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Royal Commissions Amendment Bill 2006

Sue Harris Rimmer
Law and Bills Digest Section

Contents

Royal Commissions Amendment Bill 2006

Date introduced: 25 May 2006

House: House of Representatives

Portfolio: Prime Minister

Commencement: Sections 1 to 3 commence on the day of Royal Assent. Schedule 1 commences the day after Royal Assent.

Purpose

This Bill is to amend the *Royal Commissions Act 1902* (the Act) to clarify the operation of the Act in respect of claims of legal professional privilege (LPP).

Amendments were requested by the Commissioner of the current Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme (the Cole Inquiry), the Hon Terence Cole AO RFD QC, following the Federal Court decision in *AWB Limited v Honourable Terence Rhoderic Hudson Cole* [2006] FCA 571.

The Bill intends to put beyond doubt that any current and future Commissioner appointed under the Act may require the production of a document in respect of which LPP is claimed, for the limited purpose of making a finding about whether to accept or reject it. The decision is still finally reviewable by the courts.

The Bill was debated on 30 May and passed the House of Representatives on 31 May 2006. It is listed for debate in Senate on 15 June 2006. The urgency of the Bill's passage and early commencement date is referred to in the Explanatory Memorandum:

> This is a relatively early commencement, due to the urgency of the powers to be provided by the Bill being available for the benefit of the current Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme.[1]

Background

Legal Professional Privilege

Certain communications between a lawyer and his/her client are privileged and neither the client nor the lawyer can be compelled to disclose details of the communication. The rationale for this privilege, as identified by the High Court in 1976 in *Grant v Downs*, is that:

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> it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available. As a head of privilege legal professional privilege is so firmly entrenched in the law that it is not to be exorcised by judicial decision.[2]

The common law in so far as it relates to privilege protects certain communications in the context of the confidential relationship of lawyers and clients but not communications in other confidential relationships such as accountants and clients.

LPP is not merely a rule of evidence, it is a substantive common law right. Unless expressly abrogated by statute, it applies beyond judicial and quasi-judicial proceedings to statutory forms of compulsory disclosure.

LPP essentially has two limbs. LPP attaches to confidential communications between a legal adviser and a client (or in some circumstances between one of those entities and a third party) if those communications were made for the dominant purpose of:

- enabling the client to obtain, or the lawyer to give, legal advice; or
- litigation that is actually taking place or reasonably anticipated at the time the communication was made.

The litigation must at least be contemplated or anticipated. Legal proceedings are anticipated where there is a reasonable probability or likelihood that such proceedings will be commenced. Whether such a probability or likelihood exists is determined by an objective view, not the subjective view of the person making the communication. A vague apprehension, or the mere possibility that litigation might occur, is not sufficient. LPP extends to communications made with the intention to obtain or give legal advice or for the conduct of actual or contemplated litigation even though it is not in fact used in the litigation.

LPP may also cover the following (non-exhaustive):

- notes, memoranda, minutes or other documents made by the client or officers of the client or the lawyer of the client:
  - of communications which are themselves privileged;
  - which contain a record of those communications; or

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- which relate to information sought by lawyers to enable them to advise the clients or conduct litigation for them;
- knowledge, information or belief of clients derived from privileged communications made to them by their lawyers or lawyers' agent.

The Cole Inquiry

On 14 April 1995, acting under Chapter VII of the United Nations Charter, the Security Council adopted resolution 986, establishing the 'Oil-for-Food' Programme, providing Iraq with an opportunity to sell oil to finance the purchase of humanitarian goods, and various mandated United Nations activities concerning Iraq. The Programme, as established by the Security Council, was intended to be a 'temporary measure to provide for the humanitarian needs of the Iraqi people, until the fulfilment by Iraq of the relevant Security Council resolutions, including notably resolution 687 of 3 April 1991'.

Although established in April 1995, the implementation of the Programme started only in December 1996, after the signing of the Memorandum of Understanding (MOU) between the United Nations and the Government of Iraq on 20 May 1996 (S/1996/356). The Programme was funded exclusively with the proceeds from Iraqi oil exports, authorised by the Security Council. The first oil was exported under the Programme in December 1996 and the first shipment of supplies arrived under the Programme in March 1997.

The oil-for-food arrangement was not finalized, however, until early December 1996, after six months of negotiations between the Iraqi government, the Security Council and the Secretary-General. The final plan permitted Iraq to sell $2 billion worth of oil over six months to raise funds to buy food, medicines and other humanitarian goods. Funds earned from the oil sales were to be placed in an escrow account in New York administered by the United Nations. About $260 million was to be reserved for the Kurdish population of northern Iraq, and $600,000 placed in a special fund established to compensate victims of the Iraqi 1990 invasion. The UN Special Commission charged with monitoring Iraq's destruction of its weapons of mass destruction was to receive $20 million to cover operating expenses, with the remainder of the money to be distributed in Iraq. The Security Council could renew the oil-for-food plan after six months if Iraq complied with conditions. Finding no major violations, the Council extended the plan for a second six-month term in June 1997.

At the time of its termination on 21 November 2003, some $31 billion worth of humanitarian supplies and equipment had been delivered to Iraq under the Oil-for-Food Programme, including $1.6 billion worth of oil industry spare parts and equipment. An additional $8.2 billion worth of supplies were in the production and delivery pipeline.[3] The US-led military action began on 20 March 2003.

Since its implementation, the oil-for-food scheme has been criticized for chronic administrative delays. Allegations were made that the program was directly benefiting Saddam Hussein.[4]

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In April 2004, United Nations Secretary General Kofi Annan appointed an independent, high-level inquiry to investigate the administration and management of the Oil-for-Food Programme in Iraq. Following this, the United Nations Security Council unanimously adopted resolution 1538 (2004), which endorsed the inquiry and called for full cooperation in the investigation by all United Nations officials and personnel, the Coalition Provisional Authority, Iraq, and all other Member States, including their national regulatory authorities.

The appointed Independent Inquiry Committee (IIC) is chaired by Paul Volcker, former Chairman of the United States Federal Reserve. Committee Members include Mark Pieth of Switzerland, an expert on money-laundering in the Organization for Economic Cooperation and Development (OECD), and Richard Goldstone of South Africa, former Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda. It does not have the power to subpoena witnesses.

The IIC mandate states that it shall collect and examine information relating to the administration and management of the Oil-for-Food Programme, including allegations of fraud and corruption on the part of United Nations officials, personnel and agents, as well as contractors, including entities that have entered into contracts with the United Nations or with Iraq under the Programme.

The Final Report (Manipulation of the Oil-for-Food Programme by the Iraqi Regime) of the Independent Inquiry Committee issued on 27 October 2005 stated that AWB paid US$221.7 million to Jordan-based Alia Transportation to transport wheat through Iraq, but the funds were channelled to Saddam Hussein's regime.

Australia in response set up an inquiry with Royal Commission powers. By Letters Patent dated 10 November 2005, Terence Cole was appointed Commissioner to conduct an inquiry into and report on whether decisions, actions, conduct or payments by Australian companies mentioned in the IIC Final Report breached any Federal, State or Territory law.

The Cole Inquiry has a comprehensive webpage. The original and amended terms of reference can be accessed at:
http://www.ag.gov.au/agd/www/UNoilforfoodinquiry.nsf/Page/Terms_of_Reference

The Federal Court finding

In late March 2006, Commissioner Cole rejected an LPP claim over a particular document (Exhibit 665) which was inadvertently admitted to the Inquiry by AWB Limited.[5]

AWB Limited applied to the Federal Court for review of Commissioner Cole's decision, challenging not just the decision on the particular document, but also his capacity to determine claims of LPP. The matter was heard by the Federal Court (Justice Young) on 24 April 2006.

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The litigation was in the context of long-running disputes over the production of documents by AWB Limited. In February 2006, Commissioner Cole said the situation with AWB's claim for LPP had almost reached 'the point of absurdity'.[6] Commissioner Cole further revealed on 30 May 2006 that he was not yet satisfied that the company had 'fully responded' to fourteen formal requests for documents over the last five months. It was reported that 1200 documents or categories of documents, with a further long list of hundreds of documents, may have been the subject of LPP claims by AWB.[7] It was speculated in the press that these documents are in relation to 'Project Rose' and 'Project Lilac', based on in-house legal advice from AWB counsel Jim Cooper relating to an internal legal review of the trade with Iraq.[8]

In his judgment of 17 May 2006, Young J held that the application by AWB should be dismissed, the document in question was not subject to LPP, and Cole had the power in the circumstances of the case (as the document had been inadvertently provided to the Inquiry) to form an opinion on whether the document was subject to LPP.

However, the decision cast some doubt on whether Commissioner Cole (or any future person appointed under the Royal Commission Act) has the power to require the production of a document for inspection where a claim to LPP has been made.

The *Explanatory Memorandum* states that Commissioner Cole made a request to amend the Act to the Government on 19 May 2006:

> Mr Cole has expressed his concerns with the decision to the Australian Government and has sought urgent amendments to the RCA, noting that LPP claims have been made in respect of many documents that have not been produced to his Inquiry.[9]

In response the Attorney-General issued a press release on 23 May 2006 stating that the Government would immediately introduce a Bill to amend the Act and clarify the position for the Cole Inquiry and future Royal Commissions.[10]

ALP policy position

The ALP raised LPP concerns about the Cole Inquiry in March 2006. In a joint press release by Nicola Roxon, Shadow Attorney-General and Shadow Foreign Affairs spokesperson Kevin Rudd, they alleged that AWB Limited was abusing LPP and trying to frustrate the Cole Inquiry process.[11]

The ALP position on the Bill was summed up in the second reading debate as 'too little too late',[12] but the substance of the Bill was not opposed. Ms Roxon notes concerns by the Law Council that inspection of a document that is later held to be privileged could nonetheless 'pollute the mind' of the commissioner[13] but finds that the Bill has sufficient safeguards against bias allegations and merely 'streamlines the process by putting the onus for commencing litigation on the claimant, not the commission'.[14]

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The ALP focused more generally in the second reading debate on what they perceive as the limited terms of reference of the Cole Inquiry.

Main provisions

Schedule 1 – Amendment of *Royal Commissions Act 1902*

Item 2 would amend existing section 1B (definition of 'reasonable excuse'). The current definition of *reasonable excuse* is in relation to 'any act or omission by a witness or a person summoned as a witness before a Commission means an excuse which would excuse an act or omission of a similar nature by a witness or a person summoned as a witness before a court of law'.

Existing subsection 3(5) provides a defence of 'reasonable excuse' for a person served with a notice under subsection 2(3A).

The amendment to the definition makes it clear that 'reasonable excuse' can also apply to a person served with a notice under existing subsection 2(3A)[15] or new 6AA(3).

Item 3 inserts a new subsection to clarify that references in the Act to a requirement to produce a document, or refusal or failure to produce a document, include references in relation to part of a document.

Item 4 adds a provision to the end of section 2 which would make clarify relevant offence provisions to provide that the power in section 2 to require production of a document extends to a power to require production of a document that is subject to LPP.

The *Explanatory Memorandum* states:

> This amendment responds to comments by Young J in *AWB v Cole* ([2006] FCA 571 at paragraph 51) that 'in the absence of clear and unmistakable language, a compulsive notice such as that which can be issued under s 2(3A) will not be construed as requiring the production of legally privileged documents'.[16]

New subsection 2(5) notes that there is an obligation to produce such documents, when requested – though the obligation is subject to the procedure to be provided under proposed section 6AA (see item 5) and subject also to the powers of courts to make binding determinations on the existence of LPP.

This amendment is not intended to enable a Commission to obtain a court order compelling production of a document which is in fact subject to LPP. Only proposed section 6AA, supported by the offence provision in new subsection 6AB(2), will provide a basis to compel production of such a document, and only for the purpose of inspection.

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Item 5 inserts **new section 6AA** and **new section 6AB** for the making of decisions on claims of LPP and the powers available for that purpose, and related offence provisions.

New section 6AA is designed to ensure that, in the case of a defence based on LPP, the person making the claim must justify the claim before the Commission; a person who is not satisfied with a decision by the Commission in respect of a claim will be able to seek review of that decision in the Federal Court.

New subsection 6AA(1) has the effect that LPP will not be effective as a defence in a prosecution unless the claim for privilege has been upheld by a court, or the claim was made in a timely fashion before the Commission.

New subsection 6AA(2) makes plain that, where LPP is claimed before a Commission, the Commission can decide whether to accept or reject the claim.

The *Explanatory Memorandum* states:

> A discretion is provided, so that where it is not a priority for a Commission to pursue further a document which has been the subject of an LPP claim, the claim can be concurred to on a de facto basis. It is not intended to provide the Commission with a discretion to make a decision on grounds other than satisfaction or otherwise that the legal basis for a claim of LPP has been established.
>
> An intended effect of the express provision is that a Commission's finding on a claim of LPP will be a decision under an enactment, and therefore subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* as well as under section 39B of the *Judiciary Act 1903*.[17]

Where LPP has been claimed before the Commission, **new subsection 6AA(3)** clarifies that the Commission may require production of the document for inspection, by the Commissioner and/or an authorised person or persons, for the purpose of deciding whether to accept or reject the claim.

New subsection 6AA(4) addresses the circumstance of a document produced for inspection and the claim for privilege being accepted. The document must in that case be returned to the person who provided it. In a case where a claim of LPP is accepted in respect of part only of a document, a further requirement might be issued for production of so much of the document as is not subject to LPP.

The contents of a document that have been found to be subject to LPP will not be able to be used for the purposes of any report or decision the Commission makes.

New subsection 6AA(6) makes clear that the Commission can use its powers under section 2 in relation to consideration of the claim of LPP, for example to require information about the circumstances in which a document came into existence, and to examine witnesses in relation to the claim.

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New section 6AB inserts additional offences, closely paralleling the existing offences in section 3.

New subsection 6AB(1) establishes an offence occurs where a person fails to produce a document despite rejection of a claim for LPP under **new section 6AA** by a member and a further requirement to produce.

New subsection 6AB(2) provides the sanction in relation to the obligation to provide a document for inspection, for the purpose of making a decision on a claim of LPP under **new section 6AA**.

These are offences of strict liability (as defined in section 6.1 of the *Criminal Code*), with maximum penalties expressed as $1,000 or 6 months imprisonment.

Reasonable excuse as defined in amended section 1B is available as a defence, but LPP cannot constitute a reasonable excuse unless established by a court.

It is also a defence to a prosecution for an offence against this section if the document in question was not relevant to the matters into which the Commission was inquiring. This parallels existing subsection 2(6).

Item 6 amends subsection 6A(1) by inserting 'or section 6AB' after 'subsection 3(2B) or (5)' so that a defence of self-incrimination will not be available in relation to the new section 6AB offences. This mirrors the removal of the defence of self-incrimination in relation to the existing offences in section 1E.

Item 7 adds 'or subsection 6AA(3)' to the end of paragraph 6DD(1)(b) to ensure that evidence produced by a witness in order for a claim of LPP to be determined by the member under subsection 6AA(3) cannot be used against that witness in any civil or criminal proceedings (known as 'use immunity').

Item 8 amends subparagraphs 6F(1)(a)(ii) and (c)(ii) by inserting 'or 6AA(3)' after 'subsection 2(3A)', in each provision. These amendments make plain that documents produced by a witness in order for a claim of LPP to be determined by a member under subsection 6AA(3) may be inspected by the member and the member may make copies of them.

Item 9 provides that the amendments made by Schedule 1 apply, after the commencement of the Schedule, in relation to the proceedings of any Commission after that commencement, whether the Commission was established before or after that commencement. Therefore the provisions will be able to be used by the current Cole Inquiry.

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Concluding Comments

It is not certain that the Bill will in fact allow the Cole Inquiry to quickly obtain and use in its report the material over which AWB is claiming LPP. This is because the Bill properly allows the courts to be the final arbiter of whether LPP attaches to a document. AWB have already commenced proceedings regarding LPP claims over a large number of documents in the Federal Court.[18] Presumably AWB could ask the court for an injunction to prevent the Cole Inquiry from proceeding until those claims are resolved.

The Bill will allow Commissioner Cole to obtain and sight the documents, even if the Commissioner is then prevented from relying on evidence contained in them in his final report or subsequent proceedings.

As this Bill is so heavily contextualised by AWB's behaviour before the Cole Inquiry, it is important to note that the Bill will apply to all future Royal Commissions. LPP is a centuries-old common law right based on sound public policy reasons.[19]

As the ALP noted in the second reading debate, concerns have been raised by legal experts about whether the Commissioner will be influenced by the content of such documents when writing the report.[20] The concern is that this may in turn lead to allegations of actual or apprehended bias by affected parties. This may be especially important in cases such as the Cole Inquiry where the Commissioner is making findings of liability for individuals and corporations.

Where LPP has been claimed before the Commission, **new subsection 6AA(3)** makes it clear that the Commission may require production of the document for inspection, by the Commissioner and/or an authorised person or persons, for the purpose of deciding whether to accept or reject the claim.

It is worth noting that in practice under the Rules of Court in Australian jurisdictions, if it is undesirable for the judge who will hear the case to see the document in relation to which the claim of privilege is made, a discretion is allowed for the court to decide that the question of privilege should be decided by a different judge. The judge ultimately responsible for a finding on a particular matter would then never see the document upon which LPP is claimed if LPP is successfully made out before another judge. Issues of bias are completely avoided by this process.

Although this is an option under **new subsection 6AA(3)** of this Bill, it is not a specific requirement. The Commissioner could ask an authorised person to decide the claim so the contents of the document are never before him or her and could not influence the findings contained in the final report.

Parliament may wish to consider whether a Commissioner should be given a specific discretion to have another authorised person related to the inquiry decide questions of

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privilege so that the final report is not influenced in any way by the material contained in documents which properly attract LPP.

Endnotes

1. Explanatory Memorandum, p. 3.
2. (1976) 135 CLR 674; (1976) 11 ALR 577. See also *Daniels Corporations International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 per McHugh J at 563 [44].
3. John G. Ruggie, 'The U.N. Oil-for-Food Programme: What Went Wrong—and Right?' *UN Association of USA Policy Brief*, no. 3, 7 June 2004. See further: *Resources & Links regarding the Oil-for-Food Programme*
4. Susan Sachs and Judith Miller, 'Under Eye of U.N., Billions for Hussein in Oil-for-Food Plan', *The New York Times*, 13 August 2004.
5. See further Dan Silkstone and Sarah Smiles, 'AWB legal bid to keep papers secret', *The Age*, 31 May 2006, p. 6; David Marr, 'AWB vows long legal fight to keep files secret', *Sydney Morning Herald*, 31 May 2006, p. 8.
6. *Canberra Times,* 'Bizarre' twist stops lawyer from telling all', 23 February 2006, p. 2.
7. David Marr, 'AWB vows long legal fight to keep files secret', op cit.
8. Caroline Overington, 'Dossier deadline for AWB', *The Australian*, 30 May 2006, p. 8. Note recent jurisprudence that LPP can apply to in-house lawyers' communications that satisfy the dominant purpose test. In *Sydney Airports Corporation Ltd v Singapore Airlines Ltd and Qantas Limited* [2005] NSWCA 47 the New South Wales Court of Appeal stated 'the fact that an in-house solicitor is entitled to claim privilege on behalf of his or her employer client is now well established' (per Spigelman CJ at 18).
9. Explanatory Memorandum, p. 1.
10. Attorney-General, The Hon. Philip Ruddock, 'Government agrees to amend Royal Commissions Act', *media release* (093/2006), 23 May 2006.
11. Nicola Roxon and Kevin Rudd, 'Cole must be allowed to get to the truth of the wheat for weapons scandal', *media release*, 12 March 2006.
12. Nicola Roxon, House of Representatives, *Debates*, 30 May 2006, p. 47.
13. Comment actually made by Norman O'Bryan SC. Matt Drummond, 'Ruddock takes risky route on privilege', *Australian Financial Review*, 26 May 2006, p. 58. Law Council president John North reported at stating: 'There is a real danger that allowing a royal commissioner to view documents subject to a proper claim of privilege will create a perception of bias, as information contained in those documents could improperly influence the commissioner's thinking'.
14. Nicola Roxon, House of Representatives, *Debates*, 30 May 2006, p. 48.

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15. A member of a Commission may, by written notice served (as prescribed) on a person, require the person to produce a document or thing specified in the notice to a person, and at the time and place, specified in the notice.
16. Explanatory Memorandum, p. 4.
17. ibid., p. 5.
18. David Marr, 'AWB vows long legal fight to keep files secret', op. cit.
19. *Grant v Downs*, op cit.
20. Matt Drummond, 'Ruddock takes risky route on privilege', op. cit.

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