between the Australian Federal Police and the Law Council of Australia as to the Execution of Search Warrants on Lawyers' Premises, Law Societies and Like Institutions Where a Claim of Legal Professional Privilege is Made* (1997), [31]–[33].

8.251 In relation to disputed claims made in ATO investigations, the ATO submitted that:

> Some legal practitioners have mistakenly argued that the [ATO] bears a burden to disprove a claim for [privilege].[252]

Alternative models

8.252 In IP 33, the ALRC sought feedback about procedures that would be effective in resolving privilege claims and, in particular, the practicalities of using alternative dispute resolution models—such as recourse to an independent third party—in order to expedite the resolution of privilege claims.[253] IP 33 also asked whether such alternative models would be inappropriate for any particular investigations or in respect of any federal body, such as a Royal Commission.[254]

8.253 In relation to the use of alternative dispute resolution schemes, consideration must be given to the fact that Chapter III of the *Constitution* precludes anyone other than a judicial officer from exercising judicial power.[255] The concept of judicial power is affected by many variables, which makes it incapable of exhaustive definition.[256] In *Nicholas v The Queen*, Gaudron J stated that:

> The difficulties involved in defining 'judicial power' are well known. In general terms, however, it is that power which is brought to bear in making determinations as to rights, liabilities, powers, duties or status put in issue in justiciable controversies, and in making adjustment of rights and interests in accordance with legal standards.[257]

8.254 A decision about whether or not a communication is privileged involves the determination of a party's right to seek the protection granted by the privilege. If a party other than a judicial officer were to make such a decision, it would appear that it could not be binding on the parties for constitutional reasons.[258]

8.255 In *AWB Ltd v Cole*, Young J stated that he did not doubt that a Royal Commissioner could make a *non-binding* decision concerning a claim for privilege. Where a Royal Commissioner rejected a privilege claim, his or her ruling would provide the foundation for an application to be made to the court for an appropriate declaration or injunction.[259]

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252 Australian Taxation Office, *Submission LPP 65,* 22 June 2007.

253 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007), Question 5–6, [5.30]. Stakeholders' views on the use of an independent third party are set out separately below.

254 See Ibid, [5.30].

255 See Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, ALRC 92 (2001).

256 S Ratnapala, *Australian Constitutional Law: Foundations and Theory* (2002), 120.

257 *Nicholas v The Queen* (1998) 193 CLR 173, [70]. See also *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357.

258 'Binding' refers to the enforceability of a decision: see *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245.

259 See *AWB Ltd v Cole* (2006) 152 FCR 382, [187].

Limitation periods

8.256 The ACCC stated that it is not infrequent for restrictive trade practices matters to come to its attention 'well into, and sometimes close to, the expiry of the limitation period for commencing action'.[260] In such cases it could not risk the expiry of the limitation period by challenging privilege claims—although a successful challenge would have allowed it to obtain access to any material the subject of an improper claim.

8.257 The ACCC expressed concern that targets of its investigations had made inappropriate privilege claims as a means of exploiting the fact that the limitation period had nearly expired—thereby forcing the ACCC not to commence proceedings at all or to commence them without the benefit of the best possible evidence to support its case.[261]

Submissions and consultations

Addressing delay

8.258 There was strong support in submissions and consultations in response to IP 33 for the establishment of 'fast-tracking' court arrangements to hear privilege-related matters on short notice.[262] Suggestions ranged from establishing special listing systems within the existing court structure to establishing a special practices court to deal with privilege matters. For example, the NSW Bar Association submitted that:

> Federal and state Courts could be approached to further extend the procedures now being made available whereby Judges can hear and determine claims at short notice.[263]

8.259 In DP 73, the ALRC proposed that the Federal Court and the Supreme Court of each state and territory should have appropriate arrangements in place to cater for hearing applications on short notice concerning disputes about client legal privilege claims in federal investigations.[264]

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260 Australian Competition and Consumer Commission, *Submission LPP 53,* 13 June 2007.

261 Ibid.

262 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007; New South Wales Bar Association, *Submission LPP 41,* 5 June 2007; National Australia Bank Limited and others, *Submission LPP 30,* 4 June 2007; A Brown—Law Society of New South Wales, *Consultation LPP 15*, Sydney, 21 May 2007. See also National Australia Bank Limited and others, *Submission LPP 30,* 4 June 2007 (expression of support for improvements in court administration).

263 New South Wales Bar Association, *Submission LPP 41,* 5 June 2007.

264 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 8–10.

8.260 This proposal received widespread support.[265] For example, the Law Council submitted:

> The Law Council supports the use of courts to adjudicate and protect the existing law of client legal privilege and would welcome the opportunity to provide further input into any consultative process established in response to Proposal 8–10 for developing appropriate arrangements with the courts.[266]

8.261 The Law Society of NSW supported the proposal 'without necessarily conceding that the current arrangements are inappropriate'.[267]

Establishing a procedure for resolving disputes

8.262 In response to IP 33, there was support amongst stakeholders for a dispute resolution process involving referral of a disputed privilege claim to an independent third party (or parties),[268] with some stakeholders submitting that it would be appropriate in some circumstances,[269] and others suggesting that consideration be given to making such a referral compulsory.[270]

8.263 Dr Ronald Desiatnik submitted that consideration be given to establishing a body of persons with expertise in client legal privilege to sit for set periods or on an ad hoc basis to deal with disputed privilege claims.[271] The NSW Bar Association submitted that barristers could be made available on short notice to act as arbitrators on privilege claims.[272]

8.264 Some stakeholders made suggestions about the type of model that might be adopted. For example, the ATO submitted that legislation could prescribe a process for resolving privilege disputes, such as the appointment of an external expert to assess whether documents are privileged.

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265 Australian Federal Police, *Submission LPP 115,* 29 November 2007; National Legal Aid, *Submission LPP 106,* 5 November 2007; Law Council of Australia, *Submission LPP 94,* 1 November 2007; Law Society of New South Wales, *Submission LPP 93,* 31 October 2007; Australian Competition and Consumer Commission, *Submission LPP 92,* 26 October 2007; Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007; Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007.

266 Law Council of Australia, *Submission LPP 94,* 1 November 2007.

267 Law Society of New South Wales, *Submission LPP 93,* 31 October 2007.

268 See, eg, Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007; New South Wales Bar Association, *Submission LPP 41,* 5 June 2007; R Desiatnik, *Submission LPP 24,* 1 June 2007; Members of the Victorian Bar, *Consultation LPP 21*, Melbourne, 25 May 2007. BHP Billiton expressed support for third parties—such as law and accounting firms—to act as custodians of disputed privileged material, pending determination of a claim: see BHP Billiton Mitsubishi Alliance, *Submission LPP 21,* 1 June 2007.

269 Australian Communications and Media Authority, *Submission LPP 20,* 29 May 2007. See also Law Council of Australia, *Submission LPP 26,* 4 June 2007 (expression of support for development of alternative dispute resolution models in appropriate circumstances).

270 Australian Taxation Office, *Submission LPP 65,* 22 June 2007; Australian Competition and Consumer Commission, *Submission LPP 53,* 13 June 2007.

271 R Desiatnik, *Submission LPP 24,* 1 June 2007.

272 New South Wales Bar Association, *Submission LPP 41,* 5 June 2007.

> In the past taxpayers have entered into written agreements with the [ATO] that in the event of a dispute an external expert (considered suitable by both sides) will be engaged to examine documents subject to a claim of privilege. The external expert will provide an assessment of whether documents are 'privileged', 'not privileged' or whether he or she is unable to make an assessment of whether the documents are privileged. Both parties then have a seven day period in which to commence declaratory proceedings in the Federal Court if they disagree with the expert's determination. If neither party commences proceedings within that timeframe the expert's decision is treated as final. This process is useful because it allows the parties to resort to the Federal Court if necessary, but also offers an alternative (and sometimes quicker) means of resolving a dispute over whether documents are privileged.
>
> The [ATO] considers that it [is] worth exploring whether it would be beneficial for legislation to prescribe a dispute resolution mechanism along these lines. Such a mechanism may enable [client legal privilege] claims to be resolved quickly and efficiently.[273]

8.265 ASIC suggested a model for dispute resolution where a federal body disputes a privilege claim, including, among others, the following features:

- a claimant could elect to submit to a non-binding determination of a privilege claim by an independent Senior Counsel or commence court proceedings to establish its claim;
- if a claimant fails to take the above action it would be taken to have waived its claim;
- a claimant and a federal body could each agree to abide by the decision of the Senior Counsel but would not be bound to do so;
- if Senior Counsel makes a finding that a document is not privileged and the claimant declines to be bound, then failure by the claimant to institute proceedings within a defined time will result in the claim being waived; and
- costs of the independent determination should be on a 'costs follows the event' basis.[274]

8.266 The Law Council submitted that a consultative approach should be adopted for resolving privilege disputes and that, where possible, federal bodies should seek to negotiate with the affected party an agreed procedure for resolution. It supported a process whereby an independent third party could be engaged to determine the claim,

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273 Australian Taxation Office, *Submission LPP 65,* 22 June 2007.
274 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007.

and that upon receiving the view of the third party, each party would have seven days to commence proceedings seeking declaratory orders from a superior court in relation to whether the material is privileged.[275]

8.267 Some stakeholders expressed opposition to the use of alternative dispute resolution models to resolve privilege disputes in the context of Royal Commissions, on the basis that it would be inappropriate.[276]

8.268 The CDPP expressed opposition to alternative dispute resolution (ADR) processes for privilege claims in any federal investigations.

> The first [problem] is that this process still requires that the material over which the claim is made is removed from the investigation until the issue is resolved through an ADR process which delays the investigation, even if the ADR process might ultimately be quicker than resolving the issues in the court. The second [problem] is that the decision made out of the ADR process is not binding and may lead to further court action being initiated to resolve the claim.[277]

Onus

8.269 The ATO submitted that there should be a 'mandated process' for claiming client legal privilege that places the onus of proof on the claimant to prove that privilege attaches to a communication.[278]

8.270 In contrast, the Law Council submitted that the onus of disputing a claim should be on the federal body, except where it is necessary for a claimant to raise client legal privilege by way of defence for a prosecution for failure to comply with a notice exercising a coercive power. It stated:

> The Search Warrant Guidelines were agreed between the Law Council and the AFP in 1990, and since that time the application of [privilege] to agency investigations has become clearer. Since *Daniels*' confirmation of [privilege] as a fundamental right, the Law Council no longer considers it appropriate that [privilege] should be taken to be abandoned if a claimant does not institute proceedings within three working days. … the onus of disputing [privilege] ought to be on the agency. Alternatively, if the current procedure is to be maintained, then reasonable time (say 14 days) should be allowed.[279]

Proposal in DP 73 re dispute resolution procedure

8.271 In DP 73, the ALRC proposed that federal client legal privilege legislation should provide that, where a federal body (other than a Royal Commission), disputes a privilege claim (after having received particulars of the documents in respect of which a claim of privilege is made in answer to the exercise of a coercive power):

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275 Law Council of Australia, *Submission LPP 26,* 4 June 2007.
276 Ibid; Hon T Cole, *Consultation LPP 9*, Sydney, 1 March 2007.
277 Commonwealth Director of Public Prosecutions, *Submission LPP 61,* 12 June 2007.
278 Australian Taxation Office, *Submission LPP 65,* 22 June 2007.
279 Law Council of Australia, *Submission LPP 26,* 4 June 2007.

- a claimant should be given the opportunity within a defined time to agree to an independent review mechanism to resolve the claim;

- where a claimant does not agree to have the claim assessed by an independent reviewer or reviewers, the claimant must commence proceedings in a superior court within 14 days seeking a declaration that the disputed material is subject to client legal privilege;

- the federal body may also commence proceedings within 14 days but the onus of establishing client legal privilege is on the claimant; and

- where the claimant fails to commence proceedings, the federal body will be entitled to regard the claim as having been waived, in the absence of special circumstances that negate this inference.[280]

8.272 Some stakeholders expressed unqualified support for this proposal.[281] The Australian Financial Markets Association, for example, submitted that the proposed procedure was 'reasonable and adequate'.[282] Other stakeholders made submissions on the content of the proposal. Key points that were made include:

- A federal body should be required to give written notification to a claimant of the fact that it disputes a claim.[283]

- It is unnecessary to give a claimant an initial period of time within which to consider solely whether to submit to an independent review process. A claimant should be given a single time period within which to decide whether to opt for the independent review process or to commence proceedings.[284]

- The proposed time period of 14 days within which a claimant has to commence proceedings to establish a claim could, in some circumstances, be too short,

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280 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 8–11. The features of the independent review mechanism, to be included in a model scheme, are discussed separately below.

281 National Legal Aid, *Submission LPP 106,* 5 November 2007; Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007; Australian Competition and Consumer Commission, *Submission LPP 92,* 26 October 2007. The AFP submitted that, although it was in favour of the abrogation of privilege in federal investigations, it would not object to the proposed measure: Australian Federal Police, *Submission LPP 115,* 29 November 2007.

282 Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007.

283 Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007.

284 Confidential, *Submission LPP 108,* 14 November 2007; Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007. ASIC submitted that the time given to the claimant should 'commence on the first business day that immediately follows the date on which the claimant receives written notification from the federal body that it disputes the claimant's privilege claims': Ibid.

particularly if there is a large number of documents to consider. The time frame should be open for agreement between the claimant and the federal body or there should be scope to have the time frame determined by the court.[285] For example, it was suggested that a claimant should be given 14 to 21 days 'for the purposes only of the court making an order as to the time in which the substantive proceedings should be commenced by the claimant'.[286]

- A federal body should also have the discretion to commence proceedings to challenge a claim without first having the claim assessed by an independent reviewer.[287] There may be circumstances where claimants would seek to use the preliminary option of independent review as a means of delaying the investigation, with no intention of accepting an adverse decision.[288]

- Entitling the federal body to regard a client legal privilege claim as having been waived where the claimant fails to commence proceedings is 'unnecessarily harsh' and could have 'serious consequences' for a claimant. In these circumstances waiver should be determined by the court.[289]

8.273 Whistleblowers Australia did not address the ALRC's proposal, but instead submitted that 'a Legal Privileges Commission supported by an appropriate organisational structure and legislation' be established to consider any claims for client legal privilege. It suggested that 'the Office of the Legal Privileges Commissioner may best be located as a sub unit of the Ombudsman's office'.[290]

Need for uniform procedures

8.274 In response to IP 33, there was support in submissions and consultations for federal bodies to adopt uniform procedures or protocols for dealing with privilege claims.[291]

8.275 In DP 73, the ALRC proposed that relevant federal bodies (other than Royal Commissions) should develop and publish procedures in relation to the resolution of

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285 Allens Arthur Robinson, *Submission LPP 107,* 5 November 2007; Law Council of Australia, *Submission LPP 94,* 1 November 2007; Law Society of New South Wales, *Submission LPP 93,* 31 October 2007; Allens Arthur Robinson, *Consultation LPP 43*, Sydney, 24 October 2007.

286 Law Council of Australia, *Submission LPP 94,* 1 November 2007; Law Society of New South Wales, *Submission LPP 93,* 31 October 2007.

287 Confidential, *Submission LPP 108,* 14 November 2007; Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007.

288 Confidential, *Submission LPP 108,* 14 November 2007.

289 Law Council of Australia, *Submission LPP 94,* 1 November 2007; Law Society of New South Wales, *Submission LPP 93,* 31 October 2007. Compare, however, the ACC's support for the 'self-executing' mechanism proposed by the ALRC: Australian Crime Commission, *Consultation LPP 47*, Sydney, 26 October 2007.

290 Whistleblowers Australia, *Submission LPP 77,* 4 November 2007.

291 See, eg, Australian Pesticides and Veterinary Medicines Authority, *Submission LPP 45,* 6 June 2007; New South Wales Bar Association, *Submission LPP 41,* 5 June 2007; Law Society of New South Wales, *Submission LPP 40,* 1 June 2007.

disputed privilege claims, and that such procedures should, as far as practicable, be uniform.[292] The ALRC also proposed that the Attorney-General's Department, in consultation with relevant federal bodies, should establish a model procedure for resolving disputed privilege claims in federal investigations.[293]

8.276 Both these proposals were generally supported in submissions.[294] APRA supported the proposals subject to the recognition within the procedures

> of the different circumstances and resources of the natural and legal persons who may be subject to that agency's coercive information-gathering powers.[295]

8.277 Both the Law Council and the Law Society of NSW submitted that the procedures of federal bodies and the proposed model procedure should be developed in consultation with relevant stakeholders, including 'the Law Council and its constituent bodies'[296] and 'private legal representatives'.[297]

8.278 Members of the South Australian Bar Association expressed the view that legislation should require federal bodies to publish the proposed procedures.[298] However, the AFP submitted that it would object to the introduction of any legislative requirement to publish its policies and procedures on any issue.[299]

8.279 In DP 73, the ALRC expressed interest in hearing views about where the uniform model should be located, and in particular whether the proposed model should be located in legislation.[300] Very little feedback was received from stakeholders on this issue. Members of the South Australian Bar Association expressed the view that consideration should be given to placing the model procedure in legislation.[301]

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292 See Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 8–12.

293 See Ibid, Proposal 8–13.

294 National Legal Aid, *Submission LPP 106,* 5 November 2007; Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007; Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007; Law Council of Australia, *Submission LPP 94,* 1 November 2007; Australian Competition and Consumer Commission, *Submission LPP 92,* 26 October 2007; Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007. The AFP submitted that it would not object to the development of the proposed model procedure: Australian Federal Police, *Consultation LPP 40*, Canberra, 23 October 2007.

295 Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007.

296 Law Council of Australia, *Submission LPP 94,* 1 November 2007.

297 Law Society of New South Wales, *Submission LPP 93,* 31 October 2007.

298 Members of the South Australian Bar Association, *Consultation LPP 38*, Adelaide, 17 October 2007.

299 Australian Federal Police, *Submission LPP 115,* 29 November 2007.

300 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), [8.211].

301 Members of the South Australian Bar Association, *Consultation LPP 38*, Adelaide, 17 October 2007.

Features of the model scheme

8.280 In DP 73, the ALRC made a detailed proposal, setting out the features of a model procedure for the resolution of federal client legal privilege claims, which covered the following areas:

- allowance for a federal body to adopt a flexible approach to the mechanism used to resolve the claim;
- notification to the claimant of the availability of an independent review process;
- allowance for a reasonable time limit for the claimant to decide whether or not to agree to submit to independent review;
- provision for the appointment of a mutually acceptable independent reviewer or reviewers to make a non-binding determination of the claim—although the parties could agree to accept the assessment as binding;
- assessment by the reviewers of the claims, upon the signing of confidentiality agreements;
- provision for either party to seek declaratory relief within seven days (or another period agreed to), upon receiving the assessment of the independent review;
- the consequences of an independent review's assessment of documents as: privileged, partly privileged and not privileged;
- the payment of costs of the independent reviewer(s), with a presumption that costs be shared equally, although the parties could decide otherwise; and
- the payment of costs of court proceedings in accordance with court rules.[302]

8.281 This proposal received general support in submissions and consultations from lawyers and federal bodies.[303] For example:

- APRA supported the proposal in principle but submitted that a federal body should have the discretion to commence proceedings to challenge a claim without first having the claim assessed by an independent review.[304]

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302 See Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 8–14.

303 National Legal Aid, *Submission LPP 106,* 5 November 2007; Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007; Law Council of Australia, *Submission LPP 94,* 1 November 2007; Law Society of New South Wales, *Submission LPP 93,* 31 October 2007; Australian Competition and Consumer Commission, *Submission LPP 92,* 26 October 2007; Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007.

304 Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007.

- The Law Council and the Law Society of NSW generally agreed with the proposed model, and each submitted that:

  > Consideration also needs to be given to circumstances where the entity in possession of privileged documents is not the only entity with the right to assert privilege. …
  >
  > The procedure should be amended to make clear that, in the procedural process, if a client legal privilege claimant is required to use a privileged document to establish that another document is privileged, disclosure of the document in that context does not constitute waiver of privilege in relation to that document.[305]

- The AFP submitted that, although it objected to client legal privilege applying in federal investigations, it would support a pre-court independent review but not a court-ordered review.

  > The AFP would be in favour of the establishment of a pre-court independent review process to which contested claims may be referred where there is consent.
  >
  > The AFP concurs that any assessments undertaken by a pre-court review process should be non-binding, with the option that the parties may elect for it to be binding. …
  >
  > The AFP would object to any proposal for legislative provisions empowering a court to make orders for a matter to undergo external review, or for a third party to be engaged by the court for any purpose in the course of proceedings concerning a challenge to a privilege claim.[306]

8.282 Some stakeholders specifically opposed the proposed distribution of costs of an independent review, and submitted that a 'costs follow the event' model was preferable.[307] For example, Allens Arthur Robinson expressed the view that there should be 'an element of costs protection' for clients, where, notwithstanding that they have provided particulars and certification of claims, a federal body disputes those claims and the claims are found to be made out.[308] ASIC expressed the view that a presumption that the costs be shared equally 'would reduce the incentive for the parties to limit the number and extent of disputed privilege claims'.[309]

8.283 Other key points that were made in submissions concerning the model scheme included:

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305 Law Council of Australia, *Submission LPP 94,* 1 November 2007; Law Society of New South Wales, *Submission LPP 93,* 31 October 2007.

306 Australian Federal Police, *Submission LPP 115,* 29 November 2007.

307 Allens Arthur Robinson, *Submission LPP 107,* 5 November 2007; Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007.

308 Allens Arthur Robinson, *Submission LPP 107,* 5 November 2007. It also submitted that the costs should be limited to the reviewers' costs and not the internal or legal costs of the parties.

309 Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007.

- The procedure would be improved by requiring the independent reviewer to provide a draft determination concerning the documents he or she has reviewed. The parties should then be allowed to make submissions 'if they so choose as to any documents for which they submit a different characterisation should apply'.[310] It was submitted that this approach 'is likely to reduce costs and instances of court proceedings in circumstances where they may be a relatively simple explanation as to why a document should be privileged'.[311]

- To address the risk that the independent review process could take a considerable period of time, it would be desirable if the federal body had the power to impose a deadline from the outset and to revise that deadline only if satisfied of the need to do so.[312]

- The procedure should provide for the possibility that a federal body may wish to challenge an independent review's assessment that a document is partly privileged.[313]

- A claimant should be obliged to provide access by the independent reviewers to any other information or documents necessary to determine whether client legal privilege applies. It was submitted that this was necessary because 'it may often be difficult for an independent reviewer to assess whether legal privilege applies solely by reference to the documents which contain the relevant communications'.[314]

- The model procedure would need to be modified in circumstances where the privilege holder is a third party on whose behalf the claimant has asserted privilege.[315]

- There may be tension between the flexibility proposed here and the uniformity proposed in Proposal 8–12.[316]

8.284 The CDPP made the general observation that:

> The proposed procedure [for making and resolving claims] presents benefits in terms of clarity and consistency. However, we are concerned that its effectiveness will largely be limited to bona fide claims. It is reasonable to expect that persons who make client legal privilege claims with the intention of delaying and frustrating an investigation will also attempt to subvert the resolution process and take advantage of any opportunity to cause delay.[317]

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310 Allens Arthur Robinson, *Submission LPP 107,* 5 November 2007.
311 Ibid.
312 Confidential, *Submission LPP 108,* 14 November 2007.
313 Ibid.
314 Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007.
315 Ibid.
316 Law Society of New South Wales, *Submission LPP 93,* 31 October 2007.
317 Commonwealth Director of Public Prosecutions, *Submission LPP 101,* 2 November 2007.

Limitation periods

8.285 The ACCC submitted that legislation should provide that where a claim for privilege is the subject of a challenge, limitation periods should cease to run until the claim is resolved.[318]

8.286 The ACCC expressed the view that it was neither appropriate nor practical for its suggested suspension of the limitation period to be applied to private applicants who may be affected by the same conduct being investigated by the ACCC, and who may also wish to commence proceedings seeking damages against the persons being investigated by the ACCC.[319] It noted that the determination of limitation periods could differ between proceedings taken by the ACCC and those taken by private applicants.

8.287 The ACCC also expressed the view that insofar as it investigates potentially unlawful conduct and later takes representative proceedings in respect of that conduct, persons on whose behalf proceedings are taken would benefit from any suspension of the limitation period obtained by the ACCC.[320]

8.288 In contrast, the Law Council submitted that if extensions of limitation periods are to be allowed, then it should be open to the court to grant extensions 'regardless of which party makes an application, if it is in the interests of justice'.[321]

8.289 In DP 73, the ALRC proposed that federal client legal privilege legislation should enable superior courts to authorise the extension of a limitation period where a federal body intends to challenge a privilege claim, if granting the extension is in the interests of justice.[322]

8.290 This proposal received support in submissions.[323] However, both the Law Council and the Law Society of NSW expressed concern that the proposed approach could lead to abuses of process by federal bodies.[324] The Law Council submitted:

> the proposal may enable federal bodies to seek an extension of the limitation period by manufacturing a privilege dispute whenever insufficient diligence has been

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318 Australian Competition and Consumer Commission, *Submission LPP 53,* 13 June 2007.
319 Australian Competition and Consumer Commission, *Submission LPP 75,* 14 August 2007.
320 Ibid.
321 Law Council of Australia, *Submission LPP 94,* 1 November 2007.
322 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 8–15.
323 National Legal Aid, *Submission LPP 106,* 5 November 2007; Australian Competition and Consumer Commission, *Submission LPP 92,* 26 October 2007; Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007; Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007. The AFP submitted that it would not object to this proposed measure: Australian Federal Police, *Submission LPP 115,* 29 November 2007.
324 Law Council of Australia, *Submission LPP 94,* 1 November 2007; Law Society of New South Wales, *Submission LPP 93,* 31 October 2007.

> employed in readying a case for filing. This concern is supported by the fact that some federal bodies have filed cases very close to the expiry of the limitation period (when no privilege dispute was involved) and subsequently needed to replead because the state of the pleadings was such that they were liable to be struck out.[325]

8.291 In addition:

- the Law Society of NSW expressed concern that the proposal created uncertainty about when a limitation period expires;[326] and

- the Law Council expressed the view that the proposal was unnecessary if, under the ALRC's proposed disputed resolution mechanism (as set out in Proposal 8–11), the federal body will be able to commence proceedings within 14 days to force a determination of the issue.[327]

ALRC's views

Addressing delay

8.292 Given the considerable concerns expressed about the delays occasioned by attempting to resolve privilege claims, the ALRC considers that it is important that the Federal Court and the Supreme Courts of each state and territory have appropriate arrangements in place to cater for hearing applications on short notice concerning disputes about client legal privilege claims in federal investigations.

8.293 The types of applications that a court should be able to deal with expeditiously include the following:

- where a federal body applies for declaratory relief following a person's failure to provide particulars of client legal privilege claims (see Recommendation 8–6);

- where either a federal body or the person making the privilege claim applies for declaratory relief following the failure by a lawyer to certify a privilege claim (see Recommendation 8–7); and

- where there is a dispute about a privilege claim, including where a party has not accepted the assessment of the claim by an independent review and seeks a court determination.[328]

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325 Law Council of Australia, *Submission LPP 94,* 1 November 2007.
326 Law Society of New South Wales, *Submission LPP 93,* 31 October 2007.
327 Law Council of Australia, *Submission LPP 94,* 1 November 2007.
328 The ALRC's recommendation for an independent review mechanism for the resolution of privilege claims is discussed below.

Need for uniformity

8.294 The ALRC considers that there should be a substantial degree of uniformity of approach in resolving claims for client legal privilege in federal investigations. However, to require absolute uniformity across all federal bodies in the event of all disputed claims—regardless of the circumstances of the case, or the attitudes of the party involved in a dispute—appears unrealistic.

8.295 The ALRC is of the view that, in order to balance the competing needs for uniformity and flexibility, a multifaceted response involving legislative and policy change is required. First, a minimum legislative framework for the resolution of claims (discussed below) should be contained in federal client legal privilege legislation. This also will assist in achieving clarity. Second, policies about resolving privilege disputes should be individually developed by federal bodies—to meet the exigencies of their particular circumstances—but they should be based on a model procedure (the recommended features of which are addressed below).

8.296 The ALRC does not recommend that this approach be adopted for Royal Commissions. As stated in Chapter 5, the *Royal Commissions Act* now includes a procedure for the resolution of privilege claims. The procedure applicable to Royal Commissions is not one the ALRC considers to be appropriate for other federal bodies insofar as it would require production of a disputed document to the federal body in order for the federal body to decide whether or not to accept the claim for privilege. While it may be appropriate for Royal Commissioners—who are usually retired judges—to assess whether or not a document is privileged in the context of an independent inquiry to discover the truth[329]—it is not, in the ALRC's view, appropriate for members of other federal bodies or government departments to make such an assessment—particularly where those bodies have enforcement functions.

Recommended legislative framework

8.297 The ALRC considers that federal client legal privilege legislation should establish a minimum framework for the resolution of privilege disputes—to be complemented by the policies of federal bodies in this regard. In particular, there is a need for clarity concerning the onus of establishing a privilege claim, and for the dispute resolution process to accommodate an independent review mechanism.

8.298 Therefore, in the ALRC's view, taking into account the views expressed in submissions and consultations in response to DP 73, federal client legal privilege legislation should provide that where a federal body (other than a Royal Commission) disputes a privilege claim (after having received details of the documents in respect of

329 The functions and powers of Royal Commissions are discussed in Ch 4, and also referred to in Ch 6.

which a claim of privilege is made in answer to the exercise of a coercive power), there be a system in place for resolving the dispute with the following attributes:

(a) Where the federal body disputes a client legal privilege claim, it should be required to give written notification of that fact to the claimant.

(b) The federal body should have the option of offering the claimant an opportunity to agree to an independent review process. The ALRC considers that there may be various legitimate reasons why a federal body may not wish to have a claim referred to an independent review. For example, where the dispute involves complex matters of legal principle, such as consideration of the applicability of the fraud and crime exception to privilege, the federal body may prefer to obtain a binding judicial determination on the issue. In addition, a federal body may have reasonable grounds to believe that a particular claimant has no intention of accepting an adverse decision of an independent review and is likely to use that process as a mechanism for delay. The grounds for such a belief may be based on the federal body's previous dealings with that claimant, for example.

(c) The ALRC is persuaded that offering a claimant a time period within which to consider only whether to agree to an independent review process is likely to cause unnecessary delay. The ALRC also acknowledges that the legislative mechanism must be flexible enough to deal with circumstances where a 14 day period would be an unreasonably short time for a claimant to commence proceedings. Therefore, if the federal body decides to give the claimant an opportunity to agree to an independent review process, the ALRC considers that a claimant should be given 14 days (or such other time agreed to by the parties) to either:

- agree to an independent review mechanism; or
- commence proceedings in a superior court to establish the claim; or
- commence proceedings seeking an order from the court concerning the time in which the substantive proceedings determining the claim should be commenced by the claimant.[330]

(d) Where a claimant does not agree to have the claim independently assessed, the onus should be on the claimant to commence proceedings to establish the claim. Casting the onus on a federal body to disprove the claim would place the body in the difficult position of trying to prove a negative. Evidence relating to the circumstances in which a document was created is obviously more likely to be within the knowledge of the claimant. However, the ALRC's recommendation

330 The legislation will, of course, need to specify when the period of 14 days is taken to commence.

in this regard is not intended to affect the current onus that a federal body bears in proving that a document is subject to the fraud or crime exception.

(e) Where the federal body decides not to offer a claimant the opportunity to agree to an independent review mechanism, it should notify the claimant that it has 14 days (or such other time agreed to by the parties) to commence proceedings in a superior court to:

- establish the claim; or
- seek an order from the court concerning the time in which the substantive proceedings determining the claim should be commenced by the claimant.

(f) A federal body also should have the option of commencing proceedings within the 14 day period or such other period ordered by the court, but in such a case, the onus of establishing the claim should remain on the claimant.

(g) Where the claimant fails to commence proceedings within the required time the federal body will be entitled to regard the claim as having been waived, in the absence of special circumstances that negate this inference. For example, the inference might be negated if the claimant subsequently establishes that an emergency, 'act of God', accident or illness precluded him or her from commencing proceedings. The ALRC does not consider this outcome to be harsh because, by this stage, the claimant:

- would have received notification of the fact that the federal body disputes the claim;
- may have had an opportunity to agree to an independent review process in circumstances where the federal body offered that option;
- would have had an opportunity to negotiate an extension of the 14 day period with the federal body, bringing to its attention the factors warranting such an extension;
- in the absence of an agreement concerning an extension with the federal body, could have sought a court order extending the time within which to commence the substantive proceedings.

In any event, the claimant will be able to negate the inference where special circumstances exist. This approach addresses the problem of recalcitrant

claimants or those aiming to frustrate federal investigations by doing nothing to advance their claims upon being notified that those claims are disputed.

8.299 This process will be activated only where a federal body disputes a claim following the claimant's provision of particulars of that claim. As discussed above, the ALRC has recommended a separate scheme where a claimant fails to provide particulars of the claim.

Development of individual policies and the model scheme

8.300 Only those federal bodies which have coercive information-gathering powers the exercise of which raise, or are likely to raise, the issue of the application of client legal privilege should develop policies and procedures about the resolution of privilege claims. This would apply, for example, to major regulators like ASIC and the ACCC. However, the ALRC considers that it would be too prescriptive to impose a *legislative* requirement that such federal bodies develop and publish the requisite procedures.

8.301 As far as practicable, the procedures to be developed should be uniform. In this regard, the policies of relevant federal bodies should be based on a model procedure. Federal bodies may wish to seek input from stakeholders in relation to their proposed procedures, but that is a matter for them.

8.302 The ALRC considers that the development of a model procedure for resolving disputed privilege claims in federal investigations should be driven by the Attorney-General's Department, in consultation with relevant federal bodies. The ALRC does not make a recommendation about where the model procedure should be located, especially given the absence of stakeholders' views on this issue. As indicated in DP 73, apart from legislation, the possibilities include to locate it in the *Australian Government Investigation Standard*—which is not a publicly available document—or to require federal bodies to prepare a 'stand-alone' model protocol in this regard.[331] The ALRC tends to the view that the latter option is preferable in the interests of transparency, accountability and clarity.

Features of the recommended model scheme

8.303 The ALRC considers that there are several important features that the model procedure for resolving disputed privilege claims should include and these are set out below. Some features have been deleted, added or modified to take into account views expressed in submissions and consultations on the model proposed in DP 73.

8.304 The first point to make is that in recommending a model procedure, the ALRC is not intending to dissuade federal bodies and parties from otherwise negotiating a resolution of the dispute.

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331 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), [8.211].

Discretion to offer opportunity to agree to independent review process

8.305 For the reasons discussed at [8.298 (b)] above, the ALRC is of the view that a federal body that disputes a claim should have the discretion to offer the claimant an opportunity to agree to an independent review process. There may be legitimate reasons why a federal body may decide against offering this process to a particular claimant or in particular circumstances.

8.306 Where the federal body does not offer the claimant an opportunity to agree to an independent review process, the procedures set out in Recommendation 8–11 apply.[332] Those procedures include, for example, a requirement that the federal body notify the claimant that it has 14 days (or such other time agreed to) to commence proceedings to establish the claim or to seek a court order concerning the date by which it is to commence substantive proceedings.

Notification of independent review process and time frame

8.307 Where the federal body decides to offer the claimant an opportunity to agree to an independent review process, it should notify the claimant of the availability and features of the process and inform the claimant of the statutory time period of 14 days within which to indicate whether to agree to that process. This time limit can be varied by agreement of the parties.[333]

Voluntary participation in independent review process

8.308 A claimant who is offered an opportunity to participate in an independent review process has the option of declining that offer. Some stakeholders expressed the view that there should be a compulsory reference to a third party. However, the ALRC considers that there are some philosophical and practical problems associated with forcing persons to submit to an independent review process. If persons are compelled to submit to a process to which they would otherwise not have been subject, then there is a real risk that they will ignore the outcome of that process and automatically seek resolution via court proceedings. In such circumstances, in order to avoid the delay and costs of an independent review process, it would be better for such persons to commence court proceedings from the outset to establish their claims.

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332 Rec 8–11 is set out below.
333 See Rec 8–11.

Nature of independent review

8.309 The independent review can be carried out by one or more persons. If the parties cannot agree to one person carrying out the review, they may be more comfortable with a model—similar to that adopted by the ATO—whereby each party nominates an independent person to conduct the review. Independent reviewers should have appropriate legal qualifications. Their level of seniority and whether they are sourced from the bar, government, legal practice, the retired ranks of the bench or elsewhere, should be a matter for the parties. Constitutional considerations necessitate that any assessment given by the independent reviewers cannot bind the parties.[334] However, the claimant and federal body may agree to accept the assessment as binding.

Assessment by independent reviewer

8.310 The model process should set out the mechanics of the assessment. Upon signing a confidentiality undertaking, those conducting the independent review should be given access to the documents containing the communications in dispute and should assess each as falling in one of the following categories:

- privileged;
- partly privileged;
- not privileged; or
- unable to make an assessment.

8.311 The ALRC is reluctant to impose a mandatory requirement that the independent reviewer provide a draft determination concerning the documents he or she has reviewed and give the parties an opportunity to make submissions at that stage. Of course, the parties may agree to that course of action in a particular case—especially where they have agreed that the determination is to be binding. However, as a general proposition, in order to avoid delays, it would be preferable for the parties to provide the independent reviewer with submissions and any other relevant information concerning the categorisation of the communications prior to the assessment being made.

Treatment of additional information provided to independent review

8.312 The ALRC is not persuaded by the submission that, in addition to the documents containing the communications the subject of a privilege claim, a person should be required to provide an independent reviewer with access to any other information or document necessary to determine the claim. The ALRC has reservations about

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334 Constitutional considerations are discussed above in the section on 'Alternative models'.

compelling a person to produce such other documents to an independent review process, which is voluntary in nature.

8.313 However, the ALRC considers that a reviewer should be allowed to request access to such documents and that a claimant can voluntarily grant such a request or provide such documents on his or her own initiative. Presumably a claimant who wants to establish his or her claim will do so. Where the claimant does produce access to privileged communications not in dispute, in order to establish that a communication in dispute is privileged, the disclosure of the non-disputed privileged communications should not be taken as constituting waiver.

Consequences of independent review

8.314 The model process should set out the consequences of the assessment of an independent review—covering both situations where the parties have, or have not, agreed to accept the assessment as binding.

8.315 Where the parties have not agreed to accept the assessment as binding, either party should have seven days or such other period agreed to, within which to commence proceedings seeking declarations from a superior court in relation to whether the documents are privileged. The ALRC has nominated a seven day time limit having regard to the fact that the ATO's current dispute resolution process allows parties seven days to commence declaratory proceedings where they disagree with the determination of an external expert.

8.316 If an independent review's assessment is that a document is privileged, a claimant should be entitled to retain possession of the document unless the federal body obtains a declaration within the required time frame that the document is not privileged.

8.317 If an independent review's assessment is that a document is partly privileged, the claimant should mask those parts of the document assessed to be privileged and produce the remainder of the document to the federal body, unless the claimant seeks declaratory relief within the required time frame. A federal body also may seek a declaration within the required time frame that the parts of the documents assessed to be privileged are not privileged.

8.318 If an independent review's assessment is that a document is not privileged, the claimant should produce the document to the federal body, unless the claimant seeks declaratory relief within the required time frame.

Costs of independent reviewers

8.319 The model procedure should address payment of the costs of the independent reviewers only, and not the parties' legal costs. The aim is to provide a potentially cheaper alternative to litigation.

8.320 Determining who should bear the costs of an independent reviewer or reviewers is a difficult issue. There are vast differences in the economic resources available to claimants who may wish to participate in an independent review process. While meeting the hourly costs of a Senior Counsel appointed to be a reviewer may not be an issue for large corporations, it is or may be beyond the means of many individuals or small businesses. Any costs model should therefore retain an appropriate degree of flexibility to cater for varying circumstances, and, in particular, allow a federal body the discretion to meet the entire costs in appropriate circumstances, or a higher proportion of the costs than would be allocated if a 'costs follow the event' model were applied.

8.321 The ALRC notes that some stakeholders supported the costs of an independent review to be allocated on a 'costs follows the event' model—so that a claimant would be required to pay the costs of a review only to the extent that the review found that documents the subject of a privilege claim were not, in fact, privileged.

8.322 If a 'costs follow the event' model were to be adopted, however, the claimants in such disputes would not know up-front the estimate of costs that they would be expected to meet. This could be a disincentive to their agreeing to participate in an independent review process. It may be preferable for claimants to have a degree of certainty about the costs that they are expected to pay—especially if, in the event of a court challenge to the reviewer's assessment, the claimant becomes potentially liable to pay additional court costs. Further, the 'costs follow the event' model does not recognise that:

- Where claims are not made out, a claimant may nonetheless have had reasonable grounds for making the claim. Therefore it is not necessarily appropriate that he or she should bear the costs of the review for having resisted challenge to the claim.

- Where claims are made out, a claimant could have averted the need for a challenge in the first place by providing the federal body with fuller particulars of the claim. Therefore it is not necessarily appropriate that a federal body should bear the costs of the review for having challenged the claim.

8.323 The ALRC is therefore of the view that where an independent review takes place, the parties may agree on who is to pay the costs of the reviewers, but the ordinary presumption should be that the costs will be shared equally. Sharing the burden of costs also recognises that each party has an interest in resolving the dispute.

An independent reviewer may recommend how those costs should be distributed but such a recommendation would not be binding.

Court costs

8.324 Liability for costs for any court proceedings are to be determined by the courts in accordance with their rules. For example, under the *Uniform Civil Procedure Rules 2005* (NSW), the general rule is that costs follow the event, unless it appears to the court that some other order should be made.[335]

Third parties

8.325 The model procedure may need to be modified to cater for circumstances where the claimant is not the privilege holder and has made the claim on behalf of the privilege holder.

Limitation periods

8.326 The ALRC considers that there are valid concerns expressed by the ACCC about the potential for limitation periods near expiry to act as barriers to the challenge of privilege claims and to be exploited by targets of investigations. Such concerns need to be addressed.

8.327 The ALRC considers that granting an automatic suspension of a limitation period each time a privilege claim is challenged is unnecessary. Not every case where there is a challenge will need the limitation period to be suspended—for example, if the limitation period is six years and a federal body challenges a privilege claim in the first year of that period.

8.328 Automatic suspensions of limitation periods may also have undesirable consequences. If there are no limits to the number of challenges that a federal body can make in the course of an investigation, conceivably there could be a number of automatic suspensions granted, which could blow out a limitation period beyond what is reasonable—adversely affecting those who are the targets of federal investigations.

8.329 Consequently, the ALRC considers that a more discretionary mechanism should be adopted. The ALRC remains of the view that federal client legal privilege legislation should enable superior courts to authorise the extension of a limitation period where a federal body intends to challenge a client legal privilege claim, if granting the extension is in the interests of justice.

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335 *Uniform Civil Procedure Rules 2005* (NSW) r 42.1.

8.330 Other recommendations made by the ALRC in this Report concerning dispute resolution processes may render it less likely that a federal body will need to apply for an extension of the limitation period. In any event, the fact that a court can only grant the extension in the interests of justice provides appropriate protection against any cynical attempt by a federal body to apply for an extension for improper purposes.

8.331 The ALRC does not consider that it is either necessary or appropriate to decide in the context of this Inquiry whether courts should be able to grant extensions of the limitation period to persons other than federal bodies.

Recommendation 8–10 The Federal Court and the Supreme Court of each state and territory should have appropriate arrangements in place to cater for hearing applications on short notice concerning disputes about client legal privilege claims in federal investigations.

Recommendation 8–11 Federal client legal privilege legislation should provide that, where a federal body (other than a Royal Commission) disputes a privilege claim (after having received particulars of the documents in respect of which a claim of privilege is made in answer to the exercise of a coercive power):

- The federal body should be required to give written notification of the fact that it disputes the claim.
- The federal body, in its discretion, may decide to offer the claimant an opportunity to agree to an independent review mechanism. If the federal body so decides, it should notify the claimant that it has 14 days (or such other time agreed to by the parties) either to:
  - (a) agree to an independent review process; or
  - (b) commence proceedings in a superior court seeking
    - (i) a declaration that the disputed material is subject to client legal privilege; or
    - (ii) an order concerning the time within which the substantive proceedings determining the claim should be commenced by the claimant.

- Where the federal body decides not to offer the claimant an opportunity to agree to an independent review mechanism, it should notify the claimant that the claimant has 14 days (or such other time agreed to by the parties) to commence proceedings in a superior court seeking:

  (a) a declaration that the disputed material is subject to client legal privilege; or

  (b) an order concerning the time within which the substantive proceedings determining the claim should be commenced by the claimant.

- The federal body may also commence proceedings within 14 days or such other period ordered by the court but the onus of establishing client legal privilege is on the claimant.

- If the claimant

  (a) does not agree to an independent review mechanism when offered and fails to commence proceedings; or

  (b) is not offered an opportunity to agree to an independent review mechanism and fails to commence proceedings;

the federal body will be entitled to regard the claim as having been waived, in the absence of special circumstances that negate this inference.

Recommendation 8–12 Federal bodies (other than Royal Commissions) with coercive information-gathering powers—the exercise of which raise, or are likely to raise, the issue of the application of client legal privilege—should develop and publish procedures in relation to the resolution of disputed privilege claims. Such procedures should, as far as practicable, be uniform. (See Recommendations 8–13 and 8–14).

Recommendation 8–13 The Attorney-General's Department in consultation with federal bodies with coercive information-gathering powers—the exercise of which raise, or are likely to raise, the issue of the application of client legal privilege—should establish a model procedure for resolving disputed privilege claims in federal investigations.

Recommendation 8–14 Where a federal body disputes a privilege claim, the model procedure for resolving the claim (referred to in Recommendation 8–13) should include the following features:

(a) A federal body should have a discretion to offer the claimant an opportunity to agree to an independent review process to resolve the dispute.

(b) Where the federal body does not offer the claimant an opportunity to agree to an independent review process, the procedures set out in Recommendation 8–11 are to apply.

(c) Where the federal body decides to offer the claimant an opportunity to agree to an independent review process, it should notify the claimant of the availability and features of the process, and of the statutory time period of 14 days (or such other time agreed to by the parties) for indicating agreement to submit to the review process (see Recommendation 8–11).

(d) The claimant may agree to the engagement of a mutually acceptable independent reviewer or reviewers (with appropriate legal qualifications) to make a non-binding assessment of the claim, although the claimant and federal body may agree to accept the assessment as binding.

(e) Upon signing a confidentiality undertaking, those conducting the independent review should be given access to the documents containing the communications in dispute and should make an assessment of each in one of the following categories:

(i) privileged;

(ii) not privileged;

(iii) partly privileged; or

(iv) unable to make an assessment.

(f) The claimant may provide the independent review with access to privileged communications not in dispute in order to assist in establishing that a communication in dispute is privileged. This may be done on the claimant's initiative or otherwise voluntarily at the request of those conducting the independent review. In these circumstances, the disclosure of the non-disputed privileged communications does not constitute waiver.

(g) Upon receiving the assessment of the independent review, where the parties have not agreed to accept the assessment as binding, either party may within seven days (or another period agreed to by the parties) commence proceedings seeking declarations from a superior court in relation to whether the documents are privileged.

(h) If the independent review's assessment is that a document is privileged, the claimant is entitled to retain possession of the document unless the federal body, having sought declaratory relief within the required time frame, obtains a declaration that the document is not privileged.

(i) If the independent review's assessment is that a document is partly privileged, the claimant should mask those parts that are assessed to be privileged and produce the remainder of the document to the federal body, unless the claimant seeks declaratory relief within the required time frame. A federal body may also seek a declaration, within the required time frame, that the parts of the document assessed to be partly privileged are not privileged.

(j) If the independent review's assessment is that a document is not privileged, the claimant should produce the document to the federal body, unless the claimant seeks declaratory relief within the required time frame.

(k) If an independent review process takes place, the parties may agree on who is to pay the costs of the reviewers but the ordinary presumption is that the costs will be shared equally. A federal body may, in its discretion, agree to meet the entire costs or a higher proportion of the costs. The independent reviewer may make a non-binding recommendation about how costs should be distributed.

(l) Liability for costs for any court proceedings are to be determined by courts in accordance with their rules.

Recommendation 8–15 Federal client legal privilege legislation should enable superior courts to authorise the extension of a limitation period where a federal body intends to challenge a privilege claim, if granting the extension is in the interests of justice.

Electronic material

Background

8.332 Information the subject of a coercive power may be held in electronic form—for example on computers, disks, blackberries and mobile phones.[336]

8.333 Electronic files can be 'live', deleted, or exist in partial form as 'file fragments'.[337] 'Live' or 'active' files are files that are visible to the computer operating system. Deleted files are former 'live' files that have been marked by the operating system for deletion and to be overwritten—but can be accessed and retrieved by computer forensic specialists.[338]

8.334 The compulsory production or seizure of voluminous electronic material, in itself, has been described as problematic. The Law Society of NSW submitted that:

> It is self-evident that significant problems can arise, for example, upon the seizure of computers (including laptops) and the ability of those computers to store thousands of documents and records. Where that equipment is necessary for the day-to-day operational business, its detention for significant periods needs to be properly regulated. …
>
> Generally, it is the experience of lawyers that obligations on citizens (including corporations) to disclose electronic material (be it in the context of discovery in civil litigation, or in respect of responding to subpoenas or search warrants) can be extremely onerous, time-consuming and expensive.[339]

336 The ATO has specific policies and procedures in relation to obtaining electronically-stored information: see Australian Taxation Office, *Access and Information Gathering Manual* <www.ato.gov.au> at 23 August 2007, Ch 5.

337 A file fragment has no marker, such as a header or a footer and, as such, it is not possible to ascertain where such a file begins or ends. All fragments are treated as 'unallocated space' and privileged material may be contained in such space: J Forsyth of <e.law> australia, 'Presentation to Australian Law Reform Commission on Computer Forensics' (Paper presented at ALRC, Sydney, 29 May 2007).

338 Ibid.

339 Law Society of New South Wales, *Submission LPP 40,* 1 June 2007.

8.335 Similarly, the Corporate Tax Association expressed concerns about

> the highly onerous nature of information requests relating to electronically held information, which can be extensive and pervasive throughout large business organisations.[340]

8.336 It is relevant to note, by analogy, that the NSW Supreme Court has introduced new rules for the discovery of documents in certain proceedings in the Equity Division, which require discovery of documents in electronic form. Significantly, the rules allow lawyers to discover documents:

- without the need to go through the information in detail to categorise it into privileged and non-privileged information; and
- without prejudice to an entitlement to subsequently claim privilege over any information that has been discovered and is claimed to be privileged.[341]

Seizure of electronic material during searches

8.337 The guidelines that are attached to Commonwealth search warrants about managing client legal privilege claims during the execution of a warrant do not specifically refer to electronically-stored information.[342]

8.338 Several cases illustrate that the production or seizure of material held on computer drives and disks presents different practical considerations from the seizure of paper records. The AFP—or other investigator—may need to examine a hard drive for specific keywords in such a manner as to ensure that the data on the computer system are not altered during the examination process.[343] The process may involve the AFP taking an image of a hard drive.[344]

8.339 Seamus Byrne, Director of Forensic Technology, Vincents Chartered Accountants, stated that, in addition to creating a forensic image of a hard drive,

> an emerging practice in the specialised field of computer forensics provides the opportunity to seize selected 'active files' stored on a hard drive or other electronic

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340 Corporate Tax Association, *Submission LPP 32,* 4 June 2007. See also Australian Institute of Company Directors, *Submission LPP 43,* 8 June 2007.

341 Supreme Court of New South Wales, *Practice Note No SC Eq 3—Supreme Court Equity Division: Commercial List and Technology and Construction List*, 30 July 2007, [29.4.1]–[29.4.2]. See also M Priest, 'Discovering Ways to Cut High Legal Costs', *Australian Financial Review* (online), 21 July 2007, <www.afr.com>.

342 Search warrant guidelines are discussed below.

343 See *Kennedy v Baker* (2004) 135 FCR 520, [25]–[27]. A write-blocking device enables a hard drive to be accessed without alteration: J Forsyth of <e.law> australia, 'Presentation to Australian Law Reform Commission on Computer Forensics' (Paper presented at ALRC, Sydney, 29 May 2007).

344 *Crimes Act 1914* (Cth) s 3L allows the use of electronic equipment at search premises to copy evidential data onto a disk, tape or other device and authorises the removal of the device from the premises.

> storage media by creating a forensically-acceptable image (or copy) of specified files (logical forensic imaging). …
>
> An additional emerging practice is to create a forensically-acceptable forensic image whilst a computer is still in operation (live forensics). The method, as opposed to traditional computer forensics, allows for [electronically-stored information] contained on one or more computers on a computer network to be searched for relevance and seized with minimal disruption to the operations of the computers involved.[345]

8.340 Byrne noted that there was uncertainty associated with claims for privilege over information contained in deleted files.

> It is currently unclear as to whether a diligent legal practitioner can and/or should make a claim [in respect of] information which … isn't readily accessible by [the] client, but is likely [to be] accessible by [federal investigatory bodies] with use of their … specialist computer forensics personnel.
>
> … it is arguable whether privilege would be waived … or whether the information would continue to be protected under inadvertent disclosure or another related exception.[346]

8.341 ASIC also noted a number of difficulties associated with the seizure of electronic material during searches.

> Where documents have been held in electronic form and have been the subject of search warrants there has been uncertainty about:
>
> (i) the rights and obligations of the executing officer and the privilege claimant in relation to potential privilege claims over electronic documents during the execution of a warrant; and
>
> (ii) whether documents subject to privilege claims may be removed or seized where they are contained in a digital media that contains other material covered by the search warrant but which is not claimed to be privileged.
>
> Given the large number of documents that are often stored on electronic devices and the fact that they cannot often be quickly identified and retrieved, it is not practically feasible to impose a requirement that a privilege claimant be entitled to identify all privileged material before the device can either be imaged or removed from the premises for further examination.
>
> It is also not practically feasible … to impose a requirement that allegedly privileged material not be copied if a copy is otherwise made of the electronic data. … Evidentiary considerations also operate in favour of copying all data that is contained on a digital media to ensure the data is accurately preserved.[347]

345 S Byrne, *Submission LPP 19,* 4 June 2007.
346 Ibid.
347 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007.

8.342 In *Kennedy v Baker (No 2)*, Branson J rejected a submission that the creation and removal from search premises of an imaged hard drive were unlawful because its contents included communications to which client legal privilege attached.[348]

Resolution of claims

8.343 Resolving privilege claims in respect of communications held in electronic form may present particular difficulties. It is possible for privileged documents to be electronically 'tagged' by a forensic computer examiner and hidden from view of the federal investigatory body.[349]

8.344 In *Oke v Commissioner of the Australian Federal Police*, the parties had different views about the workability and enforceability of an agreement they had reached concerning the process to be undertaken by them in identifying disputed privileged material held on computer records, which had been seized under a Commonwealth search warrant. In 2005, Mansfield J noted that the process initially agreed to by the parties had commenced 12 months previously and that the task had only been partially completed.

> The task of identifying those documents and files on the computer records in respect of which there is a disputed claim to privilege so that the dispute may be determined by the Court is a very large one. There are apparently some hundreds of thousands of documents and files on the computer records.[350]

8.345 In 2007, in related proceedings, Mansfield J noted that:

> attempts to agree upon and implement an efficient and effective procedure to identify which, if any, contents of the laptop computer [were] in fact the subject of legal professional privilege, and so are not capable of being seized under the … warrant, have to date been unsuccessful.[351]

Submissions and consultations on reform options

Legislative clarification

8.346 In DP 73, the ALRC proposed that federal client legal privilege legislation should provide that where information which may be subject to a claim for client legal privilege is stored on the same electronic medium as non-privileged information that falls within the scope of a Commonwealth search warrant:

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348 *Kennedy v Baker (No 2)* (2004) 138 FCR 414, [16].

349 J Forsyth of <e.law> australia, 'Presentation to Australian Law Reform Commission on Computer Forensics' (Paper presented at ALRC, Sydney, 29 May 2007).

350 *Oke v Commissioner of Australian Federal Police* [2005] FCA 1363, [18], [32]. In a later case, the execution of the warrant in this matter was held to be unlawful: see *Oke v Commissioner of Australian Federal Police* (2007) 168 A Crim R 503.

351 *Oke v Commissioner of Australian Federal Police* (2007) 168 A Crim R 503, [109].

(a) the executing officer is not precluded from copying or imaging that medium and causing it to be removed from the premises for further inspection; and

(b) such copying or imaging does not amount to a waiver of privilege.[352]

8.347 In DP 73, the ALRC also expressed interest in hearing views from stakeholders about introducing any other necessary safeguards if the proposed legislative clarification were to be implemented. In particular, the ALRC asked whether it is necessary and appropriate to preserve expressly a person's ability to seek judicial relief in relation to any proposed imaging of an electronic medium—despite the existence of relevant non-privileged information stored on that medium—in circumstances where the imaging is disproportionate to the needs of the investigation.[353]

8.348 The ALRC's proposal received general support.[354] For example, the AFP submitted that

> [it] would support any measure that maintains an investigator's ability to copy or image an electronic medium in its entirety in circumstances where such might contain both privileged and non-privileged information. The nature of electronic evidence, and the amount of electronic material that could be contained within one single medium, means that any constraint on this capacity would be a significant impediment to the organisation's ability to conduct investigations.
>
> The AFP would strongly object to the addition of any restrictive aspect (in terms of quantity or otherwise) being added to the proposed provisions.[355]

8.349 National Legal Aid submitted that it was supportive of the proposal that copying does not amount to waiver, 'but is concerned that the documents which may be subject to a claim for client legal privilege be independently held until the privilege can be ascertained'.[356]

8.350 Similarly, the Law Council and the Law Society of NSW supported the view that copying or imaging should not amount to waiver.[357] They also agreed that, in the circumstances outlined in the proposal, the executing officer could copy or image the medium and cause it to be removed from the premises. However, they objected to the

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352 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 8–16.

353 Ibid, [8.256]. An example of disproportionality might be if it could be shown that the electronic medium in question contained only a discrete number of relevant non-privileged documents that were capable of being provided in hard copy or in otherwise readable form, and a large number of privileged documents.

354 Australian Federal Police, *Submission LPP 115,* 29 November 2007; Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007; Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007.

355 Australian Federal Police, *Submission LPP 115,* 29 November 2007.

356 National Legal Aid, *Submission LPP 106,* 5 November 2007.

357 Law Council of Australia, *Submission LPP 94,* 1 November 2007; Law Society of New South Wales, *Submission LPP 93,* 31 October 2007.

medium being inspected 'prior to the entity that owns the privilege being given an opportunity to inspect the medium and claim privilege'.[358]

> The copying or imaging … should provide protection against the possible destruction of evidence, but it should not allow the federal body to examine privileged material. The procedure for managing this limitation could be included in the ESI Guidelines referred to in Proposal 8–17.[359]

8.351 Byrne and Geoffrey Lambert agreed with the proposal in principle, and stressed the fact that Commonwealth search warrants, unlike other coercive-information gathering powers, inherently provide for search and seizure (or removal) powers.[360] They submitted that legislation should provide appropriate safeguards to ensure that any data copying or imaging is

> undertaken in a manner proportionate to the nature of the investigation and the severity of operational disruption to be incurred by the entity under investigation.[361]

Development of policies

8.352 In IP 33, the ALRC asked whether policies and procedures governing the execution of Commonwealth search warrants need to be amended specifically to address claims for privilege in respect of documents stored electronically.[362]

8.353 In response to IP 33, there was support in submissions and consultations for procedures governing access powers of federal bodies—including search warrant powers—to be amended specifically to address privilege claims in respect of electronically-stored information,[363] and to be publicly documented.[364]

8.354 The Law Council submitted that such processes should make it clear that a person should be able to claim client legal privilege despite any potential or actual seizure or imaging of data by an investigator.[365]

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358 Ibid.
359 Ibid.
360 S Byrne and G Lambert, *Submission LPP 102,* 5 November 2007.
361 Ibid.
362 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007), Question 5–5.
363 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007; Taxation Institute of Australia, *Submission LPP 54,* 15 June 2007; National Legal Aid, *Submission LPP 52,* 13 June 2007; Law Council of Australia, *Submission LPP 26,* 4 June 2007; S Byrne, *Submission LPP 19,* 4 June 2007.
364 S Byrne, *Submission LPP 19,* 4 June 2007.
365 Law Council of Australia, *Submission LPP 26,* 4 June 2007.

8.355 The ATO submitted that:

> The development of any mandatory process for claiming [client legal privilege] should include processes that are capable of being applied in respect of … electronic materials.[366]

8.356 The Law Society of NSW submitted that:

> The policies and procedures governing the execution of Commonwealth search warrants need to be consistent irrespective of the mechanism used to store documents. … Policies and procedures need to place the holder or the person with control of the documents in a position of responsibility so that future claims of out-of-jurisdiction arguments cannot be entertained. The policies and procedures that exist, or as modified to take account of electronic storage, must be regularly monitored as new technologies and electronic processes develop.[367]

Proposal concerning guidelines for electronically-stored information subject to search and seizure powers

8.357 In DP 73, the ALRC proposed that guidelines addressing the resolution of client legal privilege claims in respect of electronically-stored information (the ESI Guidelines) be developed by the Law Council of Australia, the AFP, CDPP, and relevant accounting professional bodies, in consultation with (a) federal bodies that possess search and seizure powers; and (b) computer forensic experts. The ALRC proposed that the ESI Guidelines:

- be adaptable for searches;
- should be provided to persons at the time a Commonwealth search warrant is executed; and
- should, as far as possible, be consistent with the processes for dealing with the resolution of privilege claims in respect of information in paper form.[368]

8.358 This proposal was generally supported in submissions and consultations.[369] For example, the Law Council agreed that guidelines should be established and that the Law Council should be a consulting entity.[370] It also made suggestions in relation to the content of the guidelines.

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366 Australian Taxation Office, *Submission LPP 65,* 22 June 2007.
367 Law Society of New South Wales, *Submission LPP 40,* 1 June 2007.
368 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 8–17.
369 Australian Federal Police, *Submission LPP 115,* 29 November 2007; Commonwealth Director of Public Prosecutions, *Submission LPP 101,* 2 November 2007; Law Council of Australia, *Submission LPP 94,* 1 November 2007; Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007.
370 Law Council of Australia, *Submission LPP 94,* 1 November 2007

> To avoid a federal body being able to examine privileged material that it obtains through the copying or imaging of a medium the following procedure could be employed. Two copies of the medium are made, with one being given to the claimant and the other being held by an independent third party. The claimant can then examine the copy of the medium to identify potentially privileged material. The potentially privileged material can then be subject to the procedure outlined in Proposal 8–3 [re making claims]. The same material is to be deleted from the second copy and that copy provided to the federal body for it to access.[371]

8.359 Byrne and Lambert stated that liaison between the Law Council, the AFP and other relevant bodies 'is essential'.[372] They submitted that input also be sought from 'experienced legal practitioners who possess demonstrated technical and practical working knowledge of ESI and the relevant legal framework'.[373] They also suggested that the guidelines cover:

- the placement of the seized data in the safe custody of an independent third party, with the claimant allowed an opportunity to identify privileged communications;
- the secure erasure of data identified as privileged; and
- allowance for the court to order inspection and examination on a 'without prejudice' regard for privilege where the claimant so requests because the 'burden of ascertaining privilege is too great in comparison with the time and costs reasonably likely to be incurred in the process'.[374]

8.360 ASIC submitted that the ALRC needed to clarify that the proposal intended only to deal with policies and procedures in respect of Commonwealth searches.[375]

Proposal concerning guidelines for electronically-stored information subject to other coercive information-gathering powers

8.361 Electronically-stored information may be subject to coercive information-gathering powers other than search and seizure—such as powers to access, inspect and copy. In recognition of this fact, the ALRC proposed in DP 73 that relevant federal bodies with coercive information-gathering powers should develop and publish policies and procedures in relation to managing and resolving claims for privilege in

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371 Ibid. The Law Society of NSW expressed a similar view: Law Society of New South Wales, *Submission LPP 93,* 31 October 2007.
372 S Byrne and G Lambert, *Submission LPP 102,* 5 November 2007.
373 Ibid.
374 Ibid.
375 Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007.

respect of electronically-stored information.[376] The ALRC proposed that the policies and procedures should, as far as possible, be consistent with the processes for dealing with the resolution of privilege claims in respect of information in paper form.[377]

8.362 This proposal was generally supported in submissions,[378] with one exception.[379] Westpac submitted:

> Given that so much information is now stored electronically Westpac is concerned that the wording of this Proposal undermines the effectiveness of and the detailed consideration that has been given to formulating all of the other proposals dealing with managing and resolving claims for privilege. In our view the policies and procedures developed by federal bodies for electronically-stored information must be consistent with the processes for dealing with information contained in paper form.[380]

Other suggestions for reform

8.363 In response to IP 33, Byrne submitted that electronically-stored information, as potential evidence, should be searched and seized by federal bodies with the use of specialist computer forensic personnel.

> To date, only a very small number of computer forensic specialists within Australian [federal investigatory bodies] have had relevant training and experience in both logical forensic imaging and live forensic methods to seize [electronically-stored information].[381]

8.364 Byrne also submitted that logical forensic imaging may be a feasible alternative in non-hostile situations when a federal body is certain that only a specific amount of active electronic files on a hard drive need to be seized—as opposed to an entire hard drive.[382]

ALRC's views

Legislative clarification

8.365 The ALRC is of the view that legislative clarification is warranted to address the concerns identified by stakeholders in relation to the uncertainty concerning:

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376 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 8–18.

377 Ibid, Proposal 8–18.

378 National Legal Aid, *Submission LPP 106,* 5 November 2007; S Byrne and G Lambert, *Submission LPP 102,* 5 November 2007; Law Council of Australia, *Submission LPP 94,* 1 November 2007; Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007; Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007. The AFP submitted that it would not object to the proposed measure: Australian Federal Police, *Submission LPP 115,* 29 November 2007.

379 Westpac Banking Corporation, *Submission LPP 85,* 1 November 2007.

380 Ibid.

381 S Byrne, *Submission LPP 19,* 4 June 2007.

382 Ibid.

- the legality of seizing or imaging hard drives containing both non-privileged seizable information and information potentially subject to a privilege claim; and

- any consequential waiver in the event of such seizure or imaging.

8.366 The ALRC considers that federal client legal privilege legislation should provide that an officer executing a Commonwealth search warrant is not precluded from (a) imaging an electronic medium that contains non-privileged information that falls within the scope of a Commonwealth search warrant in circumstances where potentially privileged information is stored on the same medium; and (b) removing that medium from the premises. This is consistent with the approach taken by Branson J in *Kennedy v Baker (No 2)*.[383]

8.367 The legislation should also provide that the imaging of the medium, of itself, does not amount to a waiver of privilege—thereby preserving the holder's right to make a claim.

8.368 The ALRC did not receive sufficient feedback on implementing legislative safeguards concerning the imaging of hard drives to enable it to formulate a recommendation in this regard. However, based on the views that were expressed, the ALRC is not persuaded that there is a need for legislative safeguards such as ensuring proportionality of imaging—although this could appropriately be addressed in policies and guidelines.

Development of policies and guidelines

8.369 The ALRC considers that policies and procedures governing the execution of Commonwealth searches—whether pursuant to a warrant or not—should be developed to address specifically the handling of claims for privilege in respect of documents stored electronically.

8.370 In the ALRC's view, such policies should be developed by key stakeholders involved in executing, advising on, or responding to, Commonwealth search and seizure powers—namely the Law Council, the AFP, the CDPP and—in recognition of the proposed extension of the privilege—relevant accounting professional bodies.[384]

8.371 It is important that such guidelines be developed in consultation with federal bodies who possess search and seizure powers, and computer forensic experts. Such

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383 *Kennedy v Baker (No 2)* (2004) 138 FCR 414. See also *A Firm of Solicitors v District Court at Auckland* [2006] 1 NZLR 586, [112].

384 See Rec 6–6.

guidelines could address, for example, the handling of privileged information contained on an imaged medium, including privileged information in deleted files; the electronic 'tagging' of privileged information; and where appropriate, the deletion or return of privileged information that has been imaged by a federal investigatory body. The guidelines also might place an onus on the privilege claimant to deliver to a federal body, in readable form, non-privileged electronic information. However, the guidelines should be consistent with the processes for dealing with privilege claims in respect of information in paper form.

8.372 The guidelines should be provided to persons the subject of a Commonwealth search at the time a search warrant (or search without warrant) is executed.[385]

8.373 Because electronically stored information may be subject to coercive information-gathering powers other than search and seizure powers, the ALRC considers that federal bodies with coercive information-gathering powers—the exercise of which raise, or are likely to raise the issue of the application of client legal privilege—should develop and publish policies and procedures in relation to managing and resolving claims for privilege in respect of electronically-stored information.

8.374 For example, such policies could address the circumstances—if any—in which a federal body would:

- negotiate the production of electronic material without prejudice to the ability of a person, the subject of a coercive power, to make a subsequent claim for privilege—that is, adopt a model similar to that of the NSW Supreme Court in the context of discovery; and

- adopt each of the different types of forensic imaging available.

8.375 Taking into account the concerns expressed by Westpac, the ALRC has reformulated the recommendation to provide that the requisite policies and procedures must be consistent with the processes for dealing with the resolution of privilege claims in respect of information in paper form. It was never the ALRC's intention that the standards to be imposed in respect of electronically-stored information be lower than those imposed in respect of information in paper form. Rather, the ALRC sought to emphasise that the procedures to be devised concerning electronically-stored information will need to cater for different practical considerations and challenges arising from information held in that form.

385 See also discussion on search warrant guidelines below.

Recommendation 8–16 Federal client legal privilege legislation should provide that where information which may be subject to a claim for client legal privilege is stored on the same electronic medium as non-privileged information that falls within the scope of a Commonwealth search warrant:

(a) the executing officer is not precluded from copying or imaging that medium and causing the copy or image to be removed from the premises; and

(b) such copying or imaging does not amount to a waiver of privilege.

Recommendation 8–17 There is a need for guidelines addressing the resolution of client legal privilege claims made in response to search and seizure powers in respect of electronically-stored information (ESI Guidelines). The Law Council of Australia, the Australian Federal Police, the Commonwealth Director of Public Prosecutions, and relevant accounting professional bodies in consultation with (a) federal bodies that possess search and seizure powers and (b) computer forensic experts, should devise the ESI guidelines. The ESI Guidelines should be adaptable for use at searches of premises of lawyers and accountants, other premises and searches of the person, and should be provided to persons at the time a Commonwealth search warrant is executed. The ESI Guidelines should be consistent with the processes for dealing with the resolution of privilege claims in respect of information in paper form.

Recommendation 8–18 Federal bodies with coercive information-gathering powers—the exercise of which raise, or are likely to raise, the issue of the application of client legal privilege—should develop and publish policies and procedures in relation to managing and resolving claims for privilege in respect of electronically-stored information. The policies and procedures should be consistent with the processes for dealing with the resolution of privilege claims in respect of information in paper form.

Search warrant guidelines

Background

8.376 The practicalities of answering a notice to produce documents (where the recipient of the notice is in control of the process of searching for those documents) is markedly different from the execution of searches or the on-site inspection of

documents by federal bodies (where representatives of those bodies play a role in controlling the process of gathering information). In the latter case, there may be a conundrum insofar as the inspector or investigator is not entitled to seize privileged material but may need to look at it first, in order to determine that it cannot be seized.[386]

8.377 In his dissenting judgment in *Baker v Campbell*—a case concerning the application of privilege to a Commonwealth search warrant—Brennan J stated:

> If the privileges which affect the obligation to testify or to produce documents in judicial proceedings are to be engrafted upon and to modify powers conferred on investigative agencies, some procedure for determining the validity of a claim of privilege has to be devised.[387]

Execution of warrants at premises of lawyers

8.378 In 1997, a protocol establishing Guidelines between the AFP and the Law Council (the AFP Guidelines) came into effect concerning the execution of Commonwealth search warrants on the premises of lawyers, law societies and similar institutions.[388] The AFP Guidelines are specifically concerned with the procedures to be adopted where a claim for privilege is made, and aim to 'negate or reduce the risks of documents which may be subject of legal professional privilege being seized'.[389] The AFP Guidelines, in part, provide that:

- an officer executing a search warrant at the premises of a lawyer or Law Society is to invite the lawyer or representative of the Law Society to cooperate in the search;

- where the lawyer or Law Society refuses to cooperate, the executing officer is to advise that:

  (1) the search will proceed and that this may entail a search of all files and documents; and

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386 The Full Federal Court held in *JMA Accounting Pty Ltd v Carmody* (2004) 139 FCR 537, 542 that in some circumstances it may be appropriate for a tax officer to examine a document cursorily in order to determine if privilege applied—the document is not to be looked at closely; merely enough to enable the officer to decide whether it may be copied.

387 *Baker v Campbell* (1983) 153 CLR 52, 105. See also *Australian Federal Police v Propend Finance* (1997) 188 CLR 501, 505–506 (Brennan J); Victorian Parliament Law Reform Committee, *The Powers of Entry, Search, Seizure and Questioning by Authorised Persons* (2002), rec 36, which states that agencies should ensure they have a protocol in place for the seizure of documents over which client legal privilege is claimed.

388 See Australian Federal Police and Law Council of Australia, *General Guidelines Between the Australian Federal Police and the Law Council of Australia as to the Execution of Search Warrants on Lawyers' Premises, Law Societies and Like Institutions Where a Claim of Legal Professional Privilege is Made* (1997).

389 Ibid, [5].

(2) a document will not be seized if, on inspection, the executing officer considers that it falls outside the terms of the warrant or is privileged;

- where the lawyer or Law Society agrees to cooperate with the search team:

  (1) the executing officer is to give them the opportunity to claim privilege in respect of any documents identified as potentially falling within the warrant;

  (2) if a claim for privilege is made the lawyer or Law Society is to indicate the grounds upon which, and in whose name, the claim is made;

  (3) documents the subject of a privilege claim are to be placed by the lawyer or the Law Society in a sealed container;

  (4) a list of the documents the subject of a claim is to be prepared;

  (5) the list and container are to be endorsed to the effect that the parties agree that the warrant has not been executed in respect of those documents;

  (6) the documents are to be given forthwith into the custody of the magistrate or justice who issued the warrant or another independent party, pending resolution of the disputed claim;

  (7) where proceedings to establish the privilege claimed have been instituted the documents are to be delivered into the possession of the Registrar of the Court in which the proceedings are commenced; and

  (8) where proceedings to establish privilege have not been instituted within three working days of the delivery of the documents into the possession of the third party,[390] or where the parties have agreed about the disclosure of all or some of the documents, the parties shall ask the third party to release to the executing officer all of the documents or only those agreed upon.

8.379 Shortly after the AFP Guidelines came into effect they were the subject of some criticism.[391] In 1998, McNicol observed that 'although the [AFP] Guidelines generally seem to have worked in practice, there are still several unresolved issues',[392] including:

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390 The parties may agree to another reasonable time period.

391 See S McNicol, 'Unresolved Issues Arising from the General Guidelines between the AFP and the Law Council of Australia' (1998) 72 *Australian Law Journal* 137.

- the AFP Guidelines, contrary to their objective, do not preserve privilege insofar as they proceed on the basis that warrants will issue in terms which encompass privileged documents;[393]

- the AFP Guidelines are not rules of law and any breach or violation will have 'little or no sanction attached to it in practical or legal terms';[394]

- a question arises as to why *all* documents for which privilege is claimed have to be placed in a sealed container instead of only the ones where the claim is contentious;[395] and

- the role of the third party seems negligible because the AFP Guidelines suggest that the documents held by the third party are not actually read by the third party but are ultimately delivered to the Registrar of the Court or released to the executing officer, depending on the circumstances.[396]

Execution of warrants at other premises

8.380 Documents the subject of client legal privilege can fall within the scope of search warrants executed at premises other than those of a lawyer or law society. In these circumstances, search warrants may have a notice attached to them headed 'Claims for Legal Professional Privilege: Premises other than those of a Lawyer, Law Society or Like Institution' which sets out a procedure for claiming client legal privilege.[397] The procedure, which is to be followed to the extent that it is possible to do so, similarly provides for the placing of documents subject to a claim in a sealed container; the listing of those documents; and the delivery of the list and container to a third party pending resolution of the claim. One difference is that the person claiming privilege has four—rather than three—working days after delivery of the documents to the third party in which to commence proceedings to establish the privilege claimed.[398]

Execution of search warrants on a person

8.381 Documents the subject of a claim for client legal privilege can fall within the scope of a search warrant executed on a person. Warrants to search persons obtained by ASIC pursuant to s 3E of the *Crimes Act 1914* (Cth) have a document attached to them entitled 'Claims for Legal Professional Privilege: Searches of the Person' which

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392 Ibid, 138.

393 This point was made by Gaudron J in *Australian Federal Police v Propend Finance* (1997) 188 CLR 501, 537. See S McNicol, 'Unresolved Issues Arising from the General Guidelines between the AFP and the Law Council of Australia' (1998) 72 *Australian Law Journal* 137, 138.

394 S McNicol, 'Unresolved Issues Arising from the General Guidelines between the AFP and the Law Council of Australia' (1998) 72 *Australian Law Journal* 137, 139.

395 Ibid, 141.

396 Ibid, 141.

397 *Kennedy v Baker* (2004) 135 FCR 520, [19]–[20]; *Kennedy v Wallace* (2004) 208 ALR 424, [72]; *Oke v Commissioner of Australian Federal Police* (2007) 168 A Crim R 503, [104].

398 The parties may agree to another time period.

sets out the procedure to be followed where a person, the subject of a search, makes a claim.[399]

8.382 The procedure allows an officer to look at each document briefly, without reading its contents, to assess whether it appears likely that the document contains privileged information. The procedure provides that:

- the officer is to return the document if satisfied that it is not relevant or that it is clearly covered by client legal privilege;
- the officer is entitled to seize the document if of the view that it is clearly not covered by client legal privilege; and
- where the officer decides the document is relevant but cannot form a view about whether it is privileged, he or she is to ask the person to agree to a set procedure for resolving the claim. That procedure also provides for the listing of the documents, the placing of the documents in an envelope or sealed container; and the delivery of the list and container to a third party pending resolution of the claim.

Submissions and consultations

8.383 In IP 33, the ALRC sought feedback about whether existing search warrant guidelines were working in a satisfactory manner.[400]

8.384 The AGS submitted that the AFP Guidelines arguably represented the most effective way of dealing with procedural difficulties arising from privilege claims made in the context of search warrants.[401] Some stakeholders suggested changes to the AFP Guidelines and other search warrant guidelines—including matters that should be added—but nobody suggested that they should be dispensed with or were fundamentally inadequate.

8.385 The Law Society of NSW submitted that:

> Other than anecdotally, it is a safe assumption that the execution of federal warrants on law firms and the like is highly contentious and needs careful attention. For example, the manner in which a law [firm's] files can be seized (for example by ASIC), the period during which they are detained and the accessibility of the information particularly of the third parties contained in them is largely unknown. The mere fact that it is 'unknown' must raise concerns as to whether there are appropriate

399 Australian Securities and Investments Commission, *Submission LPP 5,* 29 March 2007.
400 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007), Question 5–4.
401 Australian Government Solicitor, *Submission LPP 50,* 13 June 2007.

> procedures being followed. The process needs to be somewhat more transparent after seizure, and the rights of the concerned parties better identified.[402]

8.386 The Law Council submitted that:

> A Commonwealth investigatory agency may possess search and seizure powers but offer no publicly available information about how these powers will be used in practice, including its approach to [privilege] claims during the execution of search warrants.
>
> In these circumstances [and subject to certain qualifications] … it [is] appropriate for such a … body to follow the relevant AFP Guidelines—for either lawyer's or non-lawyer's premises—when executing a search warrant and dealing with [privilege] claims. A copy of the relevant guidelines should also be annexed to the warrant.[403]

8.387 The Law Council also submitted that some form of alternative dispute resolution process should be included in search warrant guidelines. As noted above,[404] the Law Council submitted that the onus of disputing a claim should be on the federal body or—if the current regime is to be maintained—that a claimant should be given a reasonable time (such as 14 days) to institute proceedings to establish its claim.

8.388 ASIC submitted that search warrant guidelines should address:

- the making of claims in respect of electronic material;[405]
- the circumstances in which blanket claims are or are not acceptable; and
- the uncertainty about whether the AFP Guidelines apply to the execution of search warrants on non-legal premises insofar as those premises contain the workspace of in-house counsel.[406]

Proposal re AFP Guidelines

8.389 In DP 73, the ALRC proposed that the AFP and the Law Council should revise the AFP Guidelines to:

(a) refer to the proposed method of making a claim, as set out in the proposed federal client legal privilege legislation;

(b) allow the claimant an opportunity to agree to an independent review mechanism to resolve the claim;

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402 Law Society of New South Wales, *Submission LPP 40,* 1 June 2007.
403 Law Council of Australia, *Submission LPP 26,* 4 June 2007.
404 See discussion above on onus in resolving privilege disputes.
405 Issues and proposals in relation to electronic material are discussed above.
406 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007.

(c) state that the AFP Guidelines apply to any part of non-legal premises that contain the work space of in-house counsel; and

(d) refer to the procedures for making and resolving claims in respect of electronically-stored information.[407]

8.390 In DP 73, the ALRC noted that if its proposal for persons to be given 14 days to commence proceedings to establish their claim were to be implemented, this would necessitate a change to search warrant guidelines insofar as they allow claimants only three or four days to commence proceedings. The ALRC expressed interest in hearing views from stakeholders—particularly federal investigatory bodies—about the impact of this proposed extension of time in the context of claims arising from the execution of search warrants.[408]

8.391 The ALRC's proposal was generally supported in submissions.[409] In addition, in consultation, the AFP did not oppose an approach that would allow persons to be given 14 days (or such other time agreed to by the parties or ordered by the court) to commence proceedings to establish their claim. This approach was premised on the view that allowing claimants a longer period of time than they currently had to commence proceedings would be likely to lead to the formulation of well-considered claims, and reduce the risk of blanket claims being made.[410]

Proposal concerning other search warrant guidelines

8.392 In DP 73, the ALRC proposed that the CDPP, in consultation with relevant federal bodies that possess search warrant powers, should amend the documents attached to Commonwealth search warrants concerning the execution of warrants on non-legal premises and on the person to:

(a) refer to the proposed method of making a claim, as set out in the proposed federal client legal privilege legislation;

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407 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 8–19.

408 Ibid, [8.279].

409 Commonwealth Director of Public Prosecutions, *Submission LPP 101,* 2 November 2007; Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007; Law Council of Australia, *Submission LPP 94,* 1 November 2007; Law Society of New South Wales, *Submission LPP 93,* 31 October 2007. ASIC supported the proposal subject to its comments on Proposal 8–11: Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007. The AFP submitted that it would not object to the proposed measure: Australian Federal Police, *Submission LPP 115,* 29 November 2007.

410 Australian Federal Police, *Consultation LPP 40*, Canberra, 23 October 2007.

(b) allow the claimant an opportunity to agree to an independent review process; and

(c) refer to the procedures for making and resolving claims in respect of electronically-stored information.[411]

8.393 This proposal was generally supported in submissions.[412]

8.394 In recognition of the proposed extension in DP 73 of client legal privilege to 'tax advice' given by professional accounting advisers, the ALRC also proposed that the AFP, ATO and legal and accounting professional bodies should negotiate guidelines concerning the execution of search warrants on the premises of professional accounting advisers in circumstances where a claim of client legal privilege is made.[413] The ALRC proposed that the guidelines should include the matters referred to in [8. 393(a)–(c)] above.

8.395 This proposal was generally supported in submissions,[414] including by representative legal bodies that did not support the proposed extension of client legal privilege to 'tax advice' prepared by professional accounting advisers.[415]

ALRC's views

AFP Guidelines and guidelines in relation to other premises and searches of the person

8.396 The ALRC considers that it is important for persons whose premises or person are the subject of a Commonwealth search warrant to be provided with guidelines about the procedures to be adopted in making and resolving a claim for privilege. Such guidelines should be attached to search warrants executed by all federal investigatory bodies. The immediacy and circumstances of a search increase the significance of

411 See Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 8–20.

412 National Legal Aid, *Submission LPP 106,* 5 November 2007; Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007; Law Council of Australia, *Submission LPP 94,* 1 November 2007; Law Society of New South Wales, *Submission LPP 93,* 31 October 2007; Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007. ASIC supported the proposal subject to its comments on Proposal 8–11: Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007. The AFP submitted that it would not object to the proposed measure: Australian Federal Police, *Submission LPP 115,* 29 November 2007.

413 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 8–21.

414 National Legal Aid, *Submission LPP 106,* 5 November 2007; Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007. ASIC supported this proposal subject to its comments on Proposal 8–11: Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007. The AFP submitted that it would not object to the proposed measure: Australian Federal Police, *Submission LPP 115,* 29 November 2007.

415 Law Council of Australia, *Submission LPP 94,* 1 November 2007; Law Society of New South Wales, *Submission LPP 93,* 31 October 2007

ensuring that affected persons are informed up-front about the protocols to be adopted in protecting their rights concerning privilege.

8.397 The ALRC is of the view that other recommendations made by the ALRC concerning practice and procedure necessitate changes to the AFP Guidelines and to the guidelines concerning the search of non-legal premises and the person. In particular, all search warrant guidelines should be amended to:

- refer to the proposed method of making a privilege claim—to be set out in the proposed federal client legal privilege legislation;[416]

- reflect the fact that a federal body may, in its discretion, offer a claimant an opportunity to agree to an independent review mechanism.[417] Where this opportunity is afforded, search warrant guidelines should refer to the model procedure for resolving a claim, which should include the features set out in Recommendation 8–14;

- where the claimant is not offered, or does not agree, to participate in an independent review process, the claimant is to be allowed 14 days (or such other time agreed to by the parties) either to commence proceedings in a superior court to establish the claim or to seek an order concerning the time in which the substantive proceedings determining the claim should be commenced by the claimant; and

- refer specifically to the procedures for resolving client legal privilege disputes in respect of electronically-stored information—see Recommendation 8–17.

8.398 In order to promote clarity and certainty of approach, the AFP Guidelines should be amended to state that they apply to any part of non-legal premises that contain the work space of an in-house counsel.

Premises of professional accounting advisers

8.399 In view of the proposed extension of client legal privilege to 'tax advice' given by professional accounting advisers in the context of the exercise of coercive information-gathering powers by the Commissioner of Taxation,[418] the ALRC considers that guidelines need to be developed to address the execution of search warrants at the premises of such advisers. In the ALRC's view, the guidelines should be developed by the AFP, the ATO and legal and accounting professional bodies.

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416 See Rec 8–3.
417 See Rec 8–11.
418 See Rec 6–6.

Recommendation 8–19 The Australian Federal Police and the Law Council of Australia should revise the *General Guidelines between the Australian Federal Police and the Law Council of Australia as to the Execution of Search Warrants on a Lawyers' Premises, Law Societies and Like Institutions in Circumstances where a Claim of Legal Professional Privilege is Made* to:

(a) refer to the proposed method of making a claim, as set out in the proposed federal client legal privilege legislation (see Recommendation 8–3);

(b) refer to the model procedure for resolving a claim in circumstances where the federal body decides to offer the claimant an opportunity to agree to an independent review process. The process to be adopted should meet the minimum requirements set out in Recommendation 8–14;

(c) state that, where the claimant is not offered the opportunity, or does not agree, to participate in an independent review process, the claimant is to be given 14 days (or such other time agreed to by the parties) to either commence proceedings in a superior court to (i) establish the claim or (ii) seek an order concerning the time within which the substantive proceedings determining the claim should be commenced by the claimant;

(d) refer to the procedures for making and resolving claims in respect of electronically-stored information (see Recommendation 8–17); and

(e) state that the Guidelines apply to any part of non-legal premises that contain the work space of in-house counsel.

Recommendation 8–20 The Commonwealth Director of Public Prosecutions, in consultation with relevant federal bodies that possess search warrant powers, should amend the following documents which are attached to Commonwealth search warrants: *Claims for Legal Professional Privilege: Premises other than those of Lawyer, Law Society or Like Institution* (Non-Legal Premises Notice) and *Claims for Legal Professional Privilege: Searches of the Person*, to include the matters referred to in Recommendation 8–19(a)–(d) above.

Recommendation 8–21 The Australian Federal Police, the Australian Taxation Office and legal and accounting professional bodies should negotiate guidelines concerning the execution of search warrants on the premises of professional accounting advisers in circumstances where a claim of client legal privilege is made. The guidelines should include the matters referred to in Recommendation 8–19(a)–(d) above.

Other policies and procedures

Background

8.400 Many of the recommendations in this chapter are directed towards increasing transparency in the approach taken by federal bodies to client legal privilege by requiring that such bodies develop and publish their policies and procedures in relation to a number of aspects of privilege.[419] The ALRC's approach is premised on the view that obligations of federal bodies concerning privilege arise at various stages, namely, before a privilege claim is made, when it is made and after it is made.

8.401 The ARC, in its draft report on the coercive information-gathering powers of federal bodies, has recommended that:

> Agencies should keep written records of the situations where the privilege applies, especially if it is waived. Agency guidelines should be developed in the area of privilege. Topics covered should include the procedures to be adopted by agencies in responding to a claim for privilege and the nature and effect of a waiver of privilege.[420]

8.402 Some federal bodies have internal policies and procedures that address client legal privilege claims but these are not always apparent, transparent or accessible. The ATO's policies on privilege—which are accessible on its website—are a notable exception.[421] As discussed above, those policies are set out in the ATO Manual. The ATO Guidelines on exercising access powers on the premises of lawyers are also published and accessible, being an appendix to Chapter 6 of the ATO Manual.

8.403 In *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95), the ALRC made recommendations that regulators develop and publish guidelines or policies in a number of areas including: enforcement policies; penalty-related settlements; enforceable undertakings; publicity; and leniency and

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419 See, eg, Recs 8–2, 8–8, 8–12, 8–18.

420 Administrative Review Council, *Government Agency Coercive Information-Gathering Powers [Draft Report]* (2007), Principle 16.

421 See also Australian Commission for Law Enforcement Integrity, *Practice Notes*, 1 May 2007, [59]–[60].

immunity.[422] For example, a number of benefits were identified in requiring regulators to develop and publish enforcement policies, some of which may equally be applicable to a requirement that bodies publish policies about privilege. These benefits included:

- improving the understanding of the regulated community as to what compliance requires;
- accountability and transparency in the exercise of discretionary governmental power;
- consistency in enforcement decision making;
- guidance to regulator staff;
- a coordinated approach with other regulators and agencies; and
- the accumulation of expertise.[423]

Submissions and consultations

8.404 In IP 33, the ALRC asked whether federal bodies exercising coercive information-gathering powers should be required to develop and publish policies in relation to: informing persons of their position concerning privilege; the procedures to be adopted in making and resolving claims for privilege; and managing and recording documents or communications received in respect of which a claim for privilege has been made.[424]

8.405 In response to IP 33, there was strong support in submissions and consultations for the development and publication of such policies,[425] with some stakeholders

422 See Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), Rec 10–1 (enforcement policies); Rec 16–1 (penalty-related settlements); Rec 16–3 (enforceable undertakings); Rec 16–4 (publicity); Rec 17–1 (leniency and immunity).

423 See Ibid, Ch 10, especially [10.60]. In order to accommodate concerns that some regulators had concerning the publication of their policies, the ALRC also suggested the development of internal enforcement guidelines that are not required to be published if it is considered necessary to supplement the publicly available guidelines.

424 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007), Question 5–7.

425 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007; Taxation Institute of Australia, *Submission LPP 54,* 15 June 2007; National Legal Aid, *Submission LPP 52,* 13 June 2007; Australian Pesticides and Veterinary Medicines Authority, *Submission LPP 45,* 6 June 2007; Law Society of New South Wales, *Submission LPP 40,* 1 June 2007; Corporate Tax Association, *Submission LPP 32,* 4 June 2007; Law Council of Australia, *Submission LPP 26,* 4 June 2007; R Desiatnik, *Submission LPP 24,* 1 June 2007; BHP Billiton Mitsubishi Alliance, *Submission LPP 21,* 1 June 2007.

specifically supporting the ATO's practices in this regard.[426] For example, BHP Billiton Mitsubishi Alliance submitted that the publication of procedures

> in a manner readily accessible to the public will … assist in raising awareness of the procedures and ensuring that they are adhered to.[427]

8.406 The Law Council submitted that:

> Publishing guidelines will increase understanding by all parties about what is involved in the investigatory process, improve accountability and transparency in how those powers are exercised and lead to consistent practices in resolving situations where documents or communications do, or may, become the subject of claims for [privilege].[428]

8.407 As noted elsewhere in this chapter, there was general support for procedures to be uniform.[429]

8.408 Some stakeholders submitted that it was important that the policies of federal bodies include giving persons notification about their ability to seek legal advice, legal representation or legal aid. For example, Desiatnik submitted that:

> What[ever] information is given it should be prefaced with the warning that it is subject to whatever legal advice the recipient may wish to obtain.[430]

8.409 Fitzroy Legal Service submitted it should not be left to individual federal bodies to develop policies about all aspects of client legal privilege. It submitted that overarching federal legislation should set out:

- the procedures to be followed when potentially privileged information is seized;
- how potentially privileged information will be handled by the organisation;
- which independent third party (court or otherwise) will determine whether the information is privileged;
- that documents will be returned if a claim for privilege is successful.[431]

8.410 It also submitted that it 'would be beneficial for [federal bodies] to articulate policies so long as they were consistent with [the] legislative structure'.[432]

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426 See, eg, Corporate Tax Association, *Submission LPP 32,* 4 June 2007; Fitzroy Legal Service, *Submission LPP 29,* 4 June 2007.
427 BHP Billiton Mitsubishi Alliance, *Submission LPP 21,* 1 June 2007.
428 Law Council of Australia, *Submission LPP 26,* 4 June 2007.
429 See, eg, Australian Pesticides and Veterinary Medicines Authority, *Submission LPP 45,* 6 June 2007; Law Council of Australia, *Submission LPP 26,* 4 June 2007.
430 R Desiatnik, *Submission LPP 24,* 1 June 2007.
431 Fitzroy Legal Service, *Submission LPP 29,* 4 June 2007.
432 Ibid.

8.411 However, publication of policies was not uniformly supported. Officers from the Australian Security Intelligence Organisation (ASIO) expressed concerns that publication of ASIO's policies would have an adverse impact on its operational activities.[433]

8.412 In DP 73, the ALRC proposed that federal bodies with coercive information-gathering powers—the exercise of which raise or are likely to raise, the issue of the application of client legal privilege—should develop their policies and procedures in relation to:

(a) notifying persons that they may wish to seek independent legal advice concerning their response to a coercive power or, if applicable, seek legal representation; and

(b) making claims for privilege—which should be consistent with the proposed legislative procedures.[434]

8.413 This proposal was generally supported in submissions.[435] For example, ASIC expressed support for the development of such policies and procedures 'once the application of client legal privilege to the information-gathering powers of federal bodies has been clarified'.[436]

8.414 The Law Council and the Law Society of NSW supported the proposal and also submitted that consideration

> needs to be given to circumstances where the entity in possession of the privileged documents is not the only entity with the right to assert privilege. Federal bodies should direct entities to consider this possibility, especially when they are dealing with unrepresented persons.[437]

8.415 APRA objected to the proposal on the basis that:

> The institutions and persons the subject of APRA's notices are large enough and sophisticated enough to seek legal advice in responding to an APRA information-

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433 Officers from the Australian Security Intelligence Organisation and the Inspector-General of Security and Intelligence, *Consultation LPP 34*, Sydney, 26 June 2007.

434 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 8–22.

435 National Legal Aid, *Submission LPP 106,* 5 November 2007; Australian Financial Markets Association, *Submission LPP 95,* 2 November 2007; Law Council of Australia, *Submission LPP 94,* 1 November 2007; Law Society of New South Wales, *Submission LPP 93,* 31 October 2007; Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007. The AFP submitted that it would not object to this proposed measure: Australian Federal Police, *Submission LPP 115,* 29 November 2007.

436 Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007.

437 Law Council of Australia, *Submission LPP 94,* 1 November 2007; Law Society of New South Wales, *Submission LPP 93,* 31 October 2007.

gathering power and so APRA should not be required to develop and publish the procedures referred to in the proposal.[438]

ALRC's views

8.416 The articulation of transparent and accessible policies by federal bodies on various aspects of client legal privilege has an important role to play—whether by itself or as a complement to the ALRC's proposed federal client legal privilege legislation—in addressing issues of clarity, accountability and fairness.

8.417 In addition to the other recommendations made in this chapter, which require relevant federal bodies to develop and publish various policies about specific aspects of privilege, the ALRC remains of the view that federal bodies should also develop and publish their policies and procedures in relation to:

- notifying persons that they may wish to seek independent legal advice concerning their response to a coercive power or, if applicable, seek legal representation; and

- making a claim for privilege.[439]

8.418 The ALRC also considers that federal bodies that possess coercive powers that abrogate or modify client legal privilege should be required to develop and publish additional policies and procedures concerning the management, recording and return of privileged information produced to them. The ALRC's recommendation in this regard is set out in Chapter 7.[440]

8.419 The ALRC recognises that there are aspects of policy and procedure that federal bodies may wish not to publish for sensitive operational reasons. This may be the case in particular with a federal body such as ASIO—especially in relation to the exercise of its covert powers. In some cases, it may be appropriate for an abridged version of a policy to be made public. In other cases, federal bodies with oversight powers—such as the Inspector-General of Intelligence and Security—should satisfy themselves that the federal bodies which they oversee have appropriate internal policies about privilege in place.

Notification about independent legal advice

8.420 As discussed above, the ALRC has recommended that federal bodies should be required to notify persons about whether client legal privilege applies to the exercise of

438 Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007.
439 These are addressed separately below.
440 See Rec 7–7.

a particular coercive power. However, it is not the responsibility of a federal body to advise a person about whether client legal privilege attaches to any particular communication falling within the scope of a notice issued under a coercive power. This is properly the subject of independent legal advice. The policies of federal bodies should address the circumstances in which they will give notification about seeking independent legal advice in responding to a coercive power, including, where applicable, seeking legal representation.

8.421 The ALRC acknowledges that it may not always be strictly necessary for a federal body to notify a person or institution of their ability to seek legal advice—for example where a federal body, such as APRA, deals regularly with large institutions known to seek legal advice as a matter of course when responding to coercive information-gathering powers. However, in the ALRC's view, that does not absolve federal bodies that have dealings with well-resourced or 'sophisticated' notice recipients from developing transparent policies articulating the circumstances in which they will give the requisite notification. One cannot presume that every subject of every coercive information-gathering power of a particular federal body would fail to benefit from being notified of the ability to seek legal advice.

8.422 As discussed above, relevant factors may include: whether the person the subject of the power is the subject of the investigation; whether the person the subject of the power is known to be unrepresented; the type of power being exercised; the nature of the investigation; and whether the statute conferring the power confers a right to legal representation in an interview or examination.[441] Moreover, a federal body ought to consider the desirability that, in conducting its investigations, its behaviour accords with that expected of a model investigator.

Making claims for privilege

8.423 Policies about making claims for privilege should be consistent with the proposed legislative procedure for making a privilege claim. They could address, for example, the circumstances in which a federal body will request particulars, verification, and certification of client legal privilege claims made in response to the exercise of coercive information-gathering powers.

Recommendation 8–22 Federal bodies with coercive information-gathering powers—the exercise of which raise, or are likely to raise, the issue of the application of client legal privilege—should develop and publish their policies and procedures in relation to:

441 See discussion above on unrepresented persons.

(a) notifying persons that they may wish to seek independent legal advice concerning their response to a coercive power or, if applicable, seek legal representation; and

(b) making claims for privilege—which should be consistent with the proposed legislative procedures.

9. Ensuring Professional Integrity—Education and Accountability

Contents

Introduction

9.1 The ALRC has heard allegations that lawyers have at times 'overstepped the mark' in relation to claims that certain communications are the subject of client legal privilege. In the Issues Paper, *Client Legal Privilege and Federal Investigatory Bodies* (IP 33) and the Discussion Paper, *Client Legal Privilege and Federal Investigatory Bodies* (DP 73), the ALRC raised a number of questions in relation to claims of privilege being made for the purpose of frustrating investigations.

9.2 The misuse of privilege claims as a tactic for delay or obstruction may be seen to contradict the very purpose of administration of justice that privilege is said to serve.[1] Misuse of privilege also goes against a lawyer's duty to the court by frustrating

1 See Ch 2.

court process and the administration of justice.[2] As the Law Council of Australia (Law Council) commented, lawyers have a duty to the court

> to ensure that claims of [client legal privilege] are soundly based. This is part of their duty not to assist in an abuse of process or in misleading the court. A claim for [privilege] that is made without merit, to cause delay or obstruction, is an abuse of process.[3]

9.3 Similarly, NSW Young Lawyers stated that:

> A lawyer engaging in [improperly claiming client legal privilege] risks undermining the reputation of the legal profession as a whole and reduces the confidence of litigants in the Court system.[4]

9.4 The appropriate framework for making and resolving claims of client legal privilege is considered in Chapter 8. Ways to deter—and punish—alleged misuse or abuses of privilege claims are the principal subject of this chapter.

The question of abuse

Examples of alleged abuse

9.5 Three examples may be used to illustrate the challenges posed in identifying alleged abuse of client legal privilege claims: the Australian Wheat Board (AWB) Royal Commission;[5] the British American Tobacco litigation;[6] and *Seven Network Ltd v News Ltd*.[7] While only the first example concerns client legal privilege claims in the context of a federal investigatory body, all three attracted media and public attention to the issue of alleged 'overreaching' in relation to lawyers' practices more generally.

9.6 During the AWB Royal Commission, Commissioner Cole expressed some concerns regarding AWB's claims for client legal privilege, since:

- the Royal Commission repeatedly sought a complete list from AWB of all documents not produced on the basis of a privilege claim, and this list was never provided;[8]
- AWB finally conceded that many documents for which privilege had been claimed were no longer claimed to be privileged;[9] and

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2 Confidential, *Submission LPP 48,* 12 June 2007.
3 Law Council of Australia, *Submission LPP 26,* 4 June 2007, [318].
4 NSW Young Lawyers, *Submission LPP 49,* 12 June 2007, 14.
5 T Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (2006); *AWB v Cole (No 5)* (2006) 155 FCR 30.
6 *McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 73; *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524; *British American Tobacco Australia Services Ltd v Cowell* (2003) 8 VR 571.
7 *Seven Network Ltd v News Ltd* [2005] FCA 142.
8 T Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (2006), [7.42].
9 Ibid, [7.55].

- AWB's claims for privilege significantly delayed completion of hearings.[10]

9.7 Commissioner Cole stated that:

> The claim for legal professional privilege [by AWB] in respect of the Project Rose brief to Mr Tracey QC, abandoned on day 62 of the hearings, resulted in great delay and expense to the Inquiry. Had AWB produced the brief earlier, with most of the relevant documents contained in it, the course of this Inquiry would have been different, and its duration and expense much less. Whatever may be said about legal professional privilege flowing from the skill of compiling a brief, it is plain that the original documents copied in the brief were all material to this Inquiry, would have had to be produced in response to notices, and would, after the expenditure of significant time and money, be compiled by the Inquiry to give a chronological picture of the involvement of AWB and its officers in the payment of monies by way of trucking fees. Had there been frankness or real cooperation on the part of AWB, most material documents could have been produced in November 2005.[11]

9.8 The second example arises in the tobacco litigation context. A former legal counsel for British American Tobacco Australasian Services (BATAS) gave evidence that BATAS and its lawyers had participated in a 'contrivance' to hide evidence behind client legal privilege.

> BATAS would give [its lawyers] copies of its documents (including those that might harm it if discovered in litigation) ostensibly for legal advice. The originals would be destroyed under the document retention policy while [the lawyers] kept the copies but claimed that they were protected by privilege.[12]

9.9 At first instance, Eames J held that the process of discovery 'was subverted' by BATAS and its solicitor, 'with the deliberate intention of denying a fair trial to the plaintiff'.[13] It was not a strategy, he said, 'which the court should countenance'. In such circumstances he held that it was an outcome that could not be cured and the 'only appropriate order' was to strike out the defence and to enter judgment for the plaintiff.[14]

9.10 The Victorian Court of Appeal held, however, that the decision at first instance was flawed and allowed the defendant's claim of client legal privilege.[15] This meant that the documents had not properly been admitted into evidence and thus the basis of Eames J's conclusion—that there was a deliberate strategy to destroy disadvantageous documents—even if correct, could not stand.[16]

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10 Ibid, [7.57].
11 Ibid, [7.64].
12 C Parker and A Evans, *Inside Lawyers' Ethics* (2007), 220.
13 *McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 73, [385].
14 Ibid, [385].
15 *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524.
16 *McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 73, [131].

9.11 Although the outcome of the appeal was to put the documents back behind the cloak of privilege, the fact that the contents had been revealed brought certain practices into the spotlight. The dispute is now the subject of continuing litigation.[17]

9.12 The third example similarly arose in the context of discovery—*Seven Network Ltd v News Ltd.*[18] The applicant's claim for access to certain documents in this case was resisted on the basis of client legal privilege. The documents in question had been prepared by in-house counsel for News Ltd and the central issue was the 'dominant purpose test'—had the documents been prepared for the dominant purpose of giving legal advice?[19]

9.13 The privilege claim originally covered around 300 documents in an affidavit sworn by the Chief General Counsel for News Ltd. By the time of the hearing, nearly seven months later, the claims with respect to approximately one third of the documents had been withdrawn and verifying affidavits were set aside.

9.14 Tamberlin J was critical of News Ltd's conduct of the discovery process.

> The importance of the availability of documentation to parties in litigation, particularly in litigation on the scale of the present case, and the public interest in the courts making fully informed decisions by reference to documentary records, requires scrupulous compliance with the requirements of the [Federal Court Rules] and the accepted principles for discovery and the assertion of privilege. … The Court must be able to rely on diligent compliance with its orders and this is reflected in the requirement that the solicitor must give a certificate.[20]

9.15 Tamberlin J rejected the privilege claim with respect to all but four of the documents and described the initial claim as 'substantially excessive'.[21] In such circumstances he awarded costs on an indemnity basis against News Ltd.[22]

9.16 These three examples prompt the questions to be considered in this chapter—do any, or all, of the practices highlighted by the examples take client legal privilege beyond its legitimate bounds and into the area of misuse or abuse and, if so, what should be the appropriate responses?

9.17 That *some* response is required is evident. As the Law Council commented: 'lawyers who knowingly make excessive claims of [client legal privilege] do a great disservice to the justice system and the legal profession and should be subject to sanctions'.[23]

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17 For example, *McCabe v British American Tobacco Australia Services Ltd* [2007] VSC 216.
18 *Seven Network Ltd v News Ltd* [2005] FCA 142.
19 See Ch 3.
20 *Seven Network Ltd v News Ltd* [2005] FCA 142, [22].
21 Ibid, [42].
22 Ibid, [44].
23 Law Council of Australia, *Submission LPP 26,* 4 June 2007.

9.18 Associate Professor Adrian Evans also commented on the importance of responding to the concerns expressed by Commissioner Cole in the AWB Royal Commission.

> Commissioner Cole carefully criticised not the actual claim of privilege by AWB over the edited minutes of its Board Meetings, but the public wisdom in the decision to make the claim of privilege at all. Cole was referring to the effect on the public reputation of AWB that it would seek to use privilege to keep secret its Board Minutes. This observation captures the community cynicism that privilege claims *per se* are conspicuously associated with deceit, commercial exploitation and criminal behaviour. I don't think the position is as bad as that, but the perception does justify this reference.[24]

9.19 The challenge for the ALRC was to disentangle the issues of perception of abuse from those of valid practice and to assess what should be appropriate responses to actual instances of, for example, 'deceit, commercial exploitation and criminal behaviour'.[25] The difficult issue of weighing up when an expansive claim of privilege becomes an improper one also is compounded by potential breadth of a test which requires the assessment of the 'dominant purpose' of the communications in question.[26]

The extent of the problem of abuse

9.20 A major problem identified in relation to claims of client legal privilege is the delay that such claims may generate for investigations by federal investigatory bodies. In IP 33, the ALRC sought comment on the use of such claims as a tactic for delay or obstruction.[27]

9.21 In analysing the submissions and consultations, comments about procedural delay—and appropriate ways to resolve it—needed to be distinguished from the use of delay as a tactic to obstruct investigations. The general issue of delay is considered in Chapter 6. Ways to improve transparency in the making of claims and processes to avoid delay and the resolution of claims are recommended in Chapter 8.

9.22 The ALRC considers that the combination of improvements, recommended throughout this Report, should make a significant contribution towards the reduction of delay. The recommendations will also facilitate a more cooperative environment in which federal investigatory bodies are able to seek and obtain information, with or without the specific exercise of coercive information-gathering powers, by:

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24 A Evans, *Submission LPP 4,* 27 March 2007.
25 Ibid.
26 See Ch 3.
27 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007), Question 7–6.

- clarifying whether client legal privilege is abrogated or not, in the first place—hence avoiding litigation of the kind in *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (*Daniels*);[28]

- providing a clear framework for the provision of information to persons the subject of coercive information-gathering powers;[29]

- making explicit the information that persons the subject of coercive information-gathering powers need to provide, where they seek to make a claim of client legal privilege;[30] and

- establishing an effective framework for the resolution of disputes concerning client legal privilege.[31]

9.23 If these recommendations are implemented, the extent of the perceived problem of abuse may be significantly reduced. The comments in submissions and consultations need to be considered, therefore, with such recommendations in mind.

Submissions and consultations

9.24 A common theme in the submissions and consultations was the difficulty in establishing when a claim of client legal privilege amounts to abuse. Where a lawyer is testing the boundaries of the doctrine of privilege with an arguable case, this is different from making a hopeless claim as a tactic in order to frustrate or delay an investigation. Issues in relation to client legal privilege are not necessarily straightforward. The disagreement between Eames J and the Victorian Court of Appeal in the British American Tobacco litigation as to what amounted to a waiver of privilege, is a significant illustration in point.[32] A rejected claim of client legal privilege, therefore, is not necessarily an improper one.[33]

9.25 The difficulty of proving bad faith was emphasised, for example, in the submission of the Australian Institute of Company Directors (AICD):

> The privilege is that of the client not the lawyer. 'Bad faith' can be difficult to determine. A claim of privilege may be made in good faith on the basis that the claim is arguable. Lawyers have a professional duty towards their client to put their case. If a claim for privilege fails, AICD is concerned that it may be all too easy to claim bad faith. To impose penalties and sanctions may place the person, particularly a client, in

28 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543. See Ch 5.
29 See Ch 8.
30 See Ch 8.
31 See Ch 8.
32 *McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 73; *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524.
33 See, eg, G Healy and A Eastwood—Freehills, *Consultation LPP 30*, Sydney, 12 June 2007; Regulatory lawyers of Clayton Utz, *Consultation LPP 13*, Sydney, 15 May 2007.

> a position of 'double jeopardy' having lost the claim for privilege and subject to the consequences that flow from that.[34]

9.26 The New South Wales (NSW) Bar Association considered that abuse is likely to arise in particular areas:

> (a) over-claiming—in the sense that the decisions are made to claim privilege on an overly cautious or inexperienced basis leading to some of the claims, upon examination, being found to be unsustainable, but with proceedings delayed in the meantime;
>
> (b) lack of transparency in the making of claims—parties not providing a full list with separate identification of the various privilege documents until being pressed to do so, again delaying resolution of proceedings;
>
> (c) over-use of masking of documents for privilege;
>
> (d) (probably most rarely) warehousing or privileging.[35]

9.27 The practice of 'masking'—sometimes described as 'redaction'—involves the obscuring of those parts of documents that are claimed to be subject to client legal privilege. According to the NSW Bar Association, 'masking' most frequently occurs

> not in respect of primary privilege claims, but in respect of secondary, or derivative claims: a summary of legal advice in one sentence in a 10-page board paper; extracts of a conversation with a solicitor in a client's longer file note etc.
>
> [It] is likely to be the product either of an attempt to widen a privilege claim inappropriately or of a caution bred of a lack of understanding about how appropriately to mask a document.[36]

9.28 'Warehousing' and 'privileging' of documents, referred to above, are described as follows:

> 'Warehousing' is the act of placing prejudicial documents in the hands of third parties and beyond the power of a party to litigation on the understanding that such documents may be retrieved by the party 'by the grace and favour of the third party'.
>
> 'Privileging' is the act of placing prejudicial documents 'in the hands of lawyers under cover of spurious requests for legal advice so as to permit a claim for privilege'. This may be done by labelling otherwise non-privileged documents 'for the purpose of legal advice' and providing the documents to a lawyer purportedly for the purpose of seeking legal advice. [37]

9.29 The purpose of such practices is 'to enable a party to place prejudicial documents beyond the reach of litigants'.[38]

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34 Australian Institute of Company Directors, *Submission LPP 43,* 8 June 2007. See also Fitzroy Legal Service, *Submission LPP 29,* 4 June 2007.

35 New South Wales Bar Association, *Submission LPP 41,* 5 June 2007.

36 Ibid.

37 Ibid, citing *Re Mowbray: Brambles Australia Ltd v British American Tobacco Australia Services Ltd* [2006] NSWDDT 15, [12].

38 New South Wales Bar Association, *Submission LPP 41,* 5 June 2007.

9.30 The Australian Competition and Consumer Commission (ACCC) also drew attention to the tactic of potential over-claiming through the making of 'blanket claims' during the course of investigations and the inherent dangers of such practice.

> The ACCC's practical experience shows that ordinary Court procedures which apply in relation to dealing with claims of legal professional privilege can be 'gamed' to seriously stifle or lengthen an investigation by, for example, making a blanket claim of legal professional privilege.[39]

9.31 A key issue is whether notorious examples, such as those that arose in the AWB Royal Commission, are isolated 'one-offs', or are actually examples of a much bigger problem. A number of submissions and consultations queried the extent of the alleged problem in relation to actual misuse of client legal privilege claims. The Law Society of NSW commented that:

> A brief review of reported and unreported NSW cases has not turned up an instance to date of professional disciplinary action having been taken against a solicitor or barrister on such a basis.[40]

9.32 Similarly, the NSW Bar Association suggested that:

> To the extent privilege is thought to have been misused before federal investigative agencies, for example as per the Cole Report, there is no evidence of a widespread problem, certainly not one sufficiently widespread to commend to anyone radical changes to the privilege.[41]

9.33 While the NSW Bar Association identified the practices of 'warehousing' and 'privileging' as troubling, it commented that there was no evidence available to it to suggest that these practices were widespread.[42]

9.34 Conversely, the ACCC expressed concern that it is very difficult to determine whether the abuse is more than 'occasional', noting that:

> It should not be accepted as axiomatic that legal professional privilege is only occasionally abused in the absence of reliable evidence to support this. There have been rare occasions where the ACCC has been made aware of inappropriate privilege claims because of particular unique circumstances. … Of course, the fact that it is only on rare occasions that such abuse is able to be uncovered by the ACCC does not support the proposition that it only occurs on rare occasions.[43]

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39 Australian Competition and Consumer Commission, *Submission LPP 53,* 13 June 2007. ASIC also raised concerns in relation to blanket claims—particularly in relation to electronically stored information—and the delays that this causes for investigations: Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007. See also Australian Taxation Office, *Submission LPP 65,* 22 June 2007. The issue of 'blanket claims' is considered in Ch 8.

40 Law Society of New South Wales, *Submission LPP 40,* 1 June 2007.

41 New South Wales Bar Association, *Submission LPP 41,* 5 June 2007. See also I Temby, *Submission LPP 72,* 19 July 2007.

42 New South Wales Bar Association, *Submission LPP 41,* 5 June 2007.

43 Australian Competition and Consumer Commission, *Submission LPP 53,* 13 June 2007. The ACCC cited a number of illustrations of difficulties it had in identifying improper claims of privilege having been made, and the difficulties it has in verifying claims of privilege. This is discussed further in Ch 8.

ALRC's views

9.35 While there is no clear evidence of chronic abuse of claims of client legal privilege, there is evident distrust on the part of federal investigatory bodies that claims are not being made legitimately in some cases.

9.36 It should be noted, however, that as it is in the very nature of client legal privilege that communications are kept confidential—and never made known to anyone other than the lawyer and client involved—it is difficult to gauge the extent of any actual abuse. Federal investigatory bodies are, therefore, necessarily reliant on the integrity of lawyers in asserting claims of client legal privilege.

9.37 It is the ALRC's view that if co-operation and trust were improved in relation to the making and resolving of claims through the procedures suggested in Chapter 8, the scope for suspicion of abuse on the part of federal investigatory bodies would be minimised.

9.38 The introduction of more transparent processes, does not, however, address the issue of 'gaming', or using privilege claims as 'a tool to impede',[44] which may take the practice into the area of alleged abuse. This is considered further below.

Responding to abuse

9.39 In IP 33, the ALRC queried whether professional disciplinary action should follow in cases where a lawyer has maintained a claim for client legal privilege improperly as a tactic for delay or obstruction.[45]

9.40 The rules of conduct of state and territory law societies and bar associations cover various aspects of practice; and the Legal Profession Acts in each state and territory set out the definitions of conduct that may lead to disciplinary action.[46]

Legal Profession Acts

9.41 While each state and territory has its own legislation, regulations and rules concerning the legal profession, in recent years the Commonwealth, state and territory attorneys-general have endorsed comprehensive model provisions as the basis for consistent national laws.[47] The structure of the model legislation was influenced by the work of the National Legal Profession Model Laws Project, involving the Law Council

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44 Commonwealth Director of Public Prosecutions, *Submission LPP 61,* 12 June 2007.

45 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007), Question 7–6.

46 *Legal Profession Act 2006* (ACT); *Legal Profession Act 2004* (NSW); *Legal Profession Act 2006* (NT) *Legal Profession Act 2007* (Qld); *Legal Practitioners Act 1981* (SA); *Legal Profession Act 1993* (Tas); *Legal Profession Act 2004* (Vic); *Legal Practice Act 2003* (WA). See also Standing Committee of Attorneys-General, National Legal Profession Model Bill (2006).

47 See Law Council of Australia, *Framework for a National Legal Services Market: National Legal Profession Model Reforms* (2005).

and its constituent bodies working closely with the Standing Committee of Attorneys-General.[48] In addition to setting out a uniform standard for law degrees and practical legal training, the model provisions include uniform definitions of unsatisfactory professional conduct and professional misconduct. NSW, Victoria, Queensland, the Northern Territory and the Australian Capital Territory (ACT) have implemented the model legislation in each jurisdiction's respective Legal Profession Act and regulations.[49]

9.42 Under the Model Legal Profession Act, 'unsatisfactory professional conduct' is defined as including:

> conduct of an Australian legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.[50]

9.43 'Professional misconduct' is defined as including:

> (a) unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
>
> (b) conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.[51]

9.44 Examples of conduct capable of constituting 'unsatisfactory professional conduct' or 'professional misconduct' are also set out, including 'conduct consisting of a contravention of this Act, the regulations or the legal profession rules'.[52]

Case examples

9.45 A case which is instructive in relation to the possible application of the existing disciplinary frameworks to an alleged abuse of a claim for client legal privilege is *Clough v Queensland Law Society Inc.*[53] The solicitor, Clough, supplied information in the course of litigation that was incomplete and incorrect.[54] The Solicitors' Complaints

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48 Ibid, 2. The constituent bodies of the Law Council include the Law Society of NSW, ACT Bar Association, Bar Association of Queensland, Law Institute of Victoria, Law Society of the Northern Territory, Law Society of South Australia, Law Society of Tasmania, Law Society of Western Australia, NSW Bar Association, Northern Territory Bar Association, Queensland Law Society, the Victorian Bar and Western Australian Bar Association.

49 *Legal Profession Act 2004* (NSW); *Legal Profession Act 2004* (Vic); *Legal Profession Act 2007* (Qld); *Legal Profession Act 2006* (NT); *Legal Profession Act 2006* (ACT).

50 Law Council of Australia, *National Practice—National Legal Profession Model Bill & Model Regulations* <www.lawcouncil.asn.au/natpractice/currentstatus.html> at 30 November 2007, Model Bill, cl 4.2.1.

51 Ibid, cl 4.2.2 (1).

52 Ibid, cl 4.2.3 (a).

53 *Clough v Queensland Law Society Inc* [2002] 1 Qd R 116.

54 Ibid, [3] (Pincus JA).

Tribunal of Queensland suspended him from practice for a period of 12 months and required him satisfactorily to undertake a legal education program in civil litigation prior to his applying to have his practising certificate restored. Clough appealed from this ruling. The Attorney-General and the Law Society also appealed on the basis that the penalty was inadequate and sought to have Clough removed from the roll of legal practitioners altogether.

9.46 The Law Society considered that although Clough was not dishonest, he had been guilty of 'malpractice and/or professional misconduct and/or unprofessional conduct or practice' in relation to the disclosure of certain documents in relation to a matter in the District Court.[55]

9.47 In considering the appeal, Muir J commented that:

> To supply false and misleading material to a solicitor on the other side of the record and to the solicitor's client, was to conduct the case unfairly and to fall short of, to a substantial degree, the standards of professional conduct observed or approved by members of the profession of good repute and competency. The conduct thus went beyond mere negligence and amounted to unprofessional conduct.[56]

9.48 Clough erred in relation to the extent of the required disclosure in the relevant action. The Tribunal 'found actions and statements which might have been regarded as chicanery to be honest but mistaken'.[57] The Court of Appeal dismissed both appeals, leaving the original penalties imposed by the Tribunal to stand, but required Clough to pay the costs of the appeal.

9.49 Another example is *Guss v Law Institute of Victoria Ltd.*[58] The Full Tribunal of the Legal Profession Tribunal had found Joseph Guss guilty of misconduct in a professional capacity, cancelled his practising certificate as a solicitor and prevented him from applying for another certificate for three years. Guss appealed to the Court of Appeal of Victoria.

9.50 The matter arose out of litigation in which Guss's wife had sued Geelong Building Society for damages in relation to the Society's conduct as mortgagee in selling certain property. Guss was in possession of a facsimile of a survey plan of the subject property and failed to produce it on discovery. He argued that the document was subject to privilege. Maxwell P distinguished between 'discovery' and 'production':

> The misconduct with which Guss was charged, and which was found proved, was constituted by his failure to make *discovery* of the documents. Discovery and production are, of course, separate steps. Privilege, if it exists, is relevant only to production. It does not affect the obligation to make discovery of relevant documents,

55 Ibid.
56 Ibid, [73].
57 Ibid, [5].
58 *Guss v Law Institue of Victoria Ltd* [2006] VSCA 88.

> that is, to disclose that they were in the plaintiff's possession or control. This he failed to do. Whether a claim for privilege against production of the documents might have been sustained is a quite separate question.[59]

9.51 The Full Tribunal of the Legal Profession Tribunal considered that Guss's failure to discover the survey was a 'very serious instance of misconduct':[60]

> This issue is failure to discover or disclose. The fact is the facsimile plans were and remained in the possession of Guss and not disclosed.
>
> There is really no necessity to state the obvious. It is asserted in the interests of justice that full disclosure be made of all the documents related to the issues in the case.
>
> In that regard, it is relevant that a solicitor is an officer of the Supreme Court with a duty not to obstruct the interests of justice.[61]

9.52 The Court of Appeal of Victoria agreed:

> It is difficult to overstate the importance to the administration of justice of the paramount duty of a legal practitioner not to mislead the court. Where there is any conflict, or risk of conflict, between that duty and what the practitioner perceives to be his/her duty to the client, the duty to the court must always prevail. Nowhere is the risk of conflict more likely to arise than in relation to the obligation to make discovery. …
>
> For a practitioner to do what Guss has been found to have done—knowingly to withhold a relevant document and to stand silent while counsel engaged on behalf of his client made in open court what he (Guss) alone knew to be a false statement about the non-existence of such a document—is rightly to be viewed as very serious conduct. As counsel for the Law Institute submitted to the Tribunal, the conduct found proved went to the heart of the administration of justice.[62]

9.53 These cases illustrate that a lawyer may come within the realm of 'unsatisfactory professional conduct' or 'professional misconduct' under the applicable disciplinary regimes. Under the relevant disciplinary legislation, the lawyer may be subject to a range of consequences. In NSW, for example, penalties may include: a caution; conditions imposed on a practising certificate; a fine of up to $75,000; and removal from the roll.[63]

9.54 The ability to initiate disciplinary proceedings against a lawyer is also wide. For example, in NSW, 'every person' has the right to complain about the conduct of lawyers to the relevant legal professional association or the independent Legal Services Commissioner.[64] The term 'lawyer', in this context, applies to those lawyers who hold practising certificates as well as to those who do not.[65]

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59 Ibid, [16].
60 Ibid, [36].
61 Ibid, quoting the Legal Profession Tribunal.
62 Ibid, [39], [40].
63 *Legal Profession Act 2004* (NSW) ss 540(2), 562.
64 Ibid s 494(2)(a).
65 Ibid s 5. The term 'legal practitioner' applies to those who hold practising certificates: s 6.

9.55 The Law Council noted that in some cases where misconduct is suspected, judges have referred the matter directly to the relevant legal services regulator, citing *Linfox v Yates* as a specific instance.[66] Hence, if a federal investigatory body considers that a lawyer has abused a claim of client legal privilege it would be open for the body to make a complaint about the lawyer to a legal services regulator.[67]

Specific penalty provisions

9.56 There are also examples, however, of specific legislative provisions dealing with abuse of client legal privilege. Section 103(9) of the *Taxation Administration Act 2003* (WA), for example, provides that:

> A person, either personally or on another's behalf, who claims that legal professional privilege applies to a document, information or relevant material and who knows, or ought to know at the time that claim is made that it is false, misleading, or without substance, commits an offence.
>
> Penalty: $20000.[68]

9.57 A more general example of provisions imposing penalties on lawyers and clients for intentionally thwarting court processes is seen in the *Crimes* (*Document Destruction) Act 2006* (Vic). This legislation created a new criminal offence—in direct response to the British American Tobacco litigation in Victoria.[69] Where documents or other things are reasonably likely to be required in any ongoing or potential future legal proceedings, a person who knows this and destroys or conceals them with the intention of preventing their use in a legal proceeding is guilty of an indictable offence.

9.58 In other jurisdictions such matters may be considered under general legal profession rules. For example, in NSW, the inappropriate destruction of documents is proscribed by Rule 177 of the *Legal Profession Regulation 2005* (NSW).

9.59 In the context of this Inquiry, the question remains whether specific penalties are needed—such as the provision in Western Australia—or whether the existing general disciplinary regimes are adequate.

Submissions and consultations

9.60 In IP 33, the ALRC sought comment on whether professional disciplinary action should follow, and what penalties should be imposed, where there was an abuse of a

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66 *Linfox v Yates* [2004] NSWSC 943; Law Council of Australia, *Submission LPP 26,* 4 June 2007.

67 In its submission in response to DP 73, however, the ATO noted that agencies may have secrecy provisions which may prevent their being able to do so: Australian Taxation Office, *Submission LPP 81,* 29 October 2007. See discussion below.

68 *Taxation Administration Act 2003* (WA) s 103 is discussed in detail in Ch 8.

69 For example, in introducing the Second Reading of the Bill in the Legislative Assembly, the Attorney-General, the Hon RJ Hulls, stated that 'the bill responds to important issues that arose in the recent case of *McCabe* in the Victorian Court of Appeal'(*British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524): Victoria, *Parliamentary Debates*, Legislative Assembly, 16 November 2005, 2181 (R Hulls—Attorney-General).

claim of client legal privilege.[70] The ALRC also sought information on whether professional disciplinary action has ever been taken against a lawyer for improperly maintaining a claim for client legal privilege; and whether the threat of professional disciplinary action might act to inhibit lawyers from providing proper representation to their clients.[71]

9.61 The general thrust of submissions and consultations in response to IP 33 was that disciplinary action should follow an abuse of a claim of client legal privilege.[72] The principal disagreement was about *how* this should occur. On the one hand, it was argued that there are sufficient avenues for dealing with misuse within the existing disciplinary framework for lawyers; on the other, there were arguments that there should be a specific penalty regime to deal with alleged misuse of privilege claims. There were also comments about the impact that such a penalty regime might have in relation to the lawyer-client relationship.

Are existing disciplinary frameworks adequate?

9.62 Many submissions pressed the view that existing disciplinary frameworks are adequate to deal with situations of alleged misuse of claims of client legal privilege, or, as a Committee of the Law Society of NSW put it, that issues regarding abuse of client legal privilege claims are just a 'subset' of broader issues concerning lawyers' ethical responsibilities.[73]

9.63 The Law Council noted that heavy sanctions already are provided for under the Legal Profession Acts in each state and territory. In its view, such sanctions should be regarded as 'sufficient':

> the present sanctions available for abuse of [client legal privilege], namely rules of Court, professional disciplinary rules or (in some jurisdictions) prosecution, are adequate and … no further provisions are required.
>
> The Courts already have discretionary power to award costs against counsel and solicitors where costs are incurred improperly, without reasonable cause, are wasted by undue delay, or by any other misconduct or default by the legal practitioner, e.g.

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70 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007), Questions 7–6, 7–7, 7–8.

71 Ibid, [7.90].

72 For example, Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007; Australian Taxation Office, *Submission LPP 65,* 22 June 2007; Victoria Legal Aid, *Submission LPP 55,* 14 June 2007; Taxation Institute of Australia, *Submission LPP 54,* 15 June 2007; National Legal Aid, *Submission LPP 52,* 13 June 2007; NSW Young Lawyers, *Submission LPP 49,* 12 June 2007; New South Wales Bar Association, *Submission LPP 41,* 5 June 2007; National Australia Bank Limited and others, *Submission LPP 30,* 4 June 2007; Law Council of Australia, *Submission LPP 26,* 4 June 2007; R Desiatnik, *Submission LPP 24,* 1 June 2007; I Turnbull, *Submission LPP 18,* 3 June 2007.

73 New South Wales Law Society Litigation and Practice Committee, *Consultation LPP 23*, Sydney, 28 May 2007.

> *Federal Court Rules*, Order 62, rule 9(1); *Rules of the Supreme Court of Victoria*, Rule 63.23.[74]

9.64 The Law Society of NSW submitted, similarly, that:

> There is absolutely no evidence to show that existing systems of professional conduct, regulation and discipline, the law of contempt and the Court's jurisdiction to impose costs orders on legal representatives personally, are anything other than adequate, appropriate and well adapted to deal with such concerns.[75]

9.65 NSW Young Lawyers also drew attention to the scope of existing disciplinary frameworks for lawyers:

> Lawyers are required to adhere to minimum ethical standards in practice and complete an ethics course as part of their practical legal training requirements entitling them to practice.
>
> If client legal privilege is improperly claimed over a communication as a tactic for delay it would be well understood by the lawyer that they have engaged in conduct that falls outside minimum ethical standards required in the practice of law.
>
> The conduct of a lawyer who knowingly engages in conduct that falls outside minimum ethical standards in the practice of law should be considered professional misconduct.[76]

9.66 Victoria Legal Aid supported the 'appropriate use of complaints and disciplinary procedures'.[77] National Legal Aid also endorsed this view.[78]

9.67 It was also submitted that the same rules should apply to all lawyers and, in particular, to in-house counsel, who may not hold practising certificates.[79]

9.68 The NSW Bar Association endorsed the application of professional disciplinary sanctions where improper claims are made, but also made express suggestions as to amendments that could be made to professional disciplinary rules to ensure that such claims are caught more readily. It specifically suggested[80]

> a separate professional rule stipulating obligations in respect of privilege claims which would provide greater clarity as to the specific content of a practitioner's duty to the court, and would focus for practitioners the serious and substantive nature of a claim to privilege.[81]

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74 Law Council of Australia, *Submission LPP 26,* 4 June 2007. See also Victoria Legal Aid, *Submission LPP 55,* 14 June 2007; A Brown—Law Society of New South Wales, *Consultation LPP 15*, Sydney, 21 May 2007.

75 Law Society of New South Wales, *Submission LPP 40,* 1 June 2007.

76 NSW Young Lawyers, *Submission LPP 49,* 12 June 2007.

77 Victoria Legal Aid, *Submission LPP 55,* 14 June 2007.

78 National Legal Aid, *Submission LPP 52,* 13 June 2007.

79 Australian Corporate Lawyers Association, *Consultation LPP 4*, Sydney, 13 February 2007.

80 New South Wales Bar Association, *Submission LPP 41,* 5 June 2007.

81 Ibid.

9.69 The NSW Bar Association further spelled out the form that such amended rules could take. For example, the amendment proposed for solicitors was as follows:

> A. For solicitors:
>
> *Revised Professional Conduct and Practice Rules 1995*, Rule A.15AA:
>
> A practitioner must ensure that any advice which he or she gives to his or her client in respect of making or maintaining a claim of client legal privilege in respect of a communication, and any such claim made or maintained, is supported by reasonable grounds.
>
> When making or maintaining a claim to client legal privilege on behalf of a client, the senior practitioner who is responsible for the provision of the service or a principal of the practice must certify that each claim is supported by reasonable ground(s) and, to the extent possible, must identify the ground(s) for each claim.
>
> In determining whether a claim to client legal privilege is supported by reasonable ground(s), a practitioner must have regard to the content of the document, the existence or otherwise of any contemporaneous records made by the author of the communication to the effect that it is considered to be privileged, and any factual matters bearing upon the creation of the communication, including the purpose(s) of the author and recipient or both.
>
> In making partial claims of privilege in respect of communications in or recorded in a document, a practitioner must mask only those portions of the document the disclosure of which would result in the substance of privileged communications being revealed.
>
> For the purposes of this Rule, 'client legal privilege' has the meanings ascribed to that term at sections 117–119 of the *Evidence Act 1995* (NSW), as amended from time to time; and other terms as defined in the *Legal Profession Act 2004 (NSW)*, as amended from time to time have the same meanings in this rule.[82]

9.70 Concerns were expressed, however, about whether the present disciplinary procedures ever actually 'caught' lawyers who had abused client legal privilege claims. Andrew Brown, in-house counsel for the Law Society of NSW advised that, to his knowledge, there had never been a case of professional disciplinary action taken against a lawyer for improperly maintaining a claim for client legal privilege.[83] The ALRC heard also that there was research suggesting no such cases in Queensland.[84]

9.71 The absence of professional disciplinary action in circumstances of alleged abuse of client legal privilege claims may be because there is no basis for complaint; or, where there is, that complaints are not being made. Dr Christine Parker pointed out that professional disciplinary action is usually prompted by a complaint from clients and, in the case of client legal privilege, it is more likely to be that the client is being protected 'too well'. She suggested that, if federal investigatory bodies considered that

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82 Ibid. A similar rule was proposed for barristers.

83 A Brown—Law Society of New South Wales, *Consultation LPP 15*, Sydney, 21 May 2007.

84 C Parker, *Correspondence*, 14 September 2007. *Clough v Queensland Law Society Inc* [2002] 1 Qd R 116—considered above—while relevant to privilege questions, is not strictly about privilege.

there were cases of suspected abuse of client legal privilege claims, the agencies themselves should invoke the existing complaints mechanisms against lawyers.

> If regulators such as the ATO, federal police etc could cooperate with the professional [disciplinary bodies] in such circumstances to provide evidence, then there would be more likelihood of successful disciplinary action—which in turn would provide a signal to the profession as to the ethical conduct expected.[85]

9.72 Parker also drew attention to the particular problem of triggering the application of the disciplinary provisions in the context of in-house counsel as

> the client does not have any incentive to complain, and even if they do have complaints about their lawyer, they don't need to use the disciplinary system because they are employing the lawyer and can therefore control or discipline them in other ways.[86]

9.73 The behaviour of in-house counsel is, therefore, only going to come to the attention of the disciplinary authorities if a complaint is made by 'other lawyers working with them on the case', 'the other side (ie the investigatory agency and/or its lawyers', a judge; or the disciplinary authority investigates the lawyer's conduct of its own motion. Parker commented, however, that the latter course of action has particular obstacles, as disciplinary bodies

> would find it difficult to get access to information—by definition—because of the privilege claims, especially where the complaint involves a lawyer inside a large company represented by a big law firm because they are set up and resourced to deal mostly with complaints about service from individual clients about individual lawyers (mostly in smaller law firms). They do not have the resources and capacity to manage these more complicated investigations with the level of legal 'firepower' likely to be arrayed against them on the other side.[87]

9.74 Parker advocated that federal investigatory bodies develop 'a protocol of informing the relevant professional disciplinary authority'.[88] She also suggested that judges—and lawyers themselves—ought to take the initiative in making complaints to disciplinary bodies where they consider that a lawyer has acted unethically.[89] Notwithstanding the issues concerning the activation of the existing professional disciplinary provisions, Parker preferred such an approach of dealing with alleged abuses of privilege claims to one of 'proliferating penalty provisions in legislation in other areas':

> That approach can be used in a tactical or political way to scare off lawyers from representing their clients fearlessly, and it seems better to deal with allegations of lawyer misconduct within the disciplinary regime that is specifically set up to deal with that issue appropriately.[90]

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85 C Parker, *Correspondence*, 27 August 2007.
86 C Parker, *Correspondence*, 14 September 2007.
87 Ibid.
88 C Parker, *Correspondence*, 27 August 2007.
89 C Parker, *Correspondence*, 27 August 2007.
90 Ibid.

9.75 Where current disciplinary frameworks apply, however, the Australian Government Solicitor (AGS) added a note of caution about disciplinary action being initiated by federal investigatory bodies:

> Investigatory bodies must respect the role of lawyers in properly protecting clients' rights and interests. Like in any other context, the investigatory body could make a complaint about a lawyer's conduct to the relevant legal profession disciplinary authority. The making of client legal privilege claims with no real foundation might well, in the particular circumstances, constitute unprofessional conduct. However, to be seen to be acting responsibly itself, the investigatory body would need to have some sound basis in the circumstances for submitting that the lawyer's conduct was unprofessional.[91]

Should specific penalties apply?

9.76 In IP 33, the ALRC asked whether a person who makes or maintains a claim for client legal privilege in bad faith, either personally or on another's behalf, should be made liable to penalties, whether criminal, civil or administrative.[92] Section 103(9) of the *Taxation Administration Act 2003* (WA), set out above, was cited as an example.

9.77 The Law Council explained that s 103(9) was introduced 'to counter the perceived problem of serious abuses of client legal privilege by legal practitioners'.[93] At the time it was introduced, the Law Council gave qualified support to its introduction, 'as a measure preferable to abrogation'.[94]

9.78 The Law Society of Western Australia opposed the introduction of this provision and attempted to have it removed from the Taxation Administration Bill 2001 (WA).[95] It submitted to the Attorney General of Western Australia that there had been no instances of such mischief.[96] The Law Society also submitted that client legal privilege is a client's fundamental common law right and that the creation of a penalty provision could result in lawyers adopting a 'safety first' attitude by refraining from claiming the privilege to avoid the possibility of prosecution or professional disciplinary proceedings.[97]

9.79 The Law Council argued that the example of the Western Australian provision should not be followed, now that more general provisions were available:

> The Law Council notes that the *Taxation Administration Act* provision precedes the now existing legal services regulatory regime. Given that clearly adequate remedies

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91 Australian Government Solicitor, *Submission LPP 50,* 13 June 2007.
92 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007), Question 7–7.
93 Law Council of Australia, *Submission LPP 26,* 4 June 2007.
94 Ibid.
95 R O'Connor, 'Legal Professional Privilege, the Daniels Case and the Taxation Administration Bill 2001 (WA)' (2003) 30(1) *Brief* 10, 10.
96 Ibid, 10.
97 Ibid, 11.

> now exist for the abuse of [privilege] … the Law Council does not support specific penalties directed at abuse of [client legal privilege].[98]

9.80 However, in the event that specific penalties were to be introduced, the Law Council made suggestions about what might be included:

> rather than automatically making claiming [client legal privilege] an offence if a practitioner 'ought to have known' that the privilege was unavailable, each case should be considered on its facts. For example, the failure to be aware that the privilege was unavailable might be explicable on a basis such as lack of legal knowledge, incompetence or carelessness, rather than deliberate abuse of process, in which case it should not attract as heavy a pecuniary penalty as those provided for by the *Taxation Administration Act 2003* (WA). In addition, as IP 33 notes, the law of privilege has developed and evolved over time, partly due to the inclination of the legal profession to test its boundaries. A blanket penalty to catch practitioners who 'ought to have known' that [client legal privilege] did not apply may unnecessarily deter exploration of the boundaries of [client legal privilege].[99]

9.81 The Australian Securities and Investments Commission (ASIC) argued that 'there are sound reasons for imposing penalties on lawyers who make bad faith claims'.[100] Having affirmed a view of the doctrine of client legal privilege as a 'fundamental human right',[101] Dr Ronald Desiatnik commented that:

> It has risen from the ranks of other evidentiary laws to achieve post-graduate status while retaining its under-graduate evidentiary qualifications. As such, any assertion or maintenance of the privilege in bad faith by a lawyer, or the lawyer's properly informed client, should carry a mandatory civil penalty, and a discretionary criminal sanction.[102]

9.82 In support of introducing specific penalties, ASIC pointed to the effect that 'bad faith' claims had in relation to investigations:

> Costs are incurred by privilege claims that are made in bad faith, (including money, impeding the effective administration of justice and reducing timely and effective regulation).[103]

9.83 The ACCC recommended a regime of sanctions on lawyers 'responsible for spurious claims':

> Such sanctions could range from costs orders against the lawyers personally through to disciplinary measures imposed by the relevant professional body. More serious sanctions would be reserved for those lawyers who misstate material facts in support of the claim for privilege.[104]

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98 Law Council of Australia, *Submission LPP 26,* 4 June 2007.
99 Ibid.
100 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007. See also NSW Young Lawyers, *Submission LPP 49,* 12 June 2007; Confidential, *Submission LPP 48,* 12 June 2007.
101 See the discussion of a rights analysis of client legal privilege in Ch 2.
102 R Desiatnik, *Submission LPP 24,* 1 June 2007.
103 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007.
104 Australian Competition and Consumer Commission, *Submission LPP 53,* 13 June 2007.

9.84 The issue of the application of penalties to persons other than lawyers was also remarked upon. The Australian Tax Office (ATO) assumed that 'a person' (as referred to in IP 33)[105] is a broad category and it could include 'the client who is claiming [client legal privilege], his or her legal representative, or any other person making a claim for [client legal privilege] on his or her behalf'.[106]

9.85 In relation to penalising non-lawyers, ASIC commented that:

> For privilege claims made by non-lawyers who have not received legal advice in relation to them, it is likely to be difficult to establish that the claims have been made in bad faith and that they warrant the imposition of penalties. In view of the complexity of the law relating to client legal privilege and the fact that lawyers may experience difficulty in readily assessing whether a claim of privilege is available, it may be considered overly harsh to expose non-lawyers to the risk of penalties for invalidly claiming the privilege.[107]

9.86 Some submissions included specific recommendations about the kinds of penalties that might be imposed, for example, 'providing for the making of costs orders for unreasonable privilege claims and criminal penalties for bad faith privilege claims'.[108] The ATO suggested that:

> Costs could be ordered against a person who makes an improper claim for [client legal privilege] where litigation is on foot or, as suggested in the ALRC Issues Paper 33, there may be some form of criminal sanction. It may also be worth exploring the introduction of some form of evidentiary or administrative sanction against a person who makes or maintains a claim for [client legal privilege] in bad faith. For example, in the tax context an administrative penalty could perhaps be linked to the amount of revenue involved in a particular case.[109]

9.87 A number of submissions commented that a regime of specific sanctions directed to alleged abuse of client legal privilege claims would have a chilling effect in relation to legal practice and that this would operate to the detriment of clients and the operation of the legal system.

9.88 For example, Keith Kendall commented that 'introducing sanctions for any assertion of client legal privilege is likely to create more problems than it solves'.[110]

> Introducing sanctions for deemed abuses of client legal privilege is likely to produce a new problem, being the inhibition of the provision of the legal advice itself. How is a legal adviser to know in advance whether an assertion of privilege will lead to sanctions? This is likely to create conflicts of interest for the legal adviser, in that the legal adviser will have to temper pursuing their client's case as vigorously as possible with a concern for their own professional standing. This could lead to a situation in

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105 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007), [7.92].
106 Australian Taxation Office, *Submission LPP 65,* 22 June 2007.
107 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007.
108 I Temby, *Submission LPP 72,* 19 July 2007.
109 Australian Taxation Office, *Submission LPP 65,* 22 June 2007.
110 K Kendall, *Submission LPP 57,* 31 May 2007.

> which legal advisers are reluctant to assert privilege for fear of the sanctions. This could then lead, later, to professional negligence claims should the client later find out that a privilege claim could have been sustained, but damaging communications were nevertheless disclosed.[111]

9.89 Victoria Legal Aid expressed a similar concern about the detrimental effect on the relationship between lawyers and clients that a penalty regime may produce:

> … there is a real risk that such steps could be used to encourage lawyers to not assert rights which they should by asserting on behalf of clients or on behalf of the legitimate expectations and rights of the persons entitled to the benefit of privilege in respect of communications.[112]

9.90 The Law Society of NSW warned that:

> This question is somewhat like suggesting that a person who pleads 'not guilty' but who is ultimately found 'guilty' should not only be found guilty of the crime for which they have been prosecuted but also be found to have been guilty of the second crime of pleading 'not guilty'. Generally, a person should not be afraid to mount an argument on the basis that, if the argument is lost, they are exposed to an allegation that they have put forward an argument in bad faith. That exposure makes a person reluctant to put forward an argument and works against the proper right to invoke privilege particularly in a case where privilege is arguable but not clear cut.[113]

9.91 The AICD noted that any 'additional requirements'—on top of existing professional standards and obligations—may deter lawyers 'from providing frank advice'.[114]

9.92 The AGS expressed concerns about how coercive information-gathering powers may be perceived if a penalties regime were introduced for the misuse of claims of client legal privilege.

> There would be a danger that sanctions against improper claims may be portrayed as oppressive, and bring the coercive powers themselves into some disrepute as needlessly draconian. A failure to sustain a claim to client legal privilege before the courts would in the ordinary course be visited with a costs order against the claimant. The prospect of this is always going to act as some disincentive to the making of claims for privilege that lack foundation.[115]

9.93 Problems in the application of a penalties regime were also identified in some submissions. The 'challenge', as one submission put it, 'will be to prove that the claim was asserted or maintained in bad faith':

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111 Ibid.

112 Victoria Legal Aid, *Submission LPP 55,* 14 June 2007. See also National Legal Aid, *Submission LPP 52,* 13 June 2007; Fitzroy Legal Service, *Submission LPP 29,* 4 June 2007; A Brown—Law Society of New South Wales, *Consultation LPP 15*, Sydney, 21 May 2007.

113 Law Society of New South Wales, *Submission LPP 40,* 1 June 2007.

114 Australian Institute of Company Directors, *Submission LPP 43,* 8 June 2007.

115 Australian Government Solicitor, *Submission LPP 50,* 13 June 2007.

> This is because assessing whether a claim [of privilege is valid] is not always clear. This factor also supports the position that Commonwealth investigatory bodies should publish clear guidelines on when a person can assert and maintain privilege.[116]

9.94 Kendall also identified a range of practical issues in relation to a penalties regime:

> In particular, who would decide what constitutes bad faith? Even if such an arbiter could be decided upon, there would need to be some predetermined yardstick by which bad faith could be measured. Deciding such matters only with the benefit of hindsight is unsatisfactory in a context where serious penalties are being considered. Anything other than a reliable objective measure would create an element of uncertainty that is likely to affect the provision of legal advice.[117]

9.95 In view of such difficulties, the Fitzroy Legal Service submitted that:

> Rather than seeking to impose disciplinary penalties, we feel that it would be more appropriate for lawyers to be fully instructed about the ethics of claiming privilege, if this is not already the case.[118]

9.96 In DP 73, the ALRC expressed the view that utilising existing disciplinary frameworks that apply to lawyers was a more preferable avenue for dealing with alleged instances of misuse or abuse of claims of client legal privilege than the introduction of a provision like s 103(9) of the *Taxation Administration Act 2003* (WA).[119]

9.97 The Law Council supported this overall approach and strongly opposed the development of any form of statutory penalty for lodging or maintaining a claim of privilege negligently or in 'bad faith':

> It is clear that the courts have appropriate powers to sanction such conduct, demonstrated by *Clough v Queensland Law Society Inc* and *Linfox v Yates.* While clarity may assist the public in identifying unethical conduct and reporting it to the Law Society or legal services regulator, each case is different and must be considered according to the relevant facts. The appropriate penalty in each case could vary, from personal costs orders against a negligent practitioner, orders that the practitioner undertake education or training in client legal privilege, or more serious action in cases where serious misconduct, or a pattern of behaviour, is in evidence.
>
> The Law Council is also concerned that any amendment to the rules of conduct should not affect or curtail:
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> - the capacity of lawyers to represent their client's interests and
> - the important role of legal practitioners in exploring the limits of the law.[120]

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116 Confidential, *Submission LPP 48,* 12 June 2007.
117 K Kendall, *Submission LPP 57,* 31 May 2007.
118 Fitzroy Legal Service, *Submission LPP 29,* 4 June 2007.
119 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), [9.91].
120 Law Council of Australia, *Submission LPP 94,* 1 November 2007.

Clarifying disciplinary frameworks

9.98 In DP 73, the ALRC proposed that state and territory legal professional associations should clarify their professional conduct rules to provide specific guidance about a lawyer's ethical duties with respect to making and maintaining a claim of client legal privilege.[121] This was consistent with the ALRC's preference to rely on existing disciplinary frameworks.

9.99 The ATO agreed that 'the existence of measures to ensure the professional integrity of lawyers in relation to privilege is extremely important' and, in principle, agreed with this proposal.[122] ASIC also supported this proposal as 'potentially assisting in reducing the extent to which client legal privilege may be invalidly claimed'.[123]

9.100 The Law Council, however, indicated that there had been 'mixed responses' from its constituent bodies—all state and territory law societies and bar associations.[124] Rather than such matters being dealt with by state and territory legal professional associations, the Law Council submitted that any amendment to professional conduct rules should be effected through the Law Council's Model Conduct Rules and hence would be 'better considered and advanced by the Law Council through its Model Rules Working Group'.[125] Subject to this, however,

> the Law Council does not oppose a proposal that State and Territory Law Societies and Bar Associations clarify a lawyer's ethical duties with respect to client legal privilege under professional conduct rules, provided this does not mandate any form of offence or penalty.[126]

9.101 The Law Council considered that, in view of the operation and ongoing work of the Model Rules Working Group, and the fact that this group had not had the opportunity to consider the proposals in DP 73,

> a preferable approach would be for the ALRC to abstain from direct recommendations requiring amendments to Legal Profession Professional Conduct Rules or legal professional bodies' continuing legal education programs until proper consideration can be given to the circumstances facing organisations in different jurisdictions.[127]

9.102 The Law Society of NSW, while affirming its commitment 'to continually monitoring and, where appropriate, improving the Solicitors' Rules and other ethical guidelines for its members—including in relation to the making of claims for client legal privilege'—did not consider this proposal 'either necessary or appropriate':

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121 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 9–1.

122 Australian Taxation Office, *Submission LPP 81,* 29 October 2007.

123 Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007. ASIC gave block support to all the proposals in Ch 9 in these terms. See also Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007.

124 Law Council of Australia, *Submission LPP 94,* 1 November 2007.

125 Ibid.

126 Ibid.

127 Ibid.

> the Solicitors' Rules will be amended as and when necessary to reflect changes in the law and the community's expectations of legal practitioners in New South Wales, without the need for intervention by the Commonwealth government.[128]

9.103 NSW Young Lawyers also affirmed the existing framework for practitioners and disagreed 'that practitioners require specific guidance about their ethical duties with respect to client legal privilege' or 'that changes need to be made to specifically address client legal privilege in regard to the professional conduct rules'.

> Legal practitioners operate under very strict ethical guidelines, underpinned by their overriding duty of candour to the court. For a practitioner to make a claim for privilege knowing that it is misleading, inaccurate or wholly unfounded, is clearly a breach of those high ethical standards.
>
> The potential penalties currently in place for unprofessional conduct or professional misconduct are sufficient to deal with practitioners who make spurious client legal privilege claims. Dishonesty is regarded as extremely serious in the legal profession and punishable by fines, suspension or striking off. The maintenance of a spurious claim for privilege is a dishonest assertion of privilege over a document and should be punishable.[129]

9.104 As the ALRC proposed in DP 73 that clients have the benefit of privilege in relation to tax advice,[130] some submissions suggested that appropriate disciplinary mechanisms also should apply to tax advisers. The ATO, for example, submitted that

> it is … essential that there are appropriate mechanisms to ensure that tax advisers maintain professional integrity.[131]

Initiating complaints

9.105 In DP 73, the ALRC noted Parker's suggestion that regulators themselves should cooperate with professional disciplinary bodies to ensure that inappropriate conduct was being identified and punished accordingly.[132]

9.106 The ATO agreed with Parker's statement that if regulators (such as the ATO) were to provide evidence to a professional disciplinary body then there would be more likelihood of successful disciplinary action, but there were obstacles for the ATO in doing so:

> We are constrained by our current taxation secrecy provisions, such as section 16 of the [*Income Tax Assessment Act 1936*], from referring a lawyer who makes a false or misleading claim for [client legal privilege] to his or her professional body. We cannot necessarily refer inappropriate conduct to a relevant professional association

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128 Law Society of New South Wales, *Submission LPP 93,* 31 October 2007.
129 NSW Young Lawyers, *Submission LPP 116,* 1 November 2007.
130 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 6–3.
131 Australian Taxation Office, *Submission LPP 81,* 29 October 2007.
132 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), [9.65].

> and hence, in most circumstances the association would remain unaware of that inappropriate conduct.[133]

9.107 Given the obstacle of such secrecy provisions—and any others that might apply in relation to other federal bodies—the ATO submitted that such provisions would need to be amended 'to allow federal investigatory agencies to refer a lawyer to his or her professional association'.[134]

9.108 A complaint against a lawyer with respect to a claim of client legal privilege also may be made by, for example, other lawyers, or a judge. NSW Young Lawyers submitted:

> It is understandable that proving that a client legal privilege claim is spurious or dishonest would be very difficult. In this regard, complaints should be made by judges, fellow practitioners and clients.[135]

9.109 The Australian Corporate Lawyers Association (ACLA) was concerned about singling out the actions of in-house counsel for attention and submitted that:

> Considerations in relation to a lawyer's behaviour … should apply to all lawyers, not just in-house lawyers—as is currently the case. … ACLA would seek to make further submissions if there were proposals to treat in-house lawyers differently to other practitioners.[136]

9.110 The Law Council also expressed a concern in relation to complaints that may be initiated without proper foundation—and particularly where such complaints were made by federal bodies:

> [The] ALRC should recommend that the federal client legal privilege legislation contain penalties for federal agencies where it is found that an agency or its legal adviser has lodged a complaint against a practitioner for misconduct in relation to a client legal privilege claim, which is without foundation and appears designed to place undue pressure on the party claiming privilege.[137]

Failing to certify

9.111 In DP 73, the ALRC proposed that state and territory legal professional associations should clarify their professional conduct rules to provide that a certification of a claim that documents are privileged,[138] without reasonable grounds, is an example of conduct that contravenes the relevant professional conduct rules. This proposal received limited responses in submissions.

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133 Australian Taxation Office, *Submission LPP 81,* 29 October 2007. In an earlier submission the ATO had made a similar point: Australian Taxation Office, *Submission LPP 65,* 22 June 2007.

134 Australian Taxation Office, *Submission LPP 81,* 29 October 2007.

135 NSW Young Lawyers, *Submission LPP 116,* 1 November 2007.

136 Australian Corporate Lawyers Association, *Submission LPP 83,* 31 October 2007.

137 Law Council of Australia, *Submission LPP 94,* 1 November 2007.

138 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 8–3.

9.112 The AFP, ASIC and APRA supported or agreed with the proposal, without making any specific comments.[139]

9.113 Both the Law Council and the Law Society of NSW submitted comments in relation to the certification process itself—these are considered in Chapter 8—as well as on the proposal with respect to the consequences of a failure to certify on reasonable grounds. Both bodies pointed to the 'very serious consequences' for a legal practitioner under the professional conduct rules and queried

> whether the gravity of a failure by a legal practitioner to satisfy him/herself that there are reasonable grounds for the making of a claim for client legal privilege requires that the practitioner be exposed to such serious professional consequences.[140]

9.114 The Law Council and the Law Society of NSW also urged a more flexible or discretionary approach with respect to the application of disciplinary rules to cases of alleged abuse of client legal privilege claims, as currently applied in relation to certificates given by solicitors under s 347 of the *Legal Profession Act 2004* (NSW) concerning reasonable prospects of success in litigation.[141]

> This would permit either the Court or the legal professional associations to regulate legal practitioners with due regard to the gravity of failures to satisfy themselves that there are reasonable grounds for the making of claims for client legal privilege, without the draconian result of disciplinary action following as a matter of course in the instance of such failures.[142]

9.115 The Law Council submitted that such an approach 'would accord with the underlying rationale for regulating such conduct'.[143]

ALRC's views

9.116 The ALRC's view is that the major problems identified in relation to claims of client legal privilege are best addressed through a more transparent and expeditious framework for the making and assessing of claims,[144] complemented by better education of lawyers to inculcate a far greater understanding of the nature of, and responsibilities in relation to, the making of privilege claims.[145]

9.117 The ALRC remains of the view that the best strategies for addressing alleged instances of misuse or abuse of claims of client legal privilege are to clarify and

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139 Australian Federal Police, *Submission LPP 115,* 29 November 2007; Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007 Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007.

140 Law Council of Australia, *Submission LPP 94,* 1 November 2007. The comments in the submission of the Law Society of NSW are almost identical: Law Society of New South Wales, *Submission LPP 93,* 31 October 2007.

141 Law Council of Australia, *Submission LPP 94,* 1 November 2007; Law Society of New South Wales, *Submission LPP 93,* 31 October 2007.

142 Law Society of New South Wales, *Submission LPP 93,* 31 October 2007.

143 Law Council of Australia, *Submission LPP 94,* 1 November 2007.

144 As discussed in Ch 8.

145 The issue of legal education is considered below.

enhance the existing disciplinary frameworks that apply to lawyers to ensure that cases of actual abuse are appropriately caught and punished. This is considered preferable to introducing a provision like s 103(9) of the *Taxation Administration Act 2003* (WA). The ALRC considers that client legal privilege is best seen as one aspect of a lawyer's overall ethical responsibilities—and misuse of claims punished as such—rather than singling out privilege for specific attention on its own, except as an illustration of broader ethical duties.

9.118 It is also evident, however, that such strategies may not cover all areas of alleged abuse. Professional disciplinary frameworks have the most potent impact where a person may lose his or her practising certificate. In appropriate cases the practising certificate may be cancelled and conditions imposed upon any application for renewal, and so on.[146] If a lawyer does not have a practising certificate, he or she may still be removed from the roll of the relevant courts, in addition to whatever other penalties may be imposed under the relevant legal professional legislation.

9.119 The ALRC agrees with submissions that recommended that the professional conduct rules of the relevant legal professional associations should be clarified to make the obligations with respect to client legal privilege much more obvious as examples of the broader ethical responsibilities of lawyers. The ALRC acknowledges that in some cases professional conduct rules already may provide specific—and appropriate—guidance with respect to a lawyer's ethical duties generally, and specifically in relation to client legal privilege. Insofar as any such rules currently do not, legal professional associations should ensure that they include such guidance. To this extent the ALRC considers that a general recommendation—applicable to all state and territory legal professional associations—is necessary. Moreover, where the ALRC previously proposed that legal professional associations should 'clarify' the relevant rules to provide specific guidance in relation to client legal privilege claims, the ALRC is now of the view that such associations should 'ensure' that the rules provide the appropriate level of guidance. This recognises that some rules may already do so and does not impose any additional burden.

9.120 Further, it is the ALRC's view that, if the procedure of certification proposed in Chapter 8 is implemented, certification by a lawyer without reasonable grounds also should be listed as an example of conduct that may contravene the relevant conduct rules.[147] Similarly, if a lawyer fails, without reasonable grounds, to certify a privilege claim—where requested to do so by a federal investigatory body—such conduct should be listed as an example of conduct that may contravene relevant conduct rules.

9.121 The ALRC recognises the role that the Law Council's Model Rules Working Group has played in relation to the development of the Model Rules for Professional

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146 In this regard see, eg, *Clough v Queensland Law Society Inc* [2002] 1 Qd R 116 and *Guss v Law Institue of Victoria Ltd* [2006] VSCA 88, considered above.

147 See Ch 8 for a discussion of the consequences of a failure to certify communications as privileged and, in particular, Rec 8–7.

Conduct and considers that this body may well guide the content and implementation of the model rules once developed. The recommendation in relation to action by state and territory legal professional associations in no way seeks to derogate from any role the Working Group may have in this regard.

9.122 It should also be noted that the ALRC does not seek to derogate from the court's inherent power to control its own processes and to deal with abuse of process when it arises.

Recommendation 9–1 State and territory legal professional associations should ensure that their professional conduct rules provide specific guidance about a lawyer's ethical duties with respect to making and maintaining a claim of client legal privilege.

Recommendation 9–2 State and territory legal professional associations should clarify their professional conduct rules to provide that examples of conduct that contravenes the relevant rules may include:

(a) a certification that there are reasonable grounds for making a privilege claim—in line with Recommendation 8–3—without reasonable grounds; or

(b) a failure to certify a privilege claim, without reasonable grounds.

Legal education

9.123 Legal education refers to both the legal knowledge and competencies required to qualify a person to be admitted to practice as a lawyer; and the continuing legal education of lawyers, both mandatory and voluntary. The rules governing admission to practise as a lawyer in all jurisdictions require the attainment of approved academic qualifications and satisfactory completion of approved practical legal training requirements.[148] The rules governing practising certificates also stipulate certain requirements in relation to continuing legal education.[149] A concern, in this context, is whether there is sufficient training—in all respects—in relation to legal ethics and professional responsibility, and specifically in relation to the responsibilities in making claims of client legal privilege.

9.124 In discussing the ethics of corporate lawyers, Parker and Evans, state:

> Ethically unreflective corporate lawyering can sometimes occur not so much because of failures of personal ideals as because of narrow legalistic training and culture that

148 See, eg, *Legal Profession Act 2004* (NSW) s 24; and *Legal Profession Admission Rules 2005* (NSW) r 94.

149 See, eg, *Continuing Professional Development Rules 2007* (Vic); Law Society of New South Wales, *Revised Professional Conduct and Practice Rules*, Solicitors Rules, pt 42.

> do not equip corporate lawyers to know how to put ethics into action … or even to recognise ethical issues when they arise.[150]

9.125 In its review of the federal civil justice system, the ALRC found that insufficient attention is given to training Australian lawyers in legal ethics and professional responsibility.[151] In the final report of that inquiry, *Managing Justice: A Review of the Federal Civil Justice System* (ALRC 89) (2000), the ALRC stated that education and training clearly play a critical role in shaping legal culture.[152] A healthy professional culture is 'one that values lifelong learning and takes ethical concerns seriously'.[153]

Academic qualifications

9.126 In all states and territories, the minimum academic requirements comprise 11 areas of study (known as the 'Priestley Eleven'). In NSW, for example, these are set out in Schedule Five of the *Legal Profession Admission Rules 2005* (NSW). Client legal privilege may fall within several of the listed areas in these Rules:

- civil procedure;[154]
- evidence;[155] and
- professional conduct.[156]

Practical legal training requirements

9.127 The Australasian Professional Legal Education Council (APLEC), in conjunction with the Law Admissions Consultative Committee, developed a set of 'Competency Standards for Entry Level Lawyers' (Competency Standards) as part of the project towards uniform admission rules across Australia.[157] These provide the backdrop for the Uniform Admission Rules and the translation of these into state and territory provisions.

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150 C Parker and A Evans, *Inside Lawyers' Ethics* (2007), 217.

151 See Australian Law Reform Commission, *Review of the Federal Civil Justice System*, DP 62 (1999), Ch 3.

152 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89 (2000), Ch 2.

153 Ibid, [2.3].

154 *Legal Profession Admission Rules 2005* (NSW) sch 5, Civil Procedure, under topic 6, 'Obtaining evidence—discovery of documents, interrogatories, subpoena and other devices'.

155 Ibid, Evidence, under topic 3, 'Privilege'.

156 Ibid, comprising 'Professional and personal conduct in respect of practitioner's duty: (a) to the law, (b) to the Courts, (c) to clients, including basic knowledge of the principles of trust accounting, and (d) to fellow practitioners'.

157 Australasian Professional Legal Education Council and the Law Admissions Consultative Committee, *Competency Standards for Entry Level Lawyers* (2000/2002) Australasian Professional Legal Education Council <www.aplec.asn.au> at 30 November 2007. The document may be downloaded from the APLEC website: http://www.aplec.asn.au.

9.128 The Competency Standards require that, at the point of admission, each applicant must provide evidence of having achieved the requisite competence in designated 'Skills, Practice Areas and Values', the latter of which stipulates 'Ethics and Professional Responsibility'.[158]

9.129 The Revised Uniform Admission Rules recommend that students seeking admission as lawyers should have to achieve standards of competency in ten of 15 designated areas of practical legal training, one of which is ethics and professional responsibility.[159]

9.130 In NSW, for example, Rule 96 requires that the course of practical training includes 'evidence of attainment of competencies' in listed areas, including 'Values—Ethics and Professional Responsibility'.[160]

9.131 A synopsis of the competencies is then set out in the Sixth Schedule of the *Legal Profession Admission Rules 2005* (NSW). Client legal privilege may broadly fall within the following listed areas of competency required of an entry level lawyer:

- civil litigation practice;
- criminal law practice; and
- ethics and professional responsibility.[161]

9.132 The last topic is described in some detail, including eight specific elements:

- acting ethically;
- discharging the legal duties and obligations of legal practitioners;
- complying with professional conduct rules;
- complying with fiduciary duties;
- avoiding conflicts of interest;
- acting courteously;
- complying with rules relating to the charging of fees; and

158 Ibid.
159 New South Wales Office of the Legal Services Commissioner, *Lawyer Regulation in Australia: Admission* <www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/lra_admission> at 13 April 2007.
160 *Legal Profession Admission Rules 2005* (NSW) r 96.
161 Ibid sch 6.

- reflecting on wider issues.[162]

9.133 The duties and obligations of legal practitioners include the duty:

- of confidentiality;
- to act competently and to maintain competence;
- to act honestly;
- not to mislead the court; and
- not to pervert the course of justice or the due administration of justice.[163]

Continuing legal education

9.134 The rules in each jurisdiction prescribe that, for the maintenance of practising certificates, a specified number of continuing legal education units be completed.

9.135 The *Continuing Professional Development Rules 2007* (Vic), for example, require that each year a practitioner must complete at least one unit (the equivalent of one hour of face to face training) in each of four fields, one of which is 'Ethics and Professional Responsibility'. An example of a topic that may be included within this field is the 'difference between the duty of confidentiality and legal professional privilege'.[164]

9.136 In NSW, the Mandatory Continuing Legal Education Rules stipulate that a practitioner, unless exempted by the Council of the Law Society, must complete a required number of points each year.[165] To be eligible under the rules, a course must be:

- of significant intellectual or practical content and must deal primarily with matters directly related to the practice of law;
- conducted by persons who are qualified by practical or academic experience in the subject covered; and
- relevant to the practitioner's immediate or long term needs in relation to the practitioner's professional development and to the practice of law.[166]

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162 Ibid.
163 Ibid, 'Explanatory Note', at the end of the section on 'Ethics and Professional Responsibility'.
164 *Continuing Professional Development Rules 2007* (Vic) r 5.2(b); App A.
165 Law Society of New South Wales, *Revised Professional Conduct and Practice Rules*, Solicitors Rules; *New South Wales Solicitors' Rules* , pt 42.
166 Law Society of New South Wales, *Revised Professional Conduct and Practice Rules*, Solicitors Rules, 42.1.1–42.1.4.

9.137 Unless specifically required of a particular practitioner as a condition of his or her practising certificate, however, the compulsory areas set out in the *Legal Profession Regulation 2005* (NSW) do not include 'Ethics and Professional Responsibility'.[167]

Submissions and consultations

9.138 In IP 33, the ALRC asked whether there are sufficient systems in place to ensure that lawyers are properly informed about their professional ethics and responsibilities in relation to the making and maintaining of claims of client legal privilege;[168] and what is the best way of ensuring lawyers are properly informed about their professional ethics and responsibilities in relation to: (a) making and maintaining claims of client legal privilege; and (b) identifying privileged communications at the time of creation.[169]

9.139 Submissions and consultations endorsed the importance of educating lawyers thoroughly about their ethical responsibilities in relation to client legal privilege claims—and agreed that this would help deal with some of the perceived problems. ASIC, for example, commented that:

> initiatives that promote the education of lawyers concerning their legal and ethical obligations in making and maintaining privilege claims will potentially assist in reducing the extent to which legal privilege may be invalidly claimed.[170]

9.140 This view also was clearly put in other submissions.[171] While the emphasis was principally upon post-admission education, some comments also focused upon pre-admission issues.

9.141 Consultations with legal academics evidenced a strong commitment to the importance of ethics in the law curriculum. It was suggested that best practice in ethical education is that ethical matters be embedded throughout the law school curriculum as they arise, rather than having, for example, a single ethics unit. It was admitted, however, that it is challenging to find the best place, or places, to achieve this.[172] If privilege is included as part of an ethics component taught in first year, the

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167 The compulsory areas are: the principles of equal employment opportunity; the law relating to discrimination and harassment; occupational health and safety law; employment law; and the management of legal practice consistent with such matters: Legal Profession Regulation 2005 (NSW), r 176(1).

168 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, IP 33 (2007), [7.96].

169 Ibid, Question 7–8.

170 Australian Securities and Investments Commission, *Submission LPP 70,* 29 June 2007.

171 For example, Australian Government Solicitor, *Submission LPP 50,* 13 June 2007; Fitzroy Legal Service, *Submission LPP 29,* 4 June 2007; Regulatory lawyers of Clayton Utz, *Consultation LPP 13*, Sydney, 15 May 2007.

172 Academics of the Law School of the Australian National University, *Consultation LPP 27*, Canberra, 1 June 2007; B McKillop, M Kumar and F Beaupert, *Consultation LPP 16*, Sydney, 21 May 2007; C Parker, *Correspondence*, 27 August 2007.

students may find it very confusing because they have little knowledge of the law at that stage.[173]

9.142 Legal academics also considered it important to try to inculcate a 'resilience' in law students—so that, for example, as practitioners they would be able to cope with 'the culture of law firms' and to deal with the requests of 'powerful partners' or clients.[174]

9.143 Parker commented that:

> Privilege really is one of those areas where the clients, the courts and the community are completely and utterly dependent on lawyers fulfilling their ethical obligations properly. This must be one area where it is particularly important that aspiring lawyers understand that their own conduct will be crucial in making sure the rationale of the privilege is met properly.[175]

9.144 NSW Young Lawyers emphasised the importance of taking a multi-faceted view of education.

> The ethics components taught, as part of the practical legal training courses that individuals have to undertake to become a legal practitioner, should include a strict curriculum to ensure that individuals are clearly aware of their ethical obligations in relation to claims of client legal privilege.
>
> The professional conduct committees of the various legal bodies should play a role in ensuring lawyers are properly informed about their professional ethics and responsibilities in relation to making and maintaining claims of client legal privilege.
>
> Professional conduct committees can do this by providing advisory services to practitioners who are unsure whether their particular circumstances would allow them to maintain a claim of client legal privilege so as to encourage only proper claims of client legal privilege. Such services should be actively promoted and lawyers should be strongly encouraged to use those services when in doubt as to making or maintaining a claim of client legal privilege.[176]

9.145 The Law Council also reinforced the need for effective continuing professional education for all practitioners. It commented that:

> It is important for the legal profession to have effective educational systems in place to ensure that all practitioners, no matter how inexperienced or senior they may be, keep up to date with their professional ethics and responsibilities. The Law Council considered that this method is the best way to ensure that practising lawyers are

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173 Academics of the Law School of the Australian National University, *Consultation LPP 27*, Canberra, 1 June 2007.

174 Ibid.

175 C Parker, *Correspondence*, 27 August 2007.

176 NSW Young Lawyers, *Submission LPP 49,* 12 June 2007. See also, eg, Confidential, *Submission LPP 48,* 12 June 2007.

> informed about their professional and ethical obligations in relation to both making claims of privilege and identifying privileged communications.[177]

9.146 The Law Council provided a number of examples of how client legal privilege issues have been emphasised in continuing legal education schemes in Victoria, NSW and Queensland. For example, it cited the 'pro-active approach' of the Law Institute of Victoria, which has provided six seminars in the last three years on the subject and the example of a seminar on client legal privilege run in conjunction with the ATO. This seminar involved 'a panel of experienced practitioners and ATO staff, exploring how [client legal privilege] claims made as part of an ATO investigation were resolved in practice'.[178]

9.147 In relation to the mandatory continuing legal education requirement in NSW, the Law Society of NSW submitted that, while it was 'not aware of deficiencies in the method of training lawyers or in the requirements for continuing legal education',

> [it] would not oppose giving consideration to modifying mandatory Continuing Legal Education (CLE) requirements, so that a solicitor must attend a minimum number of seminars over a specifically regulated period on the subject of legal client privilege and the associated obligations of lawyers in claiming privilege on behalf of clients.[179]

9.148 The Law Council reported that the ethics strategy in Queensland was 'still in its infancy having begun in 2006' and that 'the current strategy has an early intervention approach which focuses on establishing ethical sensitivity and decision-making skills from law school on through admission'.[180]

9.149 The NSW Bar Association considered that education was crucial in relation to specific practices where errors of judgment were easily made. A particular example given was about the dangers of 'over-masking', where, it was submitted, guidelines could be published in the *Law Society Journal* and the *Bar News* 'in order to inculcate improved masking practices'.[181]

9.150 Other educational strategies identified in submissions were the provision of advisory bulletins on a continuing basis to practitioners and the availability of

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177 Law Council of Australia, *Submission LPP 26,* 4 June 2007. See also Victoria Legal Aid, *Submission LPP 55,* 14 June 2007; Taxation Institute of Australia, *Submission LPP 54,* 15 June 2007.

178 Law Council of Australia, *Submission LPP 26,* 4 June 2007.

179 Law Society of New South Wales, *Submission LPP 40,* 1 June 2007. The Taxation Institute of Australia also recommended attendance at a compulsory seminar dealing with the making and maintaining of client legal privilege claims every three years: Taxation Institute of Australia, *Submission LPP 54,* 15 June 2007.

180 Law Council of Australia, *Submission LPP 26,* 4 June 2007. The seminars offered by the Queensland Law Society include issues of confidentiality and duties to clients, including the matter of client legal privilege. The curriculum for continuing professional development seminars is also currently under review.

181 New South Wales Bar Association, *Submission LPP 41,* 5 June 2007. At the time of writing, a third revision is planned, to be relaunched in 2008: Australian Corporate Lawyers Association, *Annual Report 2007*, 6.

information through dedicated officers or telephone 'hotlines' to assist in providing up to date, practical information in relation to ethics and professional responsibilities.[182]

9.151 The Law Council drew attention to the Ethics Rulings of the Law Institute of Victoria's Ethics Committee, which are published in the monthly *Law Institute Journal* and detailed on the Institute's website with other ethical information and guidance.[183]

9.152 There was support for continuing education of other kinds as well—not merely those associated with the renewal of practising certificates. This is particularly relevant where lawyers do not hold practising certificates, which may be the case, for example, with some in-house counsel. ACLA noted that

> Regardless of any changes that may be recommended in the law, there is a need for the ongoing education of lawyers and others in regard to law and practice and relevant ethical requirements in this area. ACLA has been—and will continue to be—active in promoting programs of this kind for all in-house counsel and expects to do so in the future.[184]

9.153 A specific example of such ongoing education is ACLA's manual, *Ethics for In-house Counsel*, which includes a section on 'best practice guidelines' in relation to privilege. This states:

> In-house counsel:
>
> - have an obligation to ensure that their organisations are aware of the conditions under which privilege will apply or could be claimed
> - have a duty to advise employees within their organisation that they are *not* and cannot be their personal legal adviser in any situation where that could conflict with their duty to represent the organisation itself. They should advise such employees to take separate representation
> - must always keep in mind who *is* the client? Counsel should regard the organization itself as the client
> - may make a claim for privilege if a case for privilege exists but not if it is clearly known that the privilege has in fact been lost.[185]

9.154 A further strategy suggested by National Legal Aid was the introduction of 'appropriate induction courses' by employers, which

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182 NSW Young Lawyers, *Submission LPP 49,* 12 June 2007; Law Council of Australia, *Submission LPP 26,* 4 June 2007. The Law Council noted that the Client Relations Centre of the Queensland Law Society reportedly receives, on average, 3 calls per month specifically relating to client legal privilege. The establishment of such services was recommended in New South Wales Law Reform Commission, *Scrutiny of the Legal Profession: Complaints Against Lawyers*, Report 70 (1993), rec 63, [5.31].

183 Law Council of Australia, *Submission LPP 26,* 4 June 2007.

184 Australian Corporate Lawyers Association, *Submission LPP 66,* 22 June 2007.

185 Australian Corporate Lawyers Association and Corporate Lawyers Association of New Zealand, *Ethics for In-house Counsel* (2004). The second edition was published in 2004, in cooperation with the Corporate Lawyers Association of New Zealand, St James Ethics Centre and Minter Ellison.

> would assist to reinforce and contextualise the professional ethics studies undertaken at university. Continuing professional development programs should also address issues relating to professional ethics and responsibilities.[186]

9.155 An improvement in the internal review practices of law firms also was advocated. Parker suggested that best practice internal monitoring within law firms would include undertaking an 'ethical audit or review', to ensure that each work team's claims of privilege were appropriately made.[187] Professional associations could usefully be involved in identifying and disseminating law firm best practice in this area.

9.156 A specific question in IP 33 concerned whether communications should be identified as privileged at the time of creation. NSW Young Lawyers responded that:

> Obvious difficulties may arise where lawyers, under the pressures of time, are put in a position of determining whether certain communications are privileged. Therefore, identifying privileged communications at the time of creation is usually a matter of practice for most lawyers.
>
> However lawyers should be made aware of their professional responsibilities in identifying privileged communications at the time of creation through the ethics and professional conduct committees of their law society or institute on a regular basis.[188]

9.157 While identifying communications as privileged at the time of their creation is good practice, it is not necessarily a straightforward exercise—particularly in the context of the 'dominant purpose' test.[189] Peter Brereton commented that:

> It is often very difficult, or impossible, to determine whether a document is privileged merely by looking at it, particularly applying the dominant purpose test. Even with the benefit of speaking with the author and the recipient of the document it can be difficult to determine whether a document reflects a privileged communication. The challenge can be especially acute in the context of communications involving in-house counsel and also where there is a lengthy gap between the time of the communication and the time when the question of privilege arises. These difficulties mean that there is a wider area in which minds can legitimately differ about whether a document is privileged than we would like to think.
>
> The most important time for giving attention to the question of privilege is at the time of communication. Lawyers should ensure that a privileged communication is marked as privileged and be equally vigilant to ensure that only privileged communications are so marked. This is a discipline that is important for all lawyers, but is of special significance for in-house counsel.[190]

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186 National Legal Aid, *Submission LPP 52,* 13 June 2007.
187 C Parker, *Correspondence*, 27 August 2007.
188 NSW Young Lawyers, *Submission LPP 49,* 12 June 2007.
189 See Ch 3.
190 P Brereton, *Correspondence*, 14 September 2007.

Requirements for admission to practice

9.158 In DP 73, the ALRC proposed that university and other legal education programs on legal ethics and professional responsibility forming part of the required areas of knowledge for admission purposes, should include specific consideration of the ethical responsibility of lawyers in relation to claims of client legal privilege.[191] The ALRC also proposed that the legal ethics requirement forming part of the practical legal training competencies in rules governing admission to practice as a lawyer should include the responsibility of lawyers in relation to client legal privilege claims.[192]

9.159 Submissions were generally supportive of these proposals.[193] National Legal Aid added that:

> The earlier in their law courses students are introduced to the ethical responsibilities of lawyering the more likely an ethical approach will be inculcated in them. Students need to understand the ethical context in which laws operate at the time that they study those laws.[194]

9.160 While supportive of the proposal that the requirements for admission to practice should include a specific consideration of the ethical responsibility of lawyers in relation to client legal privilege claims, the Law Council emphasised the role of state and territory admission authorities and the Council of Australian Law Deans.

> In some jurisdictions the requirements for legal ethics training and admission to practice are set by the various Legal Professional Admission Boards and, accordingly, the Law Council suggests that the ALRC seek the views of those bodies in relation to this proposal.
>
> The successful completion of a Graduate Practical Legal Training course is a requirement for admission in most Australian jurisdictions. The Australasian Practical Legal Education Council (APLEC) has developed Competency Standards for Entry Level Lawyers. These Competency Standards provide a blueprint for the content and standard of PLT courses in Australia. The Competency Standards for 'Ethics and Professional Responsibility' do not specifically address client legal privilege, but do require students to show competence in 'discharging the legal duties and obligations of legal practitioners'. The ALRC may wish to raise this proposal with APLEC.[195]

Continuing legal education

9.161 In DP 73, the ALRC proposed that continuing legal education programs should include a regular review of the law and responsibilities in relation to the making and

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191 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 9–3.

192 Ibid, Proposal 9–4.

193 Australian Federal Police, *Submission LPP 115,* 29 November 2007; Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007; Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007. The Law Society of NSW was 'not opposed' to the proposals with respect to admission requirements: Law Society of New South Wales, *Submission LPP 93,* 31 October 2007.

194 National Legal Aid, *Submission LPP 106,* 5 November 2007.

195 Law Council of Australia, *Submission LPP 94,* 1 November 2007.

maintaining of a claim of client legal privilege.[196] This was generally supported in submissions.[197]

9.162 The Law Society of NSW objected, however, to what it saw as the 'interventionist' nature of the proposal.

> The Law Society is very committed to ensuring that the mandatory continuing legal education scheme in New South Wales sets a standard for continuing education that ensures that its members are continually equipped with appropriate knowledge to practise properly. This scheme includes mandatory seminars on ethics and professional responsibility. The mandatory continuing legal education scheme will be amended as and when necessary to reflect changes in the law and the community's expectations of legal practitioners in New South Wales, without the need for intervention by the Commonwealth government.[198]

9.163 National Legal Aid supported the proposal, noting that 'a regular review only is proposed, rather than an imposition of particular programs'.[199]

9.164 ACLA agreed with the emphasis on continuing legal education and commented:

> ACLA is proactive and focused on educating in-house lawyers on ethics and other professional responsibilities, as it potentially impacts in-house jobs in a very fundamental way.
>
> At ACLA we will continue to focus significant training on client legal privilege. The training deals with the 'black letter' aspects of privilege, but also the important interpersonal skills necessary to deal with international clients.[200]

9.165 Parker suggested that education and ethical guidelines about privilege should include information about independence of in-house counsel.[201]

9.166 In DP 73, the ALRC also proposed that professional associations should issue to their members 'best practice' notes from time to time, about the law and responsibilities in relation to making and maintaining a claim of client legal privilege.[202] This received general support in submissions, with some qualifications.[203]

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196 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 9–5.

197 Australian Federal Police, *Submission LPP 115,* 29 November 2007; National Legal Aid, *Submission LPP 106,* 5 November 2007; Australian Prudential Regulation Authority, *Submission LPP 91,* 1 November 2007; Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007.

198 Law Society of New South Wales, *Submission LPP 93,* 31 October 2007.

199 National Legal Aid, *Submission LPP 106,* 5 November 2007.

200 Australian Corporate Lawyers Association, *Submission LPP 83,* 31 October 2007.

201 C Parker, *Correspondence*, 12 November 2007.

202 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 9–6.

203 Australian Federal Police, *Submission LPP 115,* 29 November 2007; National Legal Aid, *Submission LPP 106,* 5 November 2007 ('Supported to the extent appropriate in each jurisdiction'); Law Council of Australia, *Submission LPP 94,* 1 November 2007 ('The Law Council does not oppose this proposal, provided the issuing of such notes is not mandated'); Australian Prudential Regulation Authority,

9.167 The Law Society of NSW was opposed to this proposal, however, 'on the basis that it creates unnecessary regulation of the Law Society's activities':

> The Law Society is very committed to ensuring that mandatory continuing legal education scheme in New South Wales sets a standard for continuing education that ensures that its members are continually equipped with appropriate knowledge to practise properly. As well, publications issued by the Law Society such as the Law Society Journal and 'Monday Briefs', which are sent to each member either in print or electronically, cover issues of ethics and professional responsibility on a regular basis.[204]

Integrity and tax advisers

9.168 In DP 73, the ALRC proposed the extension of the protection of client legal privilege to tax advice.[205] This led the ATO to suggest that there should be safeguards to ensure the professional integrity of tax advisers, similar to those proposed with respect to lawyers.

> This issue does create some potential difficulties because, unlike lawyers, there is no compulsion of a registered tax agent to be a member of a professional association. Also, unlike lawyers, tax advisers have no overarching obligations as officers of the court. For these reasons, there may not be adequate means for ensuring tax advisers are accountable for misuse of the tax advice statutory privilege.
>
> The Tax Office notes that the ALRC has proposed that a claim that a document is a tax advice document may be required to be certified by a lawyer. However, we would be more comfortable if there was some direct oversight of the professional integrity of accountants involved in tax privilege claims. A lawyer who was asked to certify a claim would inevitably be reliant on what the relevant accountant told them. Therefore, we consider that mechanisms to ensure that the integrity of accountants is maintained would also be appropriate.[206]

9.169 The Institute of Chartered Accountants in Australia (ICAA) submitted that accountants—and not only lawyers—ought to be allowed to certify a claim to privilege, where such certification had been requested by a federal body under Proposal 8–7. In this context, the ICAA noted the professional codes that apply to tax advisers and submitted that

> Whilst we acknowledge that lawyers, being officers of the court, are governed under a strict professional conduct and disciplinary frameworks, accountants and tax agents are also subjected to similar regimes … [and] are subjected to a professional code of conduct and if these are breached, disciplinary sanctions apply. The new proposed legislative framework for tax practitioners contains a more comprehensive code of conduct and a wider range of disciplinary sanctions. In addition members of

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Submission LPP 91, 1 November 2007; Australian Securities and Investments Commission, *Submission LPP 84,* 31 October 2007.

204 Law Society of New South Wales, *Submission LPP 93,* 31 October 2007.

205 Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies*, DP 73 (2007), Proposal 6–3.

206 Australian Taxation Office, *Submission LPP 81,* 29 October 2007.

professional bodies, such as the Institute, have to abide by a more strict code of ethics and associated disciplinary regime.[207]

ALRC's views

9.170 The ALRC's view is that there is considerable scope for improving the various levels of legal education to identify client legal privilege issues more particularly—both prior to and after admission to practice—to ensure a better understanding of the obligations of lawyers in relation to privilege claims within the context of a lawyer's overall ethical responsibilities to the court.

9.171 For example, the stipulation in the requirements as to the legal knowledge for admission to practice that 'privilege' be covered under the topic of Evidence, should be amended to include an express reference to ethical obligations in relation to, inter alia, making claims that communications are the subject of client legal privilege. This level of particularity also should be included in relation to the competencies specified for practical legal training; in mandatory continuing legal education requirements; and in relevant specialist accreditation training.

9.172 Legal professional associations should utilise a range of communication strategies to identify and publicise best practice in relation to client legal privilege claims—and ethical issues more generally—and support their members through the provision of advisory services, such as the existing telephone 'hotlines'.

9.173 As discussed in Chapter 6, the ALRC recommends that client legal privilege should apply also to tax advice documents provided by independent professional accounting advisers.[208] Further, in Chapter 8, the ALRC recommends that, where a federal body so requests, a claimant may be required to have a claim of client legal privilege certified by a lawyer.[209] The consequence of these recommendations is that, while the tax advice may attract privilege, the independent professional accounting adviser is not able to provide the certification, if required by a federal body. However, as a federal body may not require certification of the claim of privilege, the independent professional accounting adviser may act in a gate-keeping role in relation to the making of the claim. Therefore, while the ALRC does not consider it appropriate, in the context of this Inquiry, to make recommendations about the continuing education and disciplinary frameworks applicable to professional accounting advisers, the ALRC agrees, of course, that it is best practice to ensure that such advisers maintain high standards of professional integrity. Moreover, given the importance of the gate-keeping role—if the tax advice privilege were to be adopted—

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207 Institute of Chartered Accountants in Australia, *Submission LPP 82,* 31 October 2007. See also Institute of Chartered Accountants in Australia, *Submission LPP 1,* 14 March 2007. The National Institute of Accountants also drew attention to the 'rigorous Continuous Professional Education requirements' of professional accounting bodies as part of its submission that included a rejection of the proposal that privilege claims in relation to tax advice be certified by a lawyer: National Institute of Accountants, *Submission LPP 87,* 1 November 2007.

208 Rec 6–6.

209 Rec 8–3.

accounting bodies should provide appropriate education and training on an ongoing basis, with respect to the operation of the tax advice privilege.

Recommendation 9–3 University and other legal education programs on legal ethics and professional responsibility that are accepted for admission purposes should include specific consideration of the ethical responsibility of lawyers in relation to making and maintaining a claim of client legal privilege.

Recommendation 9–4 The study of legal ethics requirement found in state and territory rules and Uniform Admission Rules governing admission to practice as a lawyer should include the responsibility of lawyers in relation to making and maintaining a claim of client legal privilege.

Recommendation 9–5 Continuing legal education programs (including those required for the maintenance of a current practising certificate) should include a regular review of the law and responsibilities in relation to the making and maintaining of a claim of client legal privilege.

Recommendation 9–6 Legal professional associations should issue to their members 'best practice' notes from time to time, about the law and responsibilities in relation to making and maintaining a claim of client legal privilege.

Appendix 1. Table of Legislation

Commonwealth legislation containing coercive information-gathering powers

Federal body[1]	Commonwealth legislation
Australian Building and Construction Commissioner	*Building and Construction Industry Improvement Act 2005*
Australian Crime Commission	*Australian Crime Commission Act 2002*
	Surveillance Devices Act 2004
	Telecommunications (Interception and Access) Act 1979
Australian Commission for Law Enforcement Integrity	*Law Enforcement Integrity Commissioner Act 2006*
	Surveillance Devices Act 2004
	Telecommunications (Interception and Access) Act 1979
Australian Communications and Media Authority	*Broadcasting Services Act 1992*
	Interactive Gambling Act 2001
	Radiocommunications Act 1992
	Telecommunications Act 1997
	Telecommunications (Consumer Protection and Service Standards) Act 1999

1 The name of departments and agencies used in this Report were current as at 1 December 2007 prior to the issue of the *Administrative Arrangements Order* on 3 December 2007.

Australian Competition and Consumer Commission	*Trade Practices Act 1974*
Australian Customs Service	*Customs Act 1901*
Australian Energy Regulator	*National Electricity (South Australia) Act 1996*
Australian Federal Police (AFP)	The legislation listed for the AFP is by way of example only. There are numerous acts containing, for example, AFP powers of search and seizure
	Crimes Act 1914[2]
	Proceeds of Crime Act 2002
	Surveillance Devices Act 2004
	Telecommunications (Interception and Access) Act 1979
Australian Fisheries Management Authority	*Fisheries Management Act 1991*
	Torres Strait Fisheries Act 1984
Australian Maritime Safety Authority	*Australian Maritime Safety Authority Act 1990*
	Occupational Health and Safety (Maritime Industry) Act 1993
	Navigation Act 1912
Australian Pesticides and Veterinary Medicines Authority	*Agricultural and Veterinary Chemicals (Administration) Act 1992*
	Agricultural and Veterinary Chemicals Code Act 1994

2 A number of other federal investigatory bodies have powers of search and seizure under the *Crimes Act 1914* (Cth) s 3E.

Australian Prudential Regulation Authority (APRA)	*Banking Act 1959*
	Insurance Act 1973
Australian Quarantine Inspection Service	*Australian Meat and Livestock Industry Act 1997*
	Export Control Act 1982
	Imported Food Control Act 1992
	Quarantine Act 1908
Australian Securities and Investments Commission (ASIC)	*Australian Securities and Investments Commission Act 2001*
	Corporations Act 2001
	Insurance Contracts Act 1984
APRA, ASIC	*Life Insurance Act 1995*
	Retirement Savings Accounts Act 1997
	Superannuation Industry (Supervision) Act 1993
Australian Security Intelligence Organisation	*Australian Security Intelligence Organisation Act 1979*
	Telecommunications (Interception and Access) Act 1979

Australian Taxation Office	*Fringe Benefits Tax Assessment Act 1986*
	Income Tax Assessment Act 1936
	Product Grants and Benefits Administration Act 2000
	Petroleum Resources Rent Tax Assessment Act 1987
	Superannuation Contributions Tax (Assessment and Collection) Act 1997
	Superannuation Contributions Tax (Members of Constitutionally Protected Funds) Assessment and Collection Act 1997
	Superannuation Guarantee (Administration) Act 1992
	Taxation Administration Act 1953
	Termination Payments Tax (Assessment and Collection) Act 1997
Australian Transaction Reports and Analysis Centre	*Anti-Money Laundering and Counter-Terrorism Financing Act 2006*
	Financial Transaction Reports Act 1988
Australian Transport Safety Bureau	*Transport Safety Investigation Act 2003*
Centrelink	*A New Tax System (Family Assistance) (Administration) Act 1999*
	Farm Household Support Act 1992
	Social Security Act 1991
	Social Security (Administration) Act 1999
	Student Assistance Act 1973

Child Support Agency	*Child Support (Assessment) Act 1989*
	Child Support (Registration and Collection) Act 1988
Civil Aviation Safety Authority	*Civil Aviation Act 1988*
Comcare	*Asbestos-Related Claims (Management of Commonwealth Liabilities) Act 2005*
	Occupational Health and Safety Act 1991
	Safety, Rehabilitation and Compensation Act 1988
Commonwealth Director of Public Prosecutions	*Proceeds of Crime Act 2002*
Commonwealth Ombudsman	*Ombudsman Act 1976*
Department of Agriculture, Fisheries and Forestry	*Wheat Marketing Act 1989*
Department of Defence and the Australian Defence Force	*Defence Act 1903*
	Defence Force Discipline Act 1982
Department of Environment and Water Resources	*Environment Protection and Biodiversity Conservation Act 1999*
Department of Health and Ageing: Aged Care	*Aged Care Act 1997*
Department of Health and Ageing: Therapeutic Goods Administration	*Therapeutic Goods Act 1989*
Department of Immigration and Citizenship	*Migration Act 1958*
Gene Technology Regulator	*Gene Technology Act 2000*
Great Barrier Reef Marine Park Authority	*Great Barrier Reef Marine Park Act 1975*

Human Rights and Equal Opportunity Commission	*Human Rights and Equal Opportunity Commission Act 1986*
Insolvency and Trustee Service Australia	*Bankruptcy Act 1966*
	Proceeds of Crime Act 2002
Inspector of Transport Security	*Inspector of Transport Security Act 2006*
Inspector-General of Intelligence and Security	*Inspector-General of Intelligence and Security Act 1986*
Inspector-General of Taxation	*Inspector-General of Taxation Act 2003*
Medicare Australia	*Medicare Australia Act 1973*
Migration Agents Registration Authority	*Migration Act 1958*
National Offshore Petroleum Safety Authority	*Petroleum (Submerged Lands) Act 1967*
Office of the Privacy Commissioner	*Privacy Act 1988*
Royal Commissions	*Royal Commissions Act 1902*
Workplace Ombudsman	*Workplace Relations Act 1996*

Appendix 2. List of Submissions

Name	*Submission Number*	*Date*
Administrative Appeals Tribunal	Submission LPP 111	6 Nov 2007
Allens Arthur Robinson	Submission LPP 107	5 Nov 2007
Attorney General's Department of New South Wales	Submission LPP 14	9 May 2007
Australasian Compliance Institute	Submission LPP 79	26 Oct 2007
Australia and New Zealand Banking Group Limited; BHP Billiton Limited; Foster's Group Limited; National Australia Bank Limited; Orica Limited; Telstra Corporation Limited; The Shell Company of Australia Limited; Westpac Banking Corporation; Zinifex Limited	Submission LPP 30	4 June 2007
Australian Commission for Law Enforcement Integrity	Submission LPP 69	20 July 2007
Australian Communications and Media Authority	Submission LPP 20	29 May 2007
Australian Competition and Consumer Commission	Submission LPP 2	14 Mar 2007
	Submission LPP 53	13 June 2007
	Submission LPP 75	14 Aug 2007
	Submission LPP 92	26 Oct 2007
Australian Corporate Lawyers Association	Submission LPP 66	22 June 2007
	Submission LPP 83	31 Oct 2007
Australian Council of Trade Unions	Submission LPP 88	1 Nov 2007

Australian Crime Commission	Submission LPP 8	29 June 2007
Australian Customs Service	Submission LPP 56	13 June 2007
Australian Federal Police	Submission LPP 115	29 Nov 2007
Australian Financial Markets Association	Submission LPP 67	22 June 2007
	Submission LPP 95	2 Nov 2007
Australian Fisheries Management Authority	Submission LPP 37	5 June 2007
Australian Government Department of Health and Ageing	Submission LPP 51	17 July 2007
Australian Government Department of Immigration and Citizenship	Submission LPP 46	12 June 2007
	Submission LPP 73	4 July 2007
Australian Government Inspector of Transport Security	Submission LPP 7	9 May 2007
Australian Government Office of the Privacy Commissioner	Submission LPP 71	29 June 2007
Australian Government Office of the Gene Technology Regulator	Submission LPP 68	25 June 2007
Australian Government Solicitor	Submission LPP 50	13 June 2007
	Submission LPP 113	5 Nov 2007
Australian Institute of Company Directors	Submission LPP 43	8 June 2007
Australian Pesticides and Veterinary Medicines Authority	Submission LPP 45	6 June 2007
Australian Prudential Regulation Authority	Submission LPP 74	6 July 2007
	Submission LPP 91	1 Nov 2007
Australian Quarantine and Inspection Service	Submission LPP 16	29 May 2007

Australian Securities and Investments Commission	Submission LPP 5	29 Mar 2007
	Submission LPP 70	29 June 2007
	Submission LPP 84	31 Oct 2007
Australian Taxation Office	Submission LPP 65	22 June 2007
	Submission LPP 81	29 Oct 2007
Australian Transaction Reports and Analysis Centre	Submission LPP 31	4 June 2007
Australian Transport Safety Bureau	Submission LPP 34	28 May 2007
BHP Billiton Mitsubishi Alliance	Submission LPP 21	1 June 2007
Business Coalition for Tax Reform	Submission LPP 63	19 June 2007
	Submission LPP 96	2 Nov 2007
S Byrne	Submission LPP 19	4 June 2007
S Byrne and G Lambert	Submission LPP 102	5 Nov 2007
Centrelink	Submission LPP 35	17 July 2007
S Cirillo and R Withana	Submission LPP 9	10 May 2007
Civil Liberties Australia (ACT) Inc	Submission LPP 86	1 Nov 2007
P Clay and V Tekic	Submission LPP 11	30 April 2007
Comcare	Submission LPP 64	14 June 2007
Commonwealth Director of Public Prosecutions	Submission LPP 61	12 June 2007
	Submission LPP 101	2 Nov 2007
Commonwealth Ombudsman	Submission LPP 47	12 June 2007
Confidential	Submission LPP 48	12 June 2007
Confidential	Submission LPP 60	18 June 2007

Confidential	Submission LPP 103	5 Nov 2007
Confidential	Submission LPP 108	14 Nov 2007
Construction, Forestry, Mining and Energy Union (Construction and General Division)	Submission LPP 90	1 Nov 2007
Corporate Tax Association	Submission LPP 32	4 June 2007
	Submission LPP 100	2 Nov 2007
CPA Australia Ltd	Submission LPP 44	14 June 2007
	Submission LPP 98	2 Nov 2007
R Desiatnik	Submission LPP 24	1 June 2007
A Evans	Submission LPP 4	27 Mar 2007
Federation of Community Legal Centres (Vic) Inc	Submission LPP 38	5 June 2007
Fitzroy Legal Service	Submission LPP 29	4 June 2007
S Goodwin	Submission LPP 112	12 Nov 2007
Grant Thornton Association Inc	Submission LPP 97	2 Nov 2007
Great Barrier Reef Marine Park Authority	Submission LPP 17	1 June 2007
J Hannaford, Examiner, Australian Crime Commission	Submission LPP 114	19 Nov 2007
Human Rights and Equal Opportunity Commission	Submission LPP 28	4 June 2007
	Submission LPP 99	2 Nov 2007
Insolvency and Trustee Service Australia	Submission LPP 62	20 June 2007
	Submission LPP 105	5 Nov 2007
Insolvency Practitioners Association	Submission LPP 109	6 Nov 2007
Inspector-General of Intelligence and Security	Submission LPP 22	1 June 2007

Inspector-General of Taxation	Submission LPP 13	16 May 2007
Institute of Chartered Accountants in Australia	Submission LPP 1	14 Mar 2007
	Submission LPP 25	4 June 2007
	Submission LPP 82	31 Oct 2007
	Submission LPP 89	1 Nov 2007
Intellectual Property Research Institute of Australia	Submission LPP 104	5 Nov 2007
	Submission LPP 117	14 Dec 2007
K Kendall	Submission LPP 57	31 May 2007
S Laver	Submission LPP 110	7 Nov 2007
Law Council of Australia	Submission LPP 26	4 June 2007
	Submission LPP 94	1 Nov 2007
Law Society of New South Wales	Submission LPP 40	1 June 2007
	Submission LPP 93	31 Oct 2007
Medicare Australia	Submission LPP 6	10 April 2007
National Institute of Accountants	Submission LPP 59	20 June 2007
	Submission LPP 87	1 Nov 2007
National Legal Aid	Submission LPP 52	13 June 2007
	Submission LPP 106	5 Nov 2007
National Offshore Petroleum Safety Authority	Submission LPP 23	1 June 2007
D Nelson	Submission LPP 42	9 June 2007
	Submission LPP 78	19 Oct 2007
New South Wales Bar Association	Submission LPP 41	5 June 2007

New South Wales Council for Civil Liberties Inc	Submission LPP 39	5 June 2007
NSW Young Lawyers	Submission LPP 49	12 June 2007
	Submission LPP 116	1 Nov 2007
R O'Connor	Submission LPP 36	5 June 2007
C O'Donnell	Submission LPP 10	16 May 2007
	Submission LPP 80	26 Oct 2007
Office of the Australian Building and Construction Commissioner	Submission LPP 33	4 June 2007
QBE Insurance Group	Submission LPP 58	18 June 2007
T Sim	Submission LPP 3	5 Dec 2006
T Smyth and C Strauch	Submission LPP 12	30 May 2007
Sussex Street Community Law Service Inc	Submission LPP 15	30 May 2007
Taxation Institute of Australia	Submission LPP 54	15 June 2007
I Temby	Submission LPP 72	19 July 2007
K Thompson	Submission LPP 76	7 Sept 2007
I Turnbull	Submission LPP 18	3 June 2007
Victoria Legal Aid	Submission LPP 55	14 June 2007
Westpac Banking Corporation	Submission LPP 85	1 Nov 2007
Whistleblowers Australia	Submission LPP 77	4 Nov 2007
M Wyles	Submission LPP 27	4 June 2007

Appendix 3. List of Consultations

Name	*Location*
Academics, Law School, University of Western Australia	Perth
Allens Arthur Robinson	Sydney
Australian Bankers' Association	Sydney
Australian Corporate Lawyers Association	Sydney; Melbourne
Australian Crime Commission	Sydney
Australian Federal Police	Canberra
Australian Government Attorney-General's Department	Canberra
Australian Quarantine and Inspection Service	Sydney-Canberra (by phone)
Australian Taxation Office	Sydney
R Baxt, Freehills	Sydney
Justice P Bergin, Supreme Court of New South Wales	Sydney
A Black, Mallesons Stephen Jaques	Sydney (by phone)
S Bennett, Sparke Helmore Lawyers	Sydney
G Bloomfield, V Holmes, L Honcope, P Spender, College of Law, Australian National University	Canberra
A Brown, Law Society of New South Wales	Sydney
The Hon T Cole	Sydney
R Desiatnik	Sydney

Justice G Eames, Supreme Court of Victoria	Melbourne
Federation of Community Legal Centres (Vic) Inc	Melbourne
Justice T Gray, Supreme Court of South Australia	Adelaide
G Healy and A Eastwood, Freehills	Sydney
Insolvency Practitioners Association	Sydney
Institute of Chartered Accountants and representatives of Deloitte Touche & Tohmatsu, Ernst & Young, KPMG and PricewaterhouseCoopers	Sydney
D Jackson QC, J Sheahan SC, and R Kelly	Sydney
Law Council of Australia	Canberra
Law Society of Western Australia	Perth
Litigation Law and Practice Committee, Law Society of New South Wales	Sydney
E Magner, School of Law, University of New England	Sydney-Armidale (by phone)
Chief Justice W Martin, Justice N Owen, Supreme Court of Western Australia	Perth
Justice R McDougall, Supreme Court of New South Wales	Sydney
B McKillop, M Kumar and F Beaupert, Faculty of Law, University of Sydney	Sydney
Members of the South Australian Bar Association	Adelaide
Members of the Victorian Bar	Melbourne
Members of the Western Australian Bar Association	Perth
New South Wales Bar Association	Sydney
New South Wales Public Defenders Office	Sydney

Office of the Commonwealth Director of Public Prosecutions	Canberra
Office of the Legal Services Commissioner	Sydney
Officers from the Australian Security Intelligence Organisation and the Inspector-General of Intelligence and Security	Sydney
C Parker, Law School, University of Melbourne	Sydney
Regulatory lawyers of Clayton Utz	Sydney
J Segal	Sydney

Appendix 4. List of Abbreviations

AAT	Administrative Appeals Tribunal
AAT Act	*Administrative Appeals Tribunal Act 1975* (Cth)
ABA	American Bar Association
ABCC	Office of the Australian Building and Construction Commissioner
ABS	Australian Bureau of Statistics
ACC	Australian Crime Commission
ACC Act	*Australian Crime Commission Act 2002* (Cth)
ACCC	Australian Competition and Consumer Commission
ACLA	Australian Corporate Lawyers Association
ACLEI	Australian Commission for Law Enforcement Integrity
ACMA	Australian Communications and Media Authority
ACS	Australian Customs Service
ACT	Australian Capital Territory
ACTU	Australian Council of Trade Unions
ADR	Alternative dispute resolution
AER	Australian Energy Regulator
AFMA	Australian Fisheries Management Authority
AFP	Australian Federal Police
AFP Act	*Australian Federal Police Act 1979* (Cth)

AFP Guidelines	*General Guidelines Between the Australian Federal Police and the Law Council of Australia as to the Execution of Search Warrants on Lawyers' Premises, Law Societies and Like Institutions Where a Claim of Legal Professional Privilege is Made* (1997)
AGS	Australian Government Solicitor
AIC	Australian Intelligence Community
AICD	Australian Institute of Company Directors
ALRC	Australian Law Reform Commission
ALRC 26	Australian Law Reform Commission, *Evidence*, ALRC 26 (1985)
ALRC 38	Australian Law Reform Commission, *Evidence*, ALRC 38 (1987)
ALRC 95	Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002)
ALRC 102	Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005)
AML/CTF Act	*Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth)
AMSA	Australian Maritime Safety Authority
AMSA Act	*Australian Maritime Safety Authority Act 1990* (Cth)
AM & S Europe	*AM & S Europe Ltd v Commission of the European Communities* [1983] 1 QB 878
APLEC	Australasian Professional Legal Education Council
APRA	Australian Prudential Regulation Authority
APRA Act	*Australian Prudential Regulation Authority Act 1998* (Cth)
APVMA	Australian Pesticides and Veterinary Medicines Authority
AQIS	Australian Quarantine Inspection Service

ARC	Administrative Review Council
ARC Act	*Asbestos-Related Claims (Management of Commonwealth Liabilities) Act 2005* (Cth)
ASC	Australian Securities Commission (now the Australian Securities and Investments Commission)
ASC Act	*Australian Securities Commission Act 1989* (Cth) (since repealed)
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001* (Cth)
ASIO	Australian Security Intelligence Organisation
ASIO Act	*Australian Security Intelligence Organisation Act 1979* (Cth)
ATO	Australian Taxation Office
ATO Guidelines	Guidelines agreed between the Commissioner of Taxation and the Law Council of Australia in relation to the exercise of the ATO's access powers at lawyers' premises in circumstances where a claim of client legal privilege is made
ATO Manual	Australian Taxation Office, *Access and Information Gathering Manual*
ATSB	Australian Transport Safety Bureau
AUSTRAC	Australian Transaction Reports and Analysis Centre
AWB	Australian Wheat Board
AWB Royal Commission	Inquiry into AWB and the Oil-for-Food Programme
BATAS	British American Tobacco Australasian Services
BCII Act	*Building and Construction Industry Improvement Act 2005* (Cth)

Caltex	*Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477
Carter	*Carter v The Managing Partner, Northmore Hale Davy and Leake* (1995) 183 CLR 121
CASA	Civil Aviation Safety Authority
CCBE	Council of the Bars and Law Societies of the European Union
CDPP	Commonwealth Director of Public Prosecutions
CEO	Chief Executive Officer
CFMEU	Construction, Forestry, Mining and Energy Union
Civil Liberties Australia	Civil Liberties Australia (ACT) Inc
Companies Code	*Companies (New South Wales) Code*
CSA	Child Support Agency
CSDA Act	*Commonwealth Services Delivery Agency Act 1997* (Cth)
Daniels	*The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543
Dawson Review	*Review of the Competition Provisions of the Trade Practices Act* (2003)
DHS	Department of Human Services
DIAC	Department of Immigration and Citizenship
DOTARS	Department of Transport and Regional Services
DPP Act	*Director of Public Prosecutions Act 1983* (Cth)
DSD	Defence Signals Directorate
Edward Report	*The Professional Secret, Confidentiality and Legal Professional Privilege in the Nine Member States of the European Community* (1976)

EPBC Act	*Environment Protection and Biodiversity Conservation Act 1999* (Cth)
ESI Guidelines	Guidelines to cover the resolution of client legal privilege claims in respect of electronically-stored information
Esso	*Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49
EU	European Union
Fish Report	*Regulated Legal Professionals and Professional Privilege within the European Union, the European Economic Area and Switzerland, and Certain Other European Jurisdictions* (2004)
FTR Act	*Financial Transaction Reports Act 1988* (Cth)
GM	Genetically modified
GMOs	Genetically modified organisms
GTR	Gene Technology Regulator
HREOC	Human Rights and Equal Opportunity Commission
HREOC Act	*Human Rights and Equal Opportunity Commission Act 1986* (Cth)
ICAA	Institute of Chartered Accountants in Australia
IGIS	Inspector-General of Intelligence and Security
IGIS Act	*Inspector-General of Intelligence and Security Act 1986* (Cth)
Ingot	*Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* (2006) 67 NSWLR 91
IP 33	Australian Law Reform Commission, *Client Legal Privilege and Federal Investigatory Bodies,* IP 33 (2007)
IPRIA	Intellectual Property Research Institute of Australia
IRS	Internal Revenue Service (US)

ITS	Inspector of Transport Security
ITSA	Insolvency and Trustee Service Australia
JSCCS	Joint Statutory Committee on Corporations and Securities
Law Council	Law Council of Australia
LEIC Act	*Law Enforcement Integrity Commissioner Act 2006* (Cth)
MARA	Migration Agents Registration Authority
McNulty Memorandum	*Principles of Federal Prosecution of Business Organizations* (2006) (US)
Medicare	Medicare Australia
Morgan Grenfell	*R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563
MOU	Memorandum of Understanding
NOPSA	National Offshore Petroleum Safety Authority
NSW	New South Wales
NSWLRC	New South Wales Law Reform Commission
OGTR	Office of the Gene Technology Regulator
OHS Act	*Occupational Health and Safety Act 1991* (Cth)
OITS	Office of the Inspector of Transport Safety
OPC	Office of the Privacy Commissioner
OWS	Office of Workplace Relations
Pratt	*Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217
Propend	*Australian Federal Police v Propend Finance* (1997) 188 CLR 501
PTA	Public Transport Authority
PWC	PricewaterhouseCoopers

Pyneboard	*Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328
QLRC	Queensland Law Reform Commission
RCASIA	Royal Commission on Australia's Security and Intelligence Agencies (established by Letters Patent on 17 May 1983 and concluded in 1984)
SCAG	Standing Committee of Attorneys-General
SRC Act	*Safety, Rehabilitation and Compensation Act 1998* (Cth)
TGA	Therapeutic Goods Administration
TG Act	*Therapeutic Goods Act 1989* (Cth)
Thompson Memorandum	*Principles of Federal Prosecution of Business Organizations* (2003) (US)
TPA	*Trade Practices Act 1974* (Cth)
UK	United Kingdom
US	United States
VLRC	Victorian Law Reform Commission
Westpac	Westpac Banking Corporation
Westpac	*Westpac Banking Corporation v 789TEN Pty Ltd* [2005] NSWCA 321
WRA	*Workplace Relations Act 1996* (Cth)
Yuill	*Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319

Appendix 5. Index