Sole Purpose Test vs. Dominant Purpose Test: *Esso Australia Resources Limited v The Commissioner of Taxation*

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I. Introduction

For 23 years in Australia the sole purpose test has confined client privilege (legal professional privilege) to communications brought into existence for the sole purpose of submission to legal advisers for advice or use in anticipated legal proceedings.[1] The seemingly innocuous substitution of the word 'dominant' in the place of 'sole' by the majority of the High Court in *Esso Australia Resources Limited v The Commissioner of Taxation*,[2] despite the minority's adamant final stand in the name of sole purpose, is likely to have significant consequences.

II. Facts

In 1996 proceedings were commenced in the Federal Court of Australia appealing against amended assessments of income tax. General orders for discovery were made. The appellant claimed privilege in respect of 577 documents. There was no dispute over documents brought into existence for the sole purpose of giving or receiving legal advice. However, many of the documents were argued to attract privilege on the basis they were made for the dominant purpose of a lawyer providing legal advice. The question before the High Court was therefore whether the sole purpose test or dominant purpose test should apply.

III. Arguments before the Federal Court

The High Court upheld the Full Court's rejection of the following arguments in favour of privilege applying.

1. Evidence Act 1995 dominant purpose test

The *Evidence Act 1995* (Cth) applies to proceedings in the Federal Court. On that basis it was argued the test for privilege in that Act applied to the documents in dispute. The relevant test is whether the communication was made, or the document prepared, for the dominant purpose of the lawyer providing legal advice or legal services.[3] However, the test specifically applies only to the adducing of evidence. The High Court upheld the Full Court's ruling that the statutory provisions should not be applied otherwise than in accordance with their express terms.[4] Those terms did not include pre-trial procedures such as discovery and inspection. The privilege under the *Evidence Act* therefore did not apply to the disputed communications in *Esso*.

2. Modifying the common law by analogy with the Evidence Act

It was argued that the dominant purpose test in the *Evidence Act* should be used by analogy to modify the common law test, at least in jurisdictions where the Act applies. However,

1 *Grant v Downs* (1976) 135 CLR 674 at 688.
2 [1999] HCA 67 (21 December 1999).
3 *Evidence Act 1995* (Cth), ss 118, 119.
4 [1999] HCA 67 (21 December 1999) *per* Gleeson CJ, Gaudron and Gummow JJ at para 17, *per* McHugh J at para 64, *per* Kirby J at para 91, *per* Callinan J at para 149.

the High Court held it would only be appropriate to apply that reasoning if there was a consistent legislative view of what the public interest demands in relation to the law of client privilege.[5] Most Australian legislatures had not adopted the scheme of the *Evidence Act*. Only NSW followed that path. There was therefore no consistent pattern of legislative policy to which the common law could adapt itself.

3. Discretionary Power — Federal Court Rules O 15 r 15

The appellant sought to rely on the discretionary power in O 15 r 15 as a basis on which courts should make the test regarding to discovery conform to that applied in adducing evidence. O 15 r 15 provides that an order for the production of documents shall not be made unless the court is satisfied the order is necessary for the fair disposition of the case. Although this rule confers a discretionary power, it was held by the High Court that the purpose of the rule was to control oppressive and unnecessary obligations of discovery,[6] not to enable the court to subvert or circumvent the rules determining the existence of the privilege.[7]

III. The history of common law privilege

The major argument before the High Court concerned what test should be applied to determine the existence of client privilege. The reasoning of the High Court was closely connected to the previous law.

1. Pre-Grant v Downs

Grant v Downs[8] established the sole purpose test of legal professional privilege. Before that case there was no binding authority in Australia as to the test to be applied. However, the commonly applied test was that only one purpose of the communication needed to be for legal advice or use in anticipated litigation.[9]

2. The sole purpose test

The sole purpose test was established by the High Court in *Grant v Downs*[10] in 1976. Barwick CJ in the minority thought the proper test should be that only a document brought into existence for the dominant purpose of obtaining legal advice or use in litigation attracted privilege.[11] The majority held legal professional privilege applies to documents brought into existence for the sole purpose of legal advice or use in litigation.[12] The majority relied heavily on the rationale of the privilege to come to its conclusion:

> The rationale behind this head of privilege . . . 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 . . . 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.[13]

However, it was recognised that 'there are powerful considerations which suggest that the

5 [1999] HCA 67 (21 December 1999) at para 23.
6 [1999] HCA 67 (21 December 1999) *per* Callinan J at para 145.
7 [1999] HCA 67 (21 December 1999) *per* Gleeson CJ, Gaudron and Gummow JJ at para 32.
8 (1976) 135 CLR 674.
9 [1999] HCA 67 (21 December 1999) at para 40.
10 (1976) 135 CLR 674.
11 (1976) 135 CLR 674 at 677.
12 (1976) 135 CLR 674 at 688.
13 (1976) 135 CLR 674 at 685.

privilege should be confined within strict limits',[14] thus confining the privilege to the sole purpose test to prevent the privilege from travelling 'beyond the underlying rationale to which it is intended to give expression'.[15]

The major concern for the majority was the advent of large corporations. If a test wider than the sole purpose test applied, corporations would have an advantage over individuals. By the very nature of corporations, an enormous number of documents is produced to inform management of the activities of the servants of the company. However, such routine reports may also be provided to lawyers for the purpose of obtaining legal advice or assistance. The majority considered a sole purpose test was required to prevent these communications from attracting privilege where there was a dual purpose, when the management purpose would not attract privilege otherwise.[16]

The sole purpose test was applied at common law throughout Australia until it came under review in *Esso*.

IV. Esso: the majority

The majority in *Esso* ultimately held that the common law test in Australia for client privilege should now be the dominant purpose test. The majority consisted of Gleeson CJ, Gummow and Gaudron JJ in a joint judgement, and Callinan J in a separate judgement.

In accepting that it was appropriate to reconsider the test of client privilege, the majority gave a number of reasons. The sole purpose test did not rest upon a principle worked out in a succession of cases, instead being a sudden and unexpected alteration of accepted principle.[17] The same result would have been achieved in *Grant v Downs* by applying the dominant purpose test, so the sole purpose test was not critical to the decision in that case.[18] The majority in *Grant v Downs* did not consider the dominant purpose test or give reasons for rejecting it in favour of the dominant purpose test.[19] The reasons given for the adoption of the sole purpose test do not necessitate the rejection of the dominant purpose test or a preference for the sole purpose test.[20] Barwick CJ in *Grant v Downs* made a convincing case for the dominant purpose test, considering that the sole purpose test was too narrow.[21] Australian common law is out of line with the adoption of the dominant purpose test in England, New Zealand, Ireland and Canada.[22] The Commonwealth and New South Wales parliaments have adopted the dominant purpose test in their Evidence Acts, which gives rise to inconsistencies in the scope of the privilege at different stages of litigation.[23] For all these reasons, the majority, with the concurrence of the minority judges, held that it was appropriate to reconsider the test to be applied.

In determining which test was appropriate, the majority noted it was being asked to reconsider the balance struck in *Grant v Downs* between the public policy reflected in the rationale behind the privilege and the public policy requiring the fullest access to relevant information.[24] The test must be capable of being applied with reasonable certainty and

14 (1976) 135 CLR 674 at 685.
15 (1976) 135 CLR 674 at 688.
16 (1976) 135 CLR 674 at 687–688.
17 [1999] HCA 67 (21 December 1999) *per* Gleeson CJ, Gaudron & Gummow JJ at para 56, *per* Callinan J at paras 154–155.
18 [1999] HCA 67 (21 December 1999) *per* Gleeson CJ, Gaudron & Gummow JJ at para 56, *per* Callinan J at para 158.
19 [1999] HCA 67 (21 December 1999) *per* Gleeson CJ, Gaudron & Gummow JJ at para 56, *per* Callinan J at para 158.
20 [1999] HCA 67 (21 December 1999) *per* Gleeson CJ, Gaudron & Gummow JJ at para 56.
21 [1999] HCA 67 (21 December 1999) *per* Gleeson CJ, Gaudron & Gummow JJ at paras 46–47.
22 [1999] HCA 67 (21 December 1999) *per* Gleeson CJ, Gaudron & Gummow JJ at para 56, *per* Callinan J at para 168.
23 [1999] HCA 67 (21 December 1999) *per* Gleeson CJ, Gaudron & Gummow JJ at para 6.
24 [1999] HCA 67 (21 December 1999) *per* Gleeson CJ, Gaudron & Gummow JJ at para 35.

without undue delay and expense.[25] At first glance the sole purpose test appears to be a bright line-test, easily understood and applied.[26] However, the majority criticised the test for being so extraordinarily narrow that courts often applied it non-literally.[27] A literal application altered the balance too much in favour of disclosure, resulting in reluctance to express opinions for fear of subsequent detrimental disclosure.[28] It was concluded that if the sole purpose test had such extreme consequences that it was being applied in such a way that it was more like a dominant purpose test, it should be abandoned.[29]

The majority dealt with the argument that a sole purpose test was required to prevent unfair advantage to corporations and bureaucracies. It considered that the reasoning in *Grant v Downs* did not require a sole purpose test over a dominant purpose test. The concern in that case was that a report that might exist despite the legal purpose would still attract privilege. However, the majority in *Esso* considered that where the dominant purpose is a legal purpose, it is unlikely that the document would otherwise come into existence.[30] In fact, the sole purpose test may alter the balance too far in the other direction,[31] discriminating against corporations.[32] Corporations conduct most of their communications in writing, and such communications will usually have more than one purpose. If a dominantly legal communication were incidentally directed to someone else, a sole purpose test would require disclosure.[33] The result would be that the sheer majority of corporate communications would not be protected.

It was concluded by the majority that the dominant purpose test is preferable. It is unlikely to inconvenience anyone[34] and is well understood because of its adoption elsewhere.[35] It strikes a just balance, rules out claims of the kind that were rejected as against the rationale of the privilege in *Grant v Downs*, and brings the common law of Australia into conformity with other jurisdictions.[36]

V. The minority

The minority consisted of McHugh and Kirby JJ. Although they agreed the court should reconsider the test to be applied,[37] they concluded that the sole purpose test should prevail.

1. McHugh J

McHugh J gave two main reasons for rejecting the dominant purpose test. Firstly, an extension of the privilege would mean courts would have less access to relevant information. Documents that might lead to an important train of inquiry may never be disclosed, leading to the possibility that the judgements of courts may be contrary to what they would have been if such information was available.[38] The sole purpose test has greater potential to lead to the production of other relevant documents.[39]

Secondly, the dominant purpose was more difficult to apply. Rather than simply looking

25 [1999] HCA 67 (21 December 1999) *per* Gleeson CJ, Gaudron & Gummow JJ at para 57.
26 [1999] HCA 67 (21 December 1999) *per* Gleeson CJ, Gaudron & Gummow JJ at para 58.
27 [1999] HCA 67 (21 December 1999) *per* Gleeson CJ, Gaudron & Gummow JJ at para 58, citing Deane J in *Waterford v The Commonwealth* (1987) 163 CLR 54 at 85.
28 [1999] HCA 67 (21 December 1999) *per* Callinan J at paras 160–161.
29 [1999] HCA 67 (21 December 1999) *per* Gleeson CJ, Gaudron & Gummow JJ at para 60.
30 [1999] HCA 67 (21 December 1999) *per* Gleeson CJ, Gaudron & Gummow JJ at para 45.
31 [1999] HCA 67 (21 December 1999) *per* Gleeson CJ, Gaudron & Gummow JJ at para 59.
32 [1999] HCA 67 (21 December 1999) *per* Callinan J at para 162.
33 [1999] HCA 67 (21 December 1999) *per* Gleeson CJ, Gaudron & Gummow JJ at para 59.
34 [1999] HCA 67 (21 December 1999) *per* Callinan J at para 165.
35 [1999] HCA 67 (21 December 1999) *per* Callinan J at para 169.
36 [1999] HCA 67 (21 December 1999) *per* Gleeson CJ, Gaudron & Gummow JJ at para 61.
37 [1999] HCA 67 (21 December 1999) *per* McHugh J at para 70, *per* Kirby J at para 96.
38 [1999] HCA 67 (21 December 1999) at para 71.
39 [1999] HCA 67 (21 December 1999) at para 83.

at the face of the document to decide if there is a sole purpose, the state of mind of the person creating the document must be discovered. This would lead to cross-examination and extensive pre-trial litigation, particularly in cases where large numbers of documents are involved.[40]

McHugh J added that client privilege does not exist to protect non-legal purposes, which should not be able to free-ride on legal purposes. Although there may be cases where severance of non-legal purposes is possible, that would make the process much more complex.[41]

2. Kirby J

Kirby J was of the view that a brake on the application of the privilege was required to prevent the law being brought into disrepute.[42] He first considered arguments for the acceptance of the dominant purpose test.[43] He conceded that it would be convenient to have a uniform test. In addition, the introduction of the sole purpose test was a significant shift from the earlier law. The sole purpose test may also be somewhat unrealistic, in that human motivation is complex and rarely attributable to a single purpose. Furthermore, there were no reports of unworkability or significant inconvenience in the application of the dominant purpose test where it did apply.

However, these reasons were not enough to convince Kirby J that the test should be changed. He considered that the sole purpose test is a settled test.[44] It is simpler to apply, with no subjective questions.[45] The tendency of the common law has been to confine the privilege in an acknowledgement of the importance of access to relevant information for the courts to reach decisions.[46] Although a dominant purpose test was accepted in the Commonwealth and New South Wales Evidence Acts, other legislatures have not followed suit.[47]

The practical significance of a dominant purpose test may mean the ambit of privileged documents increases dramatically,[48] such that a broader privilege may change the outcome of much litigation. Disclosure is essential in opening up lines of inquiry, sometimes meaning the success and failure of litigation.[49]

The dominant purpose test would be more likely to advantage corporations and administration. Individuals will not be advantaged by the new test because they usually speak to a lawyer for the sole purpose of legal advice. On the other hand, corporations often create documents for multiple purposes.[50] More corporate documentation will be protected and the courts will have less capacity to enter into the minds of corporations.[51] The power of corporations will be further enhanced by the inevitable explosion of pre-trial hearings about disclosure, because of their superior ability to outlast other parties.[52]

Kirby J concluded that, weighed against these arguments, the reasons advanced in favour of the dominant purpose test were insufficient to warrant a change.[53]

40 [1999] HCA 67 (21 December 1999) at para 73.
41 [1999] HCA 67 (21 December 1999) at para 78.
42 [1999] HCA 67 (21 December 1999) at para 86.
43 [1999] HCA 67 (21 December 1999) at paras 93–98.
44 [1999] HCA 67 (21 December 1999) at para 100.
45 [1999] HCA 67 (21 December 1999) at para 100.
46 [1999] HCA 67 (21 December 1999) at para 101.
47 [1999] HCA 67 (21 December 1999) at para 104
48 [1999] HCA 67 (21 December 1999) at para 106.
49 [1999] HCA 67 (21 December 1999) at para 107.
50 [1999] HCA 67 (21 December 1999) at para 109.
51 [1999] HCA 67 (21 December 1999) at para 110.
52 [1999] HCA 67 (21 December 1999) at para 108.
53 [1999] HCA 67 (21 December 1999) at para 113.

VI. Conclusion

It is difficult to predict the effects that the dominant purpose test will have on disclosure in Australia. The proponents of the dominant purpose test reason that it is more in line with the rationale behind client privilege and strikes a just balance between the needs for full and frank disclosure and unfettered access to relevant information. It will protect communications that deserve protection, and require disclosure of the rest. Sole purpose stalwarts would argue that a dominant purpose test extends the privilege too far, protecting communications that should be disclosed and creating uncertainty in the law. Whether pre-trial hearings will 'explode' and the decisions of courts will be less informed and correspondingly less just, or the transition will be smooth and the new test will achieve fairness to all, is a matter for conjecture. The arguments for and against both tests make sense in the abstract world of theory. It will only be possible to finally conclude which test should prevail when their practical and legal effects can be compared. For now, it is time for the dominant purpose test to make its move.