HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

THE DANIELS CORPORATION INTERNATIONAL PTY LTD & ANOR — APPELLANTS

AND

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION — RESPONDENT

The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission
[2002] HCA 49
7 November 2002
S27/2002

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Full Court of the Federal Court made 16 March 2001, and in lieu thereof declare that s 155 of the* Trade Practices Act *1974 (Cth) does not require the production of documents to which legal professional privilege attaches.*

3. *Remit matter to the Federal Court to determine what, if any, of the documents specified in the notices are the subject of legal professional privilege.*

4. *Respondent to pay the appellants' costs of the proceedings in the Full Court and in this Court.*

On appeal from the Federal Court of Australia

Representation:

N J Young QC with S E Marks for the appellants (instructed by Meerkin & Apel)

A Robertson SC with J C Sheahan SC for the respondent (instructed by Corrs Chambers Westgarth)

CATCHWORDS

The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission

Evidence – Legal professional privilege – Statutory notice to produce documents – Whether statute abrogated legal professional privilege.

Trade practices – Notice to produce documents to Australian Competition and Consumer Commission – Commission investigating whether *Trade Practices Act* 1974 (Cth) contravened – Whether documents to be produced included those for which legal professional privilege claimed.

Trade Practices Act 1974 (Cth), s 155.

1 GLEESON CJ, GAUDRON, GUMMOW AND HAYNE JJ. The Australian Competition and Consumer Commission ("the ACCC"), the respondent to this appeal, served notices on Meerkin & Apel ("the solicitors"), the second named appellants, requiring the production of documents held by them as a result of their having acted as solicitors for the first named appellant, The Daniels Corporation International Pty Ltd ("the Corporation"). The notices were served pursuant to s 155 of the *Trade Practices Act* 1974 (Cth) ("the Act").

2 The solicitors produced some but not all of the documents specified in the notices. They and the Corporation claimed that the remaining documents were the subject of legal professional privilege and that s 155 of the Act does not authorise the ACCC to require production of documents to which that privilege attaches.

History of the proceedings

3 To test the correctness of the claim that s 155 does not authorise it to require production of documents to which legal professional privilege attaches, the ACCC commenced proceedings against the Corporation in the Federal Court of Australia seeking, amongst other orders, a declaration that it, the Corporation, was not entitled to refuse to produce documents on the ground of legal professional privilege and, also, an order requiring it to produce specified documents. The solicitors were later joined as respondents to the proceedings and similar orders were sought against them.

4 In the Federal Court, the question whether s 155 of the Act authorises the ACCC to require production of documents to which legal professional privilege attaches was isolated as a preliminary issue and referred to the Full Court for decision. The Full Court held that s 155 did authorise notices requiring the production of such documents[1], relying principally on the decisions of this Court in *Pyneboard Pty Ltd v Trade Practices Commission*[2] and *Corporate Affairs Commission (NSW) v Yuill*[3]. In the result, the Full Court declared that the solicitors were "not entitled to refuse to comply with ... the notices ... on the ground of legal professional privilege" and ordered the Corporation to pay the costs of determining the preliminary issue. Having made those orders, it was

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1 *Australian Competition and Consumer Commission v The Daniels Corporation International Pty Ltd* (2001) 108 FCR 123.

2 (1983) 152 CLR 328.

3 (1991) 172 CLR 319.

unnecessary for the Federal Court to determine whether or not privilege attached to any of the documents the subject of the notices under s 155 of the Act.

Section 155 of the Act

Subject to sub-s (2A), which is not presently relevant, s 155(1) provides:

"if the Commission, the Chairperson or the Deputy Chairperson has reason to believe that a person is capable of furnishing information, producing documents or giving evidence relating to a matter that constitutes, or may constitute, a contravention of this Act, or is relevant to a designated telecommunications matter (as defined by subsection (9))[4] or is relevant to the making of a decision by the Commission under subsection 93(3) or (3A)[5], a member of the Commission may, by notice in writing served on that person, require that person:

(a) to furnish to the Commission, by writing signed by that person or, in the case of a body corporate, by a competent officer of the body corporate, within the time and in the manner specified in the notice, any such information;

(b) to produce to the Commission, or to a person specified in the notice acting on its behalf, in accordance with the notice, any such documents; or

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4 Sub-section (9) of s 155 of the Act provides:

"A reference in this section to a ***designated telecommunications matter*** is a reference to the performance of a function, or the exercise of a power, conferred on the Commission by or under:

(a) the *Telecommunications Act 1997*; or

(b) the *Telecommunications (Consumer Protection and Service Standards) Act 1999*; or

(c) Part XIB or XIC of this Act."

5 Sections 93(3) and (3A) authorise the giving of notices with respect to specified conduct the effect of which is to substantially lessen competition.

(c) to appear before the Commission at a time and place specified in the notice to give any such evidence, either orally or in writing, and produce any such documents."

6 Section 155(2) of the Act confers power on the ACCC to authorise entry to premises to inspect documents. That power arises in somewhat different circumstances from the power to require the provision of information, the production of documents and the giving of evidence under s 155(1). Again subject to sub-s (2A), s 155(2) provides:

> "if the Commission, the Chairperson or the Deputy Chairperson has reason to believe that a person has engaged or is engaging in conduct that constitutes, or may constitute, a contravention of this Act, Part 20 of the *Telecommunications Act 1997*[6] or Part 9 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*[7], a member of the Commission may, for the purpose of ascertaining by the examination of documents in the possession or control of the person whether the person has engaged or is engaging in that conduct, authorize, by writing signed by the member, a member of the staff assisting the Commission (in this section referred to as an ***authorized officer***) to enter any premises, and to inspect any documents in the possession or under the control of the person and make copies of, or take extracts from, those documents."

7 The obligations that arise on the service of a notice under ss 155(1) or (2) and the consequences of the failure to comply with those obligations are specified in ss 155(5), (6), (6A) and (7). As at the date of the notices in issue in this appeal[8], those sub-sections provided:

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6 Part 20 of the *Telecommunications Act* 1997 (Cth) provides for control over the international aspects of the telecommunications industry. It empowers the Minister to give directions to Signatories to the INTELSAT Agreement and Inmarsat Convention and to make Rules of Conduct in relation to dealings with international telecom operators. Part 20 also contains requirements for carriers and carriage service providers to ensure compliance with certain international Conventions.

7 Part 9 of the *Telecommunications (Consumer Protection and Service Standards) Act* 1999 (Cth) provides price control arrangements for Telstra. Part 9 also regulates carriage services, content services and facilities supplied by Telstra.

8 Sub-sections (5) and (6A) were amended by Items 23 and 25 of Sched 2 to the *Treasury Legislation Amendment (Application of Criminal Code) Act (No 2)* 2001 (Cth) with effect from 15 December 2001. It is common ground that nothing turns on those amendments.

"(5) A person shall not:

(a) refuse or fail to comply with a notice under this section to the extent that the person is capable of complying with it;

(b) in purported compliance with such a notice, knowingly furnish information or give evidence that is false or misleading; or

(c) obstruct or hinder an authorized officer acting in pursuance of subsection (2).

(6) The occupier or person in charge of any premises that an authorized officer enters in pursuance of subsection (2) shall provide the authorized officer with all reasonable facilities and assistance for the effective exercise of his or her powers under that subsection.

(6A) A person who contravenes subsection (5) or (6) is guilty of an offence punishable on conviction:

(a) in the case of a person not being a body corporate–by a fine not exceeding $2,000 or imprisonment for 12 months; or

(b) in the case of a person being a body corporate–by a fine not exceeding $10,000.

(7) A person is not excused from furnishing information or producing or permitting the inspection of a document in pursuance of this section on the ground that the information or document may tend to incriminate the person, but the answer by a person to any question asked in a notice under this section or the furnishing by a person of any information in pursuance of such a notice, or any document produced in pursuance of such a notice or made available to an authorized officer for inspection, is not admissible in evidence against the person:

(a) in the case of a person not being a body corporate–in any criminal proceedings other than proceedings under this section; or

(b) in the case of a body corporate–in any criminal proceedings other than proceedings under this Act."

8 Reference should also be made to sub-s (7A) which, at the relevant time[9], provided:

> " This section does not require a person:
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> (a) to give information or evidence that would disclose the contents of a document prepared for the purposes of a meeting of the Cabinet of a State or Territory; or
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> (b) to produce or permit inspection of a document prepared for the purposes of a meeting of the Cabinet of a State or Territory; or
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> (c) to give information or evidence, or to produce or permit inspection of a document, that would disclose the deliberations of the Cabinet of a State or Territory."

Legal professional privilege

9 It is now settled that legal professional privilege is a rule of substantive law[10] which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications 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. It may here be noted that the "dominant purpose" test for legal professional privilege was recently adopted by this Court in *Esso Australia Resources Ltd v Federal Commissioner of Taxation*[11] in place of the "sole purpose" test which had been applied following the decision in *Grant v Downs*[12].

10 Being a rule of substantive law and not merely a rule of evidence, legal professional privilege is not confined to the processes of discovery and

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9 Sub-section (7A) was also amended by Sched 2 to the *Treasury Legislation Amendment (Application of Criminal Code) Act (No 2)* 2001 (Cth).

10 *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 490 per Deane J.

11 (1999) 201 CLR 49 at 73 [61] per Gleeson CJ, Gaudron and Gummow JJ.

12 (1976) 135 CLR 674.

inspection[13] and the giving of evidence in judicial proceedings[14]. Rather and in the absence of provision to the contrary, legal professional privilege may be availed of to resist the giving of information or the production of documents in accordance with investigatory procedures of the kind for which s 155 of the Act provides. Thus, for example, it was held in *Baker v Campbell*, that documents to which legal professional privilege attaches could not be seized pursuant to a search warrant issued under s 10 of the *Crimes Act* 1914 (Cth)[15].

11 Legal professional privilege is not merely a rule of substantive law. It is an important common law right or, perhaps, more accurately, an important common law immunity. It is now well settled that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect. That rule, the expression of which in this Court can be traced to *Potter v Minahan*[16], was the foundation for the decision in *Baker v Campbell*[17]. It is a rule which, subject to one possible exception, has been strictly applied by this Court since the decision in *Re Bolton; Ex parte Beane*[18]. Cases in which it has since been applied include *Bropho v Western Australia*[19], *Coco v The Queen*[20] and

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13 See, with respect to discovery and inspection, *Mann v Carnell* (1999) 201 CLR 1.

14 See *Baker v Campbell* (1983) 153 CLR 52 at 115-116 per Deane J; *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 55 [4] per Gleeson CJ, Gaudron and Gummow JJ; *Mann v Carnell* (1999) 201 CLR 1 at 10-11 [19] per Gleeson CJ, Gaudron, Gummow and Callinan JJ.

15 (1983) 153 CLR 52. See also *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501.

16 (1908) 7 CLR 277 at 304 per O'Connor J.

17 (1983) 153 CLR 52.

18 (1987) 162 CLR 514.

19 (1990) 171 CLR 1.

20 (1994) 179 CLR 427.

Commissioner of Australian Federal Police v Propend Finance Pty Ltd[21]. The possible exception to the strict application of that rule was the decision in *Yuill*[22].

The decisions in *Pyneboard* and *Yuill*

12 *Pyneboard*, which was decided prior to *Re Bolton; Ex parte Beane*[23], was concerned not with legal professional privilege, but with the privilege against exposure to penalties – a privilege which all members of the Court in *Pyneboard* treated as separate and distinct from the privilege against incrimination[24]. In that case, it was held that neither a person nor a corporation served with a notice under s 155(1) of the Act could refuse to comply with the notice on the ground that compliance might expose that person or corporation to a civil penalty.

13 Before turning to the reasoning which led to the decision in *Pyneboard*, it is convenient to say something as to the nature of the privilege against exposure to penalties and its treatment in that case. That privilege is one of a trilogy of privileges that bear some similarity with the privilege against incrimination. The other two are the privilege against exposure to forfeiture and the privilege against exposure to ecclesiastical censure[25]. The privilege against exposure to penalties and that against exposure to forfeiture had their origins in the rules of equity relating to discovery[26], but it is clear, as noted by Mason ACJ, Wilson and

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21 (1997) 188 CLR 501.

22 (1991) 172 CLR 319.

23 (1987) 162 CLR 514.

24 (1983) 152 CLR 328 at 336 per Mason ACJ, Wilson and Dawson JJ, 345 per Murphy J, 350 per Brennan J.

25 See *Earl of Mexborough v Whitwood Urban District Council* [1897] 2 QB 111.

26 See *R v Associated Northern Collieries* (1910) 11 CLR 738 at 744 per Isaacs J citing the judgment of Hardwicke LC in *Smith v Read* (1736) 1 Atk 526 at 527 [26 ER 332]; *Naismith v McGovern* (1953) 90 CLR 336 at 341-342 per Williams, Webb, Kitto and Taylor JJ; *Refrigerated Express Lines (A/Asia) Pty Ltd v Australian Meat and Live-stock Corporation* (1979) 42 FLR 204 at 208 per Deane J; *Sorby v The Commonwealth* (1983) 152 CLR 281 at 318-319 per Brennan J; Maddock, *A Treatise on the Principles and Practice of the High Court of Chancery*, 2nd ed (1820), vol 1 at 214-215; Spence, *The Equitable Jurisdiction of the Court of Chancery*, (1846), vol 1 at 680; Mitford, *A Treatise on the Pleadings in suits in the Court of Chancery*, 5th ed (1847) at 229-230; Daniell, *The*

(Footnote continues on next page)

Dawson JJ in *Pyneboard*, that the privilege against exposure to penalties has long been recognised by the common law and is no longer simply a rule of equity relating to discovery[27].

14 Two other questions with respect to the privilege against exposure to penalties were considered in *Pyneboard*. The first was whether the privilege was available to a corporation. Mason ACJ, Wilson and Dawson JJ were prepared to assume, without deciding, that it was[28], but neither Murphy J[29] nor Brennan J[30] found it necessary to consider that question.

15 The second question that arose in *Pyneboard* with respect to the privilege against exposure to penalties was whether that privilege had application outside judicial proceedings. On this issue, Mason ACJ, Wilson and Dawson JJ said they were "not prepared to hold that the privilege is inherently incapable of application in non-judicial proceedings"[31]. However, that statement does not amount to a holding that the privilege is available in non-judicial proceedings. On the other hand, Murphy J saw "no reason for recognizing [the] privileges [against exposure to penalties, forfeiture and ecclesiastical censure] outside judicial proceedings"[32].

16 Because of his view that the privilege against exposure to penalties should not be recognised outside judicial proceedings, it was unnecessary in *Pyneboard*

Practice of the High Court of Chancery, 5th ed (1871), vol 1 at 485, vol 2 at 1473-1474.

27 (1983) 152 CLR 328 at 336 referring to *Earl of Mexborough v Whitwood Urban District Council* [1897] 2 QB 111 at 115 per Lord Esher MR. See also Ligertwood, *Australian Evidence*, (1988) at [5.67]; McNicol, *Law of Privilege*, (1992) at 136, 186-189; *Sorby v The Commonwealth* (1983) 152 CLR 281 at 317-318 per Brennan J.

28 (1983) 152 CLR 328 at 335.

29 (1983) 152 CLR 328 at 346-347.

30 (1983) 152 CLR 328 at 358.

31 (1983) 152 CLR 328 at 341.

32 (1983) 152 CLR 328 at 346.

for Murphy J to engage in the process of construing s 155 of the Act[33], as was done by Mason ACJ, Wilson and Dawson JJ[34] and, also, by Brennan J[35]. In construing s 155, Mason ACJ, Wilson and Dawson JJ expressly acknowledged that legislation is construed as abrogating a common law right only if it does so expressly or by necessary implication[36]. On the other hand, Brennan J approached the construction of s 155 on the basis that the issue was whether the obligation in s 155(5) to comply with a notice under s 155(1) was impliedly qualified by the privilege against self-incrimination or any like privilege[37] – an approach which fails to give effect to the rule expressed in *Potter v Minahan*[38].

17 Two aspects of s 155 led Mason ACJ, Wilson and Dawson JJ to conclude that, as a matter of necessary implication, s 155 of the Act abrogates the privilege against exposure to penalties. The first was that:

> "Without obtaining information, documents and evidence from those who participate in contraventions of the provisions of Pt IV of the Act the Commission would find it virtually impossible to establish the existence of those contraventions. The consequence would be that the provisions of Pt IV could not be enforced by successful proceedings for a civil penalty under s 76(1)."[39]

The second was the express provision in s 155(7) relating to the privilege against self-incrimination. In their Honours' view, it was "irrational to suppose that Parliament contemplated that a person could be compelled to admit commission of a criminal offence yet be excused from admitting a contravention of the Act sounding in a civil penalty."[40]

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33 (1983) 152 CLR 328 at 347.

34 (1983) 152 CLR 328 at 341, 343-344.

35 (1983) 152 CLR 328 at 356-357.

36 (1983) 152 CLR 328 at 341.

37 (1983) 152 CLR 328 at 354-355.

38 (1908) 7 CLR 277.

39 (1983) 152 CLR 328 at 343.

40 (1983) 152 CLR 328 at 345 per Mason ACJ, Wilson and Dawson JJ.

18 In the view of Brennan J in *Pyneboard*, no implied qualification was to be read into the obligation to comply with a notice under s 155(1) of the Act for that would frustrate the purpose of investigating suspected contraventions of Pt IV of the Act. On his Honour's approach, the express provisions in s 155(7) relating to the privilege against self-incrimination were unnecessary and were to be treated as inserted out of an abundance of caution[41]. Similarly, on the approach taken by Mason ACJ, Wilson and Dawson JJ, "the first part of sub-s (7) [was] redundant" and "it was the prohibition against the use of the material in proceedings for a criminal offence otherwise than under the Act that was the mainspring for the introduction of the sub-section."[42]

19 Although concerned with legal professional privilege, *Yuill*[43] was not concerned with s 155 of the Act. The question in that case was whether the power under s 295(1) of the *Companies (New South Wales) Code* ("the Code") to require the production of company books was subject to legal professional privilege. It was provided by s 296(2) of the Code that "[a] person [should] not, without reasonable excuse, refuse or fail to comply with a requirement made under section 295" so, thus, strictly the question decided by *Yuill* was that legal professional privilege was not a reasonable excuse for failing to comply with a notice under s 295(1) of the Code.

20 *Baker v Campbell* had not been decided when the Code was enacted in 1981[44] and, at that time, it was generally accepted that, in accordance with the decision of this Court in *O'Reilly v State Bank of Victoria Commissioners*[45], legal professional privilege could only be availed of in judicial and quasi-judicial proceedings. It was primarily that consideration that led Brennan J to conclude in *Yuill* that legal professional privilege could not be claimed in answer to the requirements of s 295(1) of the Code, his Honour taking the view that the Code was to be construed in light of the law as it was understood when enacted[46].

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41 (1983) 152 CLR 328 at 357.

42 (1983) 152 CLR 328 at 344.

43 (1991) 172 CLR 319.

44 See *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 337 per Gaudron J.

45 (1983) 153 CLR 1.

46 (1991) 172 CLR 319 at 323.

However, his Honour also stated that ss 299(2)(d) and 308 of the Code (which gave some limited protection with respect to privileged communications) indicated a legislative intent to abrogate legal professional privilege[47]. Moreover, his Honour was of the view that to admit legal professional privilege as an excuse for failure to comply with the requirements of s 295 "would be to impair and, in some cases, to destroy the effectiveness of the mechanism ... created ... to enforce the laws governing corporations"[48].

21 In *Yuill*, Dawson J, with whom Toohey J agreed[49], took the view that the limited protection given to privileged communications by ss 299(2)(d) and 308 of the Code, "render[ed] inescapable ... the conclusion that it was intended that, save as provided, legal professional privilege should play no part in an investigation under Pt VII [of the Code]"[50]. On the other hand, Gaudron[51] and McHugh JJ[52] each took the view that ss 296(2) and 308 were explicable on the basis that, in a context in which it was generally thought legal professional privilege could be availed of only in judicial and quasi-judicial proceedings, ss 296(2) and 308 were intended to supply a measure of protection to privileged communications and, thus, could not be treated as the manifestation of legislative intent to otherwise abrogate the privilege.

22 One other matter should be noted with respect to the decision in *Yuill*. In that case, McHugh J referred to the decision in *Pyneboard* and noted that the relevant provisions of the Code differed from s 155 of the Act in that, unlike that provision, they allowed that the requirements of s 295 "need not be complied with if there was a 'reasonable excuse' available."[53]

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47 (1991) 172 CLR 319 at 324-325.

48 (1991) 172 CLR 319 at 327.

49 (1991) 172 CLR 319 at 337.

50 (1991) 172 CLR 319 at 336.

51 (1991) 172 CLR 319 at 342.

52 (1991) 172 CLR 319 at 349.

53 (1991) 172 CLR 319 at 351.

Construction of s 155 as it affects legal professional privilege

23 On behalf of the ACCC, it was argued that, so far as concerns the question of legal professional privilege, s 155 should be construed by the same process as was adopted in *Pyneboard* and, later, by the majority in *Yuill*. It was also put that the purpose of investigating contraventions of the Act would be impaired or frustrated if legal professional privilege could be availed of to resist compliance with a notice under s 155(1) of the Act. In that context, reference was made to the expansion of the privilege effected by *Esso*[54] and to the difficulties that would be encountered in situations in which legal advice was sought in relation to proposed contraventions of the Act.

24 The notion that privilege attaches to communications made between client and lawyer for the purpose of engaging in contraventions of the Act should not be accepted[55]. A communication the purpose of which is to "seek help to evade the law by illegal conduct" is not privileged[56]. That being so, it is difficult to see that the availability of legal professional privilege to resist compliance with a notice under s 155(1) of the Act would result in any significant impairment of the investigation of contraventions of the Act, much less in the frustration of such investigations. At least, that conclusion is far less obvious than in the case of the privilege against exposure to penalties. So to say, however, does not obviate the need to construe s 155 of the Act.

25 The first question that arises in relation to the construction of s 155 is whether the approach adopted in *Pyneboard* should be followed in this case. There are a number of difficulties with that course, one of which has already been mentioned, namely, that the approach adopted by Brennan J is inconsistent with the rule expressed in *Potter v Minahan*. There are also difficulties with the approach adopted by Mason ACJ, Wilson and Dawson JJ.

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

55 See *R v Cox and Railton* (1884) 14 QBD 153.

56 *Attorney-General (NT) v Kearney* (1985) 158 CLR 500 at 513 per Gibbs CJ. See also *Jonas v Ford* (1885) 11 VLR 240; *Varawa v Howard Smith & Co Ltd* (1910) 10 CLR 382; *R v Bell; Ex parte Lees* (1980) 146 CLR 141 at 145 per Gibbs J, 151-152 per Stephen J, 161-162 per Wilson J; *Baker v Campbell* (1983) 153 CLR 52 at 86 per Murphy J; *Wigmore on Evidence*, McNaughton rev, (1961), vol 8, par 2298 at 577; McNicol, *Law of Privilege*, (1992) at 104-113.

26 The chief difficulty with the approach adopted by Mason ACJ, Wilson and Dawson JJ in *Pyneboard* is that it concentrates on the terms of s 155(1) which sub-section, it may be noted in passing, is not only concerned with the investigation of contraventions of the Act but, also, with matters relevant to designated telecommunications matters and the making of decisions under ss 93(3) or (3A) of the Act. In particular, the approach of Mason ACJ, Wilson and Dawson JJ pays no regard to s 155(2).

27 Section 155(2) authorises what would otherwise constitute a trespass. In that respect, it is similar to the search warrant provision in s 10 of the *Crimes Act* 1914 (Cth) considered in *Baker v Campbell* and, later, in *Propend*. Those decisions, which were subsequent to the decision in *Pyneboard*, respectively held and confirmed that that provision did not authorise the seizure of material to which legal professional privilege attached. Given the generality of the words of s 10 of the *Crimes Act* 1914 (Cth)[57] and their similarity to the words of s 155(2), it is difficult to see any basis upon which that sub-section can be construed, consistently with *Baker v Campbell* and *Propend*, as authorising entry to premises for the purpose of inspecting and copying material to which legal professional privilege attaches.

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57 Section 10 of the *Crimes Act* 1914 (Cth) provided:

> " If a Justice of the Peace is satisfied by information on oath that there is reasonable ground for suspecting that there is in any house, vessel, or place –
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> (a) anything with respect to which any offence against any law of the Commonwealth or of a Territory has been, or is suspected on reasonable grounds to have been, committed;
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> (b) anything as to which there are reasonable grounds for believing that it will afford evidence as to the commission of any such offence; or
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> (c) anything as to which there is reasonable ground for believing that it is intended to be used for the purpose of committing any such offence,
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> he may grant a search warrant authorizing any constable named therein, with such assistance as he thinks necessary, to enter at any time any house, vessel, or place named or described in the warrant, if necessary by force, and to seize any such thing which he may find in the house, vessel, or place."

28 The other difficulty with the approach adopted by Mason ACJ, Wilson and Dawson JJ in *Pyneboard* is that, as already noted, it renders the express abrogation, in s 155(7), of the privilege against incrimination otiose. As a general rule, statutory provisions are to be construed by giving effect to their express terms unless that would result in some absurdity[58]. No absurdity is involved in construing ss 155(1) and (2), in accordance with the rule expressed in *Potter v Minahan*, as not abrogating fundamental common law privileges and giving effect to s 155(7) according to its terms.

29 Given the difficulties with the approach adopted by Mason ACJ, Wilson and Dawson JJ in *Pyneboard*, that approach should not be followed in this case for the purpose of determining whether a person may resist a notice under s 155(1) of the Act on the ground of legal professional privilege. So to say, is not to say that *Pyneboard* was wrongly decided.

30 The implication that the privilege against exposure to penalties was abrogated by s 155(1) can 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. However, it may be that a more secure basis for the decision is to be found in the nature of the privilege.

31 In *Naismith v McGovern*, Williams, Webb, Kitto and Taylor JJ said:

> "Originally orders for discovery were not obtainable at common law, except to a limited extent, and a party to a common law action who desired general discovery had to proceed by bill in equity. But the Court of Equity would not make an order for discovery or for the administration of interrogatories in favour of the prosecutor whether the prosecutor was the Crown or a common informer or any other person where the proceeding was of such a nature that it might result in a penalty or forfeiture: '*nemo tenetur seipsum prodere*'[59]. When discovery and

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58 See *Grey v Pearson* (1857) 6 HLC 61 at 106 per Lord Wensleydale [10 ER 1216 at 1234]; *Australian Boot Trade Employes' Federation v Whybrow & Co* (1910) 11 CLR 311 at 341-342 per Higgins J; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 546 per Gaudron J (with whom Mason CJ, Wilson and Dawson JJ agreed).

59 "No one is obliged to betray himself."

> interrogatories were provided for under the rules made under the *Judicature Act* the same principle was applied."[60]

Today the privilege against exposure to penalties serves the purpose of ensuring that those who allege criminality or other illegal conduct should prove it[61]. However, there seems little, if any, reason why that privilege should be recognised outside judicial proceedings. Certainly, no decision of this Court says it should be so recognised, much less that it is a substantive rule of law. Further, it should now be accepted that, as the privilege against self-incrimination is not available to corporations[62], the privilege against exposure to penalties is, similarly, not available to them[63].

32 It is necessary now to turn to the terms of s 155 of the Act. Sub-sections (1) and (2) are expressed in general terms and, save to the extent that they serve to indicate that a significant purpose of that section is the investigation of contraventions of the Act, they provide no basis, standing alone, for an implication, much less a necessary implication, that they abrogate legal professional privilege. On the contrary, if s 155(2) is construed consistently with the decisions in *Baker v Campbell* and *Propend*, as in our view it should be, that sub-section does not abrogate legal professional privilege. And if s 155(2) is so construed, it would be incongruous for s 155(1) to be construed differently.

33 In support of the contention that legal professional privilege cannot be asserted in resistance to a notice under s 155(1) of the Act, counsel for the ACCC relied on the terms of s 155(5)(a) which, together with sub-s (6A), make it an offence to refuse or fail to comply with a notice under s 155(1) to the extent the person concerned "is capable of complying with it". Those words, it was argued, permit of an exception only where the person concerned is physically incapable of complying. It is very much to be doubted that sub-s (5)(a) is exhaustive of the matters that may be raised in answer to a charge of failing to comply with a notice under s 155(1). At the very least, ordinary principles of construction would suggest that there is an intentional element to the offences created by

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60 (1953) 90 CLR 336 at 341-342.

61 See *Trade Practices Commission v Abbco Iceworks Pty Ltd* (1994) 52 FCR 96 at 129 per Burchett J.

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

63 See *Trade Practices Commission v Abbco Iceworks Pty Ltd* (1994) 52 FCR 96.

ss 155(5) and (6A)[64]. More to the point, however, it is necessary to determine the meaning and effect of s 155(1) before it can be determined what constitutes a refusal or failure to comply with a notice.

34 There is, in our view, only one aspect of s 155 which positively suggests a legislative intent to effect an abrogation of legal professional privilege, namely, the express preservation, in sub-s (7A), of the privilege attaching to Cabinet documents and deliberations. However, very little, if anything, can be implied from the express preservation of that privilege in a context in which there is an express abrogation of the privilege against self-incrimination. Moreover, if any such implication could be made by application of the maxim *expressio unius est exclusio alterius* – a maxim upon which, it has often been pointed out, it is dangerous to rely[65] – it could hardly be said that it was a necessary implication.

35 Given the above considerations and, given also, that it is far from obvious that the retention of legal professional privilege would significantly impair the ACCC's functions under the Act, s 155 cannot be construed, consistently with the rule expressed in *Potter v Minahan*, as impliedly abrogating legal professional privilege. As earlier indicated, that does not mean that *Pyneboard* was wrongly decided. However, it may be that *Yuill* would now be decided differently.

36 It should be added that whilst reference was made in submissions to what was said to be apprehended abuses of the privilege in some circumstances, questions of the attachment of privilege to the particular documents in question have yet to be decided by the Federal Court. Further, as was pointed out long ago, "the contriving of a fraud could form no part of a recognized professional relationship."[66] In making that observation no view is expressed respecting the present litigation.

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64 See *He Kaw Teh v The Queen* (1985) 157 CLR 523.

65 See, for example, *State of Tasmania v The Commonwealth of Australia and State of Victoria* (1904) 1 CLR 329; *Houssein v Under Secretary of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88; *Carr v Finance Corp of Australia Ltd [No 2]* (1982) 150 CLR 139; *Riley v The Commonwealth* (1985) 159 CLR 1; *O'Sullivan v Farrer* (1989) 168 CLR 210; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564; *Wentworth v NSW Bar Association* (1992) 176 CLR 239.

66 *R v Bell; Ex parte Lees* (1980) 146 CLR 141 at 152 per Stephen J, referring to *Follett v Jefferyes* (1850) 1 Sim (NS) 3 at 17 per Lord Cranworth V-C [61 ER 1 at 6].

Conclusion and orders

37 The appeal should be allowed with costs. The orders of the Full Court should be set aside and in lieu thereof, it should be declared that s 155 of the Act does not abrogate legal professional privilege and the ACCC should be ordered to pay the appellants' costs of the proceedings in the Full Court. The matter should be remitted to the Federal Court to determine what, if any, of the documents specified in the notices are the subject of legal professional privilege.

38 McHUGH J. This appeal is brought by special leave against an order of the Full Court of the Federal Court. That Court held that a firm of solicitors could not claim legal professional privilege in respect of documents required to be produced to the Australian Competition and Consumer Commission ("the Commission") by a notice given under s 155 of the *Trade Practices Act* 1974 (Cth) ("the Act"). The question in the appeal is whether, by enacting the general provisions of s 155(1) of the Act, the Parliament of the Commonwealth intended the Commission to have power to require the production of documents that are the subject of legal professional privilege.

39 In my opinion, the general words of s 155(1) cannot be read as authorising the production of documents protected by legal professional privilege. It is an elementary rule of statutory construction that courts do not read general words in a statute as taking away rights, privileges and immunities that the common law or the general law classifies as fundamental unless the context or subject matter of the statute points irresistibly to that conclusion. Nothing in the context or subject matter of s 155 points to the Parliament intending the Commission to have power to require the production of documents that are the subject of legal professional privilege. In that respect, the right of legal professional privilege is in a different category from the immunity against self-incrimination, an immunity which s 155 expressly abolishes. It is also in a different category from the immunity against being exposed to a civil penalty, an immunity that this Court has held was abrogated by s 155(1)[67].

40 Relevantly, s 155 of the Act gives the Commission and its authorised officers extensive powers to obtain documents, to enter premises and to take copies of documents on the premises when the Commission has reason to believe that the Act has been contravened. Section 155(1) relevantly enacts that, if the Commission has reason to believe that a person is capable of producing documents "relating to a matter that constitutes, or may constitute, a contravention" of the Act, a member of the Commission may by notice require that person to produce the documents. If such circumstances exist, s 155(2) authorises a member of the staff assisting the Commission to enter premises, to inspect documents under the control of the person and to take copies or extracts of the documents. Section 155(5) declares that a person shall not "refuse or fail to comply with a notice … to the extent that the person is capable of complying with it". Section 155(6) requires the person in charge of premises to provide an authorised officer with all reasonable facilities and assistance for the effective exercise of the powers conferred by s 155(2). By s 155(6A) a person who contravenes s 155(5) or (6) is guilty of an offence, punishable by fine in the case of a corporation or by fine or imprisonment in the case of a natural person.

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

41 Section 155 specifically declares that one immunity recognised by the common law as fundamental is no answer to a request for the production of documents. Section 155(7) declares that "[a] person is not excused from furnishing information or producing or permitting the inspection of a document in pursuance of this section on the ground that the information or document may tend to incriminate the person". However, the sub-section also declares that any answer, information or document produced in response to a notice "is not admissible in evidence against the person" in criminal proceedings.

42 Section 155 also expressly provides that certain information or evidence need not be given or produced. Section 155(7A) enacts that a person is not required to give information or evidence that would disclose the contents of or permit the inspection of documents "prepared for the purposes of a meeting of the Cabinet of a State or Territory". Nor is a person required to give information or evidence or permit the inspection of documents "that would disclose the deliberations" of such a body.

The construction of s 155

43 Courts do not construe legislation as abolishing, suspending or adversely affecting rights, freedoms and immunities that the courts have recognised as fundamental unless the legislation does so in unambiguous terms[68]. In construing legislation, the courts begin with the presumption that the legislature does not interfere with these fundamental rights, freedoms and immunities unless it makes its intention to do so unmistakably clear. The courts will hold that the presumption has not been overcome unless the relevant legislation expressly abolishes, suspends or adversely affects the right, freedom or immunity or does so by necessary implication. They will hold that the legislature has done so by necessary implication whenever the legislative provision would be rendered inoperative or its object largely frustrated in its practical application, if the right, freedom or immunity were to prevail over the legislation. A power conferred in general terms, however, is unlikely to contain the necessary implication because "general words will almost always be able to be given some operation, even if that operation is limited in scope"[69].

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68 *Baker v Campbell* (1983) 153 CLR 52; *Bropho v Western Australia* (1990) 171 CLR 1; *Coco v The Queen* (1994) 179 CLR 427; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501.

69 *Coco v The Queen* (1994) 179 CLR 427 at 438.

44 Australian courts have classified legal professional privilege as a fundamental right or immunity[70]. Accordingly, they hold that a legislature will be taken to have abolished the privilege only when the legislative provision has done so expressly or by necessary implication[71]. Legal professional privilege describes a person's immunity from compulsion to produce documents that evidence confidential communications about legal matters made between a lawyer and client or between a lawyer and a third party for the benefit of a client[72]. The immunity also protects the disclosure of documents that record legal work carried out by the lawyer for the benefit of a client, such as research memoranda[73]. The immunity embodies a substantive legal right. Its operation is not limited to judicial or quasi-judicial proceedings[74]. Where it applies, it may be used to refuse to produce documents that are the subject of a search warrant authorised by statute[75] or other extra-curial process as well as a subpoena issued under or discovery required by rules of court[76].

45 Neither s 155 nor any other provision of the Act expressly abolishes the right to claim legal professional privilege for documents the subject of a s 155 notice. But the Commission contends that s 155 does so by necessary implication. I reject this contention. 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

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70 *Baker v Campbell* (1983) 153 CLR 52; *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501.

71 *Baker v Campbell* (1983) 153 CLR 52; *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501.

72 *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 550.

73 *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 550.

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

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

76 *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501.

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 legal professional privilege. Nor is it likely that the position has greatly changed as the result of this Court's decision in *Esso Australia Resources Ltd v Federal Commissioner of Taxation*[77]. In *Esso*, the Court held that a claim of legal professional privilege is made out if the dominant purpose of the communication was the giving or receiving of legal advice or assistance. Before *Esso*, the received doctrine was that a communication was protected by legal professional privilege only if the sole purpose of the communication was the giving or receiving of legal advice or assistance.

46 The Commission also claimed that s 155(5) indicates that the power conferred by s 155(1) is not subject to legal professional privilege because s 155(5) declares that a person shall not "refuse or fail to comply with a notice … to the extent that the person is capable of complying with it". But s 155(5) is of no assistance in construing s 155(1). The implied duty created by s 155(5) operates only in respect of documents which s 155(1), on its proper construction, requires to be produced.

Pyneboard and *Yuill*

47 The Commission also contended that two decisions of this Court – *Pyneboard Pty Ltd v Trade Practices Commission*[78] and *Corporate Affairs Commission (NSW) v Yuill*[79] – compelled the conclusion that the power conferred by s 155(1) was not subject to claims of legal professional privilege. In *Pyneboard*, the Court unanimously held that it was no answer to a notice given under s 155(1) that production of the documents might expose a person or a corporation to a penalty. In *Yuill*, a majority of the Court held that a claim of legal professional privilege was not a "reasonable excuse" for refusing to obey a requirement under s 295(1) of the *Companies (New South Wales) Code*. That sub-section empowered an inspector to require an officer of a corporation, the subject of an investigation under the Code, to produce such books of the corporation as were in his or her custody or control. Neither decision assists the Commission.

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77 (1999) 201 CLR 49.

78 (1983) 152 CLR 328.

79 (1991) 172 CLR 319.

48 The decision in *Pyneboard* can be justified by the presence of s 155(7) in the Act. Section 155(7) declared that "[a] person is not excused from furnishing information or producing or permitting the inspection of a document in pursuance of this section on the ground that the information or document may tend to incriminate the person". Mason ACJ, Wilson and Dawson JJ said[80] it was "irrational to suppose that Parliament contemplated that a person could be compelled to admit commission of a criminal offence yet be excused from admitting a contravention of the Act sounding in a civil penalty". Because of the presence of s 155(7), therefore, it was a necessary implication of s 155 that a notice under s 155(1) abolished any right to claim that production of the documents required might expose a person to a civil penalty. However, no provision in s 155 has the same, or for that matter any, relation to legal professional privilege as s 155(7) has to a claim that producing documents might expose a person to a penalty in civil proceedings.

49 More helpful to the Commission is another strand in the reasoning of Mason ACJ, Wilson and Dawson JJ in *Pyneboard*. Echoing comments in an earlier corporations case decided by the Court[81], their Honours said that s 155(1) "is valueless if the obligation to comply is subject to privilege"[82]. With great respect to their Honours, this statement cannot be accepted as correct. It is denied by the longstanding acceptance by the Commission and its predecessor of a right to claim legal professional privilege in respect of documents the subject of a s 155 notice.

50 Moreover, the contention that the power conferred by s 155(1) is not "subject to privilege" is inconsistent with the fact that the power conferred by s 155(2) is subject to legal professional privilege. Where the Commission has reason to believe that a person has contravened the Act, s 155(2) authorises a member of the staff assisting the Commission to enter premises, to inspect documents under the control of the person and to take copies or extracts of the documents. The power conferred by s 155(2) is no greater, however, than the power given by s 10 of the *Crimes Act* 1914 (Cth) to issue a search warrant to enter premises and seize anything including a document if there were reasonable grounds for suspecting that the thing afforded evidence of an offence. In *Baker v Campbell*[83], the Court held that the power conferred by s 10 was subject to legal professional privilege. Nothing in the context, history or purpose of s 155(2)

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80 (1983) 152 CLR 328 at 345.

81 *Mortimer v Brown* (1970) 122 CLR 493.

82 (1983) 152 CLR 328 at 343.

83 (1983) 153 CLR 52.

provides any ground for distinguishing the application of *Baker*[84] to that sub-section.

51 If the power conferred by s 155(2) is subject to legal professional privilege, as I think it is, it is difficult to see why s 155(1) is not also subject to legal professional privilege. Given the Court's decision in *Baker*[85], the above statement of Mason ACJ, Wilson and Dawson JJ[86] in *Pyneboard* cannot be regarded as authoritative.

52 Because *Pyneboard* dealt with a different privilege and because of the presence of s 155(7) in the Act, the decision in that case does not assist the Commission.

53 Nor does the decision in *Yuill*[87] assist the Commission. The context, history and purpose of s 155 are so different from those of s 295 of the *Companies (New South Wales) Code* that *Yuill* furnishes no assistance in construing s 155(1). Judicial decisions on statutory terms "can never give more than guidance as to the meaning of the same terms in different statutes unless the statutes are not materially different in context, history and purpose"[88]. And a decision on a statute "is likely to be of even less assistance ... when the judicial decision turned on an inference or inferences drawn from the statute as a whole"[89]. Because legal professional privilege was perceived as applying only in judicial and quasi-judicial proceedings at the time when s 295 was enacted, Brennan J held in *Yuill*[90] that the legislature did not intend the privilege to come within the term "reasonable excuse". Dawson and Toohey JJ also held[91] that the privilege did not come within that term. They did so because other provisions of the Code gave limited protection to legal professional privilege in some situations and to have held otherwise would have been incongruous with those provisions and the denial of self-incrimination as a "reasonable excuse".

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84 (1983) 153 CLR 52.

85 (1983) 153 CLR 52.

86 (1983) 152 CLR 328 at 343.

87 (1991) 172 CLR 319.

88 *Western Australia v Ward* (2002) 76 ALJR 1098 at 1196 [480]; 191 ALR 1 at 137.

89 *Western Australia v Ward* (2002) 76 ALJR 1098 at 1196-1197 [481]; 191 ALR 1 at 137.

90 (1991) 172 CLR 319 at 324.

91 (1991) 172 CLR 319 at 334-336, 337.

54 The decision in *Yuill* was also influenced by the view that the contents of a corporation's books and documents are essential to an understanding of the affairs of a corporation. Because that is so, an investigation of its affairs might be gravely impaired if an inspector was denied access to *all* of its books and documents. In *Yuill*[92], Brennan J[93] and Dawson and Toohey JJ[94] used this fact to support their conclusion that legal professional privilege was not a "reasonable excuse" for failing to comply with s 295(1).

55 Whether or not access to legally privileged documents is necessary if the affairs of a company are to be properly investigated, failure to obtain access to legally privileged documents does not render the Commission's powers under s 155 futile. Accordingly, *Yuill* does not compel or require the Court to find that the power conferred by s 155(1) is not subject to legal professional privilege.

Order

56 I would allow the appeal and set aside the orders of the Full Court of the Federal Court. I would substitute for those orders a declaration that powers conferred by s 155 of the Act are subject to any claim of legal professional privilege. I would remit the matter to the Federal Court for further hearing to determine whether legal professional privilege can be claimed in respect of any document referred to in the notices. The Commission must pay the costs of this appeal.

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92 (1991) 172 CLR 319.

93 (1991) 172 CLR 319 at 326-327.

94 (1991) 172 CLR 319 at 332-334, 337.

57 KIRBY J. The Court has before it an appeal from a judgment of the Full Court of the Federal Court of Australia[95]. The appeal was heard together with cases stated by Gaudron J[96] that are the subject of a concurrent decision. The issue is one of statutory construction. It concerns the interpretation of s 155 of the *Trade Practices Act* 1974 (Cth) ("the TPA"). The essential question is whether the Full Court erred in concluding that the section (which requires the furnishing of information and the production of documents) applies, although the communications in question are the subject of claims to legal professional privilege.

58 In deciding that the privilege was overridden by the terms of s 155, the Full Court was greatly influenced by the reasoning of the majority of this Court in *Corporate Affairs Commission (NSW) v Yuill*[97]. An examination of decisions before and after that case suggests that *Yuill* may have been wrongly decided. It appears as an exception to the approach taken by this Court to like problems. Considerations of legal principle and legal policy also support the appeal against the Full Court's interpretation. In my view, the appeal should be allowed. However, I accept that there are countervailing arguments[98]. It will be necessary to recount these in order to explain how I arrive at my conclusion.

The facts and legislation

59 *The facts and dispute*: The background facts and the procedural history are stated in other reasons[99].

60 The dispute between the parties concerns the obligation of The Daniels Corporation International Pty Ltd ("Daniels") and its solicitors to furnish information and produce documents relevant to an investigation of Daniels by the Australian Competition and Consumer Commission ("the Commission"). The information and documents were purportedly sought for the purpose of

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95 *Australian Competition and Consumer Commission v The Daniels Corporation International Pty Ltd* (2001) 108 FCR 123.

96 *Woolworths Ltd v Fels*; *Coles Myer Ltd v Fels* [2002] HCA 50.

97 (1991) 172 CLR 319.

98 cf McNicol, "*Australian Competition and Consumer Commission v The Daniels Corporation International Pty Ltd and Another*", (2002) 24 *Sydney Law Review* 281; Bruce, "The *Trade Practices Act 1974* (Cth) and the Demise of Legal Professional Privilege", (2002) 30 *Federal Law Review* 373 at 387-398.

99 Reasons of Gleeson CJ, Gaudron, Gummow and Hayne JJ at [1]-[4] ("the joint reasons").

determining whether Daniels had engaged in conduct that contravened the TPA. The information and documents included communications during 1998 between Daniels and its solicitors. Although some information and documents were provided, Daniels, acting on legal advice, declined to produce other documents. It did so on the ground that, in respect of the communications contained in them, it was entitled to legal professional privilege. The service of a notice pursuant to s 155 on the solicitors (and their joinder as a party to the proceedings) avoided any contest concerning the reach of s 155 in circumstances where physical possession of the subject documents (or other media in which the information was contained) had passed from the corporation under investigation to another person, subject to duties (in this case those of solicitors) to that corporation[100].

61 It is important to notice that, at this stage, there has been no determination of whether any of the communications in respect of which legal professional privilege has been claimed are properly the subject of such privilege. That question has been postponed whilst the threshold issue has been argued. That issue is whether, in accordance with its language and purpose, s 155 respects claims to legal professional privilege or overrides the privilege and obliges the person who is "capable of furnishing information" or "producing documents" to do so despite any such privilege that might otherwise exist.

62 *The relevant legislation*: The key provision is s 155 of the TPA. It is set out in other reasons[101]. Although amendments were introduced by legislation that came into force in December 2001[102], it was common ground that they are not relevant to the determination of Daniels' appeal.

The decision of the Full Federal Court

63 No decision of this Court has determined the question that is now presented. It was therefore necessary for the Full Court to approach that question as a matter of principle rather than of binding authority. Extracts from the reasons of the Full Court are set out in other reasons[103].

64 Section 155 contains express exemptions in cases where compliance might involve self-incrimination or exposure to a penalty or intrusion into nominated State or Territory Cabinet documents. No express provision is made

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100 cf *Daniels* (2001) 108 FCR 123 at 148 [95] per Lindgren J.

101 Joint reasons at [5]-[8], reasons of Callinan J at [129].

102 *Treasury Legislation Amendment (Application of Criminal Code) Act (No 2)* 2001 (Cth).

103 Reasons of Callinan J at [119]-[120], [123]-[127].

with respect to legal professional privilege – either to preserve, modify or abolish it in respect of communications to which a notice under s 155 otherwise applies. The impact of s 155 upon any such privilege is, accordingly, left to a process of legal reasoning. Prudently, the Full Court sought guidance from the way in which this Court had tackled questions that appeared to be in some ways analogous. Thus, the Full Court examined this Court's reasoning in *Pyneboard Pty Ltd v Trade Practices Commission*[104], *Baker v Campbell*[105] and *Yuill*[106].

65 The decision in *Pyneboard* was not concerned with legal professional privilege. It did relate to s 155, however, only in respect of exposure of a person, who had received a notice under that section, to a civil penalty. In that sense, *Pyneboard* was addressed to issues closely related to self-incrimination, a subject for which s 155(7) made explicit provision. It would be a mistake to draw from *Pyneboard* implications about common law legal professional privilege. That privilege has a different history, purpose and function. However, the reasoning in *Baker* and *Yuill* has implications for the construction of s 155 and its relationship with legal professional privilege. It will be necessary to return to that reasoning later.

Arguments against the privilege

66 *This Court's authority*: I do not regard this appeal as presenting a simple question. Cases involving contested interpretation of legislation that reach this Court are rarely straightforward. We can give no more than this Court's opinion, which thereby becomes the correct interpretation of the statute.

67 Because this is a case in which the precise question for decision has never been determined, this Court will, as in all such matters, start with the statutory text and its apparent purpose and have regard to relevant considerations of legal authority, principle and policy[107]. The applicable legal authority is not conclusive. But consistency is an attribute of the rule of law. It is therefore desirable that a court should, so far as possible, avoid giving inconsistent signals. At least it should avoid doing so unless it explains clearly any changes of direction. As the opinions in the Full Court demonstrate in this case (and as do the cases to which those opinions refer) many instances arise for the construction of legislation where it is necessary for other Australian courts to approach their

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104 (1983) 152 CLR 328.

105 (1983) 153 CLR 52.

106 (1991) 172 CLR 319.

107 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 252; *Northern Territory v Mengel* (1995) 185 CLR 307 at 347.

task seeking, so far as they can, to conform to the rulings of this Court when addressing new and analogous problems.

68 This Court's decisions closest to the question in this appeal, namely *Baker* and *Yuill*, point in opposite directions. *Baker* lays great emphasis upon the importance of legal professional privilege, holding that very clear, indeed unmistakable, provisions of legislation will be needed to deprive a person, otherwise entitled, of such privilege.

69 *Yuill* is a later decision. It held that a particular power conferred on an inspector, requiring the production of books of a corporation, necessarily overrode legal professional privilege. In *Yuill*, the legislation under consideration was, if anything, more amenable to the preservation of legal professional privilege than that under consideration here. It contained an express exception excusing the company officer served with the notice from committing an offence for a failure to comply with its requirements where there was a "reasonable excuse" for such non-compliance[108]. A textual argument was therefore available that the existence of legal professional privilege constituted a "reasonable excuse" within the statute. That argument was advanced. There is no equivalent exemption in s 155 of the TPA.

70 On the face of things, therefore, the last word of this Court on the subject of legislation providing for notices to corporations to produce documents for inspection, expresses a rule that appears unfavourable to the survival of the privilege. According to *Yuill*, legal professional privilege cannot provide an exemption from disclosure if the inspector's ability to perform the envisaged functions would thereby be "significantly diminished"[109] or would be "likely to be hampered"[110]. If such are the criteria to be applied, there can be little doubt that a construction of s 155 that upheld an unexpressed exception for legal professional privilege could, to some degree, diminish, hamper or impair the operation of the Commission's investigation. An approach to the problem presented by the present case, consistently with the majority opinions in *Yuill*, would thus appear (as the Full Court concluded) to require a decision favourable to the Commission.

71 I acknowledge that the question of authority remains open. But the legislation is, in material respects, different. Most especially, the legislation considered in *Yuill* included an unusual provision dealing expressly with legal

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108 *Companies (New South Wales) Code*, s 296(2).

109 *Yuill* (1991) 172 CLR 319 at 326 per Brennan J.

110 *Yuill* (1991) 172 CLR 319 at 333 per Dawson J.

professional privilege in a way irrelevant to the case but sufficiently expressed to indicate that some consideration had been given by the drafter to the issue[111]. Further, one of the members of the majority in *Yuill* (Brennan J) took, as a step in his reasoning, what he saw to be a relevant consideration, namely the supervening change in the understanding of the nature and availability of legal professional privilege. That had been quite different when s 155 was first enacted[112]. As Moore J said in the Full Court, correctly in my view, that "approach to the construction of a statute is rarely appropriate"[113]. It is a dubious rule of construction, of limited utility and application. Nevertheless, as a matter of decisional authority, *Yuill* certainly represents a warning light against the propositions advanced by the appellants in these proceedings.

72 *Textual arguments*: By reference to the actual provisions of s 155, the Commission advanced a number of arguments that are by no means meritless.

73 First, the law on the subject having been reduced to statutory form (and no constitutional objection being raised as to its validity[114]), the correct starting point for analysis is the language of s 155, not pre-existing doctrines of the common law. Where valid legislation has been enacted, the function of a court is to give effect to it[115], not to common law rights as if the Parliament had not spoken. This was obviously the approach favoured by Brennan J in *Pyneboard*[116]. It has the merit of concentrating the attention of the decision-maker upon the enactment of the Parliament and giving primacy to its purposes as stated in its words. In many recent decisions this Court has insisted that decision-makers should focus their

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111 *Companies (New South Wales) Code*, s 308; *Yuill* (1991) 172 CLR 319 at 336 per Dawson J.

112 *Yuill* (1991) 172 CLR 319 at 322-323. There Brennan J applied "the rule *contemporanea expositio est optima et fortissima in lege* – the best and surest mode of construing an instrument is to read it in the sense which would have been applied when it was drawn up" citing *Broom's Legal Maxims*, 10th ed (1939) at 463.

113 *Daniels* (2001) 108 FCR 123 at 143-144 [76].

114 Spier, "Section 155 of the Trade Practices Act 1974: Some Practical Issues – A Trade Practices Commission Perspective", (1994) 2 *Trade Practices Law Journal* 116 at 128.

115 *Pyneboard* (1983) 152 CLR 328 at 332-336.

116 (1983) 152 CLR 328 at 351.

attention upon the terms of applicable legislation rather than use pre-existing common law or unconnected expositions[117].

74 Secondly, in its terms, s 155 is expressed in very broad language. It makes no explicit exemption for information or documents the subject of legal professional privilege. Cases do exist where legislatures expressly enact provisions dealing with legal professional privilege, either to override it[118] or to modify it[119]. However, legislation is often silent on the point. The Commission accepted that, in such a situation, a necessary implication from the terms of the statute had to be demonstrated in order to override such an important civil right[120].

75 Thirdly, so far as "necessary implication" was concerned, the Commission submitted that it had never been the standard of this Court that a party, seeking enforcement of legislation according to its terms, had to show that such enforcement would be totally frustrated if the privilege invoked were upheld[121]. Such an approach was not only contrary to authority, but also difficult to reconcile with the emerging principles of statutory construction that this Court has emphasised in recent years. Those principles have stressed the importance of adopting a purposive approach to legislation[122]. Courts have no function to frustrate the carrying into effect of the purposes of Parliament by superimposing on a legislative text unreasonable burdens that distort the fundamental task of construction, which is to give effect to the purpose of the legislature as evident in the statutory language.

76 Fourthly, adopting a purposive approach in the present case, two textual indications were invoked to support the conclusion of the Full Court. The first was the reference to the "capability" of the person having control of the information or documents, the subject of the s 155 notice. Had it been the purpose of the Parliament to exempt information and documents on the grounds

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117 eg *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 77 [9], 89 [46]; *The Commonwealth v Yarmirr* (2001) 75 ALJR 1582 at 1587 [14]-[15], 1630 [249]; 184 ALR 113 at 122, 180.

118 *Evidence Act* 1958 (Vic), s 19D.

119 *Companies (New South Wales) Code*, s 308: see *Yuill* (1991) 172 CLR 319.

120 cf *Pantorno v The Queen* (1989) 166 CLR 466 at 473.

121 See eg *Bropho v Western Australia* (1990) 171 CLR 1 at 21-22.

122 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [70]; cf *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 423-424.

of entitlements derived from legal professional privilege, a different phrase could have been used. Alternatively, provision might have been made for exceptions for a "lawful excuse". No such exceptions, specific or general, appear. As well, the treatment of the privilege against self-incrimination (and the express indication in s 155(7)[123] that such privilege is not to afford an exception) makes it more difficult to accept that, read as a whole, s 155 contemplated an unqualified exception for legal professional privilege. Harmony within the entire section lends some force to the argument that, in so far as the Parliament turned its attention to pre-existing common law privileges, it specifically denied their continued operation.

77 Fifthly, whatever might otherwise have been the construction of the phrase "is capable of", had it arisen for consideration for the first time in this appeal, the Commission pointed out that, following *Pyneboard*, those words had been adopted in federal legislation, specifically relating to taxation[124], as a statutory formula taken as equivalent to a reference to actual possession and physical capability[125]. Although s 155 did not contain an exclusion of legal professional privilege, this (the Commission submitted) was what, in effect, the chosen phrase meant. As further federal legislation had been enacted on that footing, and countless proceedings determined on that basis, the phrase should not now be interpreted to produce a different construction.

78 Sixthly, when a purposive approach was applied to s 155, the Commission argued that it supported the construction upheld by the Full Court. The section, so it was put, disclosed laudable policy objectives that should not be impeded. The object of the section was to facilitate an investigation initiated for the high public purposes of the TPA[126]. An inability to gain access to documents of a corporation under investigation would, to that extent, run the risk of stultifying, defeating or frustrating such investigation[127]. It was illegitimate, and contrary to the repeated endorsement by this Court of the "modern" approach to statutory

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123 See also the limited reference to the privilege against self-incrimination in s 155(2A) of the TPA.

124 *Taxation Administration Act* 1953 (Cth), ss 8C(1), 8D(1).

125 cf Spier, "Section 155 of the Trade Practices Act 1974: Some Practical Issues – A Trade Practices Commission Perspective", (1994) 2 *Trade Practices Law Journal* 116 at 120.

126 *Pyneboard* (1983) 152 CLR 328 at 341.

127 Spier, "Section 155 of the Trade Practices Act 1974: Some Practical Issues – A Trade Practices Commission Perspective", (1994) 2 *Trade Practices Law Journal* 116 at 129.

construction, to superimpose on the words of s 155 an undue burden as necessary to expel the legal professional privilege of which no mention had been made. In support of this approach, the Commission relied on the principle that, where the offence in question is one against the statute itself, courts will more readily assume that the Parliament's purpose was only that stated in the legislative text[128].

79 *Arguments of principle and policy*: In addition to the foregoing, the Commission called in aid a number of considerations of legal principle or policy which, it said, reinforced the conclusion to which the arguments of authority and statutory analysis pointed[129].

80 First, a consideration favouring a clear and simple criterion (such as that available in the literal words of s 155) is the desirability of reducing the scope for extended and costly legal disputation[130]. Especially in some areas of the Commission's responsibilities, 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 the Parliament[131]. The adoption of a single criterion, such as physical capability to furnish information or produce documents, affords such a simple touchstone. The Commission suggested that it was therefore one which, in the present context, this Court should uphold.

81 Secondly, when *Baker* was decided, the observations in this Court favourable to the preservation of legal professional privilege were uttered in a legal context in which that privilege was quite confined[132]. Since that time, by the decision in *Esso Australia Resources Ltd v Federal Commissioner of Taxation*[133], the scope of legal professional privilege, as it relates to

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128 *Kempley v The King* (1944) 18 *Australian Law Journal* 118; McNicol, "*Australian Competition and Consumer Commission v The Daniels Corporation International Pty Ltd and Another*", (2002) 24 *Sydney Law Review* 281 at 294.

129 cf Bruce, "The *Trade Practices Act 1974* (Cth) and the Demise of Legal Professional Privilege", (2002) 30 *Federal Law Review* 373 at 395.

130 Spier, "Section 155 of the Trade Practices Act 1974: Some Practical Issues – A Trade Practices Commission Perspective", (1994) 2 *Trade Practices Law Journal* 116 at 127-128.

131 Spier, "Section 155 of the Trade Practices Act 1974: Some Practical Issues – A Trade Practices Commission Perspective", (1994) 2 *Trade Practices Law Journal* 116 at 129.

132 *Grant v Downs* (1976) 135 CLR 674 at 685-688.

133 (1999) 201 CLR 49.

communications in documents, has effectively been expanded. In *Esso*, I referred to the potential of this expanded rule to cover, in the case of corporations and government agencies, a much wider range of communications, thereby diminishing the ability of courts and tribunals to arrive at the truth of contested corporate and governmental conduct[134].

82 This is not the occasion to revisit those arguments. I was in the minority in *Esso*. The principle in that case must be accepted. It is, after all, the same principle as is applied in a number of foreign jurisdictions[135]. However, the increased scope must be weighed in deciding whether the privilege asserted would now truly be compatible with the operation of s 155[136]. Potential interference with the operation of that section would be expanded if the legal professional privilege were available in respect of communications prepared for legal advice by in-house corporate counsel or by joint businesses of legal practitioners and accountants, such businesses now being permitted under the law of at least one Australian State[137].

83 Thirdly, to the extent that a court introduced an unexpressed exception for legal professional privilege, it would necessarily do so in terms preserving the common law. If the Parliament had actually addressed the issue, it might have been expected that at least a qualified abrogation of the privilege would have been enacted, as had been done in the case of the privilege against self-incrimination[138]. Recognition of the privilege would render irrelevant the need for carefully balanced guidelines to govern access to, or exclusion from, particular information or documents the subject of the privilege[139]. In considering the appellants' contentions, the Commission pointed out that the exception sought was one that sat uneasily with the highly qualified exemption provided in relation to the privilege against self-incrimination[140].

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134 (1999) 201 CLR 49 at 87-92 [101]-[110].

135 See *Esso* (1999) 201 CLR 49 at 69-72 [48]-[56].

136 *Baker* (1983) 153 CLR 52 at 96 per Wilson J, 122 per Dawson J.

137 *Legal Profession Act* 1987 (NSW), s 47C.

138 TPA, s 155(7) and see s 155(2A).

139 McNicol, "Unresolved Issues Arising from the General Guidelines Between the AFP and the Law Council of Australia", (1998) 72 *Australian Law Journal* 137.

140 McNicol, "*Australian Competition and Consumer Commission v The Daniels Corporation International Pty Ltd and Another*", (2002) 24 *Sydney Law Review* 281 at 294.

84 Fourthly, the implications of the decision in this case were emphasised. Similar statutory language to that appearing in s 155 has been adopted in other federal legislation affecting powers of investigation with respect to taxation, the environment and so on[141]. Such legislation was adopted to protect and to advance the public interest. Properly conducted, with access to all relevant documents, investigations can sometimes exonerate corporations (and persons) the subject of notices under s 155. Where the Parliament had acted on past decisions of this Court[142], care is needed in initiating a different direction. Cogent reasons are needed for changing this Court's approach, given that such change would almost certainly have implications extending far beyond the present Act and the circumstances of the present parties.

Clarity in the abrogation of legal privilege

85 *The privilege as an important right*: In so far as this Court has dealt with the topic of legal professional privilege, save for *Yuill*, it has consistently emphasised the importance of the privilege as a basic doctrine of the law[143] and a "practical guarantee of fundamental rights"[144], not simply a rule of evidence law applicable to judicial or quasi-judicial proceedings[145]. It has been increasingly accepted that legal professional privilege is an important civil right to be safeguarded by the law. Of course, derogations appropriate to the needs of a democratic society may be contemplated[146]. However, vigilance is required against accidental and unintended erosions of the right.

86 Legal professional privilege is also an important human right deserving of special protection for that reason[147]. I am conscious of the fact that Daniels is a

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141 McNicol, "*Australian Competition and Consumer Commission v The Daniels Corporation International Pty Ltd and Another*", (2002) 24 *Sydney Law Review* 281 at 293.

142 *Pyneboard* (1983) 152 CLR 328 at 343-345.

143 *Goldberg v Ng* (1995) 185 CLR 83 at 121 per Gummow J; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 505 per Brennan CJ, 551-552 per McHugh J.

144 *Goldberg v Ng* (1995) 185 CLR 83 at 121 per Gummow J.

145 *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1.

146 *Foxley v United Kingdom* (2000) 31 EHRR 637 at 647 [43].

147 *Campbell v United Kingdom* (1992) 15 EHRR 137; *Foxley v United Kingdom* (2000) 31 EHRR 637.

corporation. As such, it may not be entitled to all of the rights described as fundamental human rights[148]. Nevertheless, in the expositions of the rationale for legal professional privilege, it has not so far been suggested (nor was it argued in this case) that such privilege is somehow inapplicable to a corporation or is of a kind that would not attract the presumption of parliamentary respect for its continuance in such a case[149].

87 In his explanation before the European Court of Justice of the reasons for legal professional privilege, Advocate-General Slynn explained the principle in terms applicable to both natural and legal persons[150]:

> "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."

88 *This Court's authority*: Legal professional privilege is a right that will not be taken to have been abolished by legislative provisions except by express language or clear and unmistakable implication[151]. Such was the strict rule upheld in *Baker*. This Court's later decision in *Yuill* seems to be at odds with that proposition.

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148 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 76 ALJR 1 at 27-28 [126]-[128], 41 [190]-[191]; 185 ALR 1 at 37-38, 55-56; cf *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385 at 395.

149 *Esso* (1999) 201 CLR 49 at 91 [109]; cf Bruce, "The *Trade Practices Act 1974* (Cth) and the Demise of Legal Professional Privilege", (2002) 30 *Federal Law Review* 373 at 386-387.

150 *A M & S Europe Ltd v Commission of the European Communities* [1983] QB 878 at 913; [1982] 2 ECR 1575 at 1654 and see Pagone, "Legal Professional Privilege in the European Communities: The *AM & S* Case and Australian Law", (1984) 33 *International and Comparative Law Quarterly* 663 at 668-670.

151 *Baker* (1983) 153 CLR 52 at 87, 116-117; *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 490-491; cf *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 131.

89 *Yuill*, in this Court, was a decision that reversed a unanimous judgment of the New South Wales Court of Appeal. I participated in that Court of Appeal decision[152]. Because *Yuill* dealt with a statute that has long since been repealed, it is unnecessary (even if it would otherwise be appropriate) to overrule it. However, it is proper to point out, with due respect, that there are weaknesses and difficulties in the majority opinions in this Court.

90 With due deference, the majority does not appear to have approached the issue in that case in the manner suggested by the approach of this Court to like matters. Although mention was made in the majority opinions of the rule of strictness expressed in *Baker*, obliging the clearest terms for legislation said to abrogate a "doctrine of a fundamental kind"[153], when it came to the application of that rule, the majority slipped into language far less demanding, using words such as "hamper", "impair" and "seriously impede". In fact, *Yuill* presents a singular contrast to the repeated emphasis by this Court, in decisions before[154] and since[155] *Baker*, to the effect that important common law rights will not be abrogated or impaired by general statutory language.

91 There are also significant differences between the reasoning of Brennan J on the one hand and of Dawson J (with whom Toohey J concurred) on the other. It was important to Brennan J's reasoning that the statute was to be construed with the understanding of the law as it stood when it was adopted. That is, before *Baker* was decided[156]. This consideration (although mentioned[157]) was not treated as critical to the reasoning of Dawson J. Moreover, Brennan J, who had dissented in *Baker*, appeared less enthusiastic for the approach that *Baker* laid down. For him, the issue remained the preferable construction of the statute in

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152 *Yuill v Corporate Affairs Commission (NSW)* (1990) 20 NSWLR 386. The other judges were Mahoney JA and Handley JA who, in separate reasons, generally agreed with my reasons.

153 *Yuill* (1991) 172 CLR 319 at 331 per Dawson J (Toohey J agreeing at 337). See also at 321 per Brennan J.

154 *Potter v Minahan* (1908) 7 CLR 277 at 304; *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 93.

155 eg *Bropho v Western Australia* (1990) 171 CLR 1 at 18; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 12; *Coco v The Queen* (1994) 179 CLR 427 at 435-438; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 381 [89]; *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at 328 [121].

156 *Yuill* (1991) 172 CLR 319 at 322-323 per Brennan J.

157 *Yuill* (1991) 172 CLR 319 at 330-331 per Dawson J.

question and the carrying into effect of what he took to be the legislative "intentions"[158].

92 The dissenting reasoning of Gaudron J and McHugh J appears more consistent with the general approach of this Court to the suggested abrogation or impairment of fundamental common law rights by general legislative provisions. For these reasons, the decision in *Yuill* should, in my view, be confined to its particular facts. There were peculiarities of the legislation that are not applicable in the present appeal.

93 Approaching the matter in that way, the authority of this Court otherwise speaks with a clear and consistent voice in respect of what is required for legislation, stated in general terms, to override fundamental civil rights. In *Re Bolton; Ex parte Beane*[159], it was expressed in this way:

> "Unless the Parliament makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the courts will not construe a statute as having that operation."

94 In *Bropho v Western Australia*[160], citing *Potter v Minahan*[161], the practical foundation for this principle was explained as lying in the fact that it is:

> "in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used".

95 *Textual arguments*: When the foregoing approach is adopted to s 155, there are a number of indications in the language of that section, read as a whole, that support the conclusion, urged by the appellants, that the section does not abrogate so fundamental and important a civil right as that of protecting the facility of obtaining legal advice upon matters that might subsequently prove relevant to an investigation under the Act.

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158 *Yuill* (1991) 172 CLR 319 at 322.

159 (1987) 162 CLR 514 at 523 per Brennan J.

160 (1990) 171 CLR 1 at 18.

161 (1908) 7 CLR 277 at 304 (footnote omitted).

96 First, (apart from considerations of legal history) the absence of any express mention of legal professional privilege could simply indicate that this is another instance where the Parliament has failed to address itself to the repeal of the privilege, rather than one where the generality of the language should be taken to have abolished it. That is the point made in *Bropho*.

97 Secondly, this consideration is strengthened by the explicit mention in s 155 of the qualified operation of the privilege against self-incrimination. Contrary to the submission of the Commission, the fact that the Act referred to, and reserved for particular purposes, the privilege against self-incrimination, but made no mention of the removal of legal professional privilege, reinforces the conclusion that the latter was overlooked. It gives no support to the suggestion that it was considered but rejected as unnecessary.

98 Thirdly, the provisions of s 155(2) are instructive when extracting the overall operation of the section[162]. That sub-section permits the entry of a member of the staff assisting the Commission onto premises, their inspection of documents and their copying and taking of extracts. All of these activities would otherwise be unlawful and actionable. In s 155(5)(c), an offence is provided for obstructing or hindering an authorised officer acting in pursuance of sub-s (2). It appears extremely unlikely that the Parliament would have had a purpose of denying respect to common law privileges in relation to offences against s 155(5)(a), simply because it refers to the *capability* of a person to comply with the notice, and yet require observance of such common law rights in respect of s 155(5)(c) because there is no mention in that paragraph of such capability. But the decision of this Court in *Coco v The Queen*[163] would oblige the preservation of the applicable common law privileges in s 155(2), read with s 155(5)(c). It is difficult to accept, as a matter of construction of s 155, when read as a whole, that a different approach would be applicable to other sub-sections. In short, the construction urged by the Commission demands too much of the phrase "capable of complying". To read into that phrase the abrogation of legal professional privilege is to stretch the language to attempt the discharge of a task that it was never designed to perform.

99 *Arguments of principle and policy*: A number of considerations of legal principle or legal policy reinforce the foregoing conclusions.

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162 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 396-397; *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at 321-322 [103]-[104]; *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 76 ALJR 667 at 685-686 [109]; 187 ALR 574 at 600; *SGH Ltd v Commissioner of Taxation* (2002) 76 ALJR 780 at 797 [88]; 188 ALR 241 at 265.

163 (1994) 179 CLR 427.

100 First, once this approach is adopted, it is comparatively easy to perceive a distinction between claims for the privilege against self-incrimination and claims to legal professional privilege[164]. The former would, if not restrained by the section itself[165] (or by this Court's decision[166]), present a risk of stultifying (ie rendering valueless or virtually inoperative) the investigation contemplated by s 155. On the other hand, the latter is more likely, in practice, to affect a smaller range of relevant information and a limited number of documents[167]. An observation of Dawson J in *Baker*[168] is to similar effect. He suggested that the communications to which legal professional privilege would attach were likely to be "closely confined", with the consequential impediment to investigations being "limited".

101 Even allowing that, since the decision of this Court in *Esso*, the ambit of the legal professional privilege has expanded, it is important to keep in mind the practicalities of a decision upholding that privilege. This consideration reinforces the rigorous application of the stringent test for derogations from legal professional privilege, notwithstanding that its recognition does, to some extent, involve an impediment in the unrestricted exercise of the Commission's investigatory powers which the Parliament did not explicitly enact.

102 Secondly, I do not overlook the fact that the application of the interpretative principle favouring universal human rights[169] in a context such as

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164 *Baker* (1983) 153 CLR 52 at 84-86 per Murphy J, 93 per Wilson J, 117-120 per Deane J, 126-127 per Dawson J.

165 TPA, s 155(7).

166 eg *Pyneboard* (1983) 152 CLR 328 at 343.

167 This was noted by Moore J in *Daniels* (2001) 108 FCR 123 at 146 [83] but cf [84]; McNicol, "*Australian Competition and Consumer Commission v The Daniels Corporation International Pty Ltd and Another*", (2002) 24 *Sydney Law Review* 281 at 289. See also *Yuill* (1990) 20 NSWLR 386 at 408 per Mahoney JA.

168 (1983) 153 CLR 52 at 122-123; cf *Yuill* (1991) 172 CLR 319 at 333 per Dawson J.

169 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 417-418 [166]; cf *R v Derby Magistrates' Court; Ex parte B* [1996] AC 487. In the present case, the relevant human rights include the right to a fair trial (International Covenant on Civil and Political Rights done at New York on 19 December 1966, ATS 1980 No 23, Art 14.1 ("ICCPR")), the right to protection from arbitrary or unlawful interference with privacy and correspondence (ICCPR, Art 17.1) and possibly the right to defend oneself through

(Footnote continues on next page)

the present runs into difficulties. Daniels is not a human being. It is a corporation – a legal person only[170]. In so far as the rights of human beings are concerned, in their capacity as consumers, they may arguably be better advanced by upholding the ample construction of s 155 of the TPA for which the Commission contends[171]. Nevertheless, to adopt that view would be to narrow unduly the operation of the general presumption in favour of the basic human right to legal advice, free from prying official eyes. How is this dilemma to be resolved?

103 A broad construction of s 155 would, on occasion, impinge upon individual human rights. A consistent application of the interpretative principle obliges this Court to demand a uniform clarity in provisions that abolish legal professional privilege if that is truly the Parliament's purpose. 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[172]. 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. If so, its withdrawal by the Parliament must be enacted in clear terms.

104 Thirdly, it is important to appreciate that it is comparatively rare for Australian parliaments to abolish legal professional privilege expressly. Perhaps one can infer from this fact a disinclination to do so, occasioned by a realisation of the resistance that the deprivation of such an important civil (and in some cases human) right would occasion. In *Yuill*, in the Court of Appeal, I sought to justify the use of the technique of statutory construction protective of basic rights[173]. I pointed out that oversights in the passage of legislation can easily occur. Where courts uphold unexpressed fundamental rights they may

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legal assistance of one's own choosing in the determination of criminal charges (ICCPR, Art 14.3(d)).

170 cf Waye, "The Corporation and Legal Professional Privilege", (1997) 8 *Australian Journal of Corporate Law* 25 at 31-32.

171 cf Bruce, "The *Trade Practices Act 1974* (Cth) and the Demise of Legal Professional Privilege", (2002) 30 *Federal Law Review* 373 at 397 and see *Esso* (1999) 201 CLR 49 at 89 [103].

172 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477; *Re Compass Airlines Pty Ltd* (1992) 35 FCR 447 at 455.

173 *Yuill* (1990) 20 NSWLR 386 at 402-404.

sometimes give rise to feelings of frustration amongst legislators and the officials who advise them. However, as I said in that Court[174]:

> "[T]he delay, interruption and frustration are strictly temporary. And they have a beneficial purpose. It is to permit Parliament, which has the last say, an opportunity to clarify its purpose where the court is not satisfied that the purpose is sufficiently clear. And that opportunity is reserved to those cases where important interests are at stake, which might have been overlooked and which deserve specific attention."

105 Viewed in this light, the courts are not usurping the democratic function of Parliament by insisting on clear provisions to abolish an important common law right. They are acting in a role "auxiliary to Parliament and defensive of basic rights"[175]. I observed then, and still believe, that[176]:

> "Parliaments both in this country and in other countries of the common law accept this beneficial relationship with the courts. It reflects the shared assumptions of all the lawmakers in our society … [I]t has prevented the unintended operation of words of generality in a statute to diminish basic rights as Parliament would never have enacted, had the point been properly considered."

106 There are practical reasons why, if the common law legal professional privilege is to be removed, this should only be done by a clear decision, expressly stated or necessarily implied, of a parliament with powers to act in such a way. Lord Hoffmann recently stated the principle in terms similar to those that I used ten years earlier[177]:

> "Parliament can, if it chooses, legislate contrary to fundamental principles of human rights … The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of

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174 *Yuill* (1990) 20 NSWLR 386 at 403.

175 *Yuill* (1990) 20 NSWLR 386 at 403.

176 *Yuill* (1990) 20 NSWLR 386 at 403-404; cf *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 415-416 [30]-[31], 430 [71]-[72].

177 *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 131; see also *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] 2 WLR 1299 at 1310 [44]; [2002] 3 All ER 1 at 12.

> their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."

107 Fourthly, the last passage demonstrates a coalescence in doctrine in a number of common law countries concerning the approach to be adopted to problems of the kind presented by this appeal. It is desirable that, upon such questions, this Court should apply similar doctrine. In *Yuill*, in the Court of Appeal[178], I pointed to the similarity of the position reached in this Court's decision in *Baker* and those reached by the Court of Appeal of New Zealand[179] and the Federal Court of Appeal of Canada[180].

108 Now a similar question has arisen in the House of Lords. It did so in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax*[181]. In that case, their Lordships unanimously held that such a fundamental right as legal professional privilege could only be overridden by express words or necessary implication. As that was missing from the legislation in question, it had to be concluded that the privilege continued to apply. Lord Hoffmann[182] derived his conclusion not only from decisions of the United Kingdom and European courts to which I have made reference[183]. He also referred to New Zealand authority in which it had been pointed out (before it had been fully accepted elsewhere) that legal professional privilege is not simply a rule of evidence but "a substantive right founded on an important public policy"[184]. To similar effect was the speech

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178 (1990) 20 NSWLR 386 at 397.

179 *R v Uljee* [1982] 1 NZLR 561. Reference could also be made to *Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191 noted in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] 2 WLR 1299 at 1307 [31]; [2002] 3 All ER 1 at 9.

180 *Re Director of Investigation and Research and Shell Canada Ltd* (1975) 55 DLR (3d) 713.

181 [2002] 2 WLR 1299; [2002] 3 All ER 1.

182 With whom Lord Nicholls of Birkenhead, Lord Hope of Craighead and Lord Scott of Foscote concurred: [2002] 2 WLR 1299 at 1301 [1], 1310 [41], 1312 [49]; [2002] 3 All ER 1 at 3, 12, 14.

183 [2002] 2 WLR 1299 at 1302 [7]-[8]; [2002] 3 All ER 1 at 4-5.

184 *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] 2 WLR 1299 at 1307 [31]; [2002] 3 All ER 1 at 9 referring to *Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191.

of Lord Hobhouse of Woodborough who applied the principle that to abolish such an important right, general or ambiguous statutory language was not sufficient[185].

109 Fifthly, in support of the suggestion that this approach falls far short of rendering s 155 of the Act "valueless", "inoperative" or "meaningless", it is worth recording that from the commencement of the Act in 1974, the Commission, as a matter of policy, did not press for documents declined on the "basis of a claim for legal professional privilege"[186]. The Commission's policy had changed by 2000[187]. However, in making the change, the Commission explicitly acknowledged that such documents or information were unlikely to assist investigations[188]. Compulsory disclosure of privileged communications would, in some cases, affect the ability and willingness of corporations and individuals to consult, without inhibition, with lawyers about complex legal issues affecting day to day business. It might also affect the preparedness and freedom of lawyers to advise clients concerning the TPA and especially in matters potentially giving rise to prosecutions.

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185 *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] 2 WLR 1299 at 1310 [44]; [2002] 3 All ER 1 at 12 citing *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 131 per Lord Hoffmann. See also *Wheeler v Leicester City Council* [1985] AC 1054 at 1065 per Browne-Wilkinson LJ; *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539 at 575 per Lord Browne-Wilkinson.

186 Trade Practices Commission, *Section 155 of the Trade Practices Act – a guide to the administration of the Trade Practices Commission's power to require provision of information*, (November 1994) at 11.

187 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*, (October 2000) at 14.

188 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*, (October 2000) at 15.

110 In the United Kingdom[189], Canada[190], the United States of America[191] and the European Union[192], documents to which legal professional privilege attaches are exempted from production in like circumstances. It is therefore difficult to accept that a different regime is now essential in Australia. If it is, it is not unreasonable that the Commission, which has access to government, should be obliged to seek an amendment of its Act to secure from the Parliament the addition of such a power, either expressly or by unmistakable implication.

Conclusion: the appeal succeeds

111 Legal professional privilege can arise in many circumstances. It is necessary to have a single, clear rule to govern cases in which there is propounded an unstated but implied legislative abolition. As in other countries of like legal tradition, that rule in Australia is, and should be, that the privilege is not lost by statutory words of generality. If it is to be taken away, this must be done clearly. At least then the attention of the legislature will have been addressed to the seriousness of the step. It will not be possible to deprive persons, whether natural or legal, of such a fundamental right by general words or by ambiguous formulae (such as "capable of complying") that might not be understood by readers as working such a consequence.

112 Adoption of this approach does not mean a return to an excessively literalist interpretation of regulatory legislation, where important considerations of public interest are involved. The approach is not inconsistent with a purposive construction of legislation. It remains in every case to identify the purpose. Where it is clear, from the express language or necessary implications of the statutory provisions, that the purpose overrides common law rights, such purpose must be given effect. Where, however, there is no such express language and the implications are, as here, at best uncertain, a court will be slow to include amongst the purposes of the legislation the abolition of a fundamental right.

113 It follows that the appeal succeeds. As a matter of authority, after *Yuill*, I can understand how the Full Court came to its conclusion. However, when the decision in *Yuill* is confined to its own facts, as it should be, and this case is re-examined in the light of the approach of this Court consistently stated in *Baker*,

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189 *Competition Act* 1998 (UK), s 30.

190 *Competition Act*, RSC 1985, c C-34, s 19.

191 *Antitrust Civil Process Act* (15 USC §§1311-1314).

192 *A M & S Europe Ltd v Commission of the European Communities* [1983] QB 878; [1982] 2 ECR 1575.

Ex parte Beane, *Bropho*, *Coco*, *Chu Kheng Lim v Minister for Immigration*[193], *Kartinyeri v The Commonwealth*[194] and other cases, a different result follows. The approach of this Court to the suggestion that legal professional privilege has been abolished by general words of legislation is returned to the mainstream of the authority expressed in *Baker*. That course has the added advantage of restoring Australian law, in this regard, to the approach long adopted in New Zealand and Canada and most recently in England in *Morgan Grenfell*.

114 The foregoing conclusion does not mean that a mere claim of legal professional privilege will be sufficient to attract the privilege. In the case of each communication alleged to be privileged the party making the claim must bring it within the applicable principles[195]. Legal professional privilege will not be available where a conclusion is reached that particular communications were not prepared for the dominant purpose of giving or receiving legal advice. Similarly, legal professional privilege may not apply where an ulterior purpose for the communication is demonstrated[196], for example, where the communication was made in furtherance of a criminal or fraudulent purpose[197]. The extent to which the privilege would extend to a joint practice of lawyers and non-lawyers (where that is permissible) has not been considered. Various other matters of detail remain for the future[198]. However, the declaration and order made by the Full Court cannot stand.

115 The matter must be returned to the primary judge so that the claims for privilege can be considered, in the case of each contested communication, in a way that is conformable with the general principles of legal professional privilege at common law. That privilege survives the enactment of s 155.

116 A subsidiary question was presented in the appeal relating to the costs order made by the Full Court. However, in view of the appellants' success in the appeal, it is unnecessary to deal separately with the grounds of appeal relating to that question.

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193 (1992) 176 CLR 1.

194 (1998) 195 CLR 337.

195 Now stated in *Esso* (1999) 201 CLR 49 and the *Uniform Evidence Acts*, eg *Evidence Act* 1995 (Cth), ss 118, 119.

196 *Esso* (1999) 201 CLR 49 at 80 [81]-[82].

197 cf *Re Compass Airlines Pty Ltd* (1992) 35 FCR 447 at 455-456.

198 *Daniels* (2001) 108 FCR 123 at 148 [95] per Lindgren J.

Orders

117 I agree in the orders proposed in the joint reasons.

118 CALLINAN J. A Full Federal Court[199] (Wilcox, Moore and Lindgren JJ) held that the second appellant is not entitled to refuse to comply with notices issued by the respondent in reliance upon s 155 of the *Trade Practices Act* 1974 (Cth) ("the Act") requiring the production of documents in respect of which the first appellant claimed legal professional privilege. The question that this appeal raises is whether that holding was correct. The same question arose for determination in the matters of *Woolworths Ltd v Fels* and *Coles Myer Ltd v Fels*[200] in which Gaudron J stated a case for the determination of the Full Court of this Court. No question arises in these matters whether the relevant documents are in fact covered by legal professional privilege if a claim of entitlement to it were not abrogated by the Act.

The reasoning of the Full Court of the Federal Court

119 Wilcox J referred first to *Pyneboard Pty Ltd v Trade Practices Commission*[201], a unanimous decision of this Court that a person may not refuse to comply with a notice under s 155 of the Act on the ground that the material sought might lead to exposure to a penalty. There were, in that case however, as his Honour pointed out, some differences in approach by the five Justices who constituted the Court. His Honour then turned his attention to *Baker v Campbell*[202]. There, the question was whether the production of documents which would ordinarily be subject to legal professional privilege, could be compelled, pursuant to s 10 of the *Crimes Act* 1914 (Cth). The Court (Murphy, Wilson, Deane and Dawson JJ, Gibbs CJ, Mason and Brennan JJ dissenting) held that the doctrine of legal professional privilege was not confined to judicial and quasi-judicial proceedings and that it could be claimed with respect to documents referred to in a search warrant issued under the *Crimes Act*.

120 In his discussion of *Baker v Campbell*, his Honour quoted statements from the judgments of Wilson, Deane and Murphy JJ which emphasized the importance of legal professional privilege, and the necessity for indications of strong intendment to the contrary for its abrogation[203].

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199 *Australian Competition and Consumer Commission v The Daniels Corporation International Pty Ltd* (2001) 108 FCR 123.

200 [2002] HCA 50.

201 (1983) 152 CLR 328.

202 (1983) 153 CLR 52.

203 *Australian Competition and Consumer Commission v The Daniels Corporation International Pty Ltd* (2001) 108 FCR 123 at 131 [27]-[29].

121 In *Baker v Campbell*, Wilson J, for example, said[204]:

> "The multiplicity and complexity of the demands which the modern state makes upon its citizens underlines the continued relevance of the privilege to the public interest. The adequate protection according to law of the privacy and liberty of the individual is an essential mark of a free society and unless abrogated or abridged by statute the common law privilege attaching to the relationship of solicitor and client is an important element in that protection."

122 And Deane J made these observations[205]:

> "It is a settled rule of construction that general provisions of a statute should only be read as abrogating common law principles or rights to the extent made necessary by express words or necessary intendment. As has been seen, the underlying principle that a person should be entitled to preserve the confidentiality of relevant communications between himself and his attorney is regarded as of such importance by the common law that the courts themselves do not require disclosure of the content of such communications even if it appears that such disclosure would be conducive to justice in a particular case and even if the proceedings be between parties neither of whom is entitled to claim the protection of the privilege as regards the relevant documents or information. Both logic and authority support the present-day acceptance of the preservation of that confidentiality as a fundamental and general principle of the common law. It is to be presumed that if the Parliament intended to authorize the impairment or destruction of that confidentiality by administrative action it would frame the relevant statutory mandate in express and unambiguous terms."

123 His Honour's next step was to consider the reasoning of this Court in *Corporate Affairs Commission (NSW) v Yuill*[206].

124 Wilcox J concluded that the decision in *Pyneboard* effectively governed this case: that "capable", as used in s 155 of the Act effectively refers to physical capacity, what a person is unable to do, not what a person is entitled not to do. The holder of a document has the ability to comply with a demand for production. Conduct that involves a contravention of the Act often comprises many separate acts, some of which may be done by lawyers. Without

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204 (1983) 153 CLR 52 at 95.

205 (1983) 153 CLR 52 at 116-117.

206 (1991) 172 CLR 319.

information about contacts between the person under investigation and that person's lawyer, it may be impossible for the ACCC to see the whole picture. A third consideration, his Honour said, was that the recipient of a notice may not be in a position to make a reliable assessment of the status or relevance of a particular document or documents and a solicitor recipient may not know enough about the client's actions and affairs to realise that those matters of which he or she is aware, and which may seem innocent enough, are part of a course of conduct that, considered overall, is criminal or fraudulent[207].

125 In his reasons for judgment Moore J adopted a similar approach to Wilcox J. His conclusions were stated in this way[208]:

> "First, the language of s 155(5) is, in my opinion, emphatic and requires compliance with a notice if the recipient is capable of complying with it. That appears to have been the view of Mason ACJ and Wilson and Dawson JJ in *Pyneboard* and also of Brennan J who described it[209] as 'a statutory provision, clear and absolute in its terms'. A person is capable of complying with a notice even if to do so is in derogation of a common law right, whether it is a right the person enjoys or the person asserts on behalf of another (as a solicitor does in relation to the client's legal professional privilege)."

126 His Honour continued[210]:

> "[T]he attainment of the purpose for which the power is conferred by s 155 may be hampered by treating the obligation imposed by s 155(5) as subject to claims of legal professional privilege. Documents or information relevant to the inquiry might be denied to the person undertaking it. As was made clear by the High Court in *Pyneboard*, a claim of privilege on the ground of self-incrimination would substantially fetter an investigation and stultify the statutory purpose for which s 155 was enacted."

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207 *Australian Competition and Consumer Commission v The Daniels Corporation International Pty Ltd* (2001) 108 FCR 123 at 137 [59].

208 *Australian Competition and Consumer Commission v The Daniels Corporation International Pty Ltd* (2001) 108 FCR 123 at 145 [81].

209 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 355.

210 *Australian Competition and Consumer Commission v The Daniels Corporation International Pty Ltd* (2001) 108 FCR 123 at 146 [83].

127 Lindgren J expressed his general agreement with the reasons of Wilcox and Moore JJ.

The appeal to this Court

128 Before turning to s 155 of the Act, reference should be made to, for example, ss 151BUF, 159 and 161 of it. Section 151BUF refers to the giving of a report under the record keeping rules by "[a]n individual"; s 159 to a person giving evidence before the ACCC, and, as will appear s 155 itself, in sub-ss (2A) and (7) refers to the recipient of a notice issued pursuant to it. Section 161 refers to a witness before the Australian Competition Tribunal. The significance of these sections is that they all abrogate, in express terms, the principle of the right to avoid self-incrimination. Their presence strongly implies that if what has been long regarded as a matter of fundamental principle is intended to be overridden, then the legislature, conscious of the need to do so in express terms, would have done so, especially in the same enactment, with respect to s 155.

129 It is necessary to set out the text of the section:

"**155 Power to obtain information, documents and evidence**

(1) Subject to subsection (2A), if the Commission, the Chairperson or the Deputy Chairperson has reason to believe that a person is capable of furnishing information, producing documents or giving evidence relating to a matter that constitutes, or may constitute, a contravention of this Act, or is relevant to a designated telecommunications matter (as defined by subsection (9)) or is relevant to the making of a decision by the Commission under subsection 93(3) or (3A), a member of the Commission may, by notice in writing served on that person, require that person:

(a) to furnish to the Commission, by writing signed by that person or, in the case of a body corporate, by a competent officer of the body corporate, within the time and in the manner specified in the notice, any such information;

(b) to produce to the Commission, or to a person specified in the notice acting on its behalf, in accordance with the notice, any such documents; or

(c) to appear before the Commission at a time and place specified in the notice to give any such evidence, either orally or in writing, and produce any such documents.

(2) Subject to subsection (2A), if the Commission, the Chairperson or the Deputy Chairperson has reason to believe that a person has engaged or is engaging in conduct that constitutes, or may

constitute, a contravention of this Act, Part 20 of the *Telecommunications Act 1997* or Part 9 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*, a member of the Commission may, for the purpose of ascertaining by the examination of documents in the possession or control of the person whether the person has engaged or is engaging in that conduct, authorize, by writing signed by the member, a member of the staff assisting the Commission (in this section referred to as an ***authorized officer***) to enter any premises, and to inspect any documents in the possession or under the control of the person and make copies of, or take extracts from, those documents.

(2A) A member of the Commission may not give a notice under subsection (1) or an authorisation under subsection (2) merely because:

(a) a person has refused or failed to comply with a notice under subsection 32(1) of the *Prices Surveillance Act 1983* on the ground that complying with the notice would tend to incriminate the person, or to expose the person to a penalty; or

(b) a person has refused or failed to answer a question that the person was required to answer by the member presiding at an inquiry under that Act, on the ground that the answer would tend to incriminate the person, or to expose the person to a penalty; or

(c) a person has refused or failed to produce a document referred to in a summons under subsection 34(2) of that Act, on the ground that production of the document would tend to incriminate the person, or to expose the person to a penalty.

(3) The Commission may require the evidence referred to in paragraph (1)(c) to be given on oath or affirmation and for that purpose any member of the Commission may administer an oath or affirmation.

(4) Where:

(a) particulars of an agreement were furnished to the Commissioner of Trade Practices under section 42 of the *Restrictive Trade Practices Act 1971* or of that Act as amended; or

(b) particulars of an agreement were furnished to the Commissioner of Trade Practices under section 42 of the *Trade Practices Act 1965* or of that Act as amended, being

particulars that would have been required to be furnished under section 42 of the *Restrictive Trade Practices Act 1971* if that Act had been in force when they were furnished;

and it appears to a member of the Commission that the agreement would, if still in force:

(c) constitute a contract, arrangement or understanding to which section 45 of this Act applies; or

(d) provide for the engaging in conduct that is prohibited by this Act;

the member of the Commission may, by notice in writing served on a person who appeared from those particulars to be a party to the agreement, require that person to inform the Commission, by writing signed by that person or, in the case of a body corporate, by a competent officer of the body corporate, within the time and in the manner specified in the notice, whether any action was taken by the parties to the agreement to terminate the agreement and, if so, the nature and full particulars of that action.

(5) A person shall not:

(a) refuse or fail to comply with a notice under this section to the extent that the person is capable of complying with it;

(b) in purported compliance with such a notice, knowingly furnish information or give evidence that is false or misleading; or

(c) obstruct or hinder an authorized officer acting in pursuance of subsection (2).

(6) The occupier or person in charge of any premises that an authorized officer enters in pursuance of subsection (2) shall provide the authorized officer with all reasonable facilities and assistance for the effective exercise of his or her powers under that subsection.

(6A) A person who contravenes subsection (5) or (6) is guilty of an offence punishable on conviction:

(a) in the case of a person not being a body corporate – by a fine not exceeding $2,000 or imprisonment for 12 months; or

(b) in the case of a person being a body corporate – by a fine not exceeding $10,000.

(7) A person is not excused from furnishing information or producing or permitting the inspection of a document in pursuance of this section on the ground that the information or document may tend to incriminate the person, but the answer by a person to any question asked in a notice under this section or the furnishing by a person of any information in pursuance of such a notice, or any document produced in pursuance of such a notice or made available to an authorized officer for inspection, is not admissible in evidence against the person:

(a) in the case of a person not being a body corporate – in any criminal proceedings other than proceedings under this section; or

(b) in the case of a body corporate – in any criminal proceedings other than proceedings under this Act.

(7A) This section does not require a person:

(a) to give information or evidence that would disclose the contents of a document prepared for the purposes of a meeting of the Cabinet of a State or Territory; or

(b) to produce or permit inspection of a document prepared for the purposes of a meeting of the Cabinet of a State or Territory; or

(c) to give information or evidence, or to produce or permit inspection of a document, that would disclose the deliberations of the Cabinet of a State or Territory.

(8) Nothing in this section implies that notices may not be served under this section and section 155A in relation to the same conduct.

(9) A reference in this section to a designated telecommunications matter is a reference to the performance of a function, or the exercise of a power, conferred on the Commission by or under:

(a) the *Telecommunications Act 1997*; or

(b) the *Telecommunications (Consumer Protection and Service Standards) Act 1999*; or

(c) Part XIB or XIC of this Act."

130 Some preliminary observations may be made about the section. The powers exercisable under it require for their invocation the relatively low threshold of "reason to believe". A notice may be addressed to, and require

production of documents by a person, whether that person has or has not engaged in contravening conduct. Power to enter premises is conferred. Sub-section (7A) exempts from production Cabinet documents of a State or Territory apparently whether they would attract public interest immunity or not. By contrast however with sub-s (2A) and sub-s (7), sub-s (5) says nothing about the abridgment of fundamental rights of any kind, whether relating to self-incrimination, legal professional privilege or otherwise.

131 I do not doubt, as submitted by the appellants, that this case, although it depends of course as does any case in which a power is exercisable under an enactment, upon the terms of the enactment, is sufficiently close, in statutory language, and general principle to *Baker v Campbell* as to be substantially governed by the reasoning in that case.

132 These principles relevantly emerge from *Baker v Campbell*. Legal professional privilege is a common law right of fundamental importance. A statute should only be read as abrogating fundamental common law rights to the extent necessary by express words or necessary intendment[211]. If the Parliament intended to authorize the impairment, or destruction, of legal professional privilege by administrative action, it should frame the relevant statutory mandate in express and unambiguous terms[212]. There was nothing in s 10 of the *Crimes Act* 1914 (Cth) or in any other provision of the *Crimes Act* to indicate either that the Parliament directed its attention to the modification or destruction of the confidentiality of relevant communications between a person and his or her legal advisers, or that there existed a legislative intention to modify the common law principle that the confidentiality of such communications should be preserved[213]. The fact that the question whether s 10 of the *Crimes Act* abrogated the privilege first fell to be authoritatively determined so long after its enactment, was an indication of the measure of acceptance of the view that the power which the section confers in general terms did not extend to documents to which legal professional privilege attaches[214]. According to ordinary principles of construction, the section was to be construed as not including in the documents which it authorized to be inspected or seized, those the confidentiality of which would be protected in the courts by the doctrine of legal professional privilege.

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211 *Baker v Campbell* (1983) 153 CLR 52 at 96-97 per Wilson J, 116 per Deane J, 123, 132 per Dawson J.

212 *Baker v Campbell* (1983) 153 CLR 52 at 90 per Murphy J, 96-97 per Wilson J, 117 per Deane J.

213 *Baker v Campbell* (1983) 153 CLR 52 at 117 per Deane J.

214 *Baker v Campbell* (1983) 153 CLR 52 at 123 per Dawson J.

133 Here, as with the *Crimes Act* 1914 (Cth), the Act is relevantly silent as to legal professional privilege. For abrogation to occur it would be necessary to imply it. Legal professional privilege does not have an unconfined operation. It protects only such documents as have come into existence for the dominant purpose of obtaining, or giving legal advice, or for use in litigation. Its ambit and operation by no means confine the considerable investigative powers that s 155 of the Act confers. A successful claim of legal professional privilege will almost always obstruct or restrict in some way access to materials that might be of utility to a party or a party's cause, be it criminal or civil. The common law has long understood this elementary proposition to be so. It has, however, for other powerful reasons, which remain good, been prepared to accept that some criminals may escape conviction and investigations may be sometimes hampered by reason of the availability of a claim of legal professional privilege.

134 *Baker v Campbell*, decided after *Pyneboard*, is not, of course, the only recent relevant authority. In *Coco v The Queen*[215] also, this Court repeated that it will not construe a statute as abrogating a fundamental common law right unless the Parliament makes its intention to do so unambiguously clear. There, the Court found that general words in an enactment will rarely be sufficient for that purpose if they do not specifically deal with the question. In their joint judgment, Mason CJ, Brennan, Gaudron and McHugh JJ referred to the speech of Browne-Wilkinson LJ in *Wheeler v Leicester City Council*[216], who explained that the presence of general words in a statute will generally be insufficient to authorize interference with the basic immunities which are the foundation of our freedom, that to constitute such authorization, express words are required[217]. Their Honours referred to the opinion of Browne-Wilkinson LJ in these terms[218]:

> "The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by

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215 (1994) 179 CLR 427.

216 [1985] AC 1054.

217 *Coco v The Queen* (1994) 179 CLR 427 at 436 per Mason CJ, Brennan, Gaudron and McHugh JJ.

218 *Coco v The Queen* (1994) 179 CLR 427 at 437-438 per Mason CJ, Brennan, Gaudron and McHugh JJ.

> unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights[219].
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> …
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> The need for a clear expression of an unmistakable and unambiguous intention does not exclude the possibility that the presumption against statutory interference with fundamental rights may be displaced by implication. Sometimes it is said that a presumption about legislative intention can be displaced only by necessary implication but that statement does little more than emphasize that the test is a very stringent one[220]. As we remarked earlier, in some circumstances the presumption may be displaced by an implication if it is necessary to prevent the statutory provisions from becoming inoperative or meaningless. However, it would be very rare for general words in a statute to be rendered inoperative or meaningless if no implication of interference with fundamental rights were made, as general words will almost always be able to be given some operation, even if that operation is limited in scope."

135 Very recently, the House of Lords in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax*[221] reached a similar conclusion with respect to the issue of a notice under the *Taxes Management Act* 1970 (UK) pursuant to a section which was silent with respect to legal professional privilege. Whilst it is true that the outcome of that case depended in part at least upon the application of the *Human Rights Act* 1998 (UK), there are several statements in the leading speech of Lord Hoffmann which emphasize the fundamental importance of legal professional privilege[222].

136 In this appeal the Court was pressed by the respondent with the argument that access to relevant documents for the purpose of establishing liability was of

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219 See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 12 per Mason CJ.

220 See the discussion in *Bropho v State of Western Australia* (1990) 171 CLR 1 at 16-17 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

221 [2002] 2 WLR 1299; [2002] 3 All ER 1.

222 *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] 2 WLR 1299 at 1308-1309 [35]-[37]; [2002] 3 All ER 1 at 10-11.

critical importance. Lord Hoffmann dealt with a similar argument in *Morgan Grenfell* in this way[223]:

> "The revenue say that it is important for them to have access to the taxpayer's legal advice in those cases in which liability may turn upon the purpose with which he entered into a transaction or series of transactions. This is particularly true of some of the anti-avoidance provisions. But there are many situations in both civil and criminal law in which liability depends upon the state of mind with which something was done. Apart from the exceptional case in which it appears that the client obtained legal advice for the purpose of enabling himself better to commit a crime[224] this is not thought a sufficient reason for overriding [legal professional privilege]."

137 The Full Court of the Federal Court was influenced by the words "or otherwise" in a passage from the joint judgment of Mason ACJ, Wilson and Dawson JJ in *Pyneboard*[225].

> "The comments made by Kitto and Walsh JJ in *Mortimer* [*v Brown*[226]] are apposite to s 155. Sub-section (1) confers a power on the Commission to require the provision of information, the production of documents or the giving of evidence relating to contravention, or possible contravention, of the Act. It is significant that sub-s (5) makes it an offence for a person to refuse or fail to comply with a notice under sub-s (1) 'to the extent that the person is capable of complying with it' for these words in themselves are quite inconsistent with the existence of a privilege entitling the recipient of a notice to refuse to comply, whether on the ground that compliance might involve self-incrimination or otherwise. Moreover, it is apparent that the purpose of conferring the power and imposing the obligation is to enable the Commission to ascertain whether any contravention of the Act has taken place, or is taking place, and to make the information furnished, the documents produced and the evidence given admissible in proceedings in respect of contravention of the Act, a purpose which would be defeated if privilege were available. As in *Mortimer*[227] the comment may be made that the provision is valueless if

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223 [2002] 2 WLR 1299 at 1309 [38]; [2002] 3 All ER 1 at 11.

224 *R v Cox and Railton* (1884) 14 QBD 153.

225 (1983) 152 CLR 328 at 343.

226 (1970) 122 CLR 493 at 496, 498.

227 (1970) 122 CLR 493.

> the obligation to comply is subject to privilege. Without obtaining information, documents and evidence from those who participate in contraventions of the provisions of Pt IV of the Act the Commission would find it virtually impossible to establish the existence of those contraventions. The consequence would be that the provisions of Pt IV could not be enforced by successful proceedings for a civil penalty under s 76(1)."

138 I am unable, as Wilcox J did, to read the words "or otherwise" as extending to legal professional privilege. If that were intended I would have expected their Honours to say so in terms, conscious as they must have been, in the circumstances of *Pyneboard*, of the desirability of express language in this area of the law. Furthermore, in reading their decision, it is important to keep in mind the assumption that their Honours were prepared to make in that case, which rendered it unnecessary to explore the differences between the different privileges.

139 Their Honours said[228]:

> "As will appear, this case is susceptible of determination on other grounds. For this reason we are content to assume, without deciding, that the privilege against exposure to conviction for a crime and the privilege against exposure to a civil penalty is available to a corporation in Australia."

140 The ratio of *Pyneboard* is, in any event, no more than that the privilege, if it existed, would frustrate (as opposed to merely hamper) the operation of the relevant provision, a consequence which would not, as I have pointed out, follow here.

141 In *Baker v Campbell* reference was made to the long acceptance of the availability of the relevant privilege there. It is not without significance here that the general practice and stated policy of the respondent for many years after the commencement of the operation of the Act, was that a claim of legal professional privilege was a valid reason for refusing to answer questions or produce documents in response to a notice under s 155[229]. Both in the Commission's published guidelines and in other published statements by senior management, the Commission had maintained that one reason for its policy of refraining from pressing for documents or information declined on the ground of legal

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228 *Pyneboard* (1983) 152 CLR 328 at 335 per Mason ACJ, Wilson and Dawson JJ.

229 Trade Practices Commission, *Section 155 of the Trade Practices Act – a guide to the administration of the Trade Practices Commission's power to require provision of information*, (November 1994) at 11.

professional privilege, was that such documents or information were unlikely to assist investigations in any event[230]. The ACCC has since published a new guideline concerning s 155 of the Act[231].

142 The respondent relied on *Corporate Affairs Commission (NSW) v Yuill*[232]. That case is distinguishable. It was the fact, and the majority there was impressed by it, that the Act under consideration, the *Companies (New South Wales) Code* made specific reference to legal professional privilege in two sections, 299 and 308. There are no equivalent provisions in the Act. It is unnecessary therefore for me to embark upon the rather formidable task of attempting to reconcile the reasoning of six judges in *Coco* with that of the majority of three judges[233] in *Yuill*.

143 There is one other matter which I should mention. The respondent submits that it is of significance in two respects that the present context is one of an administrative or executive inquiry: first that s 122 of the *Evidence Act* 1995 (Cth) preserves legal professional privilege in relation to the adducing of evidence if the disclosure be made under compulsion of law; and, secondly an inference of exclusion of privilege is to be less readily drawn in cases in which the obligation to answer questions and produce documents is an aspect of an examination on oath before a judicial officer. Neither of these matters, in my opinion, dictates a different conclusion from the one that I have reached. Creatures of the Executive of which this respondent is one are increasingly being armed with broader and more intrusive powers. That they are of these kinds requires, if anything, that the true and permissible ambit of the intrusion be carefully scrutinized and not be extended unnecessarily or in the teeth of unabridged (by legislation) fundamental, longstanding rights. It must be kept in mind that all that the majority says in *Pyneboard*[234] is that the relevant inference of the existence of an obligation to respond will less readily, not that it invariably will not be, drawn in the case of an examination before a judicial officer.

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230 Spier, "Section 155 of the Trade Practices Act 1974: Some Practical Issues – A Trade Practices Commission Perspective", (1994) 2 *Trade Practices Law Journal* 116 at 120.

231 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*, (October 2000).

232 (1991) 172 CLR 319.

233 Brennan, Dawson and Toohey JJ; Gaudron and McHugh JJ dissenting.

234 (1983) 152 CLR 328 at 343 per Mason ACJ, Wilson and Dawson JJ.

144 It follows that the appeal should be allowed with costs. The respondent should also pay the appellants' costs in the Full Court of the Federal Court.