

High Court Extends Legal Professional Privilege

Esso Australia Resources Ltd v Commissioner of Taxation
[1999] HCA 67

Tow Lu Lim
Colin Biggers & Paisley, Sydney

LEGAL PROFESSIONAL PRIVILEGE PROTECTS the confidentiality of certain communications made in connection with giving or obtaining legal advice or the provision of legal services. Privilege exists to encourage clients to give full and frank disclosure to their lawyers without fear of being prejudiced by that disclosure. The *Evidence Act 1995 (Cth)* ('the Act') provides that legal professional privilege – called 'client legal privilege' in the Act – attaches to communications made or documents prepared for the dominant purpose of a lawyer providing legal advice or services.

Since *Grant v Downs* (1976) 135 CLR 674, the common law test in Australia has been that privilege will only attach to confidential communications, oral or in writing, made for the sole purpose of obtaining or giving legal advice or assistance or for use in legal proceedings. This test has been abandoned in other common law jurisdictions such as England, Canada and New Zealand.

In Australia, the different criteria in the test for legal professional privilege in common law and in the Act have entailed some anomaly. The Act only applies in proceedings in a federal court or an ACT court. Although New South Wales has enacted legislation in identical terms, no other State has yet done so. Further, in a jurisdiction where the Act applies, the relevant provisions of the Act relate only to the adducing of evidence. It would not cover all the circumstances in which a claim of privilege might arise – for example, claims for privilege in relation to discovery and inspection.

In *Esso Australia Resources Ltd v The Commissioner of Taxation* [1999], the High Court sought to resolve this inconsistency. In proceedings between Esso and the Commissioner of Taxation in the Federal Court concerning amended assessments of income tax, there was disagreement between the parties in respect of certain documents during discovery. Esso did not contend that

those documents could or could not be adduced as evidence. Accordingly, the Act had no application. Esso simply claimed it was not obliged to make those documents available for inspection on the basis that they were brought into existence for the dominant purpose of the lawyer providing legal advice. The High Court was invited to reconsider *Grant v Downs* and declare which test was the proper test.

By majority the High Court stated that the correct test at common law for claiming legal professional privilege is the *dominant purpose test*. In so doing, the High Court was critical of the existing *sole purpose test*. The sole purpose test was said to be too narrow, as any claim of privilege could be defeated if there was one other purpose in addition to the legal purpose. The upshot of the decision is that legal professional privilege will now apply where the dominant purpose of the communication, oral or written, is the obtaining or giving of legal advice or is for use in legal proceedings. The *Esso* decision thus resolves the inconsistency that previously existed, as the common law position is now congruous with the Act.

Practically speaking, there will be some significant consequences for litigation in the future. Evidently, there will be more documents that would be precluded from production as it is easier to claim privilege under the dominant purpose test. Some documents which were not protected by the sole purpose test before – for example accident report forms, investigators' reports and internal reports – may now be subject to privilege. For insurers, this is a welcome consequence of the *Esso* decision. If it can be demonstrated that a document was brought into existence for the dominant purpose of obtaining legal advice or for use in legal proceedings, privilege will attach. There will, however, be more pre-trial disputes in relation to discovery and production of documents as to whether a document satisfies the dominant purpose test. ■

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