Australian Government
Australian Law Reform Commission

Client Legal Privilege and Federal Investigatory Bodies

ISSUES PAPER

You are invited to provide a submission or comment on this Issues Paper

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The closing date for submissions in response to IP 33 is 4 June 2007.

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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

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:

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Mr Will Irving, Telstra Corporation Limited
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Dr Christine Parker, University of Melbourne
Mr Bret Walker SC, St James' Hall

List of Questions

1. Introduction to the Inquiry

1–1 What are the best contemporary rationales for the doctrine of client legal privilege?

1–2 Does client legal privilege serve broad 'public interests'? What is it/are they? Does client legal privilege essentially amount to a private right?

1–3 Do the underlying rationales accord with actual current practice?

1–4 Is there a different rationale for particular contexts such as the context of Commonwealth investigatory bodies, including Royal Commissions?

2. Overview of Client Legal Privilege

2–1 A communication made in furtherance of the commission of a fraud or an offence is not protected by client legal privilege. As a practical matter, what are the difficulties for Commonwealth investigatory bodies in proving that a communication is not privileged on the basis of this exception?

2–2 The Australian Taxation Office 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 within the confidence of taxpayers and their professional accounting advisers. Are there circumstances in relation to other Commonwealth investigatory agencies where a similar concession should be extended to accountants or other professionals who provide what amounts to legal advice? By what means would such a concession or privilege best be realised—for example, by legislation, regulation or administrative instrument?

2–3 Should client legal privilege apply only to natural persons and not to corporations?

4. Client Legal Privilege in Commonwealth Investigations

4–1 Is there a need to clarify the application of client legal privilege to the coercive information-gathering powers of Commonwealth bodies (including Royal Commissions)? If so, how would this best be achieved?

4–2 Is it desirable to harmonise provisions relating to the application of client legal privilege to the coercive information-gathering powers of Commonwealth bodies? If so, what approach should be taken? Should there be a uniform set of provisions or should distinctions be drawn depending on the functions performed by Commonwealth bodies or the subject matter with which they deal? In particular, should distinctions be drawn:

(a) between Commonwealth investigatory bodies and Royal Commissions; and

(b) based on whether or not the core function or focus of the Commonwealth body is investigation or enforcement?

4–3 Would harmonisation best be achieved by: creating a specific new Commonwealth statute; amending the scattered statutory provisions conferring coercive powers on Commonwealth bodies; or by some other method?

5. Practice and Procedure

5–1 What problems arise concerning:

(a) the making and resolution of a claim for client legal privilege in response to the exercise by a Commonwealth body of a coercive information-gathering power; and

(b) in particular, where information the subject of a potential claim for privilege is held in electronic form or is sought to be seized during the execution of a search?

5–2 What issues arise in relation to the making of a claim for client legal privilege where a person the subject of a coercive information-gathering power holds documents belonging to another that record potentially privileged communications?

5–3 What issues arise in relation to the making of a claim for client legal privilege where the person who is the subject of a Commonwealth coercive information-gathering power is not legally represented or has not received legal advice in relation to his or her rights in an investigation?

5–4 Are the ‘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 in Circumstances where a Claim of Legal Professional Privilege is Made’ working in a satisfactory manner? Are the procedures followed in respect of the execution of warrants at other premises satisfactory?

5–5 Do policies and procedures governing the execution of Commonwealth search warrants need to be amended specifically to address claims made for privilege in respect of documents stored electronically?

5–6 The Australian Taxation Office has developed and published guidelines about dealing with claims for client legal privilege made during the exercise of coercive information-gathering powers. What procedures would be effective in resolving claims for client legal privilege raised in response to the exercise by a Commonwealth body of a coercive information-gathering power?

5–7 Should Commonwealth bodies exercising coercive information-gathering powers be required to develop and publish practices and policies in relation to:

(a) accurately informing persons of their position concerning client legal privilege;

(b) the procedures to be adopted in making and resolving claims for privilege; and

(c) managing and recording the documents or communications received in respect of which a claim for privilege has been made?

6. Modification or Abrogation of Privilege?

6–1 In Daniels, the High Court described client legal privilege as a 'fundamental common law right', rather than a mere procedural safeguard. However, investigatory bodies need to be able to have access to the relevant information required to perform their functions. Would modification or abrogation of the client legal privilege rules achieve greater efficiency or effectiveness in the work of Commonwealth investigatory agencies, including Royal Commissions?

6–2 What consequences might flow from the modification or abrogation of the privilege?

6–3 Is it desirable to modify or abrogate the application of client legal privilege uniformly to all the coercive information-gathering powers of Commonwealth bodies or should distinctions be drawn depending upon the functions performed by Commonwealth bodies and Royal Commissions or the subject matter with which they deal?

6–4 Client legal privilege has been abrogated under certain Commonwealth legislation such as the James Hardie (Investigations and Procedures) Act 2004 (Cth). ASIC also takes the position that client legal privilege is abrogated under the *Australian Securities and Investments Commission Act 2001* (Cth).

Similarly, client legal privilege is abrogated under the *Royal Commissions Act 1923* (NSW). What has been the practical effect, if any, of this abrogation on lawyer-client relations? Has the availability of otherwise privileged material facilitated better fact finding and enforcement by investigatory bodies?

6–5 In some areas, the privilege against self-incrimination applies only to interviews and information given in the course of an investigation, not to pre-existing documents. Should client legal privilege be available only for those documents or communications that relate to the representation of a client once the investigation process commences, and not pre-existing documents? Are there other classes of confidential communications to which the privilege should not apply or should be modified?

6–6 Once a matter has proceeded beyond the investigation phase, should the absolute protection available under the current client legal privilege rules be replaced with a 'qualified' privilege along the lines of Division 1A of the *Evidence Act 1995* (NSW)? (In which case, a court would have discretion to admit the material if the probative value of the evidence, having regard to the nature of the offence, outweighs the harm to the person who made the confidential communication.)

7. Safeguards

7–1 If client legal privilege were to be abrogated or modified, should there be a distinction drawn between privileged communications relating to the representation of a client in the investigation process, and privileged communications that relate to the subject matter of an investigation?

7–2 If client legal privilege were to be abrogated or modified, what safeguards, if any, should be put in place relating to the use of privileged information obtained through the use of coercive powers? In particular, should use immunity or derivative use immunity apply and, if so, to which type of proceedings should such immunities apply?

7–3 If use immunity or derivative use immunity were to be introduced as a safeguard, should a distinction be drawn between the application of the immunities to:

(a) corporations and individuals;

(b) the production of documents and the making of oral statements giving information;

(c) Commonwealth bodies, depending upon the functions which they perform;

(d) Commonwealth agencies exercising coercive powers and Royal Commissions; and

(e) Commonwealth investigations conducted in public and those conducted in private?

7–4 If client legal privilege were to be abrogated or modified should it remain available against third parties—for example, in response to a subpoena issued to the Commonwealth body or pursuant to a statutory request for release of that information?

7–5 If client legal privilege were to be abrogated or modified, should Commonwealth bodies exercising coercive information-gathering powers be required to develop and publish practices and policies in relation to:

(a) accurately informing persons of their position; and

(b) managing and recording the documents or communications received in respect of which a claim for privilege has been made?

7–6 Where a lawyer arguably has maintained a claim for client legal privilege improperly, as a tactic for delay or obstruction, should professional disciplinary action follow?

7–7 Should a person who, in bad faith, asserts or maintains a claim for client legal privilege either personally or on another's behalf, be made liable to penalties, whether criminal, civil or administrative?

7–8 What is the best way of ensuring that 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?

1. Introduction to the Inquiry

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Background to the Inquiry

> The three words 'legal', 'profession' and 'privilege' all have the capacity to engender negative feelings ranging from irritation to outrage among sections of society. Taken together they suggest to some a special advantage invented for their own benefit by persons who enjoy a trading oligopoly in services of questionable social utility which they provide for handsome rewards. Others view legal professional privilege in economic terms as conferring an unfair marketing advantage on lawyers where the range of services they provide overlap with those offered by other professions. Where the privilege is invoked to resist disclosure of information to public regulatory or investigatory authorities, then it is not infrequently regarded as little more than a lawyer's devise to avoid discovery of their clients' evil deeds. A contrary view regards the privilege as an essential protection for clients communicating with lawyers and an incident of their human right of access to justice. It is the interface between the privilege and statutory information gathering powers that is now under consideration by the Australian Law Reform Commission in its latest Reference from the Commonwealth Government.[1]

1 R French, 'Legal Professional Privilege and the Public Interest: A Reform Question' (2007) 34(2) *Brief* 27, 27.

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

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. The proliferation of bodies with coercive information-gathering powers presented a challenge to the common law doctrine of legal professional 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 legal professional privilege in order to achieve a more effective performance of those functions in the public interest. The ALRC has also been asked to consider whether it is desirable to clarify all existing federal provisions that modify or remove legal professional privilege, with a view to harmonisation.

1.4 The ALRC considered legal professional privilege in the investigatory context in its 2002 Report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95).[2] In that Report 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 legal professional 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 and the Victorian Law Reform Commission considered legal professional privilege 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]

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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.

1.6 Questions about the application of legal professional 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 Commission 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, legal professional privilege should not apply.[6]

Scope of the Inquiry

Terms of Reference

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

- modify or abrogate legal professional privilege in some areas in order to achieve more effective performance of Commonwealth investigatory functions;
- clarify existing provisions for the modification or abrogation of legal professional privilege, with a view to harmonising them across the Commonwealth statute book; and
- 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.

1.9 The Terms of Reference also direct the consideration of '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 legal professional privilege in the context of Commonwealth agencies with coercive powers, any modification or abrogation will

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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, 190, Rec 4.

have wider implications because of the potential for flow-on effects in the domain of legal advice. 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. The 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 HIH transactions, for example, were subject to investigation or inquiry by ASIC, the Australian Prudential Regulation Authority (APRA) and a Royal Commission.[7]

1.12 In this Inquiry the ALRC is considering specific issues in relation to the Commonwealth bodies under review. It is not conducting an evaluation of the appropriateness or otherwise of Commonwealth coercive information-gathering powers of themselves.

1.13 Claims of privilege in the context of court proceedings were the subject of consideration in the report on *Uniform Evidence Law* in 2005 (ALRC 102). The Government continues to consider the implementation of that report. It is currently on the agenda for the Standing Committee of Attorneys-General.

Terminology

Client legal privilege

1.14 Although the Terms of Reference use the phrase 'legal professional privilege', the ALRC uses 'client legal privilege' for the remainder of this Issues Paper. This is the manner in which the privilege is described in the *Evidence Act 1995* (Cth)[8] 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.[9]

1.15 In *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (*Daniels*),[10] 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.

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7 See Ch 4.
8 *Evidence Act 1995* (Cth), Pt 3.10, Div 1.
9 *Baker v Campbell* (1983) 153 CLR 52, 85 (Murphy J).
10 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

> 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.[11]

1.16 The phrase 'client legal privilege' was adopted in the uniform Evidence Acts after the ALRC's 1985 and 1988 Reports on *Evidence* (ALRC 26 and ALRC 38).[12]

Lawyer

1.17 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.

1.18 While a separate question is whether the lawyer needs to hold a practising certificate to attract the privilege, the expression 'lawyer' will be used in this Issues Paper to describe the legal relationships covered by client legal privilege. The ALRC report on *Uniform Evidence Law* (ALRC 102) rejected a requirement for a practising certificate to qualify for the privilege,[13] consistently with the decision in the ACT Court of Appeal in *Commonwealth v Vance.*[14] Without commenting on the merits of this position, the term 'lawyer' will be used for the purposes of this Inquiry.

The development of client legal privilege

The contemporary doctrine in brief

1.19 Client legal privilege in Australia today is both a doctrine[15] 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] It has also been given effect in statutory form

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11 *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].

12 Australian Law Reform Commission, *Evidence*, ALRC 26 (1985); Australian Law Reform Commission, *Evidence*, ALRC 38 (1987).

13 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.

14 *Vance v McCormack* (2004) 154 ACTR 12. The conclusion in *Vance* was supported in Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005), [14.96].

15 The term 'doctrine' has been chosen as a neutral term. The term 'right' has more recently slipped into the language in relation to privilege: see below [1.69]–[1.73]. The appropriateness, or otherwise, of this use of the word 'right' will be considered in due course in the Inquiry.

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

in the *Evidence Act 1995* (Cth),[17] the *Evidence Act 1995* (NSW) and the *Evidence Act 2001* (Tas).[18]

1.20 A concise statement of the contemporary doctrine[19] is that:

> 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.[20]

1.21 There are two broad heads of the doctrine: one that applies with respect to lawyer-client communications; and one that applies with respect to communications between third parties and the lawyer or the client. Stated simply, lawyer-client communications are protected if made for the purpose of obtaining legal advice or for the purpose of obtaining information necessary for use in litigation. Third party communications are protected if made in contemplation of litigation.[21]

1.22 The statutory privileges apply only in relevant proceedings. As was noted in ALRC 102:

> The introduction of the uniform Evidence Acts has thus created a situation in which two sets of laws operate in the area of privilege. The uniform Evidence Acts govern the admissibility of evidence of privileged communications and information. The common law does not apply. In all other situations the common law rules persist, unless a statute abrogates the privilege.[22]

1.23 Contemporary client legal privilege doctrine therefore needs to be considered in both its common law and statutory aspects and in the intersection of both. The impact of statute on the common law doctrine was summarised by the High Court in *Daniels*:

> 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

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17 *Evidence Act 1995* (Cth), pt 3.10, div 1. There are two other statutory privileges: the privilege in respect of religious confessions and the privilege in respect of self-incrimination in other proceedings: ss 127–128.

18 *Evidence Act 1995* (NSW), pt 3.10, div 1; *Evidence Act 2001* (Tas), ss 118, 119. See Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, Uniform Evidence Law, ALRC 102 (2005), [14.4].

19 The doctrine will be considered more fully in Ch 2.

20 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.

21 Ibid, 48. See Ch 2 for detail of the heads of client legal privilege.

22 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005), [14.8].

> important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect.[23]

1.24 In the context of Commonwealth bodies, the key issue has been the question of modification or abrogation of the common law privilege under the relevant legislation applying to the relevant body, as for example in *Daniels*.

Historical background

1.25 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',[24] it was described by the leading American evidence scholar, Professor John Henry Wigmore, as 'the oldest of the privileges for confidential communications'.[25]

1.26 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.[26] There are several threads that can be identified in the history of the emergence of today's privilege doctrine.[27]

Chancery

1.27 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 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

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

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

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

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

27 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.

> 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.[28]

1.28 The fear of tampering with witnesses that might follow the premature disclosure of evidence also informed the approach to the discovery of documents.[29] The production of documents that were part of a party's evidence was considered as 'opening a wide door to perjury'.[30]

Trial at law

1.29 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,[31] 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'.[32] Chancery in its auxiliary jurisdiction could be enlisted to assist to some extent, but it was 'time-consuming, cumbersome and expensive'.[33]

1.30 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 area. The reforms also made the parties 'generally competent and compellable to testify for and against each other in all courts of justice'.[34]

Privilege for documents relating to the case

1.31 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'.[35] 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

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28 Ibid, 7.
29 Ibid, 10.
30 *Bligh v Benson* (1819) 146 ER 948, 949.
31 N Williams, 'Discovery of Civil Litigation Trial Preparation in Canada' (1980) 58(1) *The Canadian Bar Review* 1, 12.
32 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.
33 Ibid, 13
34 Ibid, 13.
35 Ibid, 16.

> 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.[36]

1.32 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,[37] evolving as 'the common law equivalent of the protection that had originated in chancery for documents which formed the party's evidence'.[38]

The expanding content of privilege

1.33 Dr Ron Desiatnik provides a useful summary of the changes in the content of the privilege 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'.[39]

1.34 Common law privilege emerged in the context of trials and extended to the pre-trial period of discovery but, since *Baker v Campbell*,[40] it now also extends to non-curial contexts such as the exercise of coercive powers of investigatory or regulatory authorities.

The rationales of client legal privilege

The need to identify rationale

1.35 This section includes a consideration of a range of rationales, both positive and negative, that have been expressed in relation to client legal privilege. They are presented as a broad survey of the threads of thinking without evaluation or argument. The aim is to provide a foundation for reflection as to the justification for the maintenance and form of client legal privilege in its particular contexts.

1.36 As the Inquiry considers the application of client legal privilege in the context of Commonwealth bodies, and questions of abrogation and modification, it will necessarily touch on the underlying justifications of the doctrine itself. In focusing upon the threads of rationale that have been posited in relation to client legal privilege, the aspiration of the Inquiry should be, as the Victorian barrister Dr Sue McNicol

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36 Ibid, 16, footnotes omitted.
37 Ibid, 16.
38 Ibid, 17.
39 R Desiatnik, *Legal Professional Privilege in Australia* (2nd ed, 2005), 12 (footnotes omitted). The developments are considered more fully in, for example, J Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd ed, 1940), [2294].
40 *Baker v Campbell* (1983) 153 CLR 52.

commented, that 'the rationale should provide the foundation, the justification and the explanation for the privilege',[41] so that the current doctrine or any proposed change can be justified in terms of rationale. There should be '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.[42]

1.37 The challenge of connecting rationale to contemporary doctrine is a significant one as the consequences of a successful claim to client legal privilege, or any other 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 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.[43]

1.38 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';[44] and, on the other, that 'the underlying rationale is travelling beyond the necessary application of the privilege'.[45]

1.39 Questioning rationale also assists the consideration of any reform and, if so, the shape it should take; as well as meeting the challenge posed by the question of whether new applications of the privilege, or new situations in which the privilege is raised, require a new rationale. As Professor Andrew Paizes commented:

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41 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.

42 Ibid, 65.

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

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

45 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.

> 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?[46]

1.40 The ALRC is interested in obtaining views on what are, or should be, the most appropriate rationale or rationales for client legal privilege today; and hearing of practical experiences in relation to claims of privilege, or issues relating to privilege, that help to identify whether the supposed rationales actually accord with practice.

A range of rationales

1.41 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 to client legal privilege in relation to the particular materials and communications under consideration at any given time.[47] The principal rationales are considered below.

In support of client legal privilege

The honour of the attorney

1.42 An early rationale for protecting communications between a solicitor and client was said to be the fact that solicitors were men of honour and a man of honour would not betray a confidence, nor would judges as men of honour themselves require him to.[48] Viewed in this light, the privilege was that of the lawyer, not the client.[49] By the

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46 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.

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

48 J Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd ed, 1940), 547, [2290]. This is also referred to by W Holdsworth, *A History of English Law* (3rd ed, 1944), vol IX, 202, citing Wigmore. Doubt has, however, been thrown on Wigmore's analysis of the early history of the privilege: J Auburn, *Legal Professional Privilege: Law and Theory* (2000), Ch 1. Auburn argues that 'honour' is misunderstood here and that it was about the way evidence was given, rather than precluding evidence altogether: 6. See also Hazard, who distinguishes the functions of a barrister from those of attorneys and solicitors: G Hazard Jr, 'An Historical Perspective on the Attorney-Client Privilege' (1978) 66 *California Law Review* 1061, 1070–1073.

49 *D v National Society for the Prevention of Cruelty of Children* [1977] 1 All ER 589, 611-612, Ld Simon; N Williams, 'Discovery of Civil Litigation Trial Preparation in Canada' (1980) 58(1) *The Canadian Bar Review* 1, 38.

late 18th century, however, the emphasis of the rule and the rationale had clearly shifted to the client.[50]

Encouraging full and frank disclosure

1.43 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.[51]

1.44 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.[52]

1.45 This rationale suggests, therefore, that by protecting lawyer-client communications the value and integrity of those communications is ensured. It has been described as 'the instrumental or utilitarian view' of the legal advice privilege.[53]

Part of the policy against self-incrimination

1.46 The free communication between lawyer and client facilitates candour and full and frank disclosure and, in so doing, may be seen to be 'part of the policy against self-incrimination'.

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50 *Wright v Mayer* (1801) 31 ER 1051, 1052 ('the privilege of the client and the public', Eldon LC). See W Holdsworth, *A History of English Law* (3rd ed, 1944), IX, 202; J Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd ed, 1940), 549, [2290]. Holdsworth noted that the 'point of honour' argument had been raised during the 17th century in other relationships than that of solicitor and client. The emphasis in such contexts was confidentiality: *D v National Society for the Prevention of Cruelty of Children* [1977] 1 All ER 589, 611-612, Ld Simon. Radin draws parallels with the Roman duty of loyalty within families: M Radin, 'The Privilege of Confidential Communication Between Lawyer and Client' (1927–1928) 16 *California Law Review* 487, 488.

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

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

53 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.

> All persons ought to be able fully and freely to tell their lawyers all the facts, however remote, which surround the case, without fear that the lawyer's knowledge of these facts may be used to establish claims against them or subject them to penalties.[54]

Protecting privacy

1.47 This 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 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 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.'[55]

1.48 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'.[56]

1.49 The privacy rationale 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

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54 M Radin, 'The Privilege of Confidential Communication Between Lawyer and Client' (1927–1928) 16 *California Law Review* 487, 490. While the doctrine developed in the criminal law context, the ALRC recommended that it also extend to the imposition of civil and administrative penalties: Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), Rec 18–1.

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

56 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].

> compulsory disclosure on the demand of any administrative officer with some general statutory authority to obtain information or seize documents.[57]

1.50 The protection of the privacy of the lawyer was also identified in *Woods (t/as Turner Freeman) v Hanoldt*,[58] where the New South Wales Court of Appeal cited a passage from the United States case of *Hickman v Taylor*,[59] 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.[60]

Promoting the administration of justice

1.51 The 'administration of justice' rationale includes the rationales of full and frank disclosure[61] and compliance,[62] combining them expressly as a rationale based on a broader concept of public interest. 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.[63]

1.52 The broad 'administration of justice' rationale is also described as the 'instrumental' rationale.[64] Auburn identified three clear elements that are intertwined in this justification.

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

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

59 *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.

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

61 See above: [1.43]–[1.45].

62 See below: [1.66]–[1.68].

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

64 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. See above: [1.45].

> First, that the law is so complex that people need lawyers to manage their affairs and disputes; secondly, that lawyers are unable to discharge this function without the fullest possible knowledge of the facts of their client's situation; thirdly, that the privilege encourages the flow of this information from the client to the lawyer.[65]

Promoting the adversarial system

1.53 The protection of communications that are made with litigation in mind is part of the rationale of 'protecting the brief' in an adversarial system. It stresses the importance of protecting the information (brief) of each party from disclosure to the other side,[66] which is considered fundamental to the effective operation of the accusatorial or adversarial system itself.[67] 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.[68]

1.54 The commitment of the common law to litigation as adversarial proceedings 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.[69]

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65 J Auburn, *Legal Professional Privilege: Law and Theory* (2000), 13-14 (notes omitted).

66 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, 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.

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

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

69 J Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd ed, 1940), 374–375, [1845].

1.55 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.[70] 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?'[71]

1.56 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.[72]

1.57 The protection of the 'initiative and endeavour' 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*:[73]

> 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.'
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> 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

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

71 Ibid, vol 2, 670–671.

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

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

> where there is a readily available source which involves the invasion of no-one's rights.[74]

1.58 The privilege was extended to cover third party communications obtained as 'part of the brief',[75] or 'the brief in action',[76] namely 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'.[77]

1.59 The importance of extending the privilege to catch third party communications was emphasised by Stone J in *Pratt Holdings Pty Ltd v Commissioner of Taxation.*

> 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.[78]

1.60 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'.[79] 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.[80]

1.61 The basis of this protection and the connection with the adversary system was explained by Williams:

> From [the perspective of the adversary 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

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74 Ibid, 171–172.

75 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].

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

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

78 *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217, [87]. This may also suggest an expansion of the third party aspect to both limbs of privilege: see Ch 2.

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

80 *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.

> 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 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.[81]

1.62 The connection of the application of the privilege to third party communications in an adversarial context was identified by Brennan J in *Baker v Campbell* where he commented, in relation to documents 'brought into existence by or on behalf of a party to litigation', that:

> The legal professional privilege attaching to such documents ordinarily ensures that they are not tendered in evidence. The purpose of the privilege is the facilitation of access to legal advice, the inducement to candour in statements prepared for the purposes of litigation, and the maintenance of the curial procedure for the determination of justiciable controversies—the procedure of adversarial litigation.[82]

Discouraging litigation or encouraging settlement

1.63 As a rationale for client legal privilege it is 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'.[83]

1.64 In suggesting that the object of fostering the administration of justice was a wider notion than the demands of the adversary 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.[84]

1.65 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'.[85]

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

82 *Baker v Campbell* (1983) 153 CLR 52, 108.

83 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.

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

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

Encouraging compliance

1.66 As clients can obtain the fullest legal advice only where the lawyer is in possession of all relevant facts, the protection of communications encourages 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.[86]

1.67 This rationale is an aspect of the broad instrumental rationale captured in the 'administration of justice' description. 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 the greatest compliance with the law. Auburn notes the broader social impact of the doctrine when he stated 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.[87]

1.68 In the context of this Inquiry, namely the coercive information-gathering powers of federal investigatory bodies, it is important that lawyers be able to obtain all relevant information from clients to advise them properly, including advice relating to compliance with applicable regulatory regimes. The ALRC is interested in hearing about the practical implications of privilege in a compliance context, particularly the extent to which privilege may assist and encourage clients to comply with applicable laws.

Human right

1.69 A recent thread of rationales of client legal privilege describes it in terms of human rights.[88] Lord Hoffman in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* went so far as to call it 'a fundamental human right long established in the common law'.[89]

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86 *Baker v Campbell* (1983) 153 CLR 52, 95. See also *Carter v The Managing Partner Northmore Hale Davy and Leake* (1995) 183 CLR 121, 127–128.

87 J Auburn, *Legal Professional Privilege: Law and Theory* (2000), 13–14 (notes omitted).

88 Ibid, Ch 2.

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

1.70 In jurisdictions that have enacted human rights legislation, the human rights rationale was, as Auburn explains, 'effectively imposed over the top of the common law privilege'.[90] In common law jurisdictions without such legislation, such as Australia, the term 'human right' has slipped into the description of client legal privilege. For example, in *Daniels* Kirby J referred to client legal privilege both as an important 'civil right' and as a 'human right'.[91]

1.71 In reviewing the national laws of the European Union, the European Court of Justice observed in *AM & S Europe v Commission of the European Communities* in 1983 that all member states afforded some protection to confidential relations between lawyer and client and that:

> The protection of legal confidence is a characteristic feature of democratic systems and that, on the other hand, it has little place in the law of absolutist or totalitarian states.[92]

1.72 The Court commented, in the context of the law of the European Community (as it was then), that 'to a marked and increasing extent, legal privilege is seen as a practical guarantee of fundamental, constitutional or human rights'.[93]

> [The Consultative Committee of the Bars and Law Society of the European Community submitted] that the confidentiality of communication between lawyer and client is recognised as a fundamental, constitutional or human right, accessory or complementary to other such rights which are expressly recognised; and that as such, this right should be recognised and applied as part of 'the law' in terms of article 164 of the EEC Treaty.[94]

1.73 Where other rationales were linked to client legal privilege as a principle or tenet of the common law, and as such amenable to re-interpretation, modification and abrogation by statute, cases like these signal potentially a radical shift in thinking towards a 'rights-based' rationale.[95] 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'.[96]

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

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

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

93 Ibid.

94 Ibid.

95 See 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.

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

Against client legal privilege

Perversion of justice

1.74 Jeremy Bentham (1748–1832), the 18th century radical reformer and proponent of utilitarianism, was a staunch critic of client legal privilege.[97] As Professor William Twining has noted, Bentham was against *all* rules of evidence, especially judge-made rules.[98]

> He was particularly harsh on the lawyer-client privilege and gives no quarter to the claim that this may serve to increase rectitude of decision in the long term.[99]

1.75 Bentham expressed his antagonism with heavily-laden sarcasm.

> English judges have taken care to exempt the professional members of the partnership from so unpleasant an obligation as that of rendering service to justice.[100]
>
> …
>
> When, in consulting with a law adviser, attorney or advocate, a man has confessed his delinquency, or disclosed some fact which, if stated in court, might tend to operate in proof of it, such law adviser is not to be suffered to be examined as to any such point. The law adviser is neither to be compelled, nor so much as suffered, to betray the trust thus reposed in him. Not suffered? Why not? Oh, because to betray a trust is treachery; and an act of treachery is an immoral act.[101]

1.76 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 inconsistence 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.[102]

Public interest versus private rights

1.77 In the report of 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 and 'the fundamental right of

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97 He wrote a five volume work, *Rationale of Judicial Evidence*: 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'. This is found in vol 5 of the work.

98 W Twining, *Theories of Evidence: Bentham and Wigmore* (1985), ix, 2.

99 Ibid, 99.

100 J Bentham, *Rationale of Judicial Evidence* (1827), Book IX, Chap V, 302.

101 Ibid, 302–303.

102 Ibid, 311, 312.

persons to obtain legal advice under conditions of confidentiality'.[103] 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'.[104] He indicated that in some cases, depending on 'the issues the subject of the Royal Commission', the public interest should prevail over the private.[105]

Public interest versus public interest

1.78 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'.[106] 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.[107]

Accountable government

1.79 The issue of a higher level public interest was raised in ALRC 102 in relation to claims of privilege by government agencies, where the argument was identified that 'the rationale for client legal privilege must be balanced against the clear public interest in open and accountable government'.[108]

1.80 The New South Wales Ombudsman had queried whether client legal privilege should operate to prevent access to documents by a 'watchdog body' and that:

> It is open to question whether in fact client professional privilege is either necessary or effective in achieving its objective of ensuring frank and candid communication where public sector agencies and public officials are concerned.[109]

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

104 Ibid, [7.66].

105 Ibid, [7.67].

106 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005), [14.173].

107 *Baker v Campbell* (1983) 153 CLR 52, 96.

108 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005), [14.172] referring to Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC DP 69, NSWLRC DP 47, VLRC DP (2005) and *Waterford v Commonwealth* (1987) 163 CLR 54.

109 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005), [14.170].

1.81 The Ombudsman proposed that the uniform Evidence Acts should be amended to abrogate privilege expressly in relation to investigations being conducted by watchdog bodies set up by the Commonwealth, state or territory governments.[110]

Third parties

1.82 The extension of client legal privilege to third party communications has attracted specific criticism[111] and was described, for example, as a 'rather unattractive body of doctrine'.[112]

1.83 As Pincus J explained in *Dingle v Commonwealth Development Bank of Australia*, 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.'[113]

1.84 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 which have come into existence for the purpose of litigation.[114]

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110 Ibid, [14.171].
111 S McNicol, *Law of Privilege* (1992), 49–50.
112 *Dingle v Commonwealth Development Bank of Australia* (1989) 91 ALR 239. On the extension of the privilege to third parties, see also *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217.
113 *Dingle v Commonwealth Development Bank of Australia* (1989) 91 ALR 239, 242.
114 Ibid, 242.

Arguments in favour of client legal privilege usually assert that it provides an essential protection to clients enabling them to communicate fully and frankly with their lawyers, which serves the broader public interest in the effective administration of justice. A contrary argument is made, however, that privilege is sometimes used cynically—as a tactic to frustrate or delay investigations and proceedings—and thus can hinder the effective administration of justice by preventing or hindering the discovery of the truth.

Question 1–1 What are the best contemporary rationales for the doctrine of client legal privilege?

Question 1–2 Does client legal privilege serve broad 'public interests'? What is it/are they? Does client legal privilege essentially amount to a private right?

Question 1–3 Do the underlying rationales accord with actual current practice?

Question 1–4 Is there a different rationale for particular contexts such as the context of Commonwealth investigatory bodies, including Royal Commissions?

'Legal' privilege

Why lawyers?

1.85 Why should the privilege be attracted by the relationship of lawyer and client, and not other relationships? Whenever the question of client legal 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.

1.86 As early as 1597 Francis Bacon provided the following explanation for why the privilege should be one in relation to lawyers, not others:

> 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.[115]

115 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.

1.87 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.[116]

1.88 The High Court in *Baker v Campbell* endorsed this logic.

> The restriction of the privilege to the legal profession serves to emphasize 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.[117]

Beyond lawyers?

1.89 Today it can be said that it is not only lawyers who provide 'legal advice'. Accountants and financial advisers advise on tax law; planners on planning law and so on. As 'lawyers' work', in the nature of advice on legal matters, is now given by others, not just lawyers, should client legal privilege or an analogous privilege apply?[118]

1.90 ALRC 26 recommended the introduction of an additional discretionary privilege—a 'professional confidential relationship privilege'—to cover communications and records made in circumstances where one of the parties was under

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116 Law Reform Committee of England & Wales, *Privilege in Civil Proceedings* (1967), 16th Report, 9, quoted at Australian Law Reform Commission, *Evidence*, ALRC 26 (1985), 495.

117 *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].

118 R Baxt, 'A Matter of Privilege' (1989) 60 *Chartered Accountant* 34, 35. Traditionally, state and territory legislation restricted 'legal work' or 'legal practice' to qualified lawyers holding a current practising certificate: see, eg, *Legal Profession Act 2004* (NSW) s 14. Indeed, unauthorised legal practice amounts to an offence: s 14(1). However, there are now express exceptions to this rule, including 'legal practice engaged in under the authority of a law of ... the Commonwealth' (s 14(2)(a))—for example, work of a legal nature performed by licensed tax agents, migration agents and registered patent attorneys.

an obligation (legal, ethical or moral) not to disclose them.[119] ALRC 102 recommended that the uniform Evidence Acts should be amended to provide for such a privilege.[120]

1.91 The ALRC is interested in hearing submissions on whether client legal privilege should be extended beyond the lawyer-client context. Specific questions on this matter are posed in Chapter 2.

Organisation of this Issues Paper

1.92 Chapter 2 describes the current state of the law in relation to client legal privilege 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 raises the question of the application of the privilege to other professionals and to corporations.

1.93 Chapter 3 provides an overview of the investigatory and associated functions of Commonwealth 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 Commonwealth agencies and departments. Where the information is available, the chapter will also address the frequency with which Commonwealth bodies use coercive powers, and their policies in this regard.

1.94 Chapter 4 considers the law on client legal privilege in the specific context of Commonwealth investigations. Legislative provisions and significant cases dealing with the application of the privilege are discussed. This chapter raises issues about whether there needs to be greater clarity and consistency in the law on the application of privilege to federal coercive information-gathering powers.

1.95 Chapter 5 addresses a number of issues that arise concerning the practices and procedures in making and resolving privilege claims. Different issues may arise depending on the varying circumstances under which information can be obtained coercively, the form in which information is held and from whom the information is compelled. The chapter considers what obligations may be imposed on Commonwealth bodies which exercise coercive information-gathering powers and the subjects of those powers in order to achieve better practices and procedures.

1.96 Chapter 6 focuses on whether it is desirable to modify or abrogate client legal privilege in order to achieve a more effective performance of Commonwealth investigatory functions. The chapter considers some of the problems that arise from the

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119 Australian Law Reform Commission, *Evidence*, ALRC 26 (1985), [911]; and see Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005), Ch 15.

120 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005), Rec 15–1.

application of client legal privilege to federal investigations. It then looks at modification or abrogation of the privilege as one means of addressing these problems, and asks questions about the outcomes that may be achieved by such an approach.

1.97 Chapter 7 raises issues about the types of safeguards that might be put in place if client legal privilege were abrogated or modified, such as placing restrictions on the use of privileged communications obtained by compulsion. It also raises issues concerning safeguards against the abuse of privilege, in particular whether there should be a greater role for professional disciplinary proceedings and legal ethics education.

Process of reform

Advisory Committee

1.98 It is standard operating procedure for the ALRC to establish an expert Advisory Committee to assist with the development of its inquiries. In this Inquiry, the Advisory Committee includes judicial officers from a number of federal and state courts, corporate counsel, regulators, legal practitioners and academics with expertise in the area.[121]

1.99 The Advisory Committee met for the first time on 15 March 2007, and will meet again during the course of the Inquiry to provide advice and assistance to the ALRC. The Advisory Committee has particular value in helping the Inquiry to identify the key issues, as well as in providing quality assurance in the research and consultation effort. The Advisory Committee also will assist with the development of reform proposals as the Inquiry progresses. However, ultimate responsibility for the Report and recommendations remains with the Commissioners of the ALRC.

Community consultation and participation

1.100 Under the terms of its constituting Act, 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.[122] One of the most important features of ALRC inquiries is the commitment to widespread community consultation.[123]

1.101 The nature and extent of this engagement is normally determined by the subject matter of the 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. To the extent that this

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121 A list of Advisory Committee members can be found in the List of Participants at the front of this Issues Paper.

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

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

Inquiry is rather contained in its reach and somewhat technical it requires expert input from agencies, practitioners and judicial officers who have experience in dealing with issues of client legal privilege in practice.

1.102 However, the potentially loaded nature of the conjunction of the words 'legal profession' and 'privilege' in the same phrase in the Terms of Reference ('legal professional privilege'), and the argument of competing 'public interests' for and against the retention, modification or abrogation of the privilege, commend a consultative process that provides opportunity for wider involvement.

1.103 There are several ways in which those with an interest in this Inquiry may participate.

Expressions of interest

1.104 Individuals and organisations may indicate their expression of interest in the Inquiry by contacting the ALRC or applying online at <www.alrc.gov.au>. Those who wish to be added to the ALRC's mailing list will receive press releases and a copy of consultation documents related to the Inquiry.

Submissions

1.105 Individuals and organisations may make submissions to the Inquiry, both after the release of the Issues Paper and again after the release of the Discussion Paper. There is no specified format for submissions. The Inquiry will gratefully accept anything from handwritten notes and emailed dotpoints, to detailed commentary on matters concerning client legal privilege. Submissions can be made by contributing comments online at the ALRC's website. The ALRC also accepts confidential submissions. Details about making a submission may be found at the front of this Issues Paper.

1.106 The ALRC strongly urges interested parties, and especially key stakeholders, to make submissions *prior* to the publication of the Discussion Paper. Once the basic pattern of proposals is established it is hard for the Inquiry to alter course radically. Although it is possible for the Inquiry to abandon or substantially modify proposals for which there is little support, it is more difficult to publicise, and gauge support for, novel approaches suggested to us late in the consultation process.

Direct consultation

1.107 The ALRC maintains an active program of direct consultation with stakeholders and other interested parties. The ALRC is based in Sydney, but in recognition of the national character of the Commission, consultations will be conducted around Australia during the Inquiry. Any individual or organisation with an interest in meeting with the Inquiry in relation to issues raised in this Issues Paper is encouraged to contact the ALRC.

1.108 The Terms of Reference require the ALRC to consult widely with the key stakeholders, including the relevant federal, state and territory authorities. The ALRC has developed a consultation strategy that will allow participation and input across the wide spectrum of stakeholders. In developing this Issues Paper the ALRC has held consultations with former Royal Commissioners, legal practitioners, academics and tax advisers.

Timeframe for the Inquiry

1.109 The ALRC is required to report by 3 December 2007. The ALRC's standard operating procedure is to produce an Issues Paper and a Discussion Paper prior to producing the final report.

1.110 This **Issues Paper** is the first document produced in the course of this Inquiry, and is intended to identify the main issues relevant to the Inquiry, provide background information, and encourage informed community participation. The Issues Paper is intended to stimulate full and open discussion of the issues arising from the Terms of Reference. At this early stage, the Inquiry is genuinely open to all approaches.

1.111 The Issues Paper will be followed by the publication of a **Discussion Paper** in August. The Discussion Paper will contain a more detailed treatment of the issues, and will indicate the Inquiry's current thinking in the form of specific reform proposals. The ALRC will then seek further submissions and undertake a further round of national consultations in relation to these proposals. Both the Issues Paper and the Discussion Paper may be obtained free of charge in hard copy or on CD from the ALRC or may be downloaded free of charge from the ALRC's website <www.alrc.gov.au>.

1.112 As mentioned above, the **Report**, containing the final recommendations, is due to be presented to the Attorney-General by 3 December 2007. Once tabled in Parliament, the Report becomes a public document.[124] The final Report will not be a self-executing document—the Inquiry provides recommendations about the best way to proceed, but implementation is a matter for others.[125] In 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 will be presented to the Attorney-General, it is likely that some of its recommendations will be directed to other government and non-government agencies.

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

125 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.

1.113 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 will specify the nature of any desired legislative change.

In order to be considered for use in the Discussion Paper, submissions addressing the questions in this Issues Paper must reach the ALRC by **4 June 2007**. Details about how to make a submission are set out at the front of this publication.

2. Overview of Client Legal Privilege

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Introduction

2.1 A privilege is essentially a right to resist disclosing information that would otherwise be required to be disclosed.[1] There are a number of 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] Privileges are not only available as part of the rules of evidence, but can also 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

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 Acts: see, for example, the *Parliamentary Privileges Act 1987* (Cth). In Western Australia, parliamentary privilege has recently been criticised in the context of a refusal by the Legislative Council to allow the Corruption and Crime Commission to access parliamentary committee notes. Mr John Hyde MP was quoted as saying: **'**Members of Parliament need to stop being so hairy-chested about a 1689 elite privilege given to rich male landed gentry who happened to have the economic leverage to get elected to an undemocratic parliament': R Taylor, 'Hyde Tells MP's to Hand Over Documents to CCC', *West Australian* (Perth), 27 March 2007, 4.

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.

issue of a subpoena), the answering of interrogatories, the giving of testimony or in the course of an administrative investigation.

2.2 Client legal privilege is perhaps the most frequently discussed and claimed privilege. As outlined in Chapter 1, it developed as a common law protection and has also been recognised under the uniform Evidence Acts.[4] Key modifications to the doctrine over time have included the extension of privilege from only 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]

2.3 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 on *Uniform Evidence Law* (ALRC 102) made a number of recommendations designed to bring the Acts into line with the common law.[9]

2.4 At the present time, the privilege provisions of the *Evidence Act 1995* (Cth) apply only to the adducing of evidence at trial.[10] In all other situations the common law rules persist, unless a statute abrogates the privilege in a particular context.

2.5 This Inquiry is concerned with the interaction between client legal privilege and the investigatory functions of Commonwealth bodies that have coercive information-gathering powers.[11] As the common law governs the matters being considered in this Inquiry, this chapter will focus on the common law doctrine, although some mention will be made of the *Evidence Act* provisions.

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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), see Recs 14–2, 14–3, 14–4.

10 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.

11 The nature of those functions is discussed in Ch 3.

2.6 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.[12] Although this present Inquiry must consider the law as it currently stands, if the recommendations in ALRC 102 are adopted then it will be the *Evidence Act* provisions that 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.

2.7 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 Commonwealth 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.[13]

What is client legal privilege?

Common law

2.8 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.

Advice privilege

2.9 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.

2.10 In *AWB Ltd v Cole*, Young J, after considering a number of authorities as to what amounts to legal advice,[14] 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

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

13 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.

14 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.

'includes professional advice given by lawyers to a client as to what evidence and submissions should be placed before a commission of inquiry'.[15]

Litigation privilege

2.11 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.[16]

2.12 Litigation privilege also will cover other documents brought into existence for the dominant purpose of use in legal proceedings—such as drafts of pleadings, physical evidence such as surveillance tapes or expert reports.[17]

A blurring of the distinction

2.13 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* 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.[18] Otherwise, it was held, it may be difficult for a person seeking legal advice to communicate the problem in respect of which advice is sought without input from a third party.[19] 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.[20]

2.14 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.

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15 *AWB Ltd v Cole* (2006) 152 FCR 382, 410.
16 E Kyrou, 'Under Attack: Legal Professional Privilege' (2007) 81(3) *Law Institute Journal* 33, 33.
17 R Desiatnik, *Legal Professional Privilege in Australia* (2nd ed, 2005), 24.
18 *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217, [39].
19 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.
20 *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217, [87] (Stone J).

> 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.[21]

2.15 The High Court's description of client legal privilege in *The Daniels Corporation International Pty Ltd v Australian Competition v 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.[22]

2.16 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 appellants' 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.[23]

Statute

2.17 The *Evidence Act* 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.

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

22 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 564.

23 *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.

2.18 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.

2.19 It should be noted that under s 118, advice privilege does not presently extend to third party communications, as it does under the common law following the decision in *Pratt.* Under s 118 a third party must be an agent of the client for privilege to apply. In *Westpac Banking Corporation v 789TEN Pty Ltd*, the Court of Appeal of the Supreme Court of New South Wales found that privilege could not be claimed over letters that were sent to PricewaterhouseCoopers (PWC), regarding an audit being conducted of Westpac. 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 no evidence in the case to suggest that PWC was acting as an 'agent' of the bank.[24]

2.20 In ALRC 102, the three Commissions recommended that the s 118 of the *Evidence Act* be amended to replace the words 'client or lawyer' with the word '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.[25]

When privilege can be claimed

Types of proceeding

2.21 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.[26] *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'.[27]

2.22 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.[28]

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24 *Westpac Banking Corporation v 789TEN Pty Ltd* (2005) NSWCA 321, [29].

25 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005), Rec 14–4.

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

27 *Baker v Campbell* (1983) 153 CLR 52, 132 (Dawson J).

28 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.

2.23 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.[29] A party making a claim of privilege must provide the party seeking disclosure with sufficient facts on which they could make a decision about whether the claim for privilege could be supported.[30] Where there is a dispute as to 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 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.[31]

Types of communications

Confidential

2.24 A key feature of the doctrine is that to be protected the communications must be confidential.[32] It has been noted that this characteristic serves as a limitation on the application of the privilege.[33] However, the entirety of a solicitor'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.[34] Privilege also does not attach to evidence of transactions such as contracts or conveyances, even where they are provided to a lawyer for advice or for use in litigation.[35]

2.25 Communications made privately between a lawyer and a client are assumed to be confidential.[36] 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

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29 *Attorney-General for the Northern Territory v Maurice* (1986) 161 CLR 475, 487.
30 *National Crime Authority v S* (1991) 29 FCR 203, 211.
31 *Grant v Downs* (1976) 135 CLR 674 (Stephen, Mason and Murphy JJ), 689.
32 J Hunter, C Cameron and T Henning, *Litigation I—Civil Procedure* (7th ed, 2005), [8.35].
33 R Desiatnik, *Legal Professional Privilege in Australia* (2nd ed, 2005), 28.
34 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.
35 *Baker v Campbell* (1983) 153 CLR 52, 86; R Desiatnik, *Legal Professional Privilege in Australia* (2nd ed, 2005), 29.
36 J Hunter, C Cameron and T Henning, *Litigation I—Civil Procedure* (7th ed, 2005), [8.34]

was unavoidable that the third party was present.[37] Whether or not the client intended the communication to be confidential will also be an important consideration.[38]

2.26 The issue of the form in which the information is held is discussed in Chapter 5.

Purpose of communication

2.27 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*.[39] In 1999, the High Court in *Esso Australia Resources Ltd v Commissioner of Taxation*[40] 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.

2.28 The scope of what may be covered by client legal privilege at common law is potentially expansive. However, the dominant purpose test serves as the primary limitation on its application. The purpose of the creation of the document or communication is the vital question in a claim for client legal privilege.[41] The 'purpose' of the document has been defined as 'the reason why the document was brought into existence'.[42] 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, or whether it was made in accordance with an internal procedure or practice.[43]

2.29 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 influential purpose'.[44] This followed the approach of the United Kingdom courts to the issue.[45] 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.[46]

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37 *R v Braham and Mason* [1976] VR 547. See J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 98.
38 *R v Braham and Mason* [1976] VR 547.
39 *Grant v Downs* (1976) 135 CLR 674.
40 *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49.
41 *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1998) 153 ALR 393.
42 *Waterford v Commonwealth* (1987) 163 CLR 54, 66.
43 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 96.
44 *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.
45 See *Waugh v British Airways Board* [1980] AC 521.
46 R Desiatnik, *Legal Professional Privilege in Australia* (2nd ed, 2005), 40.

Copies

2.30 At common law, the extent to which copies of documents are afforded privilege has been a matter of some contention.[47] 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.[48]

2.31 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.[49] Where a copy is made for the purpose of seeking legal advice or pending litigation the copy becomes a separate communication in its own right to which the dominant purpose test is applied.[50] This rule therefore protects copies of unprivileged documents that become part of the lawyer's brief for litigation.[51]

2.32 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 undermine the administration of justice. A person could make a copy for the purpose of litigation, and then destroy the unprivileged original.[52]

The lawyer

2.33 **Professional capacity.** 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, courts have held that 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.[53]

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47 A Ligertwood, *Australian Evidence* (4th ed, 2004), 293.
48 Ibid, 291.
49 *Australian Federal Police v Propend Finance* (1997) 188 CLR 501, 509.
50 A Ligertwood, *Australian Evidence* (4th ed, 2004), 96.
51 Ibid, 291.
52 *Australian Federal Police v Propend Finance* (1997) 188 CLR 501, 509.
53 *Waterford v Commonwealth* (1987) 163 CLR 54, 70. It should be noted that Brennan J's comments were obiter.

2.34 **In-house counsel.** The fact that a lawyer is employed as 'in-house' counsel does not preclude a claim to client legal privilege in relation to communications between the lawyer and the employer.[54] However, such claims may be more closely scrutinised by 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.[55] In *Seven Network Ltd v News Ltd*, Tamberlin J noted that the fact that in-house counsel may also advise on other matters does not rule them out of claiming privilege.

> 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.[56]

2.35 It has been suggested that where an in-house lawyer is actually 'a player in the transaction', their legal advice will not be privileged.[57] 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.

2.36 **Practising certificate.** Related to the issue of independence is whether a lawyer must have a practising certificate for the purpose of the privilege.[58] 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.[59] Crispin J based this finding on what he considered to be the rationale for client legal privilege,[60] being the public interest in proper representation of clients. Where a legal adviser has no right to represent a client, no privilege should attach.[61] His Honour noted that, in Australian jurisdictions, the statutory right to *practise* law generally depends on the holding of a current practising certificate.[62] In August 2005, the ACT Court of Appeal overturned this decision,

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54 *Sydney Airports Corporation Ltd v Singapore Airlines Ltd and Qantas Ltd* [2005] NSWCA 47.

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

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

57 *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.

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

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

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

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

62 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.

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.[63]

2.37 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 makes it more immediately applicable but the underlying obligations subsist even if a current practising certificate is not held.[64]

2.38 The court cited *Australian Hospital Care v Duggan (No 2)* in support of this finding.[65] 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.[66]

> 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.[67]

When client legal privilege can be lost

2.39 Client legal privilege can be lost in a number of circumstances such as:

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63 *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.

64 Ibid, [21].

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

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

67 *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'.

- where a party has died;
- through waiver of the privilege;
- 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.[68]

2.40 The two major examples where client legal privilege may be lost are discussed here.

Waiver

2.41 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.[69] What is 'unfair in the circumstances' was determined by the conduct of the client. In 1999, the High Court in *Mann v Carnell* focused the common law test on inconsistency, rather than 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.[70]

2.42 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.[71]

2.43 This approach was restated by the Federal Court in *SQMB v Minister for Immigration and Multicultural and Ethnic Affairs*,[72] where it was found that waiver occurs 'when a party does something inconsistent with the confidentiality otherwise contained in the communication'.[73]

2.44 One of the most common examples of implied waiver is where a party raises an issue as to their belief or state of mind (usually in a pleading or court document or to a third party) that indicates the substance of the communication.[74] One of the ways in

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68 See S McNicol, *Law of Privilege* (1992), Ch 2.
69 A Ligertwood, *Australian Evidence* (4th ed, 2004), 296.
70 *Mann v Carnell* (1999) 201 CLR 1, 13. See also A Ligertwood, *Australian Evidence* (4th ed, 2004), 296.
71 *DSE (Holdings) Pty Ltd v Interan Inc* (2003) 127 FCR 499, [14].
72 *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.
73 *SQMB v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 205 ALR 392, [17].
74 E Kyrou, 'Under Attack: Legal Professional Privilege' (2007) 81(3) *Law Institute Journal* 33, 35.

which waiver can be implied is where the person claiming the privilege has made their 'state of mind' an issue in the proceedings, and the legal advice in question is likely to have contributed to that state of mind.[75] 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.[76]

2.45 This issue has particular implications for government decision makers who may be relying on legal advice in making determinations. *Waterford v The Commonwealth* established the general principle that client legal privilege could be claimed by public sector decision makers.[77]

2.46 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. The Commissioner stated that the matters taken into consideration were found in documents over which he had claimed privilege in the matter. In considering 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.[78]

2.47 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.[79]

Fraud or crime exception

2.48 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.[80] Communications made for an illegal purpose, such as an abuse of statutory power, are also not covered

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75 R Desiatnik, *Legal Professional Privilege in Australia* (2nd ed, 2005), 168.

76 *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.

77 *Waterford v Commonwealth* (1987) 163 CLR 54.

78 *Commissioner of Taxation v Rio Tinto* (2006) 151 FCR 341, [54]. Cited in E Kyrou, 'Under Attack: Legal Professional Privilege' (2007) 81(3) *Law Institute Journal* 33, 35.

79 *Commissioner of Taxation v Rio Tinto* (2006) 151 FCR 341, [72]–[74].

80 E Kyrou, 'Under Attack: Legal Professional Privilege' (2007) 81(3) *Law Institute Journal* 33, 104.

by the privilege.[81] The fraud need not be known to the lawyer or the client, and may be that of a third party.[82]

2.49 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.[83]

2.50 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'.[84]

2.51 In order to make out 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.[85] Chief Justice Brennan in *Propend* held that the test was one of there being 'reasonable grounds for believing that the relevant communication was for an improper purpose'.[86] 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.[87]

2.52 There has been some question as to 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,[88] Gaudron and Kirby JJ placed different caveats on the use of hearsay evidence. Gaudron J found that it could not ordinarily be used, although if it were admissible on some other issue it could be relied on if the witness were available for cross-examination.[89] Kirby J found that hearsay evidence could be relied on, but it was insufficient on its own to displace the privilege.[90]

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81 *Attorney-General (NT) v Kearney* (1985) 158 CLR 500.
82 *Capar v Police Commissioner* (1994) 34 NSWLR 715.
83 *AWB v Cole (No 5)* [2006] FCA 1234, [210].
84 Ibid, [211].
85 *O'Rourke v Darbishire* [1920] AC 581.
86 *Australian Federal Police v Propend Finance* (1997) 188 CLR 501, 514.
87 *AWB v Cole (No 5)* [2006] FCA 1234, [218].
88 Dawson, Toohey, Gaudron, and Kirby J. 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.
89 *Australian Federal Police v Propend Finance* (1997) 188 CLR 501, 547.
90 Ibid, 593.

2.53 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 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.[91]

2.54 In defence of the preservation of client legal privilege, it is often argued that the fraud exception operates effectively to stop 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.[92]

2.55 In a submission to the ALRC's Inquiry into the use of civil and administrative penalties in federal regulatory jurisdiction,[93] the Australian Competition and Consumer Commission (ACCC) expressed the view that it remains practically difficult for the ACCC to prove the existence of an improper purpose.[94] The ACCC also submitted to this Inquiry that, as there is no obligation on a notice recipient to inform the ACCC of a claim of client legal privilege, they have no way of knowing whether a valid claim to the privilege has been made.[95]

2.56 The ALRC has been told in this Inquiry that while the fraud exception is often discussed, it is rarely invoked, for the practical reason that it is extremely difficult to make a prima facie case as to the contents of a document you have never seen.[96]

2.57 The ALRC is interested in receiving views on whether the fraud exception is effective in stopping improper claims of client legal privilege, and the practical difficulties for Commonwealth bodies in proving that a communication is not privileged on this basis.

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91 R Desiatnik, *Legal Professional Privilege in Australia* (2nd ed, 2005), 11.
92 *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319, 333.
93 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002).
94 Ibid, 664.
95 Australian Competition and Consumer Commission, *Submission LPP 2*, 14 March 2007.
96 Advisory Committee members, *Advisory Committee meeting*, 15 March 2007.

Question 2–1 A communication made in furtherance of the commission of a fraud or an offence is not protected by client legal privilege. As a practical matter, what are the difficulties for Commonwealth investigatory bodies in proving that a communication is not privileged on the basis of this exception?

Abrogation of the privilege

2.58 In *Principled Regulation* (ALRC 95), the ALRC noted that few Commonwealth statutes expressly remove the operation of client legal privilege.[97] Most federal statutes are silent on the availability of the privilege. Some statutes expressly state that the privilege applies, for example, one statute states that privilege applies in the same way as it does to a witness in a High Court proceeding.[98] This issue is discussed in more detail in Chapter 4.

2.59 Until the *Daniels* case in 2002, it was thought that client legal privilege could be abrogated by implication under certain statutes. In *Yuill*,[99] the first case to remove the privilege by 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*. *Yuill* continues to be relied on by the Australian Securities and Investments Commission (ASIC) as authority that client legal privilege is abrogated under the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act).

2.60 In *Daniels*, the High Court considered whether client legal privilege was abrogated by implication under s 155 of the *Trade Practices Act.* 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'.[100] 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.[101]

2.61 The decisions of the High Court in *Yuill* and *Daniels* are discussed in detail in Chapter 4.

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97 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), [19.9].

98 *Broadcasting Services Act 1992* (Cth) s 200(3).

99 *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319.

100 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 553. (Gleeson CJ, Gaudron, Gummow and Hayne J).

101 Ibid, 553.

Extension to other professionals

Rationale

2.62 Chapter 1 considers the various rationales which are said to underlie the operation of client legal privilege and asks why the privilege should be attracted by the relationship of lawyer and client, and not by other confidential professional relationships. If the underlying rationale of the privilege is to encourage clients to seek professional advice on their legal rights and responsibilities, should the doctrine be extended to other professionals who, while not lawyers, provide what amounts essentially to legal advice?

2.63 It should be noted that in this Inquiry the ALRC will not be considering the more general issue of extending privilege to all other professional communications. In the report on *Uniform Evidence Law*, the ALRC supported adoption of a general qualified confidential relationships privilege (along the lines of s 126A of the *Evidence Act 1995* (NSW)) that would cover other categories of confidential communications.[102] The present Inquiry is focused on the operation of client legal privilege in relation to Commonwealth investigatory bodies and the ALRC will not be making broader recommendations on extension of the privilege in other areas. However, the ALRC considers that it is within the Terms of Reference to look at the underlying rationale for the privilege, and to consider if there is a logical extension of that rationale to other professionals who provide confidential legal advice.

2.64 The 'compliance rationale' for the privilege is discussed in Chapter 1—that 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

2.65 In 1998, the widespread expansion of accounting firms into the arena of legal advice prompted the United States Congress to pass legislation amending the *Internal*

102 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005), Rec 15-1.

Revenue Code to extend client legal privilege to federally authorised tax practitioners.[103] Section 7525 of the Code allows 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.

2.66 'Tax advice' is given the broad meaning of 'advice which is in the individual's authority to practice'.[104] 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.[105] It has no application to state matters. It also does not apply to any communications regarding participation in a corporate tax shelter.[106]

2.67 A number of concerns have been raised 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 changes to a criminal one at a later date.[107] 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 to a lawyer.[108]

New Zealand

2.68 In June 2005, the New Zealand Inland Revenue Department followed the United States 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'.[109]

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103 *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, 9.

104 *Internal Revenue Code(1954)* 26 USC §§ 7525(3)(B).

105 Ibid, §§ 7525(2).

106 Ibid, §§ 7525(3)(B)(b).

107 K Kendall, 'Prospects for a Tax Advisors' Privilege in Australia' (2005) 1(3) *Journal of the Australasian Tax Teachers Association* 46, 10.

108 Ibid, 11.

109 New Zealand Inland Revenue Department, *Tax and Privilege: A Proposed New Structure: A Government Discussion Document — May 2002* (2002) New Zealand Inland Revenue Department <www.taxpolicy.ird.govt.nz/publications/index.php?catid=2> , 9.

2.69 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 applied within one month for a determination by a District Court Judge 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.[110]

2.70 Unlike the United States model, the New Zealand one does not use client legal privilege as the basis for the privilege.[111] Keith Kendall argues that the United States model of tying the tax privilege to common law client legal privilege means that any developments in the common law will impact on the application of the provision. The New Zealand model deliberately separates the statutory tax privilege from the common law.[112]

United Kingdom

2.71 In the United Kingdom, s 20B of the *Tax Management Act 1970* (UK) sets out the privilege for a tax adviser against the powers of the Inland Revenue 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

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110 *Taxation Administration Act 1994* (NZ) s 20B.

111 K Kendall, 'Prospects for a Tax Advisors' Privilege in Australia' (2005) 1(3) *Journal of the Australasian Tax Teachers Association* 46, 14.

112 Ibid, 15.

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.

2.72 The legislative provision 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.

2.73 Section 330 of the *Proceeds of Crime Act 2002* (UK) was amended recently 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'[113] are exempt from the requirement to disclose where the information was received in privileged circumstances.[114]

Australia

2.74 In Australia, only qualified lawyers may give legal advice.[115] 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.[116] Registered patent attorneys may also give advice on patents law.[117]

2.75 In recognition of the type of advice offered by tax agents, and the benefits to compliance of free and frank advice, the Australian Taxation Office (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. Paragraph 7.1.1 of 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 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.

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113 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 2002* (UK) s 330(14).

114 Ibid, s 330(6).

115 See eg, *Legal Profession Act 2004* (NSW) s 14.

116 *Income Tax Assessment Act 1936* (Cth) s 251L(1)(b).

117 *Patents Act 1990* (Cth) Chapter 20.

2.76 This approach is widely described as 'the accountants' concession'.[118] Similar to client legal privilege, the concession is available for advice prepared by an external professional accounting adviser who is independent of the taxpayer.[119] However, it does not cover all confidential advice given and only operates in relation to certain types of documents.

2.77 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.[120]

2.78 Examples of these types of documents include ledgers, journals, working papers for financial statements, profit and loss accounts, balance sheets and document comprising a permanent audit file. These documents will be freely sought by ATO officers.

2.79 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.

2.80 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.

2.81 Documents that would otherwise be covered by the concession may be requested by the ATO in exceptional circumstances. Under the Guidelines, senior ATO officers are authorised to approve the lifting of the concession where the concession has been claimed and the ATO is unable to ascertain from the documents that have been provided 'the facts necessary to determine the taxation consequences of the particular transactions or arrangements'.[121] Where a determination is made that exceptional circumstances exist, the ATO officer must give the person a copy of the

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118 Australian Taxation Office, *Access and Information Gathering Manual* <www.ato.gov.au> at 31 March 2007, [1.19.6].

119 Ibid, [7.7].

120 Australian Taxation Office, *Guidelines to Accessing Professional Accounting Advisors' Papers* <www.ato.gov.au> at 31 March 2007, [2.1].

121 M Carmody, *A Question of Balance: Address to the American Club* (1999) <www.ato.gov.au/newsroom.asp> at 5 April 2007.

decision to lift the concession. This decision is subject to the normal administrative review procedures. Again, this provides the taxpayer with less protection than would be the case if client legal privilege applied, as privilege applies regardless of the circumstances.[122] 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.[123]

2.82 Patent Attorneys are also afforded a privilege under the *Patents Act 1990* (Cth). Chapter 20 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

2.83 While the above schemes 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 logically flow that, where legal advice is being provided by another professional person, such advice should also be given some protection from disclosure.[124]

2.84 To date, these types of concessions have chiefly centred on the area of taxation where an exception specifically allows tax agents to provide legal advice. The ALRC would be interested in hearing whether there were other circumstances in relation to other Commonwealth investigatory agencies where a similar concession should be extended to professionals who provide what amounts to legal advice. For example, advice may be given by non-legal professionals in relation to compliance with environmental or workplace relations legislation.

2.85 The ALRC also would be interested in views about how the accountants' concession is working in practice, and whether an administrative model (as currently available from the ATO), or a legislative model (as in the United States and New Zealand), is the best means for such a concession to be realised.

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122 K Kendall, 'Prospects for a Tax Advisors' Privilege in Australia' (2005) 1(3) *Journal of the Australasian Tax Teachers Association* 46, 8.

123 Ibid, 7.

124 Institute of Chartered Accountants in Australia, *Submission LPP 1*, 14 March 2007.

Question 2–2 The Australian Taxation Office 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 within the confidence of taxpayers and their professional accounting advisers. Are there circumstances in relation to other Commonwealth investigatory agencies where a similar concession should be extended to accountants or other professionals who provide what amounts to legal advice? By what means would such a concession or privilege best be realised—for example, by legislation, regulation or administrative instrument?

Application to corporations

2.86 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*.[125]

2.87 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.[126] 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.[127] Dr Sue McNicol has argued that:

> 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.[128]

2.88 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.[129] 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

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

126 See discussion in Ch 1 of the 'human right' rationale for client legal privilege.

127 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.

128 Ibid, 49.

129 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

> arrangements have made corporate crime and complex fraud one of the most difficult areas for the state to regulate effectively.[130]

2.89 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 ACCC to see the whole picture.[131]

2.90 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 large and powerful and better placed to initiate and defend investigation and litigation. They can do this by being better able to 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*, is likely to be diminished.[132]

2.91 Bruce cites *Grant v Downs*[133] as an early example where concerns have been expressed about whether the privilege is appropriately applied to corporations.

> There is, we should have thought, much to be said for the view that the existence of the privilege makes it more difficult for the opposing party to test the veracity of the party claiming the privilege by removing from the area of documents available for inspection documents which may be inconsistent with that case. To this extent the privilege is an impediment, not an inducement, to frank testimony, and it detracts from the fairness of the trial by denying a party access to relevant documents or at

130 Ibid, 500.
131 *Australian Competition and Consumer Commission v Daniels Corporation International Pty Ltd* (2001) 128 ALR 114, [57].
132 A Bruce, 'The Trade Practices Act 1974 (Cth) and the Demise of Legal Professional Privilege' (2002) 30 *Federal Law Review* 373, 387.
133 *Grant v Downs* (1976) 135 CLR 674.

> least subjecting him to surprise. These difficulties are magnified in cases when privilege is claimed by a corporation.[134]

2.92 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, he 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.[135]

2.93 Kirby J cited the comments of United Kingdom Advocate-General Sir Gordon Slynn in 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.[136]

2.94 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.[137] 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 the shield of privilege it may deter candid, detailed, written advice being given by lawyers and hamper the development of internal corporate compliance programs.

2.95 The ALRC received submissions on this issue during its Inquiry on civil and administrative penalties, but ultimately considered that the issues surrounding the availability of client legal privilege for corporations were beyond the scope of that

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134 Ibid, 686.

135 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 576.

136 Ibid, 576; citing *AM & S Europe Ltd v Commission of the European Communities* [1983] QB 878, 913.

137 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.

Inquiry. The ALRC recommended that these matters be looked at more closely as the subject of a specific inquiry on client legal privilege.[138]

2.96 Although it appears to be a settled area of law, there are compelling arguments both for and against allowing corporations to claim client legal privilege. Accordingly the ALRC is interested in hearing views about whether a change of the law in this area may be desirable.

Question 2–3 Should client legal privilege apply only to natural persons and not to corporations?

138 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), [19.97–19.98].

3. Overview of Commonwealth Bodies with Coercive Information-Gathering Powers

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Introduction

3.1 This chapter considers the investigatory and associated functions of Commonwealth 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 Commonwealth agencies and departments.[1] Where the information is available, the chapter will also address the frequency with which Commonwealth bodies use coercive powers,[2] 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.

3.2 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; as well as functions that are not dependent on the outcome of investigations

1 The ALRC is interested to hear about any Commonwealth body, not discussed in this Chapter, that has coercive information-gathering powers.

2 Only some Commonwealth bodies provide this information in their Annual Reports.

such as: gathering intelligence; conducting audits; and monitoring compliance with Commonwealth regulatory laws.

3.3 There are, of course, important differences in the aims and functions of Commonwealth bodies, and the subject matters with which they deal. Varying coercive powers support the different functions of Commonwealth bodies in a vast array of areas, including: criminal law enforcement; border control and immigration; financial and prudential regulation; revenue; social security; communications; health and aged care; human rights and public administration.[3]

3.4 For the purpose of performing their investigative and associated functions, Commonwealth 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 2 sets out a list of the statutes containing coercive information-gathering powers exercisable by particular Commonwealth bodies. These powers include: the power to compel the production of documents, things or information; the answering of questions; the interception of communications; and the entering of premises to search and seize records. Some Commonwealth 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.

3.5 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.

3.6 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.

3.7 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 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

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3 For the purposes of this chapter, the ALRC has adopted broad categories of federal responsibility, under which it describes the functions of Commonwealth bodies. The functions performed by some Commonwealth bodies may be broader than the boundaries of a particular categorisation—or even fall within more than one category. The ALRC welcomes suggestions from Commonwealth bodies concerning the description of the categories attributed to them.

exercise of such powers may involve a consideration of the application of the privilege against self-incrimination.

Criminal law enforcement

Australian Crime Commission

3.8 The Australian Crime Commission (ACC) is a Commonwealth statutory body established to reduce the incidence and impact of serious and organised crime.[4] 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

3.9 The ACC has a number of intelligence and investigative functions, including: collecting and analysing criminal intelligence; undertaking intelligence operations; investigating matters relating to 'federally relevant criminal activity' crime 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.[5] The ACC Board comprises members from a number of Commonwealth 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); as well as the head of the police force of each state and territory.[6]

ACC's powers

3.10 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.[7] The powers are exercisable by ACC examiners, who are independent statutory officers, appointed by the Governor-General, and the powers 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 illegally obtained assets.[8]

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4 See *Australian Crime Commission Act 2002* (Cth) s 4 for definition of 'serious and organised crime'.
5 See Ibid s 7A. See s 4 for definition of 'federally relevant criminal activity'.
6 See Ibid s 7B.
7 Australian Crime Commission, *Annual Report 2005–06*, 10; *Australian Crime Commission Act 2002* (Cth) ss 4, 7C.
8 Australian Crime Commission, *Annual Report 2005–06*, 38.

3.11 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 Commonwealth agencies 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 offences and certain state offences with a federal aspect.[11] 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.[12]

3.12 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.[13] In that period, the ACC reported the successful disruption of 22 criminal syndicates and 26 organised crime identities[14] and the ACC Board approved the following special investigations:

- *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.
- *Illicit Firearm Markets*—investigates, disrupts and dismantles organised crime groups active in illicit firearm markets in Australia and improves intelligence on the nature and extent of the firearms trafficking threat to Australia.
- *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 the aim of detecting and dismantling underlying organised criminal enterprises of national significance.[15]

9 See *Australian Crime Commission Act 2002* (Cth) ss 28–29.
10 See Ibid ss 29(3A), 30(6).
11 See Australian Crime Commission, *Annual Report 2005–06*, 10, 139.
12 See Ibid, 139. See also *Australian Crime Commission Act 2002* (Cth) ss 22–24; *Telecommunications (Interception and Access) Act 1979* (Cth) s 39.
13 Australian Crime Commission, *Annual Report 2005–06*, 41, Appendix B.
14 Ibid, 8, 39.
15 Australian Crime Commission, *Australian Crime Commission Profile 'Dismantling Serious and Organised Criminal Activity'* (2006) <www.crimecommission.gov.au> at 23 January 2007. See Australian Crime Commission, *Annual Report 2005–06*, 38.

Australian Federal Police

3.13 The Australian Federal Police (AFP) is a statutory authority established under the *Australian Federal Police Act 1979* (Cth) (AFP Act). It falls within the portfolio of the Australian Government Attorney-General's Department, and answers to the Minister for Justice and Customs.[16] The AFP is the primary law enforcement agency responsible for enforcing Commonwealth law.[17] It also takes a lead role in the maintenance of national security.

AFP's functions

3.14 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]

3.15 The AFP investigates Commonwealth 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]

3.16 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 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

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16 Australian Federal Police, *Annual Report 2005–06*, xi.
17 Of 499 indictable matters referred to the Commonwealth Director of Public Prosecutions in 2005–06, 253 of these were referred by the AFP, representing the most indictable matters referred by any agency. See Commonwealth Director of Public Prosecutions, *Annual Report 2005–06*, Table 11.
18 See *Australian Federal Police Act 1979* (Cth) s 8.
19 Australian Federal Police, *Annual Report 2005–06*, xi.
20 Ibid, xi.
21 *Australian Federal Police Act 1979* (Cth) s 8(1)(baa).
22 Ibid s 37(2).

- identifying and confiscating assets involved in or derived from the above criminal activities.[23]

3.17 In 2005–06, the AFP reported that it had undertaken high profile counter-terrorism investigations and airport security; dismantled major fraud syndicates; was involved in dismantling what is suspected to be the third largest clandestine laboratory discovered in the world; arrested and secured the conviction of high profile criminal identities; and assisted in the seizure of millions of dollars of proceeds of crime assets.[24]

3.18 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 2005–06, the bulk of assistance by the AFP to ASIC, for example, involved search or arrest warrants.[27]

AFP's powers

3.19 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 searches of persons;[30] 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:

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23 Australian Federal Police, *Annual Report 2005–06*, 10.

24 Ibid, 2.

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 30 January 2007.

27 Australian Federal Police, *Annual Report 2005–06*, 44.

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.

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.

- 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]

- 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]

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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.
41 *Telecommunications (Interception and Access) Act 1979* (Cth) ss 7(4)–7(10).
42 Ibid s 39.
43 *Crimes Act 1914* (Cth) s 3ZJ.
44 Ibid pt ID div 4, esp s 23WM.

Australian Commission for Law Enforcement Integrity

3.20 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

3.21 The core function of the Integrity Commissioner is to investigate corruption within Australian Government law enforcement agencies, including the AFP and the ACC, as well as any other Commonwealth agency that has a law enforcement function and is prescribed in the regulations. 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.[48] The Integrity Commissioner is required to give priority to serious or systemic corruption in carrying out his or her functions.[49]

3.22 The known incidence of corruption in the AFP and the ACC is infrequent.[50] However, the Attorney-General has expressed the view that it is important that safeguards are in place to preserve integrity in law enforcement[51] and to establish a body that would detect and investigate corruption in the AFP or ACC 'should it arise'.[52]

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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 *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 15.

49 Ibid s 16.

50 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).

51 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.

52 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

Integrity Commissioner's powers

3.23 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.[53] 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;[54]
- summon a person to attend a hearing to give sworn evidence or to produce documents or things, overriding the privilege against self-incrimination;[55] 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.[56]

3.24 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, further evidence or produce documents or things relevant to an investigation.[57]

3.25 Authorised officers of ACLEI, including the Integrity Commissioner, also have the same powers of arrest as a police constable[58] and are able to apply for and execute warrants to search premises and persons for the purposes of investigating a corruption issue.[59] The LEIC Act sets out the scope of the powers to search.[60] 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.[61] The power to search persons extends to searching any aircraft, vehicle or vessel that the person had operated or occupied

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Customs), 'Commonwealth to Set Up Independent National Anti-Corruption Body' (Press Release, 16 June 2004).

53 Revised Explanatory Memorandum, Law Enforcement Integrity Commissioner Bill 2006 (Cth), 2.

54 *Law Enforcement Integrity Commissioner Act 2006* (Cth) ss 75, 76.

55 Ibid ss 83, 84.

56 Ibid s 105.

57 Ibid s 97.

58 Ibid s 139.

59 See Ibid ss 108, 109, 111 (warrants by telephone, fax, email).

60 See, eg, Ibid ss 112, 113, 121.

61 See Ibid ss 112(b), 121(1).

within 24 hours before the search began, for things specified in the warrant.[62] Authorised officers also have the power to apply for telephone intercept warrants and warrants authorising the use of surveillance devices.[63]

3.26 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.[64]

3.27 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.[65]

3.28 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 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.[66]

Prosecutions

Office of the Commonwealth Director of Public Prosecutions

3.29 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 Commonwealth criminal justice system. The CDPP does not have investigatory functions or powers—its main functions are to prosecute offences against Commonwealth law and to initiate court proceedings in order to confiscate the

62 See Ibid s 113.

63 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]; *Telecommunications (Interception and Access) Act 1979* (Cth) s 39; *Surveillance Devices Act 2004* (Cth) ss 6, 14.

64 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].

65 See, eg, *Law Enforcement Integrity Commissioner Act 2006* (Cth) ss 78, 90, 94.

66 See Ibid, div 4.

proceeds of Commonwealth crime.[67] It can only exercise these functions when there has been an investigation by an investigative agency.

3.30 The CDPP regularly provides advice and assistance to Commonwealth investigators and works closely with them.[68] The decision whether to investigate a particular matter and refer that matter to the CDPP is a matter for each investigative agency.[69] 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.

3.31 During 2005–06, the CDPP received referrals from 32 Commonwealth 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.[70] Centrelink refers the largest number of briefs to the CDPP of any agency.[71]

3.32 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.[72]

3.33 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:

- 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.[73]

3.34 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;

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67 However, the CDPP has some information-gathering powers under the *Proceeds of Crime Act 2002* (Cth) ch 3, including the power to examine persons. There were 49 compulsory examinations under the Act during 2005–06: Commonwealth Director of Public Prosecutions, *Annual Report 2005–06*, 79.

68 See Commonwealth Director of Public Prosecutions, *Annual Report 2005–06*, 2.

69 See Commonwealth Director of Public Prosecutions, *The Office of the Commonwealth Director of Public Prosecutions* <www.cdpp.gov.au/AboutUs/TheOffice/> at 24 January 2007.

70 See Commonwealth Director of Public Prosecutions, *Annual Report 2005–06*, 2, Table 11.

71 See Ibid, 10, Table 11.

72 Ibid, 1.

73 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* <www.cdpp.gov.au/Prosecutions/Policy/> at 29 January 2007.

- 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 of and in the name of the Commonwealth in connection with the recovery of tax.[74]

Financial markets

Australian Competition and Consumer Commission

3.35 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.[75] Its primary responsibility is to ensure that individuals and businesses comply with Commonwealth fair trading, competition and consumer protection laws.[76] The ACCC promotes effective competition and informed markets—for example, by preventing price fixing; encourages fair trading; protects consumers; and regulates infrastructure service markets and other markets where competition is restricted, including the electricity, gas, telecommunications and transport sectors.[77]

3.36 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.[78]

ACCC's functions

3.37 The scope and nature of the ACCC's functions vary significantly across the various parts of the TPA and those under other statutes.[79] However, undertaking enforcement action has been described as the 'cornerstone' of the agency.[80] The ACCC is responsible for enforcing certain prohibitions in the TPA, such as: certain anti-

74 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 24 January 2007.

75 The ALRC has included the ACCC under the broad heading of 'financial markets'—although it may be that the ACCC's brief is wider than this.

76 Australian Competition and Consumer Commission, *Annual Report 2005–06*, 14.

77 Ibid, 14–16, 19.

78 Australian Competition and Consumer Commission, *What We Do* <www.accc.gov.au/content/index.phtml/itemId/54137/fromItemId/3744> at 12 March 2007.

79 Australian Competition and Consumer Commission, *Collection and Use of Information*, 1 October 2000, 2.

80 Australian Competition and Consumer Commission, *Annual Report 2005–06*, 3.

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.[81] 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.[82]

3.38 The ACCC is also responsible for investigating, and if necessary taking enforcement action in relation to, non-notified price increases of goods and services declared under the *Prices Surveillances Act 1983* (Cth).[83]

3.39 The ACCC has identified the detection and prosecution of cartels as a major priority,[84] 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.[85]

ACCC's powers

3.40 The ACCC has a number of coercive information-gathering powers available.[86] Some of these powers have not been used or have been used infrequently.[87] The ACCC generally prefers to obtain its information through cooperation,[88] because this is 'more efficient, less time-consuming and more flexible than the alternative practice of obtaining information by using its coercive powers'.[89] However, there are a number of 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.[90]

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81 Australian Competition and Consumer Commission, *Enforcement Priorities* <www.accc.gov.au/content/index.phtml/itemId/344494> at 7 February 2007.

82 Australian Competition and Consumer Commission, *Annual Report 2005–06*, 17.

83 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, 2; Australian Competition and Consumer Commission, *Collection and Use of Information*, 1 October 2000, 10.

84 Australian Competition and Consumer Commission, *Annual Report 2005–06*, 26.

85 Ibid, 5.

86 See, eg, *Trade Practices Act 1974* (Cth) ss 65Q(1), 95S, 95ZK, 151BK, 155.

87 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. See Australian Competition and Consumer Commission, *Submission LPP 2*, 14 March 2007.

88 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.

89 Australian Competition and Consumer Commission, *Collection and Use of Information*, 1 October 2000, 6.

90 Ibid, 6.

3.41 Section 155 of the TPA is the ACCC's most widely used coercive information-gathering power,[91] although the decision to issue a s 155 notice is not taken lightly.[92] Prior to issuing a notice, the ACCC will consider whether the information is otherwise available, including whether it would be provided voluntarily.[93] 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.[94] 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.

3.42 In 2005–06, the ACCC reported that it had issued 347 notices under its powers under s 155 to compulsorily acquire information; 124 notices to provide information in writing; 135 notices to provide documents; 88 notices to appear in person; and that no authorities were issued to enter premises and inspect documents.[95] 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.[96]

Australian Securities and Investments Commission

3.43 ASIC is an independent Commonwealth 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.[97]

ASIC's functions

3.44 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

91 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.
92 Ibid, 6.
93 Ibid, 6.
94 See *Trade Practices Act 1974* (Cth) s 155(1).
95 Australian Competition and Consumer Commission, *Annual Report 2005–06*, 43.
96 Ibid, 5.
97 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).

with functions and powers.[98] Its functions include investigatory functions conferred on it by the legislation that it administers, as well monitoring and promoting market integrity in relation to the financial and payments systems.[99]

3.45 ASIC may commence an investigation where it suspects that there may have been a contravention of 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.[100] 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.[101]

3.46 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, the Westpoint group, the National Australia Bank foreign currency traders, James Hardie, and the cross-agency tax-related investigation, 'Project Wickenby'.[102] In 2005—06, the CDPP reported that it dealt with 34 defendants on summary charges and 30 defendants on indictable charges, which were referred to it by ASIC.[103]

ASIC's powers

3.47 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;[104]
- inspect books;[105]
- require the production of books, records or information;[106]

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98 *Australian Securities and Investments Commission Act 2001* (Cth) s 1(2). Enforcement action can be in the nature of criminal, civil or administrative proceedings.

99 Ibid ss 11, 12A.

100 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.

101 Ibid s 14.

102 Australian Securities and Investments Commission, *Annual Report 2005–06*, 3, 4, 18.

103 Commonwealth Director of Public Prosecutions, *Annual Report 2005–06*, Table 11.

104 *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.

105 *Australian Securities and Investments Commission Act 2001* (Cth) s 29.

106 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. See Australian Securities and Investments Commission, *Submission LPP 5*, 29 March 2007.

- enter premises and inspect, take extracts from, and copy, records;[107] 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.[108]

3.48 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.[109]

3.49 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' to include what is in a person's custody or control.[110] 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.[111] Therefore, a notice issued under this provision can require production of documents held by a person's solicitor on behalf of that person.[112]

3.50 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.[113] In certain circumstances, ASIC officers can apply for a warrant to seize books not produced pursuant to a notice.[114] 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.[115]

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107 See, eg, *Retirement Savings Account Act 1997* (Cth) ss 94, 99; *Superannuation Industry (Supervision) Act 1993* (Cth) ss 256, 268.

108 *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).

109 See *Australian Securities and Investments Commission Act 2001* (Cth) s 28.

110 *Corporations Act 2001* (Cth) s 86.

111 *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.

112 A Black, 'Representation of Clients in Investigations by the Australian Securities & Investments Commission' (2005) (June–August) *Commercial Law Quarterly* 16, 17.

113 See *Australian Securities and Investments Commission Act 2001* (Cth) s 63.

114 See Ibid s 35.

115 See Ibid ss 72–73.

3.51 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 the ASIC Act Part 3 Division 3, is protected against liability for breach of the duty of confidentiality.[116] 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 to ASIC relevant to that investigation.

Australian Prudential Regulation Authority

3.52 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.[117] APRA was established in 1998 following recommendations from the Wallis Inquiry that a single prudential regulator be set up for the financial services sector. It brought together the prudential supervisory responsibilities of 11 separate agencies.[118]

APRA's functions

3.53 The *Australian Prudential Regulation Authority Act 1998* (Cth) (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.[119]

3.54 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.[120]

3.55 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.[121] Those functions include supervising, monitoring and investigating certain participants in the financial services industry. In performing its functions and exercising its powers, APRA is

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116 See Ibid s 92.

117 Australian Prudential Regulation Authority, *About APRA Home* <www.apra.gov.au/aboutApra/> at 7 February 2007.

118 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.

119 *Australian Prudential Regulation Authority Act 1998* (Cth) s 8(1).

120 Australian Prudential Regulation Authority, *Annual Report 2006*, 1.

121 *Australian Prudential Regulation Authority Act 1998* (Cth) s 9.

directed to 'balance the objectives of financial safety and efficiency, competition, contestability and competitive neutrality'.[122]

3.56 APRA has a number of investigatory functions. For example, it can:

- investigate, in certain circumstances, the affairs of an authorised deposit institution;[123]
- 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; [124]
- investigate designated security trust funds[125] and, in certain circumstances, a body corporate that is a general insurer or an authorised non operating holding company, including where it suspects that the body corporate has contravened a provision of the *Insurance Act 1973* (Cth);[126]
- investigate the life insurance business of a life company or an associated company;[127]
- 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);[128] 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.[129]

3.57 In 2005–06, APRA reported that seven investigations were in progress, including some carrying on from previous years.[130]

> Complex investigations typically span two or three financial years, reflecting the reality that the task of fact finding and evidence gathering is a slow and complex

122 Ibid s 8(2).
123 *Banking Act 1959* (Cth) ss 13, 13A.
124 See Ibid s 61.
125 *Insurance Act 1973* (Cth) s 79.
126 Ibid s 52.
127 See *Life Insurance Act 1995* (Cth) ss 137–138.
128 See *Retirement Savings Account Act 1997* (Cth) s 95
129 See *Superannuation Industry (Supervision) Act 1993* (Cth) s 263.
130 Australian Prudential Regulation Authority, *Annual Report 2006*, 19.

> process, particularly where enforcement action is a likely consequence and procedural fairness has to be scrupulously observed.[131]

3.58 Investigations conducted by APRA in 2005–06 included investigations into the use of 'sham' reinsurance arrangements designed to disguise the true financial position of a general insurance company; and an investigation into the marketing and promotion of complex financial reinsurance products by General Reinsurance Australia Limited.[132]

Approach to enforcement

3.59 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 identify weaknesses in a supervised institution at an early stage and to work cooperatively with that institution to remedy those weaknesses'.[133] About 7% of APRA's staffing resources are devoted to enforcement activity.[134]

APRA's powers

3.60 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.[135] 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,[136] while in other cases, the powers can be exercised only for the purposes of an investigation.[137] In some instances, a power can be exercised by APRA either for the purposes of an investigation or for monitoring purposes.[138]

Australian Transaction Reports and Analysis Centre

3.61 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)

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131 Ibid, 19.
132 Ibid, 19.
133 Ibid, 18.
134 Ibid, 18.
135 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.
136 See, eg, *Superannuation Industry (Supervision) Act 1993* (Cth) ss 254(2), 255.
137 See, eg, Ibid ss 269–70.
138 See, eg, s 55.

(FTR Act) and continues in existence under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth).[139]

AUSTRAC's functions

3.62 AUSTRAC's mission is to 'make a valued contribution towards a financial environment hostile to money laundering, major crime and tax evasion'.[140] 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.[141] 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.[142] AUSTRAC's functions, although not investigatory, assist its partner agencies in the investigation and prosecution of criminal and terrorist enterprises.[143] The data contained in financial transaction reports may indicate illegal activity, assisting partner agencies to combat major crimes including money laundering, financing of terrorism, tax evasion and drug trafficking.[144]

3.63 The function of AUSTRAC is to assist its CEO in the performance of his or her functions,[145] 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 *Anti-Money Laundering and Counter-Terrorism Financing Act*, and to promote compliance with that Act.[146]

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139 See *Financial Transaction Reports Act 1988* (Cth) s 3, definition of 'AUSTRAC'; *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 209.
140 Australian Transaction Reports and Analysis Centre, *Annual Report 2005–06*, 16.
141 See *Financial Transaction Reports Act 1988* (Cth) ss 7, 16.
142 Australian Transaction Reports and Analysis Centre, *Annual Report 2005–06*, 16.
143 Ibid, 16.
144 Ibid, 17.
145 *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 210.
146 Ibid s 212. See also functions under *Financial Transaction Reports Act 1988* (Cth) s 38.

AUSTRAC's powers

3.64 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.[147] Those powers are used to address systemic non-compliance.[148] Failure to comply with a notice under s 27E(3) of the Act is an offence, carrying a maximum penalty of two years' imprisonment.[149] Under the *Anti-Money Laundering and Counter-Terrorism Financing Act*, authorised officers of AUSTRAC have powers to apply for a monitoring warrant[150] and to enter premises by consent or under a monitoring warrant;[151] 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;[152]
- ask questions of the occupier of the premises or of any person on the premises, and require those persons to produce documents.[153]

3.65 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.[154] Authorised officers of AUSTRAC also have general powers to obtain information and documents[155] and to issue notices to reporting entities to produce documents.[156] Failure to comply with these requirements is an offence.[157]

Revenue

Australian Taxation Office

3.66 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

147 *Financial Transaction Reports Act 1988* (Cth) ss 27C–27E.
148 Australian Transaction Reports and Analysis Centre, *Annual Report 2005–06*, 28.
149 See *Financial Transaction Reports Act 1988* (Cth) s 28.
150 *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 159.
151 Ibid s 147.
152 Ibid s 148.
153 Ibid s 150.
154 See Ibid s 150.
155 Ibid s 167.
156 Ibid s 202.
157 Ibid ss 167(3), 204.

systems supporting the tax system, collecting revenue (excluding customs duty) and administering regulatory and expenditure programs.[158]

3.67 Most of the Acts administered by the ATO give the Commissioner or delegated officers rights of access to information and documents. The ATO *Access and Information Gathering Manual* lists 22 acts that contain powers to enter and remain on premises and access documents.[159] 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).

3.68 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 authorized 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.

3.69 The *Taxation Administration Act 1953* (Cth) contains penalty provisions, including an offence of refusing a request to provide information or answers questions pursuant to a taxation law.[160]

3.70 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

158 Australian Taxation Office, *Annual Report 2005–06*, 2.

159 Australian Taxation Office, *Access and Information Gathering Manual* <www.ato.gov.au> at 31 March 2007, [1.1.7]. These include the *Fringe Benefits Tax Assessment Act 1986* (Cth) ss 127–128; the *Income Tax Assessment Act 1936* (Cth) ss 263–264; the *Product Grants and Benefits Administration Act 2000* (Cth) ss 42, 45, 48; the *Petroleum Resource Rent Tax Assessment Act 1987* (Cth) s 108; the *Superannuation Contributions Tax (Assessment and Collection) Act 1997* (Cth) s 38; the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997* (Cth) ss 32–33; the *Superannuation Guarantee (Administration) Act 1992* (Cth) s 76; the *Taxation Administration Act 1953* (Cth) ss 13F, 66; and the *Termination Payments Tax (Assessment and Collection) Act 1997* (Cth) s 26(1).

160 *Taxation Administration Act 1953* (Cth) ss 8C, 8D.

into certain industries where there is no suggestion of a particular breach.[161] Similarly, although s 264 is confined to obtaining information or evidence concerning the income or assessment of any person, it may equally apply to innocent situations where the ATO is reconciling information provided by a person with information obtained from another source.[162] Richard Travers notes that s 264 notices are often simply used as a formal mechanism of communication between the Commissioner and a taxpayer.[163] 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.

3.71 The ATO has significant discretion in relation to the use of its information-gathering powers. The Taxpayers' Charter[164] 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 only will be used 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.[165]

3.72 The obligation under ss 263 and 264 is expressed in general terms, and not expressly subject to any qualification.[166] However, as discussed in Chapter 4, this does not mean that the provisions are not subject to common law rights.

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161 R Travers, 'Confidentiality of Legal Advice after Australian Competition and Consumer Commission v Daniels Corporation' (2002) 9 *Competition and Consumer Law Journal* 289, 302.

162 Ibid, 302.

163 Ibid, 305.

164 Australian Taxation Office, *Taxpayers' Charter: Fair Use of Our Access and Information Gathering Powers* (2007) <www.ato.gov.au/content/downloads/N2559book9web.pdf> at 2 April 2007.

165 Ibid.

166 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

3.73 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.[167]

3.74 The Inspector-General has powers to compel production of documents by tax officials and to take evidence from tax officials where necessary. Division 3 of the *Inspector-General of Taxation Act 2003* (Cth) grants the Inspector-General powers to compel the Commissioner of Taxation and tax officials to provide information or answer questions relevant to a review.[168] It is an offence for a tax officer to fail to comply with a notice from the Inspector-General.[169]

Intelligence and security

Australian Security Intelligence Organisation

3.75 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.[170]

ASIO's functions

3.76 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.[171] ASIO is not a law enforcement agency. It does not undertake *criminal* investigations and ASIO officers have no power of arrest.[172]

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167 Australian Government Inspector-General of Taxation, *Website* <www.igt.gov.au> at 11 April 2007.
168 *Inspector-General of Taxation Act 2003* (Cth) ss 14, 15.
169 Ibid s 15(6).
170 Australian Security Intelligence Organisation, *About ASIO* <www.asio.gov.au/About/Content/what.htm> at 12 February 2007.
171 Ibid; *Australian Security Intelligence Organisation Act 1979* (Cth) s 17.
172 Australian Security Intelligence Organisation, *Annual Report 2005–06*, vii.

ASIO's powers

3.77 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.[173] ASIO has powers to require information or documents from operators of aircraft or vessels.[174] 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[175] and tracking devices relating to persons and to objects;[176]
- intercept communications;[177]
- access computers;[178]
- enter and search premises;[179] and
- examine postal articles and delivery service articles.[180]

3.78 Proposals to use special powers are subject to 'rigorous internal consideration and approvals at a senior level'.[181] The use of special powers under the ASIO Act[182] or telecommunication interception legislation[183] requires that 'the subject's activities are, or are reasonably suspected to be, or are likely to be, prejudicial to security'.[184] In the majority of cases, investigations are resolved through less intrusive means.[185]

3.79 ASIO also can seek warrants for the questioning of persons for the purpose of investigating terrorism.[186] In limited circumstances, the warrants may authorise the

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173 Australian Security Intelligence Organisation, *About ASIO: Frequently Asked Questions About ASIO* <www.asio.gov.au/About/Content/faq.htm> at 12 February 2007.
174 *Australian Security Intelligence Organisation Act 1979* (Cth) s 23.
175 Ibid s 26.
176 Ibid ss 26B, 26C.
177 See *Telecommunications (Interception and Access) Act 1979* (Cth) pt 2–2.
178 *Australian Security Intelligence Organisation Act 1979* (Cth) s 25A.
179 Ibid s 25.
180 Ibid ss 27, 27AA. See also Australian Security Intelligence Organisation, *About ASIO: Frequently Asked Questions About ASIO* <www.asio.gov.au/About/Content/faq.htm> at 12 February 2007.
181 Australian Security Intelligence Organisation, *Annual Report 2005–06*, 45.
182 See *Australian Security Intelligence Organisation Act 1979* (Cth) pt III div 2.
183 *Telecommunications (Interception and Access) Act 1979* (Cth) pt 2–2.
184 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/attorney.htm> at 12 February 2007, [2.14].
185 Australian Security Intelligence Organisation, *Annual Report 2005–06*, 43.
186 See *Australian Security Intelligence Organisation Act 1979* (Cth) ss 34D, 34E.

detention of a person.[187] 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.[188] The Inspector-General of Intelligence and Security may be present during any questioning or detention under a warrant. ASIO executed one questioning warrant during 2005–06, and this warrant did not authorise detention.[189]

Guidelines on performance of functions

3.80 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.[190] 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.[191]

3.81 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 who may be prepared to engage in or promote activities of security concern, including their plans and capabilities.[192]

3.82 In relation to ASIO's function of obtaining intelligence relevant to security, the Guidelines provide that ASIO's investigations shall be of two types:

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187 See Ibid ss 34F, 34G.

188 Australian Security Intelligence Organisation, *About ASIO: Frequently Asked Questions About ASIO* <www.asio.gov.au/About/Content/faq.htm> at 12 February 2007.

189 Australian Security Intelligence Organisation, *Annual Report 2005–06*, 45.

190 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/attorney.htm> at 12 February 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/attorney.htm> at 12 February 2007.

191 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/attorney.htm> at 12 February 2007, [3.6].

192 Ibid, [3.7].

> (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.[193]

3.83 The Guidelines contain provisions regarding the bases for, authorisation, conduct and review of, investigations.

3.84 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.[194]

Inspector-General of Intelligence and Security

3.85 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 (ASIS);
- Defence Signals Directorate (DSD);
- Defence Imagery and Geospatial Organisation (DIGO);
- Defence Intelligence Organisation (DIO); and
- Office of National Assessments (ONA).[195]

3.86 The office was established by the *Inspector-General of Intelligence and Security Act 1986* (Cth) (IGIS Act) following recommendations made by Justice Robert Hope in the Royal Commission on Australia's Security and Intelligence Agencies (RCASIA)

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193 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/attorney.htm> at 12 February 2007, [2.2].

194 Australian Security Intelligence Organisation, *Annual Report 2005–06*, 41.

195 Inspector-General of Intelligence and Security, *Annual Report 2005–06*, 1.

General Report and the RCAISA Report on the Australian Security Intelligence Organisation that such an office be created.[196]

3.87 The IGIS's role fulfils an important public interest in ensuring that the AIC is kept accountable. The functions of IGIS are set out in the IGIS Act.[197] 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,[198] or on request from the Prime Minister.[199] 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 about 60% of the office's time.[200]

> Inspection activities have assumed even sharper importance in recent years because of the need to monitor and review use of the special powers and capabilities made available to agencies engaged in counter-terrorism work.[201]

3.88 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.[202]

3.89 Examples of inquiries that have been conducted under the IGIS Act include:

- whether the AIC had prior intelligence warning of the Bali bombings;[203]
- investigating allegations about DSD's conduct in respect of the Tampa affair;[204] and
- inquiring into ASIO' s issue of an adverse security assessment against a United States citizen, which led to his removal from Australia.[205]

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196 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.
197 See *Inspector-General of Intelligence and Security Act 1986* (Cth) ss 8, 9, 9A.
198 Ibid s 8.
199 Ibid s 9.
200 Inspector-General of Intelligence and Security, *Annual Report 2005–06*, 3.
201 Ibid, 3.
202 *Inspector-General of Intelligence and Security Act 1986* (Cth) s 8.
203 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.
204 Ibid, 16.
205 Inspector-General of Intelligence and Security, *Annual Report 2005–06*, viii, 7.

3.90 Approximately 30–40% of IGIS's resources are dedicated to inquiry work.[206] The IGIS must conduct inquiries in private.[207] This is because the IGIS 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.[208]

3.91 The IGIS has, and uses, Royal Commission type powers when conducting a full inquiry.[209] 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.[210] The IGIS can compel a person to give it information in writing, and to produce documents relevant to an inquiry[211] It is an offence not to comply with these requirements.[212] The IGIS also has the capacity to enter agencies' premises for the purposes of an inquiry.[213]

Public administration

Commonwealth Ombudsman

Commonwealth Ombudsman's functions

3.92 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'.[214] 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.[215] The *Ombudsman Act* confers on the Ombudsman the specialist roles of Defence Force Ombudsman, Immigration Ombudsman, Postal Industry Ombudsman, and Taxation Ombudsman.[216] The three major statutory roles of the Ombudsman are to:

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206 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.

207 *Inspector-General of Intelligence and Security Act 1986* (Cth) s 17(1).

208 Inspector-General of Intelligence and Security, *Annual Report 2005–06*, 1.

209 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.

210 *Inspector-General of Intelligence and Security Act 1986* (Cth) s 18(3)–(5).

211 See Ibid s 18(1)–(2).

212 Ibid s 18(7).

213 Ibid s 19.

214 Commonwealth Ombudsman, *Annual Report 2005–06*, 11.

215 *Ombudsman Act 1976* (Cth) s 4.

216 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.

- investigate and review the administrative action of Australian Government officials and agencies, upon receipt of complaints;[217]

- investigate, on the initiative or 'own motion' of the Ombudsman, the administrative actions of Australian Government agencies;[218] 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.[219]

3.93 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 an agency take corrective action.[220]

3.94 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 minister or by a justice or judge.[221] 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.[222] 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.[223]

3.95 The bulk of the work of the Ombudsman is conducting complaint based and own motion investigations.[224] During 2005–06, the Ombudsman investigated complaints made about 104 Australian Government departments and agencies.[225] In

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217 See *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.

218 See Ibid s 5(1)(b). Own motion investigations often arise from insights gained from handling individual complaints. See Commonwealth Ombudsman, *Annual Report 2005–06*, 11.

219 Commonwealth Ombudsman, *Annual Report 2005–06*, 11. 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.

220 Ibid, 11–12. See also *Ombudsman Act 1976* (Cth) pt II div 2 in relation to the reporting powers of the Ombudsman.

221 See *Ombudsman Act 1976* (Cth) s 5(2).

222 Ibid s 6.

223 Ibid s 8.

224 Commonwealth Ombudsman, *Annual Report 2005–06*, 11.

225 Ibid, 4. 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 Multicultural Affairs. See Commonwealth Ombudsman, *Annual Report 2005–06*, 56.

that time, it received 28,227 approaches and complaints,[226] and of those finalised 16,507.[227] It also completed seven own motion and major investigations, which led to 51 individual agency recommendations—49 of which were accepted by agencies.[228]

Commonwealth Ombudsman's powers

3.96 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.[229] The Ombudsman also may examine a person on oath or affirmation.[230] 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.[231] In addition, the Ombudsman may apply to the Federal Court for an order directing the person to comply.[232] 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.[233]

Building and construction

Office of the Australian Building and Construction Commissioner

3.97 The Office of the Australian Building and Construction Commissioner (ABCC) was established by the *Building and Construction Industry Improvement Act 2005* (Cth) (the BCII Act) and, following the Report of the Royal Commission into the Building and Construction Industry,[234] commenced operations on 1 October 2005. It absorbed the Building Industry Taskforce which operated from 1 October 2002.[235] The ABCC's purpose is to reform conduct in the building and construction industry,[236] and it has coercive information-gathering powers in order to assist it to achieve that purpose. [237]

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226 Commonwealth Ombudsman, *Annual Report 2005–06*, 4.
227 Ibid, 23.
228 Ibid, 7.
229 *Ombudsman Act 1976* (Cth) s 9.
230 Ibid s 13.
231 Ibid s 36.
232 Ibid s 11A(2).
233 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.
234 See Office of the Australian Building and Construction Commissioner, *Annual Report 2005–06*, 6; 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), 3.
235 Office of the Australian Building and Construction Commissioner, *Annual Report 2005–06*, 12.
236 Ibid, 12.
237 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.

3.98 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.[238]

3.99 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.[239] 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'.[240] The ABCC has also stated that it only uses these powers as a last resort.[241] The powers can only be used for investigation into a contravention by a building industry participant of a designated building law.[242] 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.[243]

3.100 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.[244]

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238 *Building and Construction Industry Improvement Act 2005* (Cth) s 10.
239 Ibid s 52.
240 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].
241 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.
242 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].
243 *Building and Construction Industry Improvement Act 2005* (Cth) s 52(1).
244 Office of the Australian Building and Construction Commissioner, *Annual Report 2005–06*, 8.

3.101 As at 30 June 2006, the ABCC reported that it had finalised 51 investigations and 74 were continuing. Trade unions were the subject of the majority of its investigations, and the major breaches investigated were industrial action, coercion and agreement/dispute resolution.[245] During 2005–06, the compulsory interview power was exercised on 27 occasions,[246] and 29 notices to attend and answer questions were issued.[247] Since the commencement of the ABCC, the majority of notices to attend and answer questions have been served on individual workers.[248] The ABCC has stated that 'the compliance powers have proven to be a particularly effective method of obtaining information from reluctant witnesses'.[249]

Social security

Centrelink

3.102 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'.[250] Centrelink is a service provider to 6.49 million customers in respect of 9.89 million individual entitlements.[251] Its clients include those looking for work, families, retired persons, sole parents, students, and young people.

3.103 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.[252] 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.[253] 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

245 Ibid, 24.
246 Ibid, 8.
247 Ibid, 28.
248 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].
249 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].
250 Centrelink, *About Us Index* <www.centrelink.gov.au/internet/internet.nsf/about_us/index.htm> at 23 February 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.
251 Centrelink, *Annual Report 2005–06*, table 1, 9.
252 *Commonwealth Services Delivery Agency Act 1997* (Cth) s 6A.
253 Ibid s 8.

- conducting litigation or proceedings related to the provision of services.[254]

3.104 In the period 2005–06, Centrelink reported that it had undertaken 110 fraud investigations and field operations and identified $34.7 million in savings and debts.[255] During the same period the CDPP prosecuted 2,855 Centrelink cases with a conviction rate of 98 %.[256]

> Centrelink takes a 'whole of government' approach to fraud detection and investigation. In accordance with the Australian Government Investigation Standards, Centrelink uses a range of measures to detect and investigate fraud. Activities include traditional desk based reviews and field reviews. The measures also include joint field operations involving [other Commonwealth, state, territory government departments and agencies].[257]

3.105 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.[258] 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 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.[259]

Health and aged care

Medicare Australia

3.106 Medicare Australia (Medicare) is an Australian government agency within the DHS. Its objective is to assist in improving health outcomes in Australia.[260] Medicare works in collaboration with the Department of Health and Ageing to achieve the health policy objectives of the Australian Government.[261] 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

254 Ibid s 7. These functions are similar to those conferred on Medicare Australia.
255 Centrelink, *Annual Report 2005–06*, 20.
256 Ibid, 29.
257 Ibid, 28.
258 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) s 343–345.
259 See *Social Security (Administration) Act 1999* (Cth) ss 63–64.
260 Medicare Australia, *About Us* <www.medicareaustralia.gov.au/about_us/index.shtml> at 14 February 2007.
261 Ibid.

Donor Register; the Australian Childhood Immunisation Register; and Special Assistance Schemes, including Bali 2005 Special Assistance.[262]

Medicare's functions

3.107 The function of Medicare is to assist the CEO in the performance of his or her functions.[263] 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.[264] 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.[265]

3.108 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).[266]

3.109 Medicare's 'program review function is responsible for preventing, detecting, and investigating fraud and inappropriate practice'.[267] Medicare has stated that:

> Criminal investigation, and subsequent prosecution by the Commonwealth Director of Public Prosecutions (CDPP) is one of the most powerful tools that Medicare Australia has in its effort to reduce fraud in the programs that it administers.[268]

3.110 In the period 2005–06, Medicare reported that it had 377 new investigation cases; 124 other cases still under investigation; and that it had referred 65 cases to the CDPP. Of its new investigations 186 concerned medical practitioners,[269] 32 concerned pharmacists, and 159 concerned members of the public.[270] 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.[271]

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262 Ibid.
263 *Medicare Australia Act 1973* (Cth) s 4A.
264 Ibid s 7. See also s 6 concerning the CEO's medicare functions.
265 Ibid s 7(e)–(g).
266 See, eg, Ibid s 8ZQ.
267 Medicare Australia, *Annual Report 2005–06*, 24.
268 Ibid, 159.
269 Medical practitioners can be investigated, for example, where they make claims for services not rendered. See Ibid, 154.
270 Ibid, 152–153.
271 Ibid, 141.

3.111 Depending on the nature and significance of any non-compliance detected by Medicare, it may opt to recover benefits paid incorrectly.[272] In 2005–06, it identified 5, 288 cases for potential recovery action totalling $4.85 million.[273]

Medicare's powers

3.112 The CEO of Medicare can 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.[274] 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.[275] Failure to comply with such a notice without reasonable excuse attracts a maximum penalty of six months' imprisonment.[276] Authorised officers may also conduct searches for the purposes of monitoring compliance either without warrant where the occupier of the premises has consented,[277] or pursuant to a search warrant.[278]

Department of Health and Ageing

Therapeutic Goods Administration

3.113 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.[279] 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.[280]

3.114 During 2005–06, the TGA completed 425 investigations concerning breaches of the *Therapeutics Goods Act* and the TGA Surveillance Unit issued 126 formal

272 Ibid, 149.
273 Ibid, 15, 151.
274 See *Medicare Australia Act 1973* (Cth) s 8L.
275 See Ibid s 8P.
276 Ibid s 8R.
277 See Ibid ss 8U, 8V.
278 See Ibid pt IID div 5.
279 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.
280 Ibid.

warnings to persons and companies, and charged 12 persons and companies with 116 criminal offences.[281]

3.115 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.[282] Failure to comply with such a notice carries a maximum penalty of $6,600.[283] The Secretary may also seek information or documents relating to compliance by medical devices with certain requirements;[284] and relating to medical devices covered by exemptions.[285] Failure to comply with these requirements carries a maximum penalty of $55,000[286] and $44,000 respectively.[287]

3.116 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 suspects that a person may have breached a civil penalty provision of the TG Act.[288] 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.[289]

Aged care

3.117 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,[290] including the *Aged Care Act 1997* (Cth).

3.118 The *Aged Care Act* provides a specific example of the Department's function of monitoring compliance by approved providers of aged care with their responsibilities under the Act. 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. Monitoring powers in relation to premises include searching premises; inspecting and taking samples of substances or things found at premises; inspecting

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281 Australian Government Department of Health and Ageing, *Annual Report 2005–06*, 52.
282 *Therapeutic Goods Act 1989* (Cth) s 8.
283 See Ibid ss 8, 42YB.
284 Ibid pt 4–8 div 1.
285 Ibid pt 4–8 div 2.
286 Ibid s 41JB.
287 Ibid s 41JG.
288 Ibid s 42YE.
289 Ibid s 42YE.
290 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 7 March 2007.

documents on the premises and taking extracts of those documents or copying them.[291] Some of these powers can only be exercised with the consent of an occupier;[292] while others can be exercised without an occupier's consent.[293] 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.[294] 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.

Gene Technology Regulator

3.119 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.

3.120 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.[295]

3.121 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.[296] Monitoring powers include:

- conducting tests on samples found at the premises;
- taking photographs or making audio or video recordings;

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291 *Aged Care Act 1997* (Cth) s 90–4.
292 Ibid pt 6.4 div 91.
293 Ibid pt 6.4 div 92.
294 See Ibid s 92–2.
295 See *Gene Technology Act 2000* (Cth) s 27.
296 See Ibid s 152. The Office of the Gene Technology Regulator, *Operations of the Gene Technology Regulator Annual Report 2005–06* (2006) 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.

- 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.[297]

3.122 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.[298] 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, as well as requiring a person to take steps to comply with the legislation.[299]

3.123 The OGTR has adopted an operational philosophy that emphasises assisting accredited organisations and licence holders to comply with their legislative obligations.[300] 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.[301]

3.124 The OGTR reported that during 2005–06, it investigated all suspected breaches of the Act that were detected through OGTR monitoring activities or self-reported and, that in all instances risks to human health and safety were assessed as negligible and commensurate action was taken, including increased monitoring and education.[302]

3.125 The OGTR also reported that it completed two investigations during 2005–06. The investigations centred on the importation of genetically modified zebra fish, and GMO dealings being performed by a health service/hospital.[303]

Australian Pesticides and Veterinary Medicines Authority

3.126 The Australian Pesticides and Veterinary Medicines Authority (APVMA) is an independent Australian Government statutory authority within the portfolio of the

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297 See *Gene Technology Act 2000* (Cth) s 153.
298 See Ibid ss 164–165.
299 See Ibid s 158.
300 Office of the Gene Technology Regulator, *Operations of the Gene Technology Regulator Annual Report 2005–06* (2006), 17.
301 Australian Government Department of Health and Ageing, *Office of the Gene Technology Regulator: Compliance and Enforcement Policy*, 1 May 2006.
302 Office of the Gene Technology Regulator, *Operations of the Gene Technology Regulator Annual Report 2005–06* (2006), 25, 49.
303 Ibid, 51.

Minister for Agriculture, Fisheries and Management. It was originally known as the National Registration Authority for Agricultural and Veterinary Chemicals.

3.127 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;
- 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.[304]

3.128 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,[305] as well as power to do anything incidental to any of its powers.[306]

3.129 The APVMA is responsible for the registration of pesticides[307] and veterinary medicines[308] prior to sale and their regulation up to and including the time of retail sale.[309] 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.[310]

3.130 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.[311]

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304 See *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth) s 7(2).
305 See Ibid s 7(1).
306 See Ibid s 7(3)(e).
307 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/introc.pdf> at 7 March 2007, 6.
308 Veterinary medicines include vaccines, antibiotics, worming products and anaesthetics. See Ibid, 6.
309 Ibid, 3.
310 Australian Pesticides and Veterinary Medicines Authority, *Information Sheet: Compliance with the Law* (2004).
311 See Australian Pesticides and Veterinary Medicines Authority, *Legislation Governing the APVMA* <www.apvma.gov.au/about_us/legislat.shtml> at 7 March 2007.

3.131 An important part of the APVMA's role is to ensure that pesticides and veterinary medicines supplied to the marketplace comply with 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.[312]

3.132 The APVMA's investigations may relate to unregistered products, unapproved labels, or the supply of restricted products to unauthorised users.[313] 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.[314] 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.[315] An inspector who has entered premises also has power to require a person to give information and produce documents.[316] Failure to comply with such a requirement carries a maximum penalty of $3,300.[317]

Human rights

Human Rights and Equal Opportunity Commission

3.133 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.[318] 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;

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312 Australian Pesticides and Veterinary Medicines Authority, *Introducing the Australian Pesticides and Veterinary Medicines Authority* <www.apvma.gov.au/publications/introc.pdf> at 7 March 2007, 9. The other strategies are prevention and quality facilitation.

313 Australian Pesticides and Veterinary Medicines Authority, *Information Sheet: Compliance with the Law* (2004).

314 See *Agricultural and Veterinary Chemicals Code Act 1994* (Cth) s 131; *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth) s 69EB.

315 See *Agricultural and Veterinary Chemicals Code Act 1994* (Cth) s 131; *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth) s 69EB.

316 See *Agricultural and Veterinary Chemicals Code Act 1994* (Cth) s 144; *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth) s 69EN.

317 See *Agricultural and Veterinary Chemicals Code Act 1994* (Cth) s 144; *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth) s 69EN.

318 See Human Rights and Equal Opportunity Commission, *Annual Report 2005–06*, 17; *Human Rights and Equal Opportunity Commission Act 1986* (Cth) schs 1–5.

- 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.[319]

3.134 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.[320] 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.[321]

3.135 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.[322]

3.136 For the purpose of performing its functions, HREOC can hold an examination or inquiry in such manner as it thinks fit.[323] It has powers under the HREOC Act to require a person or body corporate to give information in writing or to produce documents;[324] and to examine persons on oath or affirmation.[325] Failure to comply with these requirements carries a maximum penalty of $1,000 for natural persons, and $5,000 for bodies corporate.[326]

3.137 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.[327] Failure to comply with these requirements carries a maximum penalty of $1,100.[328]

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319 See *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ss 11(aa), (f); 31(b).
320 Ibid ss 11(f), 31(b).
321 See Ibid s 11(3).
322 See Ibid ss 11, 31.
323 See Ibid s 14.
324 Ibid s 21.
325 Ibid s 22.
326 Ibid s 23.
327 See Ibid ss 46PI, 46PJ.
328 See Ibid ss 46PL, 46PM.

3.138 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*.[329]

3.139 In that period five of its reports into inquiries on breaches of human rights were tabled in Parliament.[330] The annual report does not, however, provide statistics concerning the use of coercive powers by HREOC.

Privacy

Office of the Privacy Commissioner

3.140 The Office of the Privacy Commissioner (OPC) is an independent statutory organisation that reports to the Attorney-General of Australia.[331] Its purpose is to promote an Australian culture that respects privacy.[332] 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.[333]

3.141 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)[334] and the *National Health Act 1953* (Cth).

3.142 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.

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329 See Human Rights and Equal Opportunity Commission, *Annual Report 2005–06*, 56, 59, 61, 64.

330 See Ibid, 92–94.

331 Office of the Privacy Commissioner, *About the Office of the Privacy Commissioner* <www.privacy .gov.au/about/index.html> at 1 April 2007.

332 Ibid.

333 Ibid. The ALRC is currently undertaking a major review of the *Privacy Act*. At the time of writing, two issues papers have been released for comment: *Review of Privacy* (IP 31) and *Review of Privacy: Credit Reporting Provisions* (IP 32). A discussion paper with proposals for reform will be released in mid-2007.

334 Under the Spent Convictions Scheme: *Crimes Act 1914* (Cth) s 85ZM.

3.143 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 Commonwealth or territory convictions. The OPC deals with complaints under this scheme and also assesses applications from organisations seeking to be excluded from the operation of this law.[335]

3.144 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, and also provides policy advice and training on the *Privacy Act* and works to inform and educate the community about privacy issues.[336]

3.145 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.[337]

3.146 While the Privacy Commissioner has formal complaint determination powers under the *Privacy Act*, these are rarely used.[338] If the Commissioner finds a complaint substantiated, he or she may make a declaration that the conduct should not be repeated or continued, that the respondent should redress any loss or damage suffered by the

335 Office of the Privacy Commissioner, *The Operation of the Privacy Act: Annual Report 2005–06*.

336 Office of the Privacy Commissioner, *About the Office of the Privacy Commissioner* <www.privacy.gov.au/about/index.html> at 1 April 2007.

337 Office of the Privacy Commissioner, *Privacy Complaints* <www.privacy.gov.au/privacy_rights/complaints/index.html> at 11 April 2007.

338 Office of the Privacy Commissioner, *Complaint Case Notes and Complaint Determinations* <www.privacy.gov.au/act/casenotes/index.html> at 11 April 2007.

complainant, that the complainant is entitled to compensation, or that it would be inappropriate for any further action to be taken.[339]

3.147 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.[340] 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.[341]

3.148 As a general rule, an investigation is to be 'conducted in private but otherwise in such manner as the Commissioner thinks fit'.[342] The Commissioner has power to obtain information and documents from persons, and make inquiries of persons or examine witnesses on oath or affirmation.[343] 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.[344]

3.149 In 2005–06, the OPC received a total of 1,183 complaints across all areas of its jurisdiction.[345] Eleven per cent of matters were closed following a formal investigation, and where appropriate, a conciliated response. Around 30% of cases were closed following preliminary inquiries. In other cases the Privacy Commissioner declined the matter—for example, because of a lack of jurisdiction or where the matter involved a body not covered by the *Privacy Act*.[346]

Border control and immigration

Customs

3.150 The Australian Customs Service (ACS) controls the movement of trade and people into and from Australia. The principal roles of the 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.

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339 *Privacy Act 1988* (Cth) s 52.
340 Ibid s 42.
341 Ibid s 42.
342 Ibid s 43(2). Similarly, see *Ombudsman Act 1976* (Cth) s 8(2); *Migration Act 1958* (Cth) s 429.
343 *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.
344 *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).
345 Office of the Privacy Commissioner, *The Operation of the Privacy Act: Annual Report 2005–06*, [3.3.1]
346 Ibid, [3.3.2].

3.151 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.[347] The ACS provides air- and sea-based surveillance and response services to a number of government agencies.[348]

3.152 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. [349]

3.153 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.[350]

3.154 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.[351] The *Customs Act* includes a wide range of coercive powers including powers to:

- board and search ships, collect documents and question passengers;[352]
- make copies of, and take extracts from, documents in certain circumstances;[353]
- question passengers of aircraft;[354]
- question persons claiming packages;[355]

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347 Australian Customs Service, *Annual Report 2005–06*, 18.
348 Ibid, 15.
349 Australian Customs Service, *Protecting Our Borders* (2007), 3.
350 Australian Customs Service, *Customs Regulatory Philosophy* (2005) <www.customs.gov.au/site/page.cfm?u=4839> at 28 March 2007.
351 Australian Customs Service, *Protecting Our Borders* (2007), 13.
352 *Customs Act 1901* (Cth) ss 184, 189, 185.
353 Ibid s 185.
354 Ibid s 195.
355 Ibid s 196(C).

- apply for search warrants in respect of things believed to be evidential material;[356] and

- detain and search persons for purposes of law enforcement co-operation.[357]

3.155 In 2005–06, the ACS reported that it had increased the number of illegal foreign fishers detained, commenced the progressive arming of ACS officers undertaking waterfront patrol and response work, ship boarding and certain investigative operations; and enhanced investigative capability through improvements in policy, procedures and legislation.[358] In that period 56 revenue fraud cases and 461 other fraud cases were investigated.[359]

Department of Immigration and Citizenship

3.156 The Department of Immigration and Citizenship's (DIAC) core activity is 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.

3.157 In 2005–06, following the Palmer Report into the detention of Cornelia Rau,[360] DIAC has 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.[361]

3.158 Section 18 of the *Migration Act* provides a general power to obtain information and documents about unlawful non-citizens. Under s 18(1):

> If the Minister has reason to believe that a person (in this subsection called the ***first person***) is capable of giving information which the Minister has reason to believe is, or producing documents (including documents that are copies of other documents) which the Minister has reason to believe are, relevant to ascertaining the identity or whereabouts of another person whom the Minister has reason to believe is an unlawful non-citizen, the Minister may, by notice in writing served on the first person, require the first person:

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356 Ibid subdivision C.
357 Ibid div 1BA.
358 Australian Customs Service, *Annual Report 2005–06*, 59–60.
359 Ibid, 61.
360 M Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau Report* (2005).
361 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 11 April 2007.

> (a) to give to the Minister, within the period and in the manner specified in the notice, any such information; or
>
> (b) to produce to the Minister, within the period and in the manner specified in the notice, any such documents; or
>
> (c) to make copies of any such documents and to produce to the Minister, within the period and in the manner specified in the notice, those copies.

3.159 It is an offence to refuse or fail to comply with a notice under subsection 18(1).[362]

3.160 There are also other specific coercive powers granted under the Act. For example, authorised officers of DIAC have investigatory authority to enter and search an education provider's premises for visa monitoring purposes.[363] Departmental officers also may issue a production or attendance notice, requiring an individual to produce or provide information or documents that are relevant to establishing compliance with visa conditions.[364] Division 12A of the Act grants powers to officers to board and search ships, and examine documents and goods on board.[365] Under Division 13, officers are given powers of entry to search ships where there are suspected unlawful non-citizens seeking to enter the migration zone. Persons in immigration detention under the Act may be required to answer such questions as an officer considers necessary to determine their status.[366]

3.161 In 2005–06, DIAC reported that 13 new briefs of evidence were submitted to the CDPP, 12 prosecutions were initiated and 16 court matters were concluded that resulted in convictions.[367]

Australian Quarantine Inspection Service

3.162 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.

3.163 AQIS is responsible for the administration of the *Quarantine Act 1981* (Cth) and its related legislation. AQIS provides screening services for goods and passengers at

362 *Migration Act 1958* (Cth) s 21.
363 Ibid s 268CD.
364 Ibid ss 268BA–268BE.
365 Ibid s 245F(3).
366 Ibid s 257.
367 Australian Government Department of Immigration and Multicultural Affairs, *Annual Report 2005–06*, 134.

airports, seaports and mail centres.[368] 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.

3.164 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.[369]

3.165 Quarantine officers have wide powers to search, seize and treat goods suspected of being a quarantine risk. AQIS investigators have powers delegated to them pursuant to the customs legislation and other Commonwealth legislation, including the *Crimes Act 1914*.[370] Their powers include authority to search premises and seize goods.

3.166 Decisions of AQIS can be appealed to the Administrative Appeals Tribunal or the Federal Court.

Australian Fisheries Management Authority

3.167 The Australian Fisheries Management Authority (AFMA) is a statutory body that administers the day-to-day management of fisheries.[371] 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 and foreign fishing boats in the Australian fishing zone and Commonwealth-managed fisheries.

3.168 AFMA undertakes these functions in conjunction with other relevant Commonwealth 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

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368 Australian Government Department of Agriculture Fisheries and Forestry, *AQIS at a Glance* <www.daff.gov.au/content/output.cfm?ObjectID=637FF0C5-C305-43BD-9216486B57110266> at 11 April 2007.

369 Australian Government Department of Agriculture Fisheries and Forestry, *Quarantine Laws and the Role of AQIS* <www.daff.gov.au/content/output.cfm?ObjectID=D2C48F86-BA1A-11A1-A2200060A1B01130 > at 11 April 2007.

370 Ibid.

371 Australian Fisheries Management Authority, *Annual Report 2005–06*, 5. Broader fisheries policy, international negotiations and strategic policy issues are administered by another group within the Department of Agriculture, Fisheries and Forestry.

funding.[372] AFMA also has responsibilities in relation to protection of the marine environment by maintaining sustainable fishery levels.

3.169 AFMA has surveillance and enforcement powers under Part 6 of the *Fisheries Management Act.* Under this part, AMFA 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;[373]
- search the land or premises for, inspect, take extracts from, and make copies of, any documents relating to the receiving of fish;[374] 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.[375]

3.170 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.[376]

Communications

Australian Communications and Media Authority

3.171 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

372 This compliance arrangement is under review: Australian Fisheries Management Authority, *Compliance* <www.afma.gov.au/management/compliance/default.htm> at 11 April 2007.
373 *Fisheries Management Act 1991* (Cth) s 84(1)(a)(i).
374 Ibid s 84(1)(h)(ii).
375 Ibid s 84(1)(s)(ii).
376 Australian Fisheries Management Authority, *Compliance* <www.afma.gov.au/management/compliance /default.htm> at 11 April 2007.

audience and user needs; managing access to the radiofrequency spectrum; and representing Australia's communications interests internationally.[377]

3.172 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 some other related telecommunications legislation. ACMA works primarily under a self-regulation approach with the broadcasting and communications industries, while also undertaking investigations and enforcement action to ensure compliance with licence conditions, codes and standards.[378]

3.173 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 can request information from the station, as part of its investigation into a complaint. This information may include: copies of station policies and procedures; copies of relevant correspondence; documents outlining the committee, governance and management structures in place; and comments regarding compliance with the relevant code of practice or licence condition.

3.174 ACMA has power under s 168 of the *Broadcasting Services Act* to: consult with such persons, bodies and groups as it thinks fit, and may form consultative committees for that purpose; conduct investigations and hold hearings; and otherwise inform itself in any manner it thinks fit. For the purpose of an investigation, a person may be summoned to answer questions under oath and provide documents and other information.[379] A person may not refuse to answer questions or produce a document, unless it would tend to incriminate the person, or the answer would require a journalist to reveal a source.[380]

3.175 ACMA also has extensive information-gathering powers under Part 27 of the *Telecommunications Act*. Under this section, ACMA may obtain information and documents from carriers and service providers, if ACMA has reason to believe that the carrier or provider, has information or documents relevant to ACMA's functions. Written notice must be given of the requirement to produce documents or give information.[381] ACMA also may obtain information or documents from any other persons, with the same requirements for written notice.[382]

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377 Australian Communications and Media Authority, *About ACMA's Role* <www.acma.gov.au/WEB/STANDARD//pc=ACMA_ROLE_OVIEW> at 11 April 2007.
378 Australian Communications and Media Authority, *Annual Report 2005–06*, Ch 2.
379 *Broadcasting Services Act 1992* (Cth) s 173.
380 Ibid s 202.
381 *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) s 521.
382 Ibid s 522.

3.176 ACMA also has a number of search powers for certain offences under the *Telecommunications Act*. Searches in relation to technical offences under Part 21 of the Act or for breaches of the *Spam Act 2003* (Cth) may be undertaken by ACMA inspectors, under the authority of a search warrant, with consent or in an emergency.[383] 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* (technical regulation).[384]

3.177 In 2005–06, ACMA reported that it conducted 663 radiocommunications investigations, resulting in 57 advice notices and 158 warning notices being issued. ACMA initiated 463 investigations into suspected non-compliance with the radiocommunications standards regulatory arrangements. One hundred and forty two investigations were completed into radio and television licensees compliance with codes of practice, license conditions or the Act, with 34 resulting in breach findings.[385]

Environment

Department of the Environment and Water Resources

3.178 The Department of 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).[386] The EPBC Act regulates actions that will, or are likely to, have a significant impact on any matter of national environmental significance.[387]

3.179 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 2005–06, the Department dealt with 350 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 and 210 of these warranted further inquiry.[388]

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383 Ibid s 535.

384 Ibid ss 542, 548, 549.

385 Australian Communications and Media Authority, *Annual Report 2005–06*, Ch 2.

386 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).

387 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).

388 Australian Government Department of the Environment and Heritage, *Legislation Annual Reports 2005–06*, 50.

3.180 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 Department has established a compliance auditing programme to monitor adherence to approval conditions and particular manner decisions.[389]

3.181 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.[390] At 30 June 2006, 44 investigations had been carried out since 2000 for EPBC Act-related matters and a further eight investigations relating to other portfolio legislation. The EPBC Act investigations related to matters of national environmental significance, incursions into protected areas, threatened species and ecological communities, and wildlife matters. Of these cases, five have been referred to the CDPP and two to the Australian Government Solicitor.[391]

3.182 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.[392] Failure to comply with such a requirement carries a maximum penalty of $3,300.[393] Commissioners may also inspect premises either by consent or with a warrant.[394]

Great Barrier Reef Marine Park Authority

3.183 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.[395]

3.184 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 Divison 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.[396]

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389 Ibid, 51.
390 Ibid, 53.
391 Ibid, 53.
392 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 111–114.
393 Ibid s 112(3).
394 Ibid ss 115, 116.
395 Great Barrier Reef Marine Park Authority, *Goals & Aims* <www.gbrmpa.gov.au/corp_site/about_us/goals_aims> at 11 April 2007.
396 *Great Barrier Reef Marine Park Act 1975* (Cth) ss 39S, 39T, 39U.

Australian Maritime Safety Authority

3.185 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 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.

Energy

Australian Energy Regulator

3.186 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. The AER is required to monitor compliance with the National Electricity Law, the National Electricity Regulations and the National Electricity Rules. The AER may investigate breaches or possible breaches, and may enforce the law, the regulations and the rules.[397]

3.187 The *National Electricity (South Australia) Act 1996* (SA) establishes the rules 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.[398] 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.

Transport

Office of the Inspector of Transport Security

3.188 The position of Inspector of Transport Security (ITS) was established in 2006. 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

397 Australian Energy Regulator, *Monitoring and Enforcement Functions under the National Electricity Law* <www.aer.gov.au/content/index.phtml/itemId/685897> at 11 April 2007.

398 *National Electricity (South Australia) Act 1996* (SA) s 19.

inquires into surface transport security matters, subject to the agreement of the relevant state or territory government.

3.189 Under Part 5 of the *Inspector of Transport Security Act 2006* (Cth), the Inspector has powers to request information that he or she believes is relevant to an inquiry from other government agencies or any person.[399] Special procedures apply for requests for on-board recording information.[400]

3.190 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.[401] The Inspector may also exercise his or her powers to ask questions while conducting the search.[402]

Civil Aviation Safety Authority

3.191 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 (DOTAR).

3.192 CASA is responsible for safety regulation of civil air operations in Australian territory, and the operation of Australian registered aircraft outside Australian territory. 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.[403]

3.193 CASA states that its primary function under the *Civil Aviation Act* is to conduct the safety regulation of civil air operations in Australian territory and the operation of Australian aircraft outside Australian territory, by means that include 'developing effective enforcement strategies to secure compliance with aviation safety standards'.[404]

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399 *Inspector of Transport Security Act 2006* (Cth) ss 35, 36.

400 Ibid ss 35, 37.

401 Ibid ss 41, 43, 44, 46.

402 Ibid s 45.

403 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 11 April 2007.

404 Civil Aviation Safety Authority, *Enforcement Action: Introduction* <www.casa.gov.au/rules/action/index.htm> at 11 April 2007.

3.194 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.[405]

3.195 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.

3.196 CASA has a range of enforcement tools available which are set out in detail in its enforcement manual.[406] 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 concentration of enforcement action on cases where there are serious safety breaches.[407]

3.197 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, CASA is empowered to require the production of documents and other things required in the investigation of defects. Section 305 of the Regulations, 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.[408] Under s 305(1A) of the Regulations, it is an offence for a person to prevent or hinder access by an inspector to any place.

Australian Maritime Safety Authority

3.198 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.

3.199 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.

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405 Civil Aviation Safety Authority *Enforcement Manual*, <www.casa.gov.au/manuals/regulate/enf/index.htm>, at 11 April 2007, 2
406 Ibid, 2.
407 Ibid, 2.
408 Ibid, 12.

3.200 The *Navigation Act 1912* (Cth) is the main piece of Commonwealth legislation that regulates matters such as ship safety, coastal trade, employment of seafarers and shipboard aspects of the protection of the marine environment, as well as providing for a national search and rescue service.

3.201 As discussed above, AMSA is also responsible for enforcing Commonwealth legislation that has been enacted to protect the marine environment and to adopt international conventions governing marine pollution.

3.202 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.[409] Refusal to comply with such a direction is an offence under the Act, with a maximum penalty of $1,000.[410]

Australian Transport Safety Bureau

3.203 The Australian Transport Safety Bureau (ATSB) is an operationally independent body within the Department of Transport and Regional Services (DOTARS) and is Australia's prime agency for transport safety investigations.[411]

3.204 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.[412]

3.205 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.[413] ATSB investigations do not assign blame or provide a means for determining liability.

3.206 The ATSB has powers to investigate under Division 3 of the *Transport Safety Investigation Act.* Those powers are only able to be exercised in the context of an investigation.[414] Under s 32 of the Act, the Executive Director of ATSB has powers to

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409 *Navigation Act 1912* (Cth) ss 412, 413.
410 Ibid s 413.
411 Australian Transport Safety Bureau, *Australian Transport Safety Bureau* <www.atsb.gov.au/> at 11 April 2007.
412 Australian Transport Safety Bureau, *About the ATSB* <www.atsb.gov.au/about_atsb/about.aspx> at 11 April 2007.
413 *Transport Safety Investigation Act 2003* (Cth) s 7.
414 Ibid s 28.

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, which has a maximum penalty of 30 penalty units.

3.207 Other coercive information-gathering powers under the Act include powers to: enter premises without consent or a search warrant in certain circumstances (such as emergencies); enter premises with consent or with a warrant; search, photograph and take evidence from premises; and seize material that is the subject of an investigation warrant.[415]

3.208 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.[416]

Other

Office of Workplace Services

3.209 The Office of Workplace Services (OWS) was established under recent amendments to the *Workplace Relations Act 1996* (Cth) (WRA). The role of the OWS is to:

- educate employers and workers to understand their rights and obligations at work under the WRA;
- monitor workplaces and investigate complaints to ensure that workplace rights and obligations are being complied with; and
- apply penalties through court action where there is evidence of a breach of the WRA.

3.210 Under s 169 of the WRA, OWS inspectors have coercive information-gathering powers to determine whether an employer's obligations under the Act are being complied with. 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.[417] Inspectors may also, by notice, require a person to produce a document.[418] That notice must be in writing, and allow a person not less than

415 Ibid ss 33–40.
416 See Australian Transport Safety Bureau, *Publications* <www.atsb.gov.au/publications/> at 11 April 2007.
417 *Workplace Relations Act 1996* (Cth) s 169(2)(a)–(b).
418 Ibid s 169(2)(c).

14 days to respond.[419] It is an offence to contravene a requirement of an inspector to produce a document, with a maximum penalty of imprisonment for six months.[420]

Comcare

3.211 Comcare is a Commonwealth statutory authority established under the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act). Comcare administers the Commonwealth's workers' compensation scheme under the SRC Act and also administers the *Occupational Health and Safety (Commonwealth Employment) Act 1991* (OHS(CE) Act).

3.212 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.[421]

3.213 Comcare conducts investigations to determine compliance with the OHS(CE) Act and may do so on its own initiative or in response to a direction from the Safety, Rehabilitation and Compensation Commission.[422] Investigations may be reactive (undertaken in response to an incident) or proactive, where an investigation is 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.[423]

3.214 Under the OHS(CE) Act, investigators have powers to enter and inspect premises and require persons to: give to the investigator reasonable assistance; answer any questions put by the investigator; and give to the investigator any documents requested by the investigator or copies of such documents.[424] A person must comply with an investigator's request.[425] The Commission may also conduct public inquiries under s 55 of the Act, and has the power to summon witnesses and require the production of documents for that purpose.[426]

Insolvency and Trustee Service Australia

3.215 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

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419 Ibid s 169(2)(c).
420 Ibid s 819(1). This penalty does not apply if a person has a reasonable excuse.
421 Comcare, *Annual Report 2005–06*, 20.
422 Ibid, 50.
423 Ibid, 50.
424 *Occupational Health and Safety (Commonwealth Employment) Act 1991* (Cth) ss 42, 43.
425 Failure to comply with a request is an offence with a maximum penalty of $3,000 or six months imprisonment: Ibid s 43(2).
426 Ibid s 56.

for debtors and creditors, enjoys public confidence and minimises the impact of financial failure on the community'.[427]

3.216 ITSA has an investigative role in the identification and investigation of material offences under the *Bankruptcy Act 1966* (Cth) and preparation of briefs for prosecution or where appropriate refer to the AFP or other agencies.

3.217 ITSA's other functions include: operation of the Bankruptcy Registry, bankruptcy regulation and policy advice and bankruptcy estate administration.[428]

3.218 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 for that purpose, to make copies of, or take extracts from, books; 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.

3.219 The Inspector-General in Bankruptcy also has a number of general investigation powers under the Act to require the production of any books kept by an Official Receiver or by a trustee; and require a trustee to answer an inquiry made to him or her in relation to a number of matters including: a bankruptcy; the control of property under an authority given under s 188; an administration under Part XI; a personal insolvency agreement, scheme of arrangement or composition; and may at any time investigate the books of a trustee.[429]

3.220 ITSA report that during 2005–06 the Fraud Investigation team received and assessed 840 alleged offence referrals; commenced 657 investigations; completed 589 investigations; achieved compliance in 175 matters; referred four matters to state and federal police agencies for investigation; and forwarded 271 briefs of evidence to the CDPP.[430]

3.221 Over the same period, ITSA also issued warning letters to 92 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, 'investigators conduct follow-up interviews with the alleged offenders, educating them about their rights and responsibilities, and counseling them about the potential consequences of any future

427 Insolvency and Trustee Service Australia, *Structure: Role and Functions* <www.itsa.gov.au/dir228/itsaweb.nsf/docindex/about+us->structure->structure?opendocument> at 11 April 2007.
428 Ibid.
429 *Bankruptcy Act 1966* (Cth) s 9.
430 Insolvency and Trustee Service Australia, *Annual Report 2005–06*, 33.

non-compliance'. Where a recipient of a warning letter elects not to participate in this interview process, IFSA withdraws the warning letter and initiates prosecution actions.[431]

National Offshore Petroleum Safety Authority

3.222 The National Offshore Petroleum Safety Authority (NOPSA) is a statutory authority which administers offshore petroleum safety legislation. The organisation's primary objectives include:

> 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.[432]

3.223 NOPSA's occupational health and safety inspectors are granted powers to enter offshore facilities or other relevant premises, make inspections, interview persons, seize evidence and otherwise take action to ensure compliance by duty holders.[433]

Royal Commissions of inquiry

3.224 Royal Commissions of inquiry have been described as 'unquestionably the most ancient and the most dignified' of the various bodies of inquiry.[434] The origins of Royal Commissions can be traced back to the 12th century.[435]

> [I]n 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.[436]

3.225 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'.[437] 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,

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431 Ibid, 34.
432 National Offshore Petroleum Safety Authority, *Welcome to NOPSA!* <www.nopsa.gov.au/index.asp> at 11 April 2007.
433 *Petroleum (Submerged Lands) Act 1967* (Cth) ss 31–32.
434 See S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), 5; H Clokie and J Robinson, *Royal Commissions of Inquiry: The Significance of Investigations in British Politics* (1969), 24–25.
435 D Borchardt, *Commissions of Inquiry in Australia: A Brief Survey* (1991), 6–7.
436 See Ibid, 7.
437 Ibid, 6.

> order and good government of the Commonwealth, or any public purpose or any power of the Commonwealth.[438]

3.226 Royal Commissions are normally established only where a matter of public interest so requires. Their ad hoc nature distinguishes them from permanent standing Commonwealth agencies and bodies. Their purpose is usually to ascertain factual circumstances and make recommendations.[439] The discovery of the truth has been described as a prime function of a Royal Commission.[440] 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.[441]

> [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.[442]

3.227 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.[443]

3.228 Royal Commissions are a common feature of Australian public life.[444] There have been a number of high profile Commonwealth Royal Commissions, including those into the Australian Wheat Board (AWB); HIH Insurance; the building and construction industry; and Aboriginal deaths in custody.[445] In addition, since the late 1980s, each Australian state has had a high profile commission into crime or corruption.[446]

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438 *Royal Commissions Act 1902* (Cth) s 1A.

439 T Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (2006), [7.65].

440 Ibid, [7.66].

441 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.

442 Ibid, 1, 3.

443 N Owen, *Report of the HIH Royal Commission* (2003), [1.1].

444 S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), 5.

445 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 into the Building and Construction Industry* (2003); E Johnstone, *Royal Commission into Aboriginal Deaths in Custody* (1991).

446 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.

3.229 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.[447]

3.230 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;[448] and require a person appearing at the hearing of evidence to take an oath or affirmation.[449] 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.[450] 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.[451] 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.[452] However, a witness cannot be compelled to disclose to a Royal Commission 'any secret process of manufacture'.[453] 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.[454]

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447 Commonwealth, *Parliamentary Debates*, Senate, 26 August 1902, 15659 (R O'Connor), 15659.
448 *Royal Commissions Act 1902* (Cth) s 2(1).
449 Ibid s 2(3).
450 Ibid s 6FA.
451 Ibid s 3.
452 Ibid s 6. The Act provides for the separate offence of contempt of a Royal Commission. See *Royal Commissions Act 1902* (Cth) s 6O.
453 *Royal Commissions Act 1902* (Cth) s 6D(1).
454 See Ibid s 4.

4. Client Legal Privilege in Commonwealth Investigations

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Introduction

4.1 This chapter considers the law on privilege in the specific context of Commonwealth investigations. Legislative provisions and significant cases dealing with the application of the privilege are discussed. This chapter raises issues about whether there needs to be greater clarity and consistency in the law on the application of privilege to federal coercive information-gathering powers.

Legislative provisions

4.2 Commonwealth legislative provisions conferring coercive information-gathering powers on Commonwealth bodies take a number of different approaches in dealing with the issue of the application of client legal privilege. In broad terms, legislation:

- 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 privilege.

Silence

4.3 For the most part, Commonwealth laws contain no express provision in relation to client legal privilege.[1]

4.4 A subset of the provisions that are silent on privilege provide that it is not an offence for a person to intentionally or recklessly fail to comply with a coercive information-gathering power if there is a reasonable excuse, without specifying whether or not a claim for client legal privilege amounts to a reasonable excuse.[2]

Abrogation of privilege

James Hardie (Investigations and Proceedings) Act

4.5 Only a few Commonwealth statutes abrogate the privilege expressly. One example where the privilege has been abrogated is the *James Hardie (Investigations and Proceedings) Act 2004* (Cth). That Act abrogated 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]

4.6 In introducing the James Hardie (Investigations and Proceedings) Bill 2004 into Parliament, the Treasurer, Peter Costello, 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, in these circumstances.[5] In the Second Reading of the James Hardie (Investigations and Proceedings) Bill 2004, the Treasurer stated:

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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).

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.

> 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)

4.7 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, pursuant to a notice under s 3ZN of the *Crimes Act* requiring certain documents relating to the investigation of a serious terrorism offence; or

- to a magistrate, pursuant to a notice under s 3ZO of the *Crimes Act* requiring 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

4.8 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); and

- information or documents, or answering questions under the *Inspector-General of Taxation Act 2003* (Cth);

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6 Ibid, 1.
7 *Crimes Act 1914* (Cth) s 3ZQR.

on the ground that it would disclose information the subject of client legal privilege.[8]

Preservation of privilege

4.9 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 of the TPA. 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 that the TPA should make it explicit that s 155 does not require the production of documents to which privilege attaches.[10]

4.10 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 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

4.11 As discussed in Chapter 2, there are two limbs to client legal privilege—the 'litigation' limb and the 'advice' limb. Some federal legislative provisions modify the application of the privilege, insofar as they narrow 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

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8 See *Proceeds of Crime Act 2002* (Cth) s 206; *Inspector-General of Taxation Act 2003* (Cth) s 16(1).

9 See *Trade Practices Act 1974* (Cth) s 155(7B).

10 See 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.

12 See *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 138, which provides that pt 9 div 4 (concerning search warrants) does not affect the law relating to client legal privilege.

13 See *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 242.

14 *Baker v Campbell* (1983) 153 CLR 52. This case is discussed in Ch 2.

15 See *Crimes Act 1914* (Cth) s 3ZX, which 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.

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 the document fell within the litigation limb of the privilege or would involve disclosing legal advice given to someone other than a Minister, an agency or an authority of the Commonwealth.

Provisions relating to lawyers

4.12 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.

4.13 If a lawyer refuses to comply, he or she must reveal the name and address of the relevant client—where it is known—and provide sufficient particulars to identify the documents containing the privileged communications.[17] Sometimes legislation states that such a provision does not affect the law relating to client legal privilege,[18] but it also may be silent on this point.[19]

Provisions relating to procedure

4.14 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.[20]

4.15 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 2006* (Cth). It provides that a person must give evidence in private if

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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) and *Ombudsman Act 1976* (Cth) s 9(4)(ab) (which applies only to certain types of legal advice and communications).

17 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.

18 See, eg, *Law Enforcement Integrity Commissioner Act 2006* (Cth) ss 79(5), 95(5); *Australian Crime Commission Act 2002* (Cth) s 30(9).

19 See, eg, *Australian Securities and Investments Commission Act 2001* (Cth).

20 Practical and procedural issues associated with resolving claims for privilege are discussed in Ch 5.

the evidence is likely to disclose specified types of legal advice or communications that attract client legal privilege.

4.16 Another notable exception is the *Royal Commissions Act 1902* (Cth), which was 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.[21] 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.[22]

4.17 Where a claim for privilege is made to a Royal Commission, it 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.[23] Where the claim is accepted the Royal Commission must return the document and disregard the privileged material for the purposes of any report or decision it makes.[24] Where the claim is rejected the Royal Commission may use the document for the purposes of its inquiry.[25] The Act also sets out offences in relation to the non-production of documents the subject of a claim for client legal privilege.[26]

4.18 The 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.[27]

4.19 The amendments were requested by Commissioner Terence Cole, who headed the inquiry into AWB and the Oil-for-Food Programme (the AWB Royal Commission),[28] following the decision in *AWB Limited v Cole*.[29]

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21 *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.
22 Ibid s 6AA(1).
23 See Ibid s 6AA(2), (3).
24 Ibid s 6AA(4).
25 See Ibid s 6AA(5).
26 Ibid s 6AB.
27 Explanatory Memorandum, Royal Commissions Amendment Bill 2006 (Cth), 1.
28 See T Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (2006).
29 *AWB Ltd v Cole* (2006) 152 FCR 382. See also Explanatory Memorandum, Royal Commissions Amendment Bill 2006 (Cth), l.

4.20 During the AWB Royal Commission, AWB Limited challenged Commissioner Cole's decision to reject a claim for 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.[30] 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.[31]

4.21 In the Second Reading of the Royal Commissions Amendment Bill 2006, Malcolm Turnbull, 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 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.[32]

Need for clarification?

4.22 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

—in other words in the great majority of cases—there may be confusion about whether or not the exercise of a particular power overrides the privilege by implication.

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30 See *AWB Ltd v Cole* (2006) 152 FCR 382, in particular [189]. See also Explanatory Memorandum, Royal Commissions Amendment Bill 2006 (Cth), 1.

31 See *AWB Ltd v Cole* (2006) 152 FCR 382, [184]–[194]. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 18 (M Turnbull—Parliamentary Secretary to the Prime Minister), 20.

32 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 (M Turnbull—Parliamentary Secretary to the Prime Minister), 20.

4.23 In some instances, clarification about the application of the privilege to particular powers has been provided by the common law. For example, the powers of access of the Commissioner of Taxation under s 263 of the *Income Tax Assessment Act 1936* (Cth) have been held not to extend to material the subject of a claim for client legal privilege.[33]

4.24 The High Court's decision in *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (*Daniels*) clarified the application of the privilege to the coercive information-gathering power under s 155 of the TPA.[34] However, as the discussion below bears out, although the decision in *Daniels* has wider implications for the application of privilege to other coercive information-gathering powers, 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*), which dealt with the implied abrogation of privilege by the now repealed *Companies (New South Wales) Code* (the *Companies Code*).[35]

4.25 Not all coercive information gathering powers replicate the wording of s 155 of the TPA nor do they all share the same investigatory contexts. Commonwealth bodies 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 particular investigatory powers.

4.26 In addition, where privilege is abrogated by express words or where a Commonwealth body takes the position that its powers abrogate privilege by necessary implication, there is some uncertainty about the extent of the abrogation—in particular whether it covers documents relating to the representation of the client in an investigation. Ashley Black notes that:

> As a matter of practice, [the Australian Securities and Investments Commission (ASIC)] typically does not seek to exercise its powers under [the ASIC Act] to obtain access to documents relating to the representation of a client in an investigation or at an examination. An exercise of ASIC's powers in that manner would involve a fundamental threat to an examinee's right to legal representation in connection with such an investigation.[36]

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33 See, eg, *Commissioner of Taxation v Citibank Ltd* (1989) 20 FCR 403; *Allen Allen & Hemsley v Deputy Federal Commissioner of Taxation* (1989) 20 FCR 576. See also *Re Compass Airlines Pty Ltd* (1992) 35 FCR 447 (privilege not overriden by right of liquidator to obtain information under s 597 of the Corporations Law).

34 See *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543. This case is discussed below.

35 *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319. This case is discussed below.

36 A Black, 'Representation of Clients in Investigations by the Australian Securities & Investments Commission' (2005) (June–August) *Commercial Law Quarterly* 16, 19. See also 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), 119–120, where reference is made to differing views about whether ASIC has the power to seek such documents.

4.27 However, the ALRC understands that there have been occasions when Commonwealth 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.[37]

4.28 The ALRC is interested in hearing views about whether clarification of the law in this area is needed.[38]

4.29 Further, where a Commonwealth body such as ASIC takes the position that its power to require the production of documents under specific legislation abrogates privilege by necessary implication, it is uncertain whether the implied abrogation extends to other coercive powers. Black notes that it is not clear whether the obligation to provide reasonable assistance to ASIC under s 49 of the *Australian Securities and Investments Commission Act 2001* (Cth) would prevent a person asserting a claim to client legal privilege in relation to a communication.[39]

4.30 In *Principled Regulation*: *Federal Civil and Administrative Penalties in Australia* (ALRC 95), the ALRC recommended that, in the interests of providing greater clarity, a review be undertaken of federal investigatory powers and the operation of client legal privilege.[40] The desire for clarity also has been raised in the context of state legislation conferring coercive powers. The Victorian Parliament Law Reform Committee recommended that, as a general principle, the application of client legal professional privilege—whether it applies or is abrogated—be clarified in statutes containing inspectors' powers.[41]

4.31 In 2003—prior to the amendments to the *Royal Commission Act 1902*—Justice Neville Owen, the Royal Commissioner in the HIH Inquiry, also expressed a desire for clarity in the law.

> 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

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37 W Pengilley, 'Daniels: Legal Professional Privilege Against the ACCC Unanimously Upheld in the High Court' (2002) 18(7) *Trade Practices Bulletin* 93, 98.

38 The issue of obtaining access to documents relating to the representation of clients in investigations is discussed further in Ch 7.

39 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 3.

40 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), [19.47], Rec 19–4.

41 See Victorian Parliament Law Reform Committee, *The Powers of Entry, Search, Seizure and Questioning by Authorised Persons* (2002), Rec 35, 149.

> 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.[42]

Decision in *Yuill*

4.32 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*.[43] The *Companies Code* did not contain a provision abrogating the privilege expressly. 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. The *Companies Code* was enacted prior to the decision in *Baker v Campbell*.[44] The law, as understood at that time, and declared in *O'Reilly v State Bank of Victoria Commissioners*,[45] was that client legal privilege was limited to judicial and quasi-judicial proceedings. The *Companies Code* was therefore construed in light of the law as it stood when it came into force.[46]

4.33 Brennan J stated that 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).[47]

4.34 The 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.[48]

4.35 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

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42 N Owen, *Report of the HIH Royal Commission* (2003), [2.9].
43 See *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319.
44 *Baker v Campbell* (1983) 153 CLR 52.
45 *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1.
46 *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319, 323.
47 Ibid, 324.
48 Ibid, 324. See also 334 (Dawson J).

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.[49]

4.36 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.[50]

> 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.[51]

4.37 Emphasis was also 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, warranted in the public or national interest, or when the Ministerial Council decided that an investigation should take place.[52] 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.[53]

4.38 The *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) does not contain a provision that abrogates client legal privilege expressly. However, it contains provisions similar to those in the *Companies Code* that were the subject of the decision in *Yuill*.[54] ASIC relies on *Yuill* to support its position that the ASIC Act impliedly abrogates privilege.

Decision in *Daniels*

4.39 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

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49 Ibid, 325. See also 335.

50 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.

51 *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319, 336.

52 See Ibid, 326, 333.

53 Ibid, 326.

54 *Australian Securities and Investments Commission Act 2001* (Cth) ss 69, 76(1)(d).

Court in *Daniels* overturned the decision of the Full Court of the Federal Court[55] 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.[56]

4.40 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'.[57] 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.[58]

4.41 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, stressing that a communication that was made to seek assistance to evade the law by illegal conduct was not privileged.[59]

4.42 McHugh J rejected the argument that the TPA impliedly abrogated the privilege, noting:

> 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.[60]

4.43 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 1914* (Cth) to issue a search warrant to enter premises and seize things including documents, and that the Court's decisions in *Baker v Campbell*[61] and *Australian Federal Police v Propend Finance*[62] held and confirmed

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55 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.

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

57 Ibid, [11].

58 Ibid, [11], [43].

59 See Ibid, [7], [35],

60 Ibid, [45].

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

62 *Australian Federal Police v Propend Finance* (1997) 188 CLR 501.

that the power of search and seizure under the *Crimes Act* did not authorise the seizure of material to which client legal privilege attached.[63]

4.44 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.

4.45 The High Court distinguished its earlier decisions in *Pyneboard Pty Ltd v Trade Practices Commission* (*Pyneboard*)[64] and *Yuill*. The decision in *Pyneboard* was distinguished on the basis that it dealt with the privilege against self-exposure to a penalty. The decision in that case that s 155(1) of the TPA impliedly abrogated the privilege against self exposure to a penalty could partly be supported by 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'.[65]

4.46 *Yuill* was distinguished on the basis that s 295 of the C*ompanies (New South Wales) Code* was very different in context, history, purpose and wording to 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 be availed of in judicial and quasi-judicial proceedings.[66] The High Court stated that it may be that *Yuill* would now be decided differently,[67] and Kirby J expressed the view that *Yuill* may have been 'wrongly decided'.[68]

Implications of *Daniels*

General implications

4.47 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.[69]

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63 See *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [27], [50]–[51].

64 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.

65 See *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [30]–[31], [48].

66 See Ibid, [20].

67 Ibid, [35].

68 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).

69 S Donaghue, 'Coercive Investigations and Legal Professional Privilege' (2003) 77(11) *Law Institute Journal* 40, 44.

4.48 As Kirby J noted, the implications of the decision in *Daniels* transcend the TPA and the circumstances of the parties to that case.[70] 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.

4.49 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*.[71] 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.

> 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.[72]

4.50 The Australian Taxation Office's *Access and Information Gathering Manual* proceeds on the basis that client legal privilege applies to its access and information-gathering powers, and it now makes express reference to the High Court's decision in *Daniels*.[73] Similarly, while the *Building and Construction Industry Improvement Act 2005* (Cth) is silent on 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'.[74]

4.51 Where statutes conferring powers on Commonwealth bodies are silent on the application of privilege, it is not always possible to ascertain from information on the websites of Commonwealth bodies whether or not they take the stance that their particular powers override privilege.[75] The ALRC has written to a number of Commonwealth bodies with coercive information-gathering powers and has asked

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70 See *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [84].

71 *R (Morgan Grenfell) v Special Commissioner of Income Tax* [2003] 1 AC 563, [18], [22], [25].

72 See Ibid, [22], [25].

73 See Australian Taxation Office, *Access and Information Gathering Manual* <www.ato.gov.au> at 31 March 2007, [6.14], [6.15].

74 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), [34]–[35].

75 Commonwealth bodies may never have had cause to consider their position on the application of privilege to unused powers.

those bodies, where appropriate, whether they take the view that any of their powers abrogate or modify privilege by implication.[76]

Implications concerning ASIC

4.52 Despite the decision in *Daniels*, a Commonwealth body with coercive information-gathering powers may maintain that its specific investigatory powers abrogate the privilege. ASIC, for example, maintains its reliance on the decision in *Yuill* to support its position that the ASIC Act abrogates client legal privilege.[77]

4.53 However, a number of commentators have questioned ASIC's position on privilege, and its reliance on *Yuill*. For example, 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.[78]

4.54 Geoff Healy and Andrew Eastwood express the view that the decision in *Yuill* is problematic; that it should no longer be followed; and that the better view is that ASIC's investigative powers do not abrogate client legal privilege.[79] They argue that:

- unlike the *Companies (New South Wales) 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;[80]

- provisions giving lawyers statutory protection from divulging privileged communications in response to a coercive power—such as those under s 308 of

76 Responses to those letters will be considered during the course of the Inquiry.

77 *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.

78 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.

79 See 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.

80 Ibid, 380. See also Ch 2 on when privilege can be claimed.

the *Companies (New South Wales) Code* and s 69 of the ASIC Act—are explicable as preserving the duty of confidence owed by a lawyer to a client;[81]

- 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 (New South Wales) 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, that does not amount to a waiver of privilege in subsequent litigation;[82]

- the 'special investigations' regime considered in *Yuill* has since been repealed and had no equivalent in the ASIC Act;[83] 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.[84]

4.55 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.[85]

4.56 The uncertainty concerning ASIC's position on privilege was referred to by the Treasurer in his speech on the Second Reading of 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.[86]

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81 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).

82 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.

83 Ibid, 383.

84 Ibid, 384.

85 A Black, 'Representation of Clients in Investigations by the Australian Securities & Investments Commission' (2005) (June–August) *Commercial Law Quarterly* 16, 19.

86 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 2004, 1 (P Costello—Treasurer), 1–2.

4.57 Dr Stephen Donaghue, however, is more supportive of the decision in *Yuill*. He 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.[87]

4.58 In the absence of statutory clarification, resolution of the issue of 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, test litigation may make many persons and companies subject to ASIC's powers reluctant to pursue such a course.

4.59 The ALRC is interested in hearing whether, as a matter of practice, lawyers advise their clients that they do not have to produce privileged material to ASIC in light of the decision in *Daniels*. It is important to know whether the lack of clarity concerning ASIC's position is leading to inconsistent legal advice being given to those who are subject to ASIC's information-gathering powers under the ASIC Act.

Achieving clarity

4.60 If there is a need to clarify the application of client legal privilege, the issue arises as to how this could best be achieved. 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.[88] Another method would be to enact a specific new Commonwealth statute, which provides that in the absence of any clear express statutory statement to the contrary, client legal privilege is preserved in response to a coercive information-gathering power of a Commonwealth body.[89] Specific statutory regimes that sought to abrogate or modify the privilege would need to be individually amended in order to achieve that purpose.[90]

Question 4–1 Is there a need to clarify the application of client legal privilege to the coercive information-gathering powers of Commonwealth bodies (including Royal Commissions)? If so, how would this best be achieved?

87 S Donaghue, 'Coercive Investigations and Legal Professional Privilege' (2003) 77(11) *Law Institute Journal* 40, 42.

88 Appendix A sets out federal legislation containing coercive information-gathering powers.

89 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.

90 This is consistent with Ibid, Rec 19–2.

A uniform approach?

4.61 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.

4.62 ALRC 95 recommended that the Attorney-General order a review of federal investigatory powers with a view to providing greater consistency among regulators in relation to their ability to compel the disclosure of information and the operation of client legal privilege.[91]

4.63 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.[92]

4.64 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 Commonwealth bodies.

Practical considerations

4.65 On one view, consistency of approach would arguably 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 Commonwealth body but not to another. It is not uncommon for more than one Commonwealth body with coercive powers to undertake an investigation concerning offences arising from the same transactions.

4.66 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

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91 See Ibid, Rec 19–4.

92 B Saul, 'Is Removing Legal Professional Privilege a Policy Imperative?' (2001) 39(9) *Law Society Journal* 67, 69.

the Australian Tax Office, the Australian Crime Commission, the Australian Federal Police, ASIC and the Commonwealth Director of Public Prosecutions.[93]

4.67 Examples of separate parallel investigations are those conducted by provisional liquidators, ASIC, the Australian Prudential Regulation Authority (APRA), and a Royal Commission into the affairs of HIH. The categories of documents sought by ASIC and APRA 'overlapped to a significant extent'.[94] 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. …
>
> The difficulties arising from the parallel investigations by the inspector [appointed by APRA] and ASIC in turn gave rise to difficulties for the Commission. …
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> … 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.[95]

4.68 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[96]—would alleviate some of the difficulties faced by Commonwealth bodies where parallel investigations are on foot, or where multi-agency taskforces work on the same investigation.

Varying investigatory contexts

4.69 However, an assessment of whether complete consistency of approach on client legal privilege is desirable or necessary across the range of Commonwealth bodies with coercive information-gathering powers must also entail a consideration of the investigatory contexts in which those bodies operate.

4.70 As the discussion in Chapter 3 reveals, there is a wide range of relevant Commonwealth bodies operating in vastly divergent areas including: criminal law enforcement; financial and prudential regulation; revenue; border control; health;

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93 P Costello (Treasurer), 'Project Wickenby Arrests' (Press Release, 20 July 2006).
94 N Owen, *Report of the HIH Royal Commission* (2003), [2.5].
95 See Ibid, [2.5]–[2.6].
96 Safeguards are discussed in Ch 7.

social security; transport; and public administration. There are important differences in the aims, functions, operations and powers of these bodies.

4.71 Investigation is a core function for some Commonwealth bodies—such as the Australian Federal Police and the Australian Crime Commission—whereas bodies such as Centrelink and Medicare, despite having investigatory powers, are primarily service providers.

4.72 Different functions performed by Commonwealth bodies include: conducting prosecutions; gathering intelligence; and conducting audits. While some Commonwealth bodies with investigatory powers have enforcement functions—such as the ACCC and ASIC—others—such as AUSTRAC—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,[97] APRA takes enforcement action as the exception rather than the rule, having expressed a preference for 'working cooperatively' with institutions to remedy weaknesses.[98]

4.73 There is potentially more at stake for persons the subject of Commonwealth investigations carried out by Commonwealth investigatory bodies the core function of which is enforcement, compared with persons the subject of investigations carried out by Commonwealth bodies the core focus of which is monitoring compliance.

4.74 Consequently, the issue arises whether there should be distinctions drawn in the application of privilege to those powers depending on the functions performed by those bodies, or the subject matter with which they deal. If distinctions were to be drawn depending on the subject matter with which Commonwealth bodies deal, a consistent approach to privilege could be taken, for example, in respect of all Commonwealth bodies concerned with financial markets. This arguably would extend to ASIC, the ACCC, APRA and AUSTRAC—although the ACCC's brief may be considered to be wider than this and suggest a different categorisation.

4.75 However, if distinctions were to be drawn depending on whether or not the core function or focus of a Commonwealth body were 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 in areas regulating financial markets. A further distinction may be made depending on whether the body's enforcement focus is primarily criminal, civil or administrative.

Royal Commissions

4.76 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

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97 See Australian Competition and Consumer Commission, *Annual Report 2005–06*, 3.
98 See Australian Prudential Regulation Authority, *Annual Report 2006*, 18.

Commissions, and its application to other Commonwealth investigatory bodies. As discussed in Chapter 3, Royal Commissions are only established in special circumstances, where a particular public interest has been identified.

4.77 The discovery of the truth has been described as a prime function of a Royal Commission.[99] Unlike many other Commonwealth investigations, Royal Commissions are conducted in public—although evidence can be taken in private in certain situations.[100] 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 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, the Royal Commissioner 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.[101]

4.78 The ad hoc nature of Royal Commissions distinguishes them from permanent standing Commonwealth 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 Commonwealth bodies—such as the Australian Commission for Law Enforcement Integrity or the Australian Crime Commission. In addition, the subject matter of some inquiries conducted by Royal Commissions—such as the HIH Inquiry—may also fall squarely within the investigatory jurisdictions of Commonwealth 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—particularly in circumstances where it may be politically popular for a Royal Commission to be established.

4.79 In the AWB Royal Commission, Commissioner Cole recommended that consideration be given to amending the *Royal Commission 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.[102] 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.

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99 T Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (2006), vol 1, [7.66].

100 See *Royal Commissions Act 1902* (Cth) s 6D(2), (3).

101 N Owen, *Report of the HIH Royal Commission* (2003), [1.1].

102 Ibid, Rec 4.

Achieving uniformity

4.80 If it is desirable to aim for uniformity—either across the board, or across particular Commonwealth bodies—how could this best be achieved? To expect the common law to achieve uniformity is problematic. 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 uniformity is achieved, if ever.

4.81 One way of achieving uniformity would be by creating a specific new Commonwealth statute, containing provisions on privilege. This is consistent with the approach taken in ALRC 95, where the ALRC recommended the enactment of a Regulatory Contraventions Statute including a default provision confirming the existence of privilege in relation to all forms of enquiry by a regulator, in the absence of express words to the contrary.[103]

4.82 Saul has also expressed the view that:

> One avenue of law reform may be to draft a uniform or omnibus provision on privilege, perhaps as part of a new Commonwealth Code of Procedure relating to federal investigative powers. It could set out the circumstances in which all types of privilege and immunity apply in relation to provisions compelling the disclosure of information.[104]

4.83 Another way of achieving uniformity would be to amend each federal statute that contains a coercive information-gathering power. As shown in Appendix 2, 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.

4.84 If harmonisation at the federal level were considered desirable, it may follow that national harmonisation is an equally desirable option. If that were so, it would be open to the Australian Government to lead a process through the Standing Committee of Attorneys-General to have the states and territories adopt the Commonwealth model.

Question 4–2 Is it desirable to harmonise provisions relating to the application of client legal privilege to the coercive information-gathering powers of Commonwealth bodies? If so, what approach should be taken? Should there be a uniform set of provisions or should distinctions be drawn depending on the functions performed by Commonwealth bodies or the subject matter with which they deal? In particular, should distinctions be drawn:

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103 See Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), Rec 19–1. Rec 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.

104 B Saul, 'Is Removing Legal Professional Privilege a Policy Imperative?' (2001) 39(9) *Law Society Journal* 67, 69.

(a) between Commonwealth investigatory bodies and Royal Commissions; and

(b) based on whether or not the core function or focus of the Commonwealth body is investigation or enforcement?

Question 4–3 Would harmonisation best be achieved by: creating a specific new Commonwealth statute; amending the scattered statutory provisions conferring coercive powers on Commonwealth bodies; or by some other method?

5. Practice and Procedure

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Introduction

5.1 Prior to considering the significant issue of whether there are instances where the public interest would warrant a modification or abrogation of client legal privilege,[1] the ALRC is interested in ascertaining:

(a) current practices and procedures concerning both the assertion and resolution of claims of client legal privilege; and

(b) whether there are any issues or problems with such practices and procedures—as distinct from problems with the law on privilege.

5.2 This chapter addresses a number of issues that arise concerning the practices and procedures in making and resolving privilege claims. For example, concerns have been expressed about delays caused by the making of privilege claims—especially 'blanket' privilege claims[2] and that broadly worded notices issued by Commonwealth bodies

1 Modification and abrogation are discussed in Ch 6.

2 A blanket claim is where a claim is made in respect of all documents on the premises, or in a cabinet, or in someone's possession, without the person having examined the documents to verify the claim.

have the capacity to require the production of privileged material that is only peripherally relevant to the actual transactions under investigation.

5.3 It is important to establish whether such concerns can be addressed by reforming practices and procedures rather than changing the law. This process will involve identifying, during the course of the Inquiry, existing practices and procedures that may provide suitable models for more general application.

Problems in making or resolving claims

5.4 The ALRC is interested in identifying problems in practice and procedure from those who have been or are the subject of Commonwealth coercive information-gathering powers as well as the Commonwealth bodies that exercise such powers. Different issues may arise depending on the varying circumstances under which information can be coerced; the form in which information is held; and from whom the information is compelled. Each of these matters is addressed below.

Circumstances of compulsion

5.5 The circumstances under which information can be coerced vary in significant respects. Persons the subject of a coercive power may have some time in which to produce documents or information. For example, some statutes stipulate a minimum period within which documents are to be produced.[3] 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.

5.6 In addition, 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 Commonwealth 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 in so far 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.[4]

5.7 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. A reasonable opportunity to allow a person to make a claim has been

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3 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).

4 Search warrant guidelines are discussed below. 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.

described as going beyond a mere obligation to respond reasonably to a claim when made.[5]

5.8 For example, two persons (whose names have been suppressed), have alleged that the Australian Crime Commission (ACC) seized documents from their accounting firm without giving them a reasonable opportunity to claim client legal privilege.[6]

5.9 Also, 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.[7] 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 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.[8]

5.10 Where information is obtained covertly—such as by the interception of communications—persons do not have the opportunity to claim privilege. This point was made by the Senate Standing Committee for the Scrutiny of Bills:

> The Committee agrees that covert access to communications should be subject to much tighter controls than overt access because covert access denies individuals the opportunity to protect privileged information or to challenge the grounds on which access has been granted.[9]

Form in which information is held

5.11 Information the subject of a coercive power may be held in various forms—for example, in paper or electronic form. Several cases illustrate that the production or seizure of material held on computer drives and discs presents different practical considerations from the seizure of paper records. The AFP may need to examine a hard

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5 *Question of Law Reserved (No 1 of 1998)* (1998) 70 SASR 281, 290; *Kennedy v Baker* (2004) 135 FCR 520, [99].

6 S Moran, 'Paul Hogan Linked to Tax Fraud Case', 13 February 2007, <www.news.com.au>.

7 *Oke v Commissioner of Australian Federal Police* [2007] FCA 27, [121].

8 Ibid, [122].

9 See Parliament of Australia—Senate Standing Committee for the Scrutiny of Bills, *Entry, Search and Seizure Provisions in Commonwealth Legislation* (2006), [4.54]. See also *Carmody v Mackellar* (1997) 76 FCR 115, which 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 to be construed as not authorising the recording or overhearing of privileged communications.

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.[10] The process may involve the AFP taking an image of a hard drive.[11] 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.[12]

5.12 Resolving privilege claims in respect of communications held in electronic form may present particular difficulties. For example, 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 prior 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.[13]

5.13 In 2007, 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.[14]

Persons from whom information is compelled

Information held by third parties

5.14 As noted in Chapter 3, depending on the circumstances, 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. For example, information or documents may be sought from a person's lawyer, accountant, service providers, employer, business associates, friends or family.

5.15 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

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10 See *Kennedy v Baker* (2004) 135 FCR 520, [25]–[27].

11 *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.

12 *Kennedy v Baker (No 2)* (2004) 138 FCR 414, [16].

13 *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] FCA 27.

14 *Oke v Commissioner of Australian Federal Police* [2007] FCA 27, [109].

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 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.

5.16 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[15]—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.[16]

Unrepresented persons

5.17 The ALRC has previously considered the particular difficulties faced by unrepresented litigants.[17] 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—from the perspective of unrepresented persons as well as the Commonwealth bodies that require information from them.

5.18 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. As a consequence, they may produce privileged material to a Commonwealth body in response to a

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15 It has been reported, for example, that as part of Operation Wickenby—a cross agency taskforce investigating tax fraud and money laundering—an accountancy firm was prohibited from notifying its clients that their files had been seized because of the ACC's secrecy provisions. See K McClymont and J Garnaut, 'Hogan Visit to Crime Body Revealed', *Sydney Morning Herald* (online), 14 March 2007, <www.smh.com.au>.

16 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 $2200 or imprisonment for one year.

17 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.

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 Commonwealth body interprets the production of privileged material as constituting waiver.

5.19 Section 103(3) of the *Taxation Administration Act 2003* (WA)—discussed in more detail at [5.22] below—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 documents 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.[18]

5.20 It is also relevant to note that s 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 communication and documents made by an unrepresented person in preparing for examinations or interviews conducted as part of Commonwealth investigations or in preparing to comply with other types of coercive information gathering orders. The ALRC would be interested in hearing whether Commonwealth bodies, as a matter of practice, ever seek such material as part of their investigation processes.[19]

Question 5–1 What problems arise concerning:

(a) the making and resolution of a claim for client legal privilege in response to the exercise by a Commonwealth body of a coercive information-gathering power; and

(b) in particular, where information the subject of a potential claim for privilege is held in electronic form or is sought to be seized during the execution of a search?

Question 5–2 What issues arise in relation to the making of a claim for client legal privilege where a person the subject of a coercive information-gathering power holds documents belonging to another that record potentially privileged communications?

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18 See also *Taxation Administration Act 2003* (WA) s 103(2).

19 Issues concerning the production of documents to a Commonwealth body relating to the representation of a client in the investigation process are discussed in Ch 4 and Ch 6.

Question 5–3 What issues arise in relation to the making of a claim for client legal privilege where the person who is the subject of a Commonwealth coercive information-gathering power is not legally represented or has not received legal advice in relation to his or her rights in an investigation?

Statutory procedures

5.21 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 4.

5.22 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), which is also considered at [5.19] above. 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.

5.23 An issue arises as to whether the procedures to be adopted in making and resolving a claim for privilege should be set out in legislation, or whether they are more appropriately dealt with in guidelines or policy statements.

Search warrant guidelines

5.24 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.[20]

Execution of warrants at premises of lawyers

5.25 In 1997, a protocol establishing Guidelines between the Australian Federal Police and the Law Council of Australia came into effect (the AFP Guidelines) concerning the execution of Commonwealth search warrants on the premises of lawyers, law societies and similar institutions.[21] 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'.[22] 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;

  (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;

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20 *Baker v Campbell* (1983) 153 CLR 52, 105. See also *Australian Federal Police v Propend Finance* (1997) 188 CLR 501, 505–506 per 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.

21 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).

22 See Ibid, [5].

(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,[23] 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.

5.26 Shortly after the AFP Guidelines came into effect they were the subject of criticism.[24] In 1998, Dr Sue McNicol observed that 'although the [AFP] Guidelines generally seem to have worked in practice, there are still several unresolved issues,[25] including:

- 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;[26]

23 The parties may agree to another reasonable time period.

24 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.

25 Ibid, 138.

26 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.

- 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';[27]

- 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;[28] 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.[29]

5.27 The ALRC is interested in ascertaining any experiences with whether the AFP Guidelines are working in a satisfactory manner.

Execution of warrants at other premises

5.28 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 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.[30] 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.[31] The ALRC is interested in determining the extent to which this procedure is followed, and whether it is working in a satisfactory manner.

Seizing privileged material held electronically

5.29 The ALRC would like to hear views about whether policies and procedures governing the execution of Commonwealth search warrants need to be amended specifically to address claims made for privilege in respect of documents stored electronically. In *Kennedy v Baker*, Branson J stated that it could be assumed that the notice concerning privilege which was attached to the warrant was drafted prior to the enactment of the *Cybercrime Act 2001* (Cth), which inserted s 3L(1A) into the *Crimes*

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27 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.

28 Ibid, 141.

29 Ibid, 141.

30 *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] FCA 27, [104].

31 The parties may agree to another time period.

Act 1914 (Cth).[32] As noted above, that section 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.

Question 5–4 Are the '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 in Circumstances where a Claim of Legal Professional Privilege is Made' working in a satisfactory manner? Are the procedures followed in respect of the execution of warrants at other premises satisfactory?

Question 5–5 Do policies and procedures governing the execution of Commonwealth search warrants need to be amended specifically to address claims made for privilege in respect of documents stored electronically?

Procedures to be adopted?

5.30 The ALRC is interested in hearing views about what procedures would be effective in resolving claims for client legal privilege made during the exercise of coercive information-gathering powers. In particular, the ALRC would like to gauge views on:

- 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; and

- whether the use of alternative dispute resolution models would be inappropriate for any particular investigations or in respect of any Commonwealth body, such as a Royal Commission.

5.31 In relation to the use of alternative dispute resolutions schemes, it should be borne in mind that Chapter III of the *Constitution* precludes anyone other than a judicial officer from exercising judicial power.[33] The concept of judicial power is affected by many variables, which make it incapable of exhaustive definition.[34] In *Nicholas v The Queen*, Gaudron J stated that:

32 *Kennedy v Baker* (2004) 135 FCR 520, [20].

33 See Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, ALRC 92 (2001).

34 S Ratnapala, *Australian Constitutional Law: Foundations and Theory* (2002), 120.

> 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.[35]

5.32 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.[36]

5.33 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.[37]

5.34 In considering what procedures should be adopted, it is useful to have regard to existing procedures—such as those adopted by the Australian Taxation Office (ATO). These procedures are discussed below.

Australian Taxation Office's procedures

5.35 The ATO has developed and published guidelines concerning procedures to be adopted in relation to making and resolving claims for client legal privilege made in response to the exercise of its information-gathering powers. The ATO's *Access and Gathering Manual* (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.

5.36 Chapter 6 of the ATO Manual deals with privilege and clearly states the ATO's policy is that its access and information-gathering powers do not override client legal privilege.[38] The ATO Manual sets out what a person claiming privilege must do.[39] It 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.[40]

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35 *Nicholas v The Queen* (1998) 193 CLR 173, [70]. See also *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357.

36 'Binding' refers to the enforceability of a decision: see *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245.

37 See *AWB Ltd v Cole* (2006) 152 FCR 382, [187].

38 Australian Taxation Office, *Access and Information Gathering Manual* <www.ato.gov.au> at 31 March 2007, [6.15].

39 See Ibid, [6.2.2], [6.6.49]–[6.6.50]. The obligations of a person making a privilege claim, and the ATO's approach to this, are discussed below.

40 See Ibid, [6.2.3], [6.6.4]–[6.6.11].

5.37 The ATO Manual encourages a consultative approach to resolving claims for privilege. Tax officers are to work with claimants to develop a procedure for resolving privilege claims.[41] 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.[42]

5.38 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 nominate a person to inspect documents and agree whether or not privilege applies. The ATO has devised an Inspection Agreement template.[43]

5.39 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.[44]

5.40 In addition, guidelines have been 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 Guidelines).[45]

Obligations of Commonwealth bodies

5.41 In considering what procedures would be effective in relation to privilege claims, regard must be had to identifying the scope of the obligations of the Commonwealth bodies that exercise coercive information-gathering powers. These obligations can arise before a privilege claim is made; when it is made; and after it is made.

5.42 In the context of litigation, the Commonwealth and its agencies must act as 'model litigants', fairly, with complete propriety, and in accordance with the highest

41 See Ibid, [6.6.9].
42 See Ibid, [6.6.12].
43 See Ibid, Ch 6.
44 See Ibid, [6.6.38]. The ATO considers that Australian Government Solicitors or a firm of solicitors would be suitable third parties.
45 See Ibid, Appendix B.

professional standards in handling claims and litigation brought by or against them.[46] The issue arises whether comparable standards are or should be applied to the Commonwealth and its agencies in conducting investigations.[47]

Notifying persons of their position concerning privilege

5.43 There is a question whether Commonwealth bodies should be required to provide complete and accurate information to persons of their position concerning privilege, when that information should be given, and in what manner. For example, should notices to produce documents—or the covering letter to such documents—state expressly whether or not the privilege applies? 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?

5.44 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.[48]

5.45 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. As mentioned in Chapter 4, s 155(7B) states that a person is not required to produce a document that would disclose privileged information.[49] 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.[50]

5.46 The ATO Manual instructs 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:

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46 *Legal Services Direction 2005: Appendix B—The Commonwealth's Obligation to Act as a Model Litigant*. See also Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89 (2000), Ch 3.

47 The ALRC has made inquiries to ascertain the content and status of the Australian Government Investigation Standard, the existence of which is mentioned on the website of the Australian Federal Police.

48 *Fieldhouse v Commissioner of Taxation* (1989) 25 FCR 187, 200.

49 Australian Competition and Consumer Commission, *Submission LPP 2*, 14 March 2007.

50 Ibid.

> 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.[51]

5.47 Letters enclosing notices issued by the Australian Securities and Investments Commission (ASIC) 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. Where a notice is issued to a person who is not a lawyer, the covering letter to the notice 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 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.[52]

5.48 Given that, following the decision in *Daniels*, ASIC's position on privilege has been questioned,[53] there may be an issue about whether it is appropriate for ASIC to state unequivocally in its covering letters to certain ASIC notices that the privilege is not available.

Managing and recording documents the subject of a claim

5.49 Where privilege is abrogated or modified, there is a question about how a Commonwealth 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 privilege is abrogated, but use immunity applies—which prevents the subsequent use of privileged information in certain proceedings—or, despite the production of privileged information, the privilege is not taken to have been lost against third parties—for example in response to a subpoena issued to the Commonwealth body.[54]

5.50 Should it be incumbent upon Commonwealth bodies in such circumstances to develop practices and procedures requiring, for example, that documents the subject of

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51 Australian Taxation Office, *Access and Information Gathering Manual* <www.ato.gov.au> at 31 March 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 2 April 2007, 5.

52 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.

53 See discussion in Chapter 4 on the implications of *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

54 Use immunity and the issue of whether the privilege remains available against third parties are discussed in Ch 6.

a privilege claim are clearly identified as such, or kept separately from other documents? 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.[55]

Publishing policies and procedures?

5.51 Should Commonwealth bodies that have coercive information-gathering powers be required to develop and publish practices and policies concerning their approach to privilege claims? Some Commonwealth bodies have internal policies and procedures in this regard but these are not always apparent, transparent or accessible. Thus, persons who are subject to coercive powers may not be clear about the approach a Commonwealth body will take on privilege—particularly if the legislation administered by the body is typically silent on privilege.

5.52 The ATO's policies on privilege—which are accessible on its website—are a notable exception. 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.

5.53 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 immunity.[56] 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

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55 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.

56 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).

- the accumulation of expertise.[57]

Obligations of notice recipients

5.54 In considering which procedures would be effective in relation to privilege claims, regard must be had to identifying the scope of the obligations of those against whom coercive information-gathering powers are exercised.

Notifying Commonwealth body of a privilege claim?

5.55 In circumstances in which privilege applies, should the recipient of a notice, warrant or other coercive information-gathering power be required to: (a) notify a Commonwealth body that documents the subject of privilege have been withheld; and (b) provide the Commonwealth body with details of those documents? In practice, there appear to be varying approaches in this regard. The ACCC has stated that:

> Where legal professional privilege is claimed in relation to documents falling within the scope of a s 155 notice, initially the documents are not provided to the ACCC or versions with redactions are provided.
>
> There is no obligation on a notice recipient to advise the ACCC of any claim of legal professional privilege. Accordingly, … the ACCC may not be aware that any claim of legal professional privilege is being made if the recipient does not communicate this … and the response to the s 155 notice seems relatively complete. In these circumstances, the ACCC is unlikely to be in a position to detect or test the claim.[58]

5.56 Where the recipient of a notice informs the ACCC that it is claiming privilege, the practice followed by the ACCC is similar to that which would be followed in discovery:

> The ACCC reviews any descriptions of documents provided by the notice recipient, and may seek to test the claim by requesting and reviewing further relevant information. This process is essentially a negotiation and does leave the ACCC to disadvantage, as there is no requirement on the notice recipient to identify the basis for the claim.[59]

5.57 In contrast, drawing on principles established by the common law, the ATO's policy in relation to persons claiming privilege is that the person must:

- make it clear that the claim is being made—a vague assertion of the privilege is insufficient;

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57 See Ibid, Ch 10, esp [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.

58 Australian Competition and Consumer Commission, *Submission LPP 2*, 14 March 2007.

59 Ibid.

- 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;[60] 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.[61]

5.58 The ATO has pro formas that it requests persons claiming privilege to complete for each individual claim—although it acknowledges that they are not compelled to do so.[62]

5.59 In addition, under the ATO Guidelines, 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:

- 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.[63]

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60 Australian Taxation Office, *Access and Information Gathering Manual* <www.ato.gov.au> at 31 March 2007, [6.2.2].
61 Ibid, [6.6.49]–[6.6.50].
62 See Ibid, [6.6.18], [6.6.26], [6.6.31]–[6.6.32].
63 See Ibid, Appendix B, [23].

Question 5–6 The Australian Taxation Office has developed and published guidelines about dealing with claims for client legal privilege made during the exercise of coercive information-gathering powers. What procedures would be effective in resolving claims for client legal privilege raised in response to the exercise by a Commonwealth body of a coercive information-gathering power?

Question 5–7 Should Commonwealth bodies exercising coercive information-gathering powers be required to develop and publish practices and policies in relation to:

(a) accurately informing persons of their position concerning client legal privilege;

(b) the procedures to be adopted in making and resolving claims for privilege; and

(c) managing and recording the documents or communications received in respect of which a claim for privilege has been made?

6. Modification or Abrogation of Privilege?

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Introduction

6.1 Chapters 4 raises the issue of whether there needs to be greater clarity and consistency in the law as to the application of client legal privilege to federal coercive information-gathering powers. This chapter focuses on whether it may be desirable to modify or abrogate client legal privilege to achieve a more effective performance of Commonwealth investigatory functions.

6.2 As noted in Chapter 1, there have been many staunch critics of client legal privilege, including those such as Jeremy Bentham, who argued that the privilege should be abolished altogether to allow full disclosure of all relevant facts. In contrast, many in the legal profession argue that privilege is central to the administration of justice and its operation should not be hindered in any way.[1]

6.3 This chapter initially considers some of the problems that arise from the application of client legal privilege to federal investigations. The chapter then considers modification or abrogation of the privilege as one means of addressing these problems, and asks questions about the outcomes that may be achieved by such an approach.

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1 I Govey, 'Legal Professional Privilege and Commonwealth Investigatory Bodies' (Paper presented at 35th Australian Legal Convention, Sydney, 23 March 2007), 3.

Issues and problems in applying privilege

6.4 Claims of client legal privilege undoubtedly present some difficulties for investigators, since they would prefer to be able to gain 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.

Hampering the effectiveness of investigations

6.5 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'.[2] 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.[3]

6.6 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 v Consumer Commission* (*Daniels*)[4], 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 following the decision in *Esso v Commissioner of Taxation*,[5] adopting the dominant purpose test,[6] there was a significant chance that more legal advice would become unavailable due to the privilege.[7]

6.7 In *Corporate Affairs Commission of NSW v Yuill*, 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.[8]

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2 *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319, 327 (Brennan J).
3 *Australian Federal Police v Propend Finance* (1997) 188 CLR 501, 581.
4 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.
5 *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49.
6 Discussed in Ch 2.
7 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 557.
8 *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319, 326.

6.8 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.[9]

6.9 In a submission to the ALRC's inquiry into the use of civil and administrative penalties in federal law,[10] the ACCC expressed the view that various species of privilege have been employed in the past to diminish significantly its ability to efficiently and thoroughly undertake investigations 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 implications in terms of the Act.[11]

6.10 In its submission to the same Inquiry, the Australian Securities and Investments Commission (ASIC) told the ALRC that there were particular difficulties investigating misconduct in the financial sector and that

> in the case of legal professional privilege, these difficulties are combined with the frequent significant involvement of legal advisers in relation to the transactions of the type regularly investigated by ASIC.[12]

6.11 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.[13]

6.12 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. Accordingly:

> 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

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9 *Australian Competition and Consumer Commission v Daniels* (2001) 108 FCR 123, 137 (Wilcox J).

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

11 Ibid, [19.39].

12 Ibid, [19.40].

13 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 564.

> frustration of such investigations. At least, that conclusion is far less obvious than in the case of the privilege against self-exposure to penalties.[14]

Delay and frustration

6.13 Claims of client legal privilege—even where validly made—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.[15] For example, in *Kennedy v Wallace*,[16] 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.[17] The practical impact of the delay was that ASIC was not able to consider any evidence in those documents for just over one year.

6.14 The length of disputes was a significant reason for the minority decision of Kirby J in *Esso v Commissioner of Taxation.*[18] Kirby J suggested that the sole purpose test should remain 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 each communication was to seek or receive legal advice.[19]

6.15 In *Daniels*, Kirby J noted that in some of the 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'.[20]

Difficulties in Royal Commissions

6.16 The report of the inquiry concerning the AWB and the Oil-for-Food Programme (the AWB Royal Commission) discussed in detail the difficulties caused by claims to client legal privilege that were made by the AWB during that Inquiry.

6.17 During the Royal Commission, AWB raised up to 40 claims to client legal privilege concerning more than 1,400 documents.[21]

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14 Ibid, 557 (Gleeson CJ, Gaudron, Gummow and Hayne J).
15 *Baker v Campbell* (1983) 153 CLR 52.
16 *Kennedy v Wallace* (2004) 208 ALR 424.
17 *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.
18 *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49.
19 Ibid, 154.
20 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 574.
21 T Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (2006), [7.44].

6.18 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. In the Federal Court, Justice Young held that the document in question was not subject to privilege. The decision also 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. Amendments were then made to the *Royal Commissions Act 1902* (Cth) 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 purpose of making a finding about that claim.[22]

6.19 Following these amendments to the *Royal Commissions Act*, 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, 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.[23] 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.[24] 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.[25]

6.20 Commissioner Cole concluded that circumstances may arise where it is appropriate that 'the public interest in discovering the truth should prevail over the private interest in the maintenance of legal professional privilege'.[26] In his view, 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 legal professional privilege. In Cole's view, that decision would depend upon the issues that are the subject of the particular Royal Commission.[27] On this basis, Cole 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, legal professional privilege should not apply.[28]

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22 See *Royal Commissions Act 1902* (Cth) s 6AA(2), (3).

23 T Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (2006), [7.55].

24 Ibid, [7.59].

25 Ibid, [7.55].

26 The view of client legal privilege as a 'private interest' is discussed in Ch 1.

27 T Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (2006), [7.67]–[7.68].

28 Ibid, Rec 4.

Abuse of privilege

6.21 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.[29]

6.22 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).[30]

6.23 Commissioner Cole's report in the AWB Royal Commission expressed concerns about AWB's claims to client legal privilege. He stated that AWB had not produced a list of which documents formed the basis of the privilege claim.[31] He also noted that many documents for which privilege had been claimed initially were no longer claimed to be privileged.[32] 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.[33]

6.24 The ALRC would be interested in hearing views about whether there is significant misuse of claims of client legal privilege as a tactic for obstruction and delay. The question about what measures could be put in place to prevent or redress any such abuse is discussed in Chapter 7.

Question 6–1 In *Daniels*, the High Court described client legal privilege as a 'fundamental common law right', rather than a mere procedural safeguard. However, investigatory bodies need to be able to have access to the relevant information required to perform their functions. Would modification or abrogation of the client legal privilege rules achieve greater efficiency or effectiveness in the work of Commonwealth investigatory agencies, including Royal Commissions?

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29 *Burton v RJ Reynolds Tobacco Company* 167 FRD 134 (D Kan, 1996), 184.
30 Australian National Audit Office, *ATO Administration of Tax Penalties* (2000), Audit Report 31, [3.46].
31 T Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (2006), [7.42].
32 Ibid, [7.55].
33 Ibid, [7.64].

Should privilege be modified or abrogated?

6.25 Client legal privilege may be modified or abrogated by legislation. 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.[34] 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.[35]

6.26 As outlined in Chapter 4, modification or abrogation of privilege must be express, as common law rights cannot be overridden in the absence of express unambiguous words or a necessary implication to that effect.[36] There are a number of possible ways that client legal privilege could be abrogated or modified in relation to federal investigatory bodies. One model would be to abrogate the privilege for all the coercive powers of federal bodies—in essence, a return to the position pre-*Baker v Campbell*.[37] Another model would be to assess the appropriate position for abrogating the privilege based on the nature of each piece of legislation and the particular role and functions of the federal body concerned.

6.27 Alternatively, the fundamental principles of client legal privilege could be maintained, but modified to limit its application to a narrower set of circumstances. For example, in Chapter 2, the ALRC asks whether the privilege should be available to corporations. Other ways in which the privilege could be modified include limiting the availability of privilege to certain types of confidential communications, such as advice on representation but not pre-existing documents. Client legal privilege also could be modified to adopt a 'balancing test' approach, whereby privilege is not absolute, but can be determined to apply based on a set of public interest criteria.

Arguments in favour of abrogation or modification

6.28 There are essentially two streams of argument in favour of abrogation of the privilege. The first relates to the alignment with the underlying rationale. As noted in Chapter 1, if client legal privilege is essentially viewed as a private right, then there are

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

35 *Rees v Kratzman* (1965) 114 CLR 63, 80 (Windeyer J).

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

37 This model of abrogation could be combined with a number of different safeguards, including immunity after disclosure, which is discussed in Ch 7.

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.

6.29 There is also 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.[38]

6.30 The complexity of modern business arrangements arguably may tilt 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 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.[39]

6.31 As noted above, the ACCC and ASIC have argued that the nature of the offences that they regulate means that lawyers will be involved in all steps of the business processes—and thus many of the crucial documents needed for an investigation could be covered by the privilege. 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 Commission has no power to obtain confidential information about taxpayers who may be negligent or dishonest.[40]

6.32 Also in relation to taxation obligations, the New Zealand Law Commission has downplayed fears that abrogation would deliver regulators unfettered power.

> 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 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.[41]

6.33 In a submission to the ALRC's inquiry into the use of civil and administrative penalties in federal law,[42] the Australian Taxation Office (ATO) stated that, while *Baker v Campbell* expressed the view that legal professional privilege ensures 'some protection of the citizen—particularly the weak, the unintelligent and ill-informed citizen—against the leviathan of the modern state', the ATO's experience is that it is

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38 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].

39 *Baker v Campbell* (1983) 153 CLR 52, 96.

40 *New Zealand Stock Exchange v CIR* [1992] 3 NZLR 1, 4.

41 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].

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

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.[43]

6.34 As discussed in Chapter 2, there is debate about whether the recognised exception to the privilege—communications made in furtherance of a crime or fraud—effectively prevents improper claims of privilege. As noted in that chapter, it is difficult for an investigative body to detect the fraudulent purpose of the communication without first having access to it.

6.35 Dr Jonathan Auburn suggests that the scope of the privilege has changed a number of times over the centuries with little effect on lawyer-client relations.[44] In Australia, prior to *Baker v Campbell*, privilege did not extend to non-curial matters. The ALRC would be interested in hearing views as to the effect this lack of protection had on advice given in contexts where a federal investigation could eventuate later.

Arguments against abrogation or modification

6.36 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.[45]

6.37 In contrast, Auburn argues that lawyers are reluctant to question what he terms the 'abstract principles' behind the privilege.

> 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.[46]

43 Ibid, [19.82].
44 J Auburn, *Legal Professional Privilege: Law and Theory* (2000), 67.
45 *Carter v The Managing Partner Northmore Hale Davy and Leake* (1995) 183 CLR 121, 139.
46 J Auburn, *Legal Professional Privilege: Law and Theory* (2000), 65.

6.38 Auburn states that:

> just because the benefits 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.[47]

6.39 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.[48]

6.40 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.[49] 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 ...[50]

6.41 As noted above, in *Daniels*, both McHugh J and Kirby J 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.[51] Geoff Healy and Andrew Eastwood suggest that legal advice about a client's past conduct, while it may refer to relevant facts and circumstances,

> 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.[52]

6.42 The 2003 *Review of the Competition Provisions of the Trade Practices Act* (Dawson Review)[53] did not recommend that client legal privilege be abrogated under the TPA, on the basis of its role in compliance.

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47 Ibid, 66.

48 '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.

49 See, eg, B Saul, 'Legal Professional Privilege: Balancing Law Enforcement Against Protecting the Regulated' (2002) 76(2) *Law Institute Journal* 68

50 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.

51 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 583.

52 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.

53 Australian Government Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act* (2003).

> 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.[54]

6.43 The simple reason that abrogation may make a regulator's job easier is not of itself a justification for removal of the privilege. In its submission to the ALRC's Inquiry into the use of civil and administrative penalties in federal law, the Law Council of Australia argued that:

> It is wrong to attempt to circumvent due legal process because of administrative inconvenience which may result for individual agencies … Moreover, the public interest is served by ensuring thorough and proper investigatory processes are followed.[55]

6.44 Healy and Eastwood also suggest that the limits placed on client legal privilege by its own definition ensure that it does not unduly frustrate regulatory investigations. They cite the discussion in *Pratt Holdings v Commissioner of Taxation*[56] as demonstrating the difficulty of establishing the dominant purpose in cases of complex business transactions where advice is obtained from a number of professionals.[57]

> 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.[58]

6.45 Occasional abuse of the privilege is also not necessarily a reason for outright removal of a protection. 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. Possible measures are discussed in detail in Chapter 7, including guidance in professional rules of conduct about the making and maintaining of privilege claims, professional disciplinary action, the imposition of penalties, and education.

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54 Ibid, Ch 13.

55 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), [19.86].

56 *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217.

57 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.

58 Ibid, 338.

6.46 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.[59]

6.47 In the United States, 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'. Professional conduct rules governing Australian lawyers are discussed in Chapter 7.

6.48 The ALRC is interested in hearing views about what consequences might flow from modification or abrogation of the privilege. For example, in an Australian context, would the abrogation of client legal privilege have a 'chilling effect' on the nature and quality of complex legal advice?

6.49 Chapter 4 looks at whether it would be desirable to harmonise all provisions relating to the application of client legal privilege to the coercive information-gathering powers of Commonwealth bodies or whether there should be consideration of the investigatory contexts in which those bodies operate. In the context of modification or abrogation of the privilege, the ALRC is interested in hearing views on whether it is desirable to modify or abrogate the privilege uniformly to all the coercive information-gathering powers of Commonwealth bodies or should distinctions be drawn depending upon the functions performed by Commonwealth bodies and Royal Commissions or the subject matter with which they deal?

Question 6–2 What consequences might flow from the modification or abrogation of the privilege?

Question 6–3 Is it desirable to modify or abrogate the application of client legal privilege uniformly to all the coercive information-gathering powers of Commonwealth bodies or should distinctions be drawn depending upon the functions performed by Commonwealth bodies and Royal Commissions or the subject matter with which they deal?

Examples where the privilege is currently abrogated

6.50 As noted in Chapter 4, very few Commonwealth statutes expressly abrogate the privilege. However, one example where this has happened is in the *James Hardie*

59 American Bar Association, *Report of the Task Force on Attorney-Client Privilege* (2005).

(Investigations and Proceedings) Act 2004 (Cth). That Act abrogated client legal privilege in relation to certain material, allowing its use in investigations of the James Hardie Group and any related proceedings.[60] The Explanatory Memorandum of the James Hardie (Investigations and Proceedings) Bill 2004 noted that the investigation of possible contraventions of the *Corporations Act 2001* (Cth) may be impaired if ASIC and the Commonwealth Director of Public Prosecutions (CDPP) could not obtain material subject to claims of client legal privilege. In the James Hardie matter, the transactions in question were complex, and the subject of extensive legal advice and assistance. It was argued that special legislation was justified as

> materials documenting this advice may offer critical evidence as to the purpose and nature of certain transactions and such evidence may not be available from any other source.[61]

6.51 As discussed in Chapter 4, the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) does not contain a provision that abrogates client legal privilege expressly. However, it contains provisions similar to those in the *Companies Code* that were the subject of the decision in *Yuill*.[62] ASIC relies on *Yuill* to support its position that the ASIC Act impliedly abrogates privilege.

6.52 Client legal privilege is also abrogated for Royal Commissions established in New South Wales 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 thing on the ground…of privilege or on any other ground'.

6.53 This has been held to apply to client legal privilege as well as to the privilege against self-incrimination.[63] Under the *Evidence Act 1958* (Vic), if a person is required by a 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 matter in respect of which the person could claim client legal privilege.[64]

6.54 One way of establishing the practical effects of the abrogation of privilege would be to hear views from those who work within legislative regimes where the privilege has been abrogated. In the case of the *James Hardie (Investigations and Proceedings) Act 2004* (Cth), the legislation was applied retrospectively, so it would not be possible to determine what advice would have been given or sought had it been

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60 See *James Hardie (Investigations and Proceedings) Act 2004* (Cth) s 4.

61 Explanatory Memorandum, James Hardie (Investigations and Proceedings) Bill 2004 (Cth), 2.

62 *Australian Securities and Investments Commission Act 2001* (Cth) ss 69, 76(1)(d).

63 See *R v Hood* (1997) 91 A Crim R 526.

64 *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.

known to lawyer and client that their communications could have been compelled by ASIC at some later time. A similar argument perhaps could be mounted about whether a person would be aware that their action may become the focus of a Royal Commission.

6.55 For a long period of time, ASIC has taken the view that privilege is not available under the ASIC Act, and therefore lawyers who advise clients on the *Corporations Act 2001* (Cth) or related legislation would be aware that there is the potential for their advice to be sought by ASIC should an investigation occur. The ALRC is interested in receiving information about whether this has had a detrimental effect on lawyer-client relations in practice in this area, or in any other in which the privilege is not available.

6.56 Where the rules regarding privilege have been subject to change, such as with respect to the ATO and ACCC, has there been a practical impact that can be seen in providing advice under the legislation, both when privilege was in force and when it was removed?

6.57 Conversely, when agencies and Royal Commissions have had access to what would otherwise be privileged material, has the availability of that material facilitated better fact finding and enforcement by those bodies?

Question 6–4 Client legal privilege has been abrogated under certain Commonwealth legislation such as the *James Hardie (Investigations and Procedures) Act 2004* (Cth). ASIC also takes the position that client legal privilege is abrogated under the *Australian Securities and Investments Commission Act 2001* (Cth). Similarly, client legal privilege is abrogated under the *Royal Commissions Act 1923* (NSW). What has been the practical effect, if any, of this abrogation on lawyer-client relations? Has the availability of otherwise privileged material facilitated better fact-finding and enforcement by investigatory bodies?

Is client legal privilege a special right?

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.[65] The concept also includes a privilege against self-exposure to a civil or administrative penalty.[66] In relation to the investigative 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

65 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.
66 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

entitled to refuse to produce documents, but are permitted to assert the privilege subsequently in civil or criminal proceedings commenced after the investigation.[67]

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',[68] 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 legal professional privilege should be accorded differential treatment from the privilege against self-incrimination was directly examined in *Re Compass Airlines Pty Ltd*.[69] 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 legal professional 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 that legal professional privilege had been abrogated.[70] 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 to read into such a provision 'an intention to eliminate the very different privilege inherent in a proper legal professional relationship'.[71]

6.61 The decision in *Re Compass Airlines Pty Ltd* was largely based on an earlier decision *Re Transequity Ltd (in liq)*.[72] 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.[73]

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 legal professional privilege on an equal footing with the privilege against self-

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67 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 Chapter 7.

68 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.

69 *Re Compass Airlines Pty Ltd* (1992) 35 FCR 447.

70 Ibid, 459.

71 Ibid, 464.

72 *Transequity Ltd (in liq)* (1991) 6 ACSR 517.

73 Ibid, citing *Baker v Campbell* (1983) 153 CLR 52, 114 (Deane J).

incrimination by answering the question whether the *Trade Practices Act* 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 legal professional privilege.[74] However, Moore J noted 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.[75]

6.64 Wilcox J's view was later rejected by the High Court.[76] The decision of the Full Federal Court also has been criticised for making only passing reference to *Re Compass Airlines Pty Ltd*, and for not considering the conceptual differences between the privilege against self-incrimination and legal professional privilege.[77]

Possible models of modification

Documents not related to representation

6.65 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.[78] 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.[79]

6.66 In *Caltex*, McHugh J cited Lord Templeman in *Istel v Tully*[80] 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.[81]

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74 *Australian Competition and Consumer Commission v Daniels* (2001) 108 FCR 123, 137.

75 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.

76 See *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 559, 565.

77 R Travers, 'Confidentiality of Legal Advice after Australian Competition and Consumer Commission v Daniels Corporation' (2002) 9 *Competition and Consumer Law Journal* 289, 299.

78 Queensland Law Reform Commission, *Abrogation of the Privilege against Self-Incrimination: Final Report*, R 59 (2004), 36.

79 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 493. See also the discussion of approaches to the application of that immunity to documents and oral statements in Chapter 7.

80 *Istel v Tully* [1993] AC 45, 53.

6.67 In its report on *Abrogation of the Privilege against Self-Incrimination*, the Queensland Law Reform Commission 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.[82]

6.68 In the United States, 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.[83] After considering the United States 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.[84]

6.69 The ALRC is interested in hearing views about 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 is 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. The ALRC also would be interested in hearing views on whether there are other classes of communications to which the privilege should not apply or should be modified.

Question 6–5 In some areas, the privilege against self-incrimination applies only to interviews and information given in the course of an investigation, not to pre-existing documents. Should client legal privilege be available only for those documents or communications that relate to the representation of a client once the investigation process commences, and not pre-existing documents? Are there other classes of confidential communications to which the privilege should not apply or should be modified?

Qualified privilege

6.70 Under the common law, the lawyer-client relationship is the only one in which the communications are completely protected from disclosure in court. As discussed in

81 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 555.

82 Queensland Law Reform Commission, *Abrogation of the Privilege against Self-Incrimination: Final Report*, R 59 (2004), 62–63.

83 *Shapiro v United States* 335 US 1 (1948). See also New Zealand Law Commission, *The Privilege against Self-Incrimination: A Discussion Paper* (1996), 61.

84 Ibid, 63.

Chapter 2, client legal privilege is an absolute privilege. However, the *Evidence Act 1995* (NSW) provides for a professional confidential relationship privilege.[85] Section 127A of the *Evidence Act 2001* (Tas) provides an absolute privilege for medical communications in civil proceedings. In the final report on *Uniform Evidence Law* (ALRC 102), the ALRC recommended that the Commonwealth *Evidence Act* adopt the professional confidential relationships privilege, following the model of the NSW Act.[86]

6.71 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.

6.72 Section 126B provides:

> (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:
>
> (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:

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85 *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. See also the discussion on privilege and other professional relationships in Ch 2.

86 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 recommend that the confidential relationships privilege should apply to pre-trial discovery and the production of documents in response to a subpoena.

> (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.

6.73 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.[87] 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.[88]

6.74 The ALRC is interested in receiving views about whether adoption of some of the principles of the professional relationships privilege could serve as a model to modify the operation of client legal privilege in federal investigations.

6.75 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

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87 *Evidence Act 1995* (NSW) s 126B; see also *Wilson v New South Wales* [2003] NSWSC 805, [18].

88 New South Wales, *Parliamentary Debates*, Legislative Council, 22 October 1997 (J Shaw—Attorney General), 1120: see S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.11940].

why the material should be disclosed, allows a judge to exercise discretion and assess the interests of justice in each particular case.

6.76 A qualified privilege addressees the need to avoid a 'one size fits all' approach to the difficulties raised by privilege claims, and would 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 grave public importance, a qualified privilege would allow the case to be made for access and those interests be balanced against the rights of the individuals in those matters. This proposal is 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.[89]

6.77 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. 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 any disclosures to a lawyer will remain confidential. In *Grant v Downs*, the High Court considered that there was no further 'balancing test' to be performed in relation to client privilege.

> 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.[90]

6.78 Other arguments raised in favour of an absolute rule include that, if lawyers were bound to tell a client that the court may conduct a balancing test, this would worsen the chilling effect.[91] There are also a number of practical difficulties with this proposal 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.

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89 T Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (2006), [7.67].

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

91 J Auburn, *Legal Professional Privilege: Law and Theory* (2000), 65.

Question 6–6 Once a matter has proceeded beyond the investigation phase, should the absolute protection available under the current client legal privilege rules be replaced with a 'qualified' privilege along the lines of Division 1A of the *Evidence Act 1995* (NSW)? (In which case, a court would have discretion to admit the material if the probative value of the evidence, having regard to the nature of the offence, outweighs the harm to the person who made the confidential communication.)

7. Safeguards

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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 The first part of this chapter considers existing safeguards; those that might be put in place if privilege were abrogated or modified; and whether harmonisation of safeguards is necessary or desirable. In particular, it raises the issues of whether restrictions should be placed on the use of privileged communications obtained by compulsion, and whether the privilege should remain available against third parties.

7.3 The second part of the chapter considers types of measures that might be implemented to prevent or redress abuse of client legal privilege, including whether there should be a greater emphasis on education about legal ethics and professional responsibility, as well as a greater use of professional disciplinary proceedings in appropriate cases.

Safeguards if privilege is modified or abrogated

Representation of client in investigation

7.4 A person's ability to seek and receive legal advice in responding to the coercive powers of a Commonwealth 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 Commonwealth investigation, representation in that process can help to ensure that his or her interests are properly protected.

7.5 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.[1]

7.6 For the purpose of representing a client in an investigation, a lawyer might take notes of the client's instructions or prepare a chronology of events.

7.7 Chapter 4 notes that, where privilege is abrogated by express words or necessary implication, there is uncertainty whether the abrogation covers communications that relate to the representation of the client in an investigation—as distinct from privileged communications that relate to the actual matter under investigation.

7.8 To the extent that greater clarity is required, there is a related issue about what the substance of that clarification should be. There is a question whether there should be a prohibition on the compulsory disclosure of privileged communications relating to the representation of the client in the investigation.

7.9 If one accepts the argument that allowing a Commonwealth body access to privileged material is necessary 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.[2]

7.10 Ashley Black has stated that, as a matter of practice, the Australian Securities and Investments Commission (ASIC) does not typically seek to exercise its

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1 *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.

2 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.

investigatory powers under the ASIC Act to obtain access to documents relating to the representation of a client in an investigation.[3] He 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.[4] Nicholas Korner has also expressed the view that the compulsory disclosure of such communications undermines, and is inconsistent with, the right to legal representation.[5]

7.11 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 which were brought into existence for the sole purpose of their being used to enable legal advisers to represent that person before the Board. His Honour 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.[6]
>
> …
>
> 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 right of the value of the right to representation must be seriously diminished.[7]

Question 7–1 If client legal privilege were to be abrogated or modified, should there be a distinction drawn between privileged communications relating to the representation of a client in the investigation process, and privileged communications that relate to the subject matter of an investigation?

Use and derivative use immunity

7.12 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.

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3 A Black, 'Representation of Clients in Investigations by the Australian Securities & Investments Commission' (2005) (June–August) *Commercial Law Quarterly* 16, 19.

4 Ibid, 19.

5 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.

6 *Commonwealth of Australia v Frost* (1982) 41 ALR 626, 632.

7 Ibid, 633. See also *Three Rivers District Council v Governor and Company of Bank of England* [2005] 1 AC 610, mentioned in Ch 2.

7.13 There are two broad types of statutory provisions that limit the use of privileged communications obtained by the use 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.

7.14 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.[8]

7.15 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.[9] 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.

7.16 Where privilege is taken to have been impliedly removed, it may mean that no use immunity is expressly conferred.[10] 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.[11] 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.

Statutes conferring use immunity

7.17 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.

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8 See P Sofronoff, 'Derivative Use Immunity and the Investigation of Corporate Wrongdoing' (1994) 10 *Queensland University of Technology Law Journal* 122, 122.

9 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.

10 See, however, discussion below on *Australian Securities and Investments Commission Act 2001* (Cth) s 76(1)(d).

11 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), [19.52].

Proceeds of Crimes Act 2002 (Cth)

7.18 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.[12] 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.[13]

Inspector-General of Intelligence and Security Act 1986 (Cth)

7.19 A person is not excused from providing documents or information to the Inspector-General of Intelligence and Security on the grounds that to do so would disclose legal advice to a minister, agency or authority of the Commonwealth.[14] 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.[15]

Australian Securities and Investments Commission Act 2001 (Cth)

7.20 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

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12 *Proceeds of Crime Act 2002* (Cth) s 206(1)(c).
13 See Ibid s 206(2).
14 See *Inspector-General of Intelligence and Security Act 1986* (Cth) s 18(6), which is discussed in Ch 4 as an example of a provision that partially abrogates or modifies client legal privilege.
15 See Ibid s 18(6).

- the person objects to the admission of evidence of the statement.[16]

Statute conferring both use and derivative use immunity

7.21 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:

- 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.

Statute conferring no type of immunity

7.22 The *James Hardie (Investigations and Proceedings) Act 2004* (Cth), which abrogates privilege, does not contain any provisions conferring use or derivative use immunity.[17] 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'.[18] 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.[19]

Types of proceedings to which use or derivative use immunity provisions apply

7.23 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 Commonwealth investigatory body from using the privileged information against another person or entity in subsequent proceedings, subject to the general rules of evidence.

7.24 Use and derivative use immunity provisions typically apply to subsequent criminal proceedings and any proceedings for the imposition of a penalty, such as civil

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16 See *Australian Securities and Investments Commission Act 2001* (Cth) s 76(1)(d).
17 The *James Hardie (Investigations and Proceedings) Act 2004* (Cth) is also discussed in Ch 4.
18 See Ibid s 4(4). 'James Hardie material' and 'James Hardie proceeding' are defined in s 3.
19 Explanatory Memorandum, James Hardie (Investigations and Proceedings) Bill 2004 (Cth), [1.3].

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 Commonwealth investigatory bodies, seeking injunctive or declaratory relief, restraining orders or asset freezing orders.[20]

7.25 If client legal privilege were abrogated or modified, and use or derivative use immunity provisions were to be introduced, there is a question whether these provisions should apply to administrative or civil proceedings seeking banning or disqualification orders against persons. The ALRC is interested in hearing views about this.

7.26 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.[21]

7.27 However, 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.[22]

Choosing between use and derivative use immunity

7.28 The ALRC is interested in hearing whether the conferral of use or derivative use immunity, in circumstances where client legal privilege has been abrogated or modified, has affected or stymied the outcomes of investigations conducted under the *Proceeds of Crime Act 2002*, or those conducted by the IGIS, ASIC, or the Inspector-General of Taxation.

7.29 If safeguards restricting the use of privileged communications obtained by coercion were to be introduced in other federal legislation, questions arise about the

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20 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.

21 *Australian Securities Commission v Kippe* (1996) 67 FCR 499.

22 *Rich v Australian Securities & Investments Commission* (2004) 220 CLR 129, [30]–[37]. See also Exposure Draft, Corporations Amendment (Insolvency) Bill 2007 (Cth), which provides that certain proceedings initiated by ASIC, including those for the disqualification of persons from managing corporations or holding certain financial services licences, are deemed not to be penal for the purposes of the privilege against exposure to a penalty.

precise form which those safeguards should take; in particular, which form of immunity should be conferred?[23]

7.30 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. The ALRC is interested in hearing:

- whether any of these arguments are applicable in considering the application of derivative use immunity in the context of any possible abrogation of client legal privilege; and

- about other arguments for and against the application of the immunities.

7.31 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

- 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.[24]

Benefits of derivative use immunity in the ASC Act

7.32 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;[25]

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23 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).

24 *Australian Securities Commission Act 1989* (Cth) s 68 (since repealed).

25 See J Kluver, *Report on Review of the Derivative Use Immunity Reforms* (1997), [3.52]–[3.53].

- protecting against an investigatory body misusing it powers;[26]

- giving meaningful protection to direct use immunity—because any attempt to admit as evidence in criminal proceedings indirect consequences of the person giving the information or document would undermine the protection granted in respect of the answer itself;[27] and

- ensuring an appropriate balance between the interests of the state and individual liberties.[28]

Criticisms of derivative use immunity

7.33 However, the inclusion of a derivative use provision in the ASC Act was strongly criticised by the then ASC, as well as the Commonwealth Director of Public Prosecutions (CDPP).[29] 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'.[30]

7.34 In a joint 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:

> 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.[31]

7.35 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.[32]

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26 See Ibid, [3.67].

27 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).

28 See Ibid, 237, 251.

29 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).

30 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].

31 See Ibid, [1.13]–[1.14].

32 See Ibid, [3.5.1].

7.36 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.[33]

7.37 The ASC highlighted the following jeopardy 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.[34]

7.38 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.[35]

7.39 Other arguments against derivative use immunity, identified in the Kluver Report,[36] 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 rendered inadmissible in any later criminal or penalty-exposing proceedings against the person;[37] 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.[38]

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33 See Ibid, [3.14].
34 See Ibid, [3.4.4].
35 See Ibid, [4.12].
36 J Kluver, *Report on Review of the Derivative Use Immunity Reforms* (1997).
37 Ibid, [3.54].
38 See Ibid, [3.71]–[3.74].

The abolition of derivative use immunity in the ASC Act

7.40 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.[39] 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.[40]

7.41 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 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.[41]

7.42 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.[42]

7.43 In May 1997, John 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.[43]

7.44 Kluver also expressed support for the retention of 'direct' use immunity,[44] noting that it provided protection to examinees without significantly impeding the ASC's investigative and enforcement functions.[45]

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39 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]
40 Ibid, [4.11].
41 Explanatory Memorandum, Corporations Legislation (Evidence) Amendment Bill 1992 (Cth), 1.
42 See *Corporations Legislation (Evidence) Amendment Act 1992* (Cth) s 10.
43 See J Kluver, *Report on Review of the Derivative Use Immunity Reforms* (1997), 1–2.
44 Ibid, 3.
45 Ibid, [3.89].

Application of immunities to corporations and individuals

7.45 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*.[46]

7.46 In Chapter 2, the ALRC raises the issue of whether client legal privilege should apply only to natural persons, and not to corporations. Pivotal to the resolution of this issue is ascertaining the precise rationales for client legal privilege.[47]

7.47 If client legal privilege is to continue to apply to corporations but were to be abrogated or modified by statute, a related issue is whether corporations should be equally entitled to share the benefits of any use or derivative use immunity provisions conferred on individuals. For example, the use immunity provision in the *Proceeds of Crime Act 2002* (Cth), referred to above, applies only to natural persons.

7.48 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. Most significantly, a corporation cannot be deprived of its liberty—a corporation cannot be sentenced to imprisonment or periodic detention or home detention. However, both corporations and natural persons can be ordered to pay a fine. The *Crimes Act 1914* (Cth) empowers a court sentencing a corporation to impose a pecuniary penalty that is up to five times greater than the maximum pecuniary penalty that could be imposed on a natural person convicted of the same offence, provided that a contrary intention does not appear in the offence provision.[48]

7.49 The sentencing options available in sentencing a corporation for a federal offence are currently limited to those available in relation to natural persons. In *Same Crime, Same Time: The Sentencing of Federal Offenders* (ALRC 103), the ALRC recommended that federal sentencing legislation include a number of specified sentencing options for corporations convicted of a federal offence.[49]

Application of immunities to document production and oral statements

7.50 Federal provisions that contain use or derivative use immunity provisions—either in the context of the abrogation of client legal privilege or self-incrimination—

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46 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [18].

47 The rationales for client legal privilege are discussed in Ch 1.

48 See *Crimes Act 1914* (Cth) s 4B(3).

49 See Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), Ch 30, Rec 30–1. These sentencing options included orders disqualifying the corporation from undertaking specified commercial activities, adverse publicity orders and orders dissolving the corporation.

take differing approaches to the application of that immunity to documents and oral statements.

7.51 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.[50] 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.[51]

7.52 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.[52]

7.53 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.[53]

7.54 The ALRC is interested 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, the ALRC is interested in hearing views about 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.

7.55 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. If use or derivative use immunity were not to extend to the production of documents, it may have the consequence of further discouraging persons from seeking written legal advice. The ALRC is interested in hearing views about whether the extension of use or derivative

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50 *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.

51 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].

52 See *Medicare Australia Act 1973* (Cth) s 8S.

53 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 493.

use immunity to the production of documents 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.

Harmonisation?

7.56 There is a question about 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. In particular, should distinctions be drawn:

- among Commonwealth bodies, depending upon the functions which they perform?
- between Commonwealth agencies exercising coercive powers and Royal Commissions of inquiry?
- between Commonwealth investigations conducted in public and those conducted in private?

Different investigatory contexts

7.57 The different investigatory contexts of Commonwealth bodies are set out in Chapter 3 and discussed more generally in Chapter 4. As noted, Commonwealth bodies with coercive information-gathering powers operate in vastly different areas and there are important differences in their aims, functions, operations and powers. 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.

7.58 From the perspective of a person the subject of a coercive information-gathering power, the conferral of a use or derivative use immunity may have greater importance in the context of an investigation conducted by a Commonwealth body seeking to enforce the law, compared to a Commonwealth body seeking cooperation with the regulated community to ensure compliance with the law. The question therefore arises whether particular investigatory contexts require comparatively stronger safeguards to be implemented.

Royal Commissions of inquiry

7.59 As stated in Chapter 3, 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.

7.60 The discovery of the truth has been described as a prime function of a Royal Commission.[54] 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?

7.61 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 Commonwealth bodies to bring proceedings to seek redress in respect of improper or unlawful conduct identified by the Royal Commission.

7.62 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.[55] In contrast, while the *Evidence Act 1958* (Vic) has a specific provision conferring use immunity in the context of the abrogation of self-incrimination,[56] the statute is silent on the question of immunity as it applies in the context of the abrogation of client legal privilege.[57]

7.63 In *X v Australian Prudential Regulation Authority*,[58] the High Court decided that the use by the Australian Prudential Regulation Authority (APRA) of the evidence of X and Y[59] before the HIH Royal Commission did not contravene s 6M of the *Royal Commissions Act 1902* (Cth).[60]

7.64 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

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54 T Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (2006), Vol 1, [7.66].

55 See *Royal Commissions Act 1923* (NSW) s 17(2).

56 See *Evidence Act 1958* (Vic) s 19C(2).

57 See Ibid s 19D.

58 *X v Australian Prudential Regulation Authority* (2007) 232 ALR 421.

59 X and Y were two senior managers of an international reinsurance business based in Germany.

60 *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.

> 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.[61]

7.65 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.[62]

Public versus private investigations

7.66 The ALRC is interested in hearing views about whether there should be a difference in the application of the immunities depending on whether Commonwealth investigations are conducted in public or private.

7.67 A public investigation—especially a high profile Royal Commission that generates a great deal of publicity—may create an expectation in members of the general public that identified unlawful or improper conduct is dealt with appropriately.

7.68 If client legal privilege were to be abrogated or modified where a Commonwealth investigation takes place in public—as is the case with Royal Commissions—this potentially could mean that privileged information is aired in public. However, a Royal Commission has power to direct that evidence be taken in private in certain situations,[63] and if privilege were abrogated or modified consideration would have to be given to the desirability or otherwise of requiring privileged information to be given in private.

Question 7–2 If client legal privilege were to be abrogated or modified, what safeguards, if any, should be put in place relating to the use of privileged information obtained through the use of coercive powers? In particular, should use immunity or derivative use immunity apply and, if so, to which type of proceedings should such immunities apply?

Question 7–3 If use immunity or derivative use immunity were to be introduced as a safeguard, should a distinction be drawn between the application of the immunities to:

(a) corporations and individuals;

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61 *X v Australian Prudential Regulation Authority* (2007) 232 ALR 421, [59].

62 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.

63 See *Royal Commissions Act 1902* (Cth) s 6D(2), (3).

(b) the production of documents and the making of oral statements giving information;

(c) Commonwealth bodies, depending upon the functions which they perform;

(d) Commonwealth agencies exercising coercive powers and Royal Commissions; and

(e) Commonwealth investigations conducted in public and those conducted in private?

Availability of privilege against third parties

7.69 If privilege were to be abrogated or modified, should privilege remain available against third parties, despite not being available against a Commonwealth investigatory body? Should the fact that a statutory provision abrogates the privilege in response to the coercive information-gathering power of a Commonwealth 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.[64]

7.70 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.[65]

- 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.[66]

64 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.
65 *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 96(6).
66 *Inspector-General of Taxation Act 2003* (Cth) s 18.

- 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.[67] 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 of Crime Act 2002* (Cth), then for the purposes of those subsections material is still taken to be privileged from production in legal proceedings.[68]

7.71 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).

7.72 The *Inspector-General of Taxation Act 2003* (Cth) 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.[69]

7.73 Commonwealth investigatory bodies may be subject to statutory duties of confidentiality or secrecy.[70] However, there are several ways in which a Commonwealth investigatory body in possession of material obtained under compulsion may be called upon to produce or release that information. A Commonwealth investigatory body may:

- be issued with a subpoena to produce documents;[71]
- receive a statutory request for release of information;[72]
- 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

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67 See, eg, *James Hardie (Investigations and Proceedings) Act 2004* (Cth) s 6. 'James Hardie material' is defined in s 3.

68 Ibid s 5.

69 *Inspector-General of Taxation Act 2003* (Cth) s 27.

70 See, eg, *Australian Securities and Investments Commission Act 2001* (Cth) s 127; *Australian Prudential Regulation Authority Act 1998* (Cth) s 56.

71 For example, an accused person may issue a subpoena to the Commonwealth investigatory body that conducted the investigation which led to charges being laid against him or her.

72 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 affects the credibility or reliability of any witness, as well as the duty of disclosing unused material;[73] or

- be a party to a Memorandum of Understanding (MOU) with other Commonwealth or state bodies, which provides for the exchange of information.[74]

7.74 The ALRC is interested in hearing views about the circumstances, if any, in which client legal privilege should be maintained against third parties, as well as the practices and policies of Commonwealth investigatory bodies in this regard. For example, if a Commonwealth body were to receive a subpoena for production, the terms of which captured privileged communications that the body had obtained on compulsion, should the Commonwealth body be required to notify persons affected by the production of the privileged communications to enable them to take steps to protect their position?

Question 7–4 If client legal privilege were to be abrogated or modified should it remain available against third parties—for example, in response to a subpoena issued to the Commonwealth body or pursuant to a statutory request for release of that information?

Practice and procedure

7.75 Chapter 5 discusses general issues of practice and procedure in making and resolving claims for client legal privilege. In particular, Question 5–7 asks whether Commonwealth bodies exercising coercive information-gathering powers should be required to develop and publish practices and policies in relation to: accurately informing persons of their position concerning client legal privilege, and managing and recording documents or communications received in respect of which a claim for

73 See Commonwealth Director of Public Prosecutions, *Statement on Prosecution Disclosure* <www.cdpp.gov.au/Prosecutions/Disclosure/> at 10 April 2007, [4.2], which 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. 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.

74 However, 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. 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.'

privilege has been made.[75] This has particular relevance in the context of considering the safeguards that should be put in place if privilege were to be abrogated or modified.

Notifying persons about abrogation or modification

7.76 If a statute were to abrogate or modify the application of client legal privilege to the exercise of a Commonwealth information-gathering power, should it be incumbent on the Commonwealth body exercising that power to notify persons the subject 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?

7.77 If so, there is a question about when and where that information should be provided. Should notices to produce documents—or the covering letter to such documents—set out this information? Should persons who are the subject of compulsory oral questioning be informed in advance that they will not be able to claim client legal privilege and whether there are any restrictions on the use of their evidence?

Managing and recording documents the subject of a claim

7.78 As noted in Chapter 5, where privilege is abrogated or modified, there is a question about how a Commonwealth body that receives privileged information pursuant to the exercise of a coercive power should manage and record that information.

7.79 If the position were to be taken that client legal privilege is to remain available as against third parties, despite its having been abrogated or modified in respect of a Commonwealth investigatory body, the ability to identify privileged communications as such becomes essential in protecting those communications from disclosure to third parties.

7.80 Should it be incumbent upon Commonwealth bodies to develop practices and procedures requiring, for example, that documents the subject of a privilege claim are clearly identified as such, or kept separately from other documents? In this respect, it is relevant to note that ASIC's covering letter to recipients of certain notices under the

75 Ch 5 also discusses the benefits of Commonwealth bodies publishing practices and policies.

ASIC Act states that the person's claim for privilege will be recorded on registration of the documents.[76]

Question 7–5 If client legal privilege were to be abrogated or modified, should Commonwealth bodies exercising coercive information-gathering powers be required to develop and publish practices and policies in relation to:

(a) accurately informing persons of their position; and

(b) managing and recording the documents or communications received in respect of which a claim for privilege has been made?

Safeguards against abuse of client legal privilege

7.81 As discussed in Chapter 6, concerns have been expressed that claims of privilege can be maintained for the purpose of frustrating investigations. This chapter notes two significant examples of abuse to provide context for the discussion that follows.

7.82 Commissioner Cole, during his inquiry concerning AWB and the Oil-for-Food Programme (the AWB Royal Commission), expressed some concerns regarding AWB's claims for client legal privilege. He stated that:

- the AWB Royal Commission repeatedly sought a complete list from AWB of all documents not produced on the basis of a privilege claim, and that this list was never provided;[77]
- AWB finally conceded that many documents for which privilege had been claimed were no longer claimed to be privileged;[78] and
- AWB's claims for privilege significantly delayed completion of hearings.[79]

7.83 Commissioner Cole stated:

> 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

76 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.
77 T Cole, *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (2006), [7.42].
78 Ibid, [7.55].
79 Ibid, [7.57].

> 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.[80]

7.84 The second example arises in the tobacco litigation context. A former British American Tobacco Australasian Services (BATAS) legal counsel gave evidence that BATAS and its lawyers 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.[81]

7.85 What measures could be put in place to prevent or redress abuse of client legal privilege claims? Possible measures include guidance in professional rules of conduct about the making and maintaining of privilege claims, professional disciplinary action, the imposition of penalties, and education.

Rules of conduct and professional disciplinary action

7.86 The rules of conduct of various state and territory law societies and bar associations require practitioners and barristers to make responsible use of court process privilege. That privilege, which is provided by the general law, prevents a barrister from being sued in defamation for statements made by him or her during the court process. The rules of conduct seek to prevent abuse of this privilege, ensuring that it is employed responsibly, with ethical rigour and forensic reticence.

7.87 For example, Rule 35 of the *New South Wales Barristers' Rules* provides that:

> A barrister must, when exercising the forensic judgments called for throughout the case, take care to ensure that decisions by the barrister or on the barrister's advice to invoke the coercive powers of a court or to make allegations or suggestions under privilege against any person:
>
> (a) are reasonably justified by the material already available to the barrister;
>
> (b) are appropriate for the robust advancement of the client's case on its merits;
>
> (c) are not made principally in order to harass or embarrass the person; and

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80 Ibid, [7.64].
81 C Parker and A Evans, *Inside Lawyers' Ethics* (2007), 220.

> (d) are not made principally in order to gain some collateral advantage for the client or the barrister or the instructing solicitor out of court.[82]

7.88 This Rule does not apply to claims for client legal privilege. However, the question arises whether professional conduct rules should similarly seek to prevent the abuse of client legal privilege and therefore expressly address the making and maintaining of client legal privilege claims. If so, specific limbs of Rule 35—in particular limbs (a) and (d)—may serve as a model for the responsible making and maintaining of a claim for client legal privilege on behalf of a client.

7.89 This calls into question the boundaries of the 'forensic judgements' of barristers and practitioners,[83] and whether they properly can make the ultimate decision about whether or not a client should claim privilege or merely offer advice in this regard.

7.90 The ALRC is also interested in hearing whether:

- as a matter of historical fact, professional disciplinary action has ever been taken against a lawyer for improperly maintaining a claim for client legal privilege;
- as a matter of principle, professional disciplinary action should be taken against a lawyer where he or she arguably has maintained a privilege claim improperly, as a tactic for delay or obstruction; and
- the threat of professional disciplinary action might have the effect in practice of unduly inhibiting lawyers from providing proper representation to their clients.

7.91 In considering the role of professional disciplinary action, it is necessary to distinguish a case where a lawyer makes a privilege claim in good faith—for example, where a lawyer genuinely believes that there is an arguable case that a communication was made for the dominant purpose of obtaining legal advice but the privilege claim is subsequently rejected by a court——from one in which a lawyer improperly makes a claim in bad faith as a tactic for delay or frustration.

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82 See also *Western Australian Bar Association (Inc) Conduct Rules* (2006) Rule 35; *Rules of Professional Conduct and Practice 2002* (NT) Rule 17.21, *Barristers' Conduct Rules 2002* (NT) Rule 35 (effective 20 March 2003); *New South Wales Solicitors' Rules* Rule 23 cl A.35. An example of a collateral advantage is where litigation in one proceeding is used to fish for evidence in another proceeding.

83 'Forensic judgements' is defined in the various rules of conduct and generally excludes decisions about the commencement of proceedings, admissions, concessions or pleas but includes advice given to the client to make such decisions. See, eg, *New South Wales Barristers' Rules* Rule 15; *Barristers' Conduct Rules 2002* (NT) Rule 15.

Question 7–6 Where a lawyer arguably has maintained a claim for client legal privilege improperly, as a tactic for delay or obstruction, should professional disciplinary action follow?

Imposition of penalties

7.92 Should a person who, in bad faith, asserts or maintains a claim for client legal privilege either personally or on another's behalf, be made liable to a penalty?

7.93 Section 103(9) of the *Taxation Administration Act 2003* (WA) 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.[84]

7.94 The Law Society of Western Australia opposed the introduction of this provision, attempting to have it removed from the Taxation Administration Bill 2001 (WA).[85] It submitted to the Attorney General of Western Australia that there had been no instances where such mischief had in fact occurred.[86] 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 and consequential professional disciplinary proceedings.[87]

7.95 There is precedent for the imposition of penalties on lawyers and clients for intentionally thwarting court processes. For example, the *Crimes* (*Document Destruction) Act 2006* (Vic) amended the *Crimes Act 1958* (Vic) to create a new criminal offence: 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.

Question 7–7 Should a person who, in bad faith, asserts or maintains a claim for client legal privilege either personally or on another's behalf, be made liable to penalties, whether criminal, civil or administrative?

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84 *Taxation Administration Act 2003* (WA) s 103 is discussed in detail in Ch 5.
85 R O'Connor, 'Legal Professional Privilege, the Daniels Case and the Taxation Administration Bill 2001 (WA)' (2003) 30(1) *Brief* 10, 10.
86 Ibid, 10.
87 Ibid, 11.

Education

7.96 Are there sufficient systems in place to ensure that lawyers are properly informed about their professional ethics and responsibilities in relation to making and maintaining claims of client legal privilege?

7.97 In its review of the federal civil justice system, the ALRC found that insufficient attention is given to training in legal ethics and professional responsibility.[88] 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.[89] A healthy professional culture is 'one that values lifelong learning and takes ethical concerns seriously'.[90]

7.98 The rules governing admission to practice as a lawyer in all jurisdictions require completion of a course on ethics or professional conduct.[91] In all states and territories, the minimum academic requirements comprise 11 areas of study (known as the Priestley Eleven), and these include professional conduct.[92] At the University of New South Wales, for example, the unit called 'Law, Lawyers and Society' is described as a course in applied legal ethics, and one of its aims is to teach students 'to identify and begin to develop the skills necessary for ethical practice'.[93]

7.99 In addition, the Revised Uniform Admission Rules recommend that students seeking admission as solicitors 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.[94]

7.100 Associate Professors Christine Parker and Adrian Evans, in the context of discussing the ethics of corporate lawyers, 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 do not equip corporate lawyers to know how to put ethics into action … or even to recognise ethical issues when they arise.[95]

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88 See Australian Law Reform Commission, *Review of the Federal Civil Justice System*, DP 62 (1999), Ch 3.

89 See Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89 (2000), Ch 2.

90 Ibid, [2.3].

91 See, eg, *Legal Profession Admission Rules 2005* (NSW) Rule 95.

92 See 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.

93 University of New South Wales, *Law, Lawyers and Society—UNSW Online Handbook 2007* <www.handbook.unsw.edu.au/undergraduate/courses/2007/LAWS6210.html> at 11 April 2007.

94 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.

95 C Parker and A Evans, *Inside Lawyers' Ethics* (2007), 217.

7.101 The ALRC is interested in hearing whether:

- current education strategies to address issues of professional conduct and ethics in university law school courses have a specific and sufficient focus on the ethical obligations of lawyers concerning claims for client legal privilege; and

- practical legal training and continuing legal education courses provide sufficient information and opportunities for lawyers to learn about their specific professional responsibilities concerning claims for client legal privilege.

7.102 A related issue is whether there are sufficient systems in place to ensure that lawyers are properly informed about their professional ethics and responsibilities at the time a communication is created. Should more attention be given to the question of whether a communication is privileged at the time of the communication? For example, should privileged communications be marked as such at the time of communication?

7.103 Should lawyers play a role in ensuring that documents are not labelled as privileged documents unless they are reasonably considered to be privileged? For example, if a lawyer receives a document from a third party that is labelled 'privileged' and the lawyer does not consider it to be privileged, should the lawyer ask for the document to be resupplied without the label, or mark it in some way to make it clear that the notation is incorrect?

Question 7–8 What is the best way of ensuring that 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?

Appendix 1. List of Abbreviations

ABA	American Bar Association
ABCC	Office of the Australian Building and Construction Commissioner
ACC	Australian Crime Commission
ACC Act	*Australian Crime Commission Act 2002* (Cth)
ACCC	Australian Competition and Consumer Commission
ACLEI	Australian Commission for Law Enforcement Integrity
ACMA	Australian Communications and Media Authority
ACS	Australian Customs Service
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)
AIC	Australian Intelligence Community
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)
AMSA	Australian Maritime Safety Authority
AMSA Act	*Australian Maritime Safety Authority Act 1990* (Cth)
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
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
CASA	Civil Aviation Safety Authority
CDPP	Commonwealth Director of Public Prosecutions
CEO	Chief Executive Officer
Companies Code	*Companies (New South Wales) Code*
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)
EPBC Act	*Environment Protection and Biodiversity Conservation Act 1999* (Cth)
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)
IGIS	Inspector-General of Intelligence and Security
IGIS Act	*Inspector-General of Intelligence and Security Act 1986* (Cth)
ITS	Inspector of Transport Security
ITSA	Insolvency and Trustee Service Australia
JSCCS	Joint Statutory Committee on Corporations and Securities
Kluver Report	*Report on Review of the Derivative Use Immunity Reforms* (1997)
LEIC Act	*Law Enforcement Integrity Commissioner Act 2006* (Cth)
Medicare	Medicare Australia
MOU	Memorandum of Understanding
NOPSA	National Offshore Petroleum Safety Authority
OGTR	Office of the Gene Technology Regulator
OHS(CE) Act	*Occupational Health and Safety (Commonwealth Employment) Act 1991* (Cth)
OITS	Office of the Inspector of Transport Safety
OPC	Office of the Privacy Commissioner
OWS	Office of Workplace Relations
Propend	*Australian Federal Police v Propend Finance* (1997) 188 CLR 501
PWC	PricewaterhouseCoopers
Pyneboard	*Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328

RCASIA	Royal Commission on Australia's Security and Intelligence Agencies (established by Letters Patent on 17 May 1983 and concluded in 1984)
SRC Act	*Safety, Rehabilitation and Compensation Act 1998* (Cth)
TGA	Therapeutic Goods Administration
TG Act	*Therapeutic Goods Act 1989* (Cth)
TPA	*Trade Practices Act 1974* (Cth)
Yuill	*Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319

Appendix 2. Table of Legislation

Commonwealth legislation containing coercive information-gathering powers

Commonwealth body	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*
Australian Communications and Media Authority	*Broadcasting Services Act 1992*
	Telecommunications Act 1997
	Telecommunications (Consumer Protection and Service Standards) Act 1999
	Radiocommunications Act 1992
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 Fisheries Management Authority	*Fisheries Management Act 1991*
	Torres Strait Fisheries Act 1984
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[1]
	Proceeds of Crime Act 2002
	Surveillance Devices Act 2004
	Telecommunications (Interception and Access) Act 1979
Australian Maritime Safety Authority	*Australian Maritime Safety Authority Act 1990*
	Navigation Act 1912
Australian Pesticides and Veterinary Medicines Authority	*Agricultural and Veterinary Chemicals Code Act 1994*
	Agricultural and Veterinary Chemicals (Administration) Act 1992
Australian Prudential Regulatory Authority (APRA)	*Banking Act 1959*
	Insurance Act 1973

1 A number of other Commonwealth investigatory bodies have powers of search and seizure under the *Crimes Act 1914* (Cth) s 3E.

Australian Securities and Investments Commission (ASIC)	*ASIC 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 Taxation Office	*Fringe Benefits Tax Assessment Act 1986*
	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
	Tax Administration Act 1953
	Termination Payments Tax (Assessment and Collection) Act 1997
Australian Transaction Reports and Analysis Centre	*Financial Transaction Reports Act 1988*
	Anti-Money Laundering and Counter-Terrorism Financing Act 2006

Australian Transport Safety Bureau	*Transport Safety Investigation Act 2003*
Australian Security Intelligence Organisation	*Australian Security Intelligence Organisation Act 1979*
	Telecommunications (Interception and Access) Act 1979
Australian Quarantine Inspection Service	*Quarantine Act 1981*
	Customs Act 1901
	Crimes Act 1914
Centrelink	*A New Tax System (Family Assistance) (Administration) Act 1999*
	Farm Household Support Act 1992
	Social Security (Administration) Act 1999
	Social Security Act 1991
	Student Assistance Act 1973
Civil Aviation Safety Authority	*Civil Aviation Act 1988*
Comcare	*Occupational Health and Safety (Commonwealth Employment) Act 1991*
Commonwealth Director of Public Prosecutions	*Proceeds of Crime Act 2002*
Commonwealth Ombudsman	*Ombudsman Act 1976*
Department of Environment and Water Resources	*Environment Protection and Biodiversity Conservation Act 1999*
Department of Health and Ageing:	*Therapeutic Goods Act 1989*
Therapeutic Goods Administration	
Department of Health and Ageing:	*Aged Care Act 1997*
Aged Care	

Department of Immigration and Citizenship	*Migration Act 1958*
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*
Inspector-General of Intelligence and Security	*Inspector-General of Intelligence and Security Act 1986*
Inspector-General of Taxation	*Inspector-General of Taxation Act 2003*
Insolvency and Trustee Service Australia	*Bankruptcy Act 1966*
Medicare Australia	*Medicare Australia Act 1973*
National Offshore Petroleum Safety Authority	*Petroleum (Submerged Lands) Act 1967*
Office of the Inspector of Transport Security	*Inspector of Transport Security Act 2006*
Office of the Privacy Commissioner	*Privacy Act 1988*
Office of Workplace Services	*Workplace Relations Act 1996*
Royal Commissions	*Royal Commissions Act 1902*

Reports of the Australian Law Reform Commission

(Not including Annual Reports)

ALRC 1 Complaints Against Police, 1975
ALRC 2 Criminal Investigation, 1975
ALRC 4 Alcohol, Drugs and Driving, 1976
ALRC 6 Insolvency: The Regular Payment of Debts, 1977
ALRC 7 Human Tissue Transplants, 1977
ALRC 9 Complaints Against Police (Supplementary Report), 1978
ALRC 11 Unfair Publication: Defamation and Privacy, 1979
ALRC 12 Privacy and the Census, 1979
ALRC 14 Lands Acquisition and Compensation, 1980
ALRC 15 Sentencing of Federal Offenders (Interim), 1980
ALRC 16 Insurance Agents and Brokers, 1980
ALRC 18 Child Welfare, 1981
ALRC 20 Insurance Contracts, 1982
ALRC 22 Privacy, 1983
ALRC 24 Foreign State Immunity, 1984
ALRC 26 Evidence (Interim), 1985
ALRC 27 Standing in Public Interest Litigation, 1985
ALRC 28 Community Law Reform for the Australian Capital Territory: First Report: The Community Law Reform Program. Contributory Negligence in Fatal Accident Cases and Breach of Statutory Duty Cases and Funeral Costs in Fatal Accident Cases, 1985
ALRC 30 Domestic Violence, 1986
ALRC 31 The Recognition of Aboriginal Customary Laws, 1986
ALRC 32 Community Law Reform for the Australian Capital Territory: Second Report: Loss of Consortium and Compensation for Loss of Capacity to do Housework, 1986
ALRC 33 Civil Admiralty Jurisdiction, 1986
ALRC 35 Contempt, 1987
ALRC 36 Debt Recovery and Insolvency, 1987
ALRC 37 Spent Convictions, 1987
ALRC 38 Evidence, 1987
ALRC 39 Matrimonial Property, 1987
ALRC 40 Service and Execution of Process, 1987
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