New South Wales
Court of Appeal

CITATION: General Manager, WorkCover Authority of NSW v Law Society of NSW [2006] NSWCA 84
This decision has been amended. Please see the end of the judgment for a list of the amendments.
HEARING DATE(S): 29 July 2005
1 September 2005
JUDGMENT DATE:
24 April 2006
JUDGMENT OF: Handley JA at 1; Hodgson JA at 2; McColl JA at 10
DECISION: Appeals dismissed with costs.

CATCHWORDS: Freedom of information - exempt documents - Legal professional privilege - advice given in governmental context - advice including extraneous matter - must be given in relevant legal context to attract privilege - importance of retainer - Internal working documents - whether disclosure in the public interest - balancing exercise - disclosure of draft reports - operation of s59A of the Freedom of Information Act 1989 - Confidential material exemption - whether error of law when Appeal Panel found no express or implied obligation of confidentiality - Secrecy provisions exemption - whether available where disclosure of documents falls within qualification, exception or excuse in relevant secrecy provision.

LEGISLATION CITED:
Administrative Decisions Tribunal Act 1997
Freedom of Information Act 1989
Supreme Court Act 1970
Workplace Injury Management and Workers Compensation Act 1998
Legal Profession Regulation 1994
Workers Compensation (General) Regulation 1995
Workers Compensation (General) Amendment (Costs) Regulation 2001
Workers Compensation (General) Amendment (Costs in Compensation Matters) Regulation 2003
Freedom of Information Act 1982 (Cth)
Freedom of Information Act 1982 (Vic)
Freedom of Information Act 1966 (US)

CASES CITED:
Alfred Crompton Amusement Machines Ltd v Customs & Excise Commissioners (No 2) [1972] 2 QB 102
Attorney-General (NT) v Maurice [1986] HCA 80;

(1986) 161 CLR 475
Attorney-General (UK) v Heinemann Publishers Pty Ltd [No 2] (1987) 10 NSWLR 86
Australian Broadcasting Tribunal v Bond [1990] HCA 33;(1990) 170 CLR 321
Australian Capital Television Pty Ltd v Commonwealth (No 2) [1992] HCA 45; (1992) 177 CLR 106
Australian Gaslight Co v Valuer-General (1940) 40 SR (NSW) 126
Australian Securities Commission v Deloitte Touche Tohmatsu (1996) 70 FCR 93
Australian Securities Commission v Marlborough Gold Mines Limited [1993] HCA 15; (1993) 177 CLR 480
Baker v Campbell [1983] HCA 39; (1983) 153 CLR 52
Balabel v Air India [1988] Ch 317
Brandusoiu v Commissioner of Police [1999] NSWADTAP 8
Bruce v Cole (1998) 45 NSWLR 163
Codelfa Construction Pty Ltd v State Rail Authority (NSW) [1982] HCA 24; (1982) 149 CLR 337
Commissioner of Police v District Court of New South Wales & Anor (1993) 31 NSWLR 606
Commissioner of Police, NSW Police v Mooney (No 3) (EOD) [2004] NSWADTAP 22
Conway v Rimmer [1968] AC 910
Daniels Corp International Pty Limited v Australian Competition and Consumer Commission [2002] HCA 49; (2002) 213 CLR 543
DSE (Holdings) Pty Ltd v InterTAN Inc [2003] FCA 1191; (2003) 135 FCR 151
Esso Australia Resources Ltd v Commissioner of Taxation [1999] HCA 67; (1999) 201 CLR 49
Grant v Downs [1976] HCA 63; (1976) 135 CLR 674
Harris v Australian Broadcasting Corporation (1983) 78 FLR 236
Hope v Bathurst City Council [1980] HCA 16; (1980) 144 CLR 1
Kiama Constructions Pty Ltd v Davey (1996) 40 NSWLR 639
Law Society of New South Wales v General Manager, Workcover Authority of New South Wales (GD) [2004] NSWADTAP 40
Law Society of New South Wales v General Manager, WorkCover Authority of New South Wales (No 2) (GD) [2005] NSWADTAP 33
Law Society of New South Wales v General Manager, Workcover Authority of New South Wales (GD) [2004] NSWADT 4
Lloyd v Veterinary Surgeons Investigating Committee [2005] NSWCA 456

Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; (1986) 162 CLR 24
Minister for Immigration and Multicultural Affairs; Re: Ex parte Applicant S 20/2002; [2003] HCA 30; (2003) 77 ALJR 1165
Neary v The Treasurer, New South Wales [2002] NSWADT 261
News Corporation Ltd v National Companies & Securities Commission (No 4) (1984) 1 FCR 64
O'Sullivan v Farrer [1989] HCA 61; (1989) 168 CLR 210
Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation [1948] HCA 24; (1948) 77 CLR 1
Pratt Holdings Pty Ltd v Commissioner of Taxation (Cth) [2004] FCAFC 122; (2004) 136 FCR 357
Re Chapman & Minister for Aboriginal & Torres Strait Islander Affairs (1996) 43 ALD 139
Re Eccleston and Department of Family Services, Aboriginal & Islander Affairs [1993] 1 QAR 60
Re Howard and Treasurer of Commonwealth of Australia (1985) 7 ALD 626
Re McKinnon and Secretary, Department of Family and Community Services [2004] AATA 1364; (2004) 86 ALD 138
Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia [1987] HCA 27; (1987) 61 ALJR 393
Re Rae and Department of Prime Minister and Cabinet (1986) 12 ALD 589
Searle Australia Pty Ltd v Public Interest Advocacy Centre and Anor (1992) 36 FCR 111
Smith, Ferguson, Forti, Grimshaw & Coburn v R [1994] HCA 60; (1994) 181 CLR 338
The Commonwealth of Australia v John Fairfax & Sons Ltd [1980] HCA 44; (1980) 147 CLR 39
The Sagheera [1997] 1 Lloyd's Rep 160
Three Rivers District Council v Governor and Company of the Bank of England (No 6) [2004] UKHL 48; [2005] 1 AC 610
Victorian Public Service Board v Wright [1986] HCA 16; (1986) 160 CLR 145
Waterford v Commonwealth [1987] HCA 25; (1987) 163 CLR 54

PARTIES: General Manager, WorkCover Authority of New South Wales (Appellant)
Law Society of New South Wales (Respondent)

FILE NUMBER(S): **CA** 40854/04; 40578/05

COUNSEL: M Allars (Appellant)
Dr J E Griffiths SC/A Searle (Respondent)

SOLICITORS: I V Knight, Crown Solicitor (Appellant)
Law Society of NSW (Respondent)

LOWER COURT JURISDICTION: New South Wales Administrative Decisions Tribunal - Appeal Panel

LOWER COURT FILE NUMBER(S): ADT 049005/05

LOWER COURT JUDICIAL OFFICER: K P O'Connor DCJ (President), J Needham SC, C Blake

LOWER COURT DATE OF DECISION: 09/09/2004

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL
CA 40854/2004
CA 40578/2005
ADT 049005/2005

HANDLEY JA
HODGSON JA
McCOLL JA

Monday 24 April 2006

GENERAL MANAGER WORKCOVER AUTHORITY OF NEW SOUTH WALES v LAW SOCIETY OF NEW SOUTH WALES

In October 2001 the WorkCover Authority of New South Wales retained Michelle Castle, a solicitor and legal costs assessor, to advise it in relation to its review of the legislative regime of costs in workers compensation matters. On 1 January 2002 the *Workers Compensation (General) Amendment (Costs) Regulation* 2001 (the "*General Costs Regulation*"), which dealt with costs recoverable by legal practitioners in claims for workers compensation matters, commenced. Prior to the commencement of the *General Costs Regulation* the Government and the Law Society agreed to review its operation to ensure its objectives were being met. In late 2002 Ms Castle gave WorkCover advice relating to submissions made by the Law Society as part of the review. In December 2002, pursuant to s 16 of the *Freedom of Information Act* 1989 (the *"FOI Act"*), the Law Society applied to WorkCover for access to documents produced by Ms Castle for the purposes of the review. WorkCover determined the documents were exempt from production on four grounds: legal professional privilege (*FOI Act* Sch 1, cl 10), that they were internal working documents whose disclosure would be contrary to the public interest (*FOI Act*, Sch 1, cl 9), that they were the

subject of a secrecy provision (*FOI Act*, Sch 1, cl 12,) and that they were contained confidential material (*FOI Act*, Sch 1, cl 13).

The Law Society applied to the Administrative Decisions Tribunal for a review of WorkCover's determination. Judicial Member Robinson upheld WorkCover's determination that the disputed documents were subject to legal professional privilege. He did not consider WorkCover's other claims for exemption. The Law Society appealed. The Administrative Decisions Tribunal Appeal Panel allowed the appeal and held that the Judicial Member had erred in law in concluding the disputed documents were subject to legal professional privilege. The Appeal Panel acceded to an application by the Law Society to extend its appeal to the merits in order to consider WorkCover's other exemption claims and in its second decision held that WorkCover had not made out any of those claims. WorkCover appealed from both decisions.

WorkCover tendered the disputed documents as a confidential exhibit before the Tribunal and Appeal Panel. On appeal WorkCover did not consent to the Court inspecting the disputed documents

HELD: per McColl JA (Handley and Hodgson JJA agreeing), dismissing both appeals:

1 The Appeal Panel did not err in law in finding that WorkCover had not established its exemption claims.

Legal professional privilege exemption

2 Legal advice privilege (one of the two heads of legal professional privilege) applies where, applying the dominant purpose test, a legal practitioner receives or creates a communication in that capacity for the purpose of the client obtaining legal advice.

Waterford v Commonwealth [1987] HCA 25; (1987) 163 CLR 54; *Esso Australia Resources Ltd v Commissioner of Taxation* [1999] HCA 67; (1999) 201 CLR 49; *Three Rivers District Council v Governor and Company of the Bank of England* (No 6) [2004] UKHL 48; [2005] 1 AC 610 applied

3. In order to attract legal advice privilege, a lawyer must make or receive a communication in a relevant legal context.

Balabel v Air India [1988] Ch 317; *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48; [2005] 1 AC 610; *DSE (Holdings) Pty Ltd v InterTAN Inc* [2003] FCA 1191; (2003) 135 FCR 151; *The Sagheera* [1997] 1 Lloyd's Rep 160 applied

4. The purpose of a legal practitioner's retainer is important in determining whether or not communications with clients were brought into existence for the dominant purpose of giving legal advice.

DSE (Holdings) Pty Ltd v InterTAN Inc [2003] FCA 1191; (2003) 135 FCR 151; *The Sagheera* [1997] 1 Lloyd's Rep 160 applied

5. Once it is established that a legal practitioner is acting in the requisite capacity, a confidential communication will attract privilege even if it contains extraneous matter as long as it was prepared for the dominant purpose of giving legal advice.

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Internal working documents exemption

6 The *FOI Act* operates on the premise that there is a public interest in the public having access to government information to facilitate the public's ability to discuss, review and criticize government action, subject to such restrictions as are reasonably necessary for the proper administration of the government

The Commonwealth of Australia v John Fairfax & Sons Ltd [1980] HCA 44; (1980) 147 CLR 39; *News Corporation Ltd v National Companies & Securities Commission (No 4)* (1984) 1 FCR 64*; Commissioner of Police v District Court of New South Wales & Anor* (1993) 31 NSWLR 606 applied

7 Testing whether disclosure of documents would be contrary to the public interest requires the decision-maker to weigh the public interest in citizens being informed of the processes of their Government and its agencies on the one hand against the public interest in the proper working of Government and its agencies on the other.

Harris v Australia Broadcasting Corporation (1983) 78 FLR 236 applied

8 The operation of cl 9(1)(b), Sch 1 of the *FOI Act* should not be constrained by rigid rules.

Re Howard and Treasurer of Commonwealth of Australia (1985) 7 ALD 626; *Re Eccleston and Department of Family Services, Aboriginal & Islander Affairs* [1993] 1 QAR 60 discussed

9 The Appeal Panel did not substitute an impermissible "tangible harm" test for the cl 9(1)(b) balancing exercise.

10 *Harris v Australian Broadcasting Corporation* is not authority for a principle of law that disclosure of draft reports is contrary to the public interest because of their potential to mislead.

Harris v Australian Broadcasting Corporation (1983) 78 FLR 236 distinguished

11 A court dealing with a challenge for error of law on an issue of the public interest must be careful not to trespass on the merits.

Re Queensland Electricity Commission; Ex parte Electrical Trade Union [1987] HCA 27; (1987) 61 ALJR 393

Confidential material exemption

12 The Appeal Panel did not err in law in concluding that Ms Castle's retainer placed no explicit obligation of non-disclosure on WorkCover, that none could be implied and that the disputed documents did not contain matters whose disclosure would disclose information obtained in confidence: cl 13(b)(i).

Secrecy exemption

13 Clause 12(1), Sch 1, *FOI Act* is a general provision which establishes that a document is prima facie exempt if its disclosure would constitute an offence, whether or not the provision creating the offence is subject to defeasance by virtue of one or more qualifications or exceptions.
14 Clause 12(2) is a specific provision which provides that if disclosure of documents would not constitute an offence because it would fall within some qualification, exception or excuse, they are not exempt.

Observations on the utility of making documents the subject of a disputed privilege claim available for the Court's inspection.

Grant v Downs [976] HCA 63; (1976) 135 CLR 674; *Alfred Crompton Amusement Machines Ltd v Customs & Excise Commissioners (No 2)* [1972] 2 QB 102 referred to

ORDERS
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IN THE SUPREME COURT
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COURT OF APPEAL
CA 40854/2004
CA 40578/2005
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HANDLEY JA
HODGSON JA
McCOLL JA

Monday 24 April 2006

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HANDLEY JA
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Monday 24 April 2006

GENERAL MANAGER WORKCOVER AUTHORITY OF NEW SOUTH WALES v LAW SOCIETY OF NEW SOUTH WALES

Judgment

1 **HANDLEY JA**: I agree with McColl JA.

2 **HODGSON JA**: I agree with the orders proposed by McColl JA and with her reasons. I make the following additional comments.

3 As regards the appeal concerning legal professional privilege, this appeal has to be determined in circumstances where WorkCover did not disclose to the Court the actual content of documents said to have been created for the dominant purpose of legal advice, and did not seek to establish the totality of its instructions which led to their creation.

4 In those circumstances, in my opinion, WorkCover could not succeed in this appeal on a quesiton of law on the basis that the Appeal Panel's conclusion involved giving the wrong legal result on the facts of the case, because this was a case where, at best for WorkCover, the dominant purpose was not entirely clear, and WorkCover, having the onus of proof, did not disclose some relevant facts to this Court and did not prove others.

5 Further, even if WorkCover were to show that the Appeal Panel applied a wrong legal rule or principle in reaching its result, it is far from clear that the appeal would be allowed. In disposing of an appeal, this Court must have regard to s 120 of the *Administrative Decisions Tribunal Act* 1997, which is in the following terms:

Orders on appeal to the Supreme Court

(1) The Supreme Court is to hear and determine the appeal and may make such orders as it thinks appropriate in light of its decision.

(2) The orders that may be made by the Supreme Court on appeal include (but are not limited to):
(a) an order affirming or setting aside the decision of the Appeal Panel, and

(b) an order remitting the case to be heard and decided again by the Appeal Panel (either with or without the hearing of further evidence) in accordance with the directions of the Supreme Court.

6 I am by no means satisfied it would be appropriate to send the case back to the Appeal Panel, much less for this Court to decide the case in favour of legal professional privilege, in circumstances where the facts necessary for such decision have not been put before this Court.

7 In any event, I am not satisfied that the Appeal Panel applied any wrong legal rule or principle. I do not understand its reference to "technical legal skills" as being intended in any narrow sense, or as excluding skills extending beyond knowledge of what the law is to an understanding of how legal proceedings work in practice and of how such workings could be affected by costs rules. I do not understand the Panel to

have stated or considered that the inclusion of substantial policy matters in an advice would preclude a judgment that its predominant purpose was legal advice. Rather, I would read the Panel's judgment as correctly addressing the question whether, having regard to the context and content of the documents, their predominant purpose was for legal advice.

8 As regards the appeal concerning public interest, the evidentiary deficiencies adverted to raise similar problems for WorkCover.

9 In any event, I am not satisfied that the Appeal Panel applied any wrong legal rule or principle. In particular, I do not read its reasons as laying down any requirement that WorkCover prove that "tangible harm" would result from disclosure. The reference to tangible harm was in my opinion intended merely to indicate that greater weight would be given to detriment shown to be probable or at least a realistic possibility, than to detriment which is merely a matter of theory or speculative possibility.

10 **McCOLL JA**: The issue for determination in these appeals is whether documents brought into existence at the request of the WorkCover Authority of New South Wales in the course of a review of the event-based system of costs in workers compensation matters introduced in 2002 by the *Workers Compensation (General) Amendment (Costs) Regulation* 2001 (the "*General Costs Regulation*") are exempt from production pursuant to the *Freedom of Information Act* 1989 (the *"FOI Act"*).

11 The Law Society of New South Wales made an application for access to the documents pursuant to the *FOI Act*. WorkCover determined the documents were exempt from production on two bases. It asserted they were protected by legal professional privilege (*FOI Act*, Schedule 1, cl 10) and were internal working documents whose disclosure would be contrary to the public interest (*FOI Act,* Schedule 1, cl 9). Accordingly it refused the Law Society's application. WorkCover's determination that the disputed documents were subject to legal professional privilege was upheld in the General Division of the Administrative Decisions Tribunal but the Appeal Panel reversed that decision: *Law Society of New South Wales v General Manager, Workcover Authority of New South Wales (GD)* [2004] NSWADTAP 40 (the *"Privilege Decision"*). In a separate decision the Appeal Panel also rejected WorkCover's internal working documents claim for exemption, as well as its additional claims of confidentiality (*FOI Act,* cl 13, Schedule 1) and secrecy (*FOI Act*, cl 12, Schedule 1): *Law Society 26f New South Wales v General Manager, WorkCover Authority of New South Wales (No 2) (GD)* [2005] NSWADTAP 33 (the "*Working Documents Decision*"). WorkCover has appealed from both Appeal Panel decisions. This judgment deals with both appeals.

Scope of the appeals

12 The application for a review of WorkCover's determination by the Tribunal was a merits review in which the "Tribunal [was] to decide what the correct and preferable decision was having regard to the materials then before it": *Administrative Decisions Tribunal Act* 1997, s 63(1). The Law Society's appeal as of right to the Appeal Panel from the privilege decision was limited to questions of law: *Administrative Decisions*

Tribunal Act, s 113(2)(a), but the Panel had a discretionary power to allow the appeal to extend to the merits.

13 WorkCover's appeals to the Supreme Court are limited to questions of law: *Administrative Decisions Tribunal Act*, s 119(1). The Appeal Panel included a Judicial Member of the Tribunal so the appeal lay directly to this Court: *Supreme Court Act* 1970, s 48(1)(vii) and (2).

The legislative framework

14 Section 16 (1) of the *FOI Act* provides that "[a] person has a legally enforceable right to be given access to an agency's documents in accordance with this Act". Section 17 prescribes the form of an application for access to agency documents. Section 24 (1) relevantly provides that after considering an application for access, an agency shall determine whether access is to be given (whether immediately or subject to deferral) or refused, and if access is to be given, any charge payable in respect of giving access. Section 25(1)(a) relevantly provides that an agency may refuse access to an exempt document. Section 28(1)(a) requires an agency to give written notice to the applicant of its determination of his or her application. Section 28(1)(e) provides that if the determination is that access is refused, the agency must specify its reasons, and the findings on any material questions of fact, with a reference to the sources of information on which those findings are based.

15 Section 59A provides:
"59A Public interest

For the purpose of determining under this Act whether the disclosure of a document would be contrary to the public interest it is irrelevant that the disclosure may:

(a) cause embarrassment to the Government or a loss of confidence in the Government, or

(b) cause the applicant to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason."

16 In any proceedings concerning a determination made under the Act by an agency or Minister, the burden of establishing that the determination is justified lies on the agency or Minister: s 61.

17 Exempt documents are dealt with in Schedule 1 to the *FOI Act*. The following clauses are relevant:

9 Internal working documents

(1) A document is an exempt document if it contains matter the disclosure of which:

(a) would disclose:
(i) any opinion, advice or recommendation that has been obtained, prepared or recorded, or

(ii) any consultation or deliberation that has taken place, in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency, and

(b) would, on balance, be contrary to the public interest.

(2) A document is not an exempt document by virtue of this clause if it merely consists of:
(a) matter that appears in an agency's policy document, or

(b) factual or statistical material.

10 Documents subject to legal professional privilege

(1) A document is an exempt document if it contains matter that would be privileged from production in legal proceedings on the ground of legal professional privilege.

(2) A document is not an exempt document by virtue of this clause merely because it contains matter that appears in an agency's policy document.

12 Documents the subject of secrecy provisions

(1) A document is an exempt document if it contains matter the disclosure of which would constitute an offence against an Act, whether or not the provision that creates the offence is subject to specified qualifications or exceptions.

(2) A document is not an exempt document by virtue of this clause unless disclosure of the matter contained in the document, to the person by or on whose behalf an application for access to the document is being made, would constitute such an offence.

13 Documents containing confidential material

A document is an exempt document:

(a) if it contains matter the disclosure of which would found an action for breach of confidence, or

(b) if it contains matter the disclosure of which:

(i) would otherwise disclose information obtained in confidence, and

(ii) could reasonably be expected to prejudice the future supply of such information to the Government or to an agency, and

(iii) would, on balance, be contrary to the public interest."

The privilege decision: statement of the case

18 The *General Costs Regulation* commenced on 1 January 2002. It amended the *Workers Compensation (General) Regulation* 1995 (the "*1995 Regulation*") by inserting a new Part 23 which dealt with costs recoverable by legal practitioners in claims for workers compensation. Part 23 fixed the maximum costs which could be recovered in such a matter as well as providing for events-based costing: that is to say costs were to be determined by reference to activities or events in connection with the matter. Hitherto costs in such matters had been substantially based on time expended: cl 23A, *Legal Profession Regulation* 1994.

19 In October 2001 WorkCover retained Michelle Castle, trading as Thomson Castle, solicitors and DIG Legal Services Pty Ltd, trading as DG Thomson Legal Costs Assessors, to advise it in relation to its review of the legislative regime concerning costs in workers compensation matters. Ms Castle was the sole principal of Thomson Castle and the Managing Director of DG Thomson.

20 Prior to the commencement of the *General Costs Regulation* the Government and the Law Society agreed that its operation would be reviewed to ensure its objectives were being met. During 2002 a review committee was appointed by the the Hon John Della Bosca MLC, Special Minister of State. The Law Society was represented on that Committee.

21 In September 2002 WorkCover renewed Ms Castle's retainer. In October 2002 the Law Society made a submission to the review committee raising concerns in relation to the new scale for events-based costing. In November 2002 Ms Castle gave WorkCover advice replying to the Law Society's submissions. Ms Castle's documents apparently included general advice as well as an assessment of the impact of the new scale on 'scenarios' developed after consultation with officers of the Law Society. The Law Society asked WorkCover for a copy of Ms Castle's report. WorkCover refused that request.

22 On 13 December 2002, pursuant to s 16 of the *FOI Act*, the Law Society applied to WorkCover for access to:
"…copies of all statements, records and reports including factual, statistical and financial material, produced by Michelle Castle for the WorkCover Authority for the purposes of the current review of the *Workers Compensation (General) Amendment (Costs) Regulation* 2001."
23 On 5 February 2003 WorkCover notified the Law Society it had determined it could release certain emails, but that five of the documents sought were exempt from release on grounds of legal professional privilege. The documents claimed to be privileged were described as:

"18/10/02 Michelle Castle, Proposed methodology – an attachment to Michelle Castle's e-mail of 18/10/02 (copy attached)
11/11/02 DG Thompson Legal Costs Assessors (Michelle Castle) – Letter and Draft Report to WorkCover *"Legal Costs Regulation Review"*

12/11/02 DG Thompson Legal Costs Assessors (Michelle Castle) – Draft Report to WorkCover *"Legal Costs Regulation Review"* – an attachment to Michelle Castle's email of 12/11/02 (copy attached)

DG Thompson Legal Costs Assessors (Michelle Castle) –Sample bills of costs x 4

27/11/2002 DG Thompson Legal Costs Assessors (Michelle Castle) – Draft report to WorkCover *"Legal Costs Regulation Review"* – an attachment to Michelle Castle's e-mail of 27/11/02 (copy attached)."

24 The Law Society applied for an internal review of WorkCover's determination: *FOI Act*, s 34. WorkCover upheld the original determination on 1 April 2003 (the "internal review determination"). In addition to the legal professional privilege exemption, the reviewing officer determined the five documents were exempt from production because they were internal working documents whose disclosure would be contrary to the public interest. The internal review determination set out a number of factors going to the public interest which were said to militate against disclosure: *FOI Act*, Schedule 1, cl 9 (b).

25 In affirming the original determination the reviewing officer stated:
"The exempt documents were created as part of a review of Schedule 6 of the *Workers Compensation (General) Regulation*. Schedule 6 sets out the maximum costs recoverable for legal services in workers compensation matters and represents a new approach to the recovery of legal costs that was an integral component of the 2001 reforms to the workers compensation scheme…a review panel, with Law Society representation, was established with a view to the preparation of a report to the Minister on the scale of costs to ensure prompt resolution of claims and adequate representation for workers and employers. Michele Castle, the Principal of DG Thompson, legal costs consultant, was engaged by WorkCover to provide advice and assistance in responding to a submission by the Law Society. Documents prepared by Ms Castle were prepared for the purposes of the report and form an integral part of it. The documents prepared do not comprise purely factual or statistical material. The proposed methodology and report were provided to WorkCover's Legal Group in connection with its advice to WorkCover on the Law Society's submissions".

26 The Law Society sought a review of WorkCover's determination in the General Division of the Administrative Decisions Tribunal: s 55, *Administrative Decisions Tribunal Act* 1997. Judicial Member Robinson held WorkCover's determination was correct: *Law Society of New South Wales v General Manager, Workcover Authority of New South Wales (GD)* [2004] NSWADT 4. Given this finding he did not go on to consider WorkCover's internal working documents exemption claim.

27 On 9 September 2004 the Administrative Decisions Tribunal Appeal Panel allowed the Law Society's appeal from Judicial Member Robinson's decision holding that he had erred in law in concluding the disputed documents were subject to legal professional privilege. It then acceded to an application by the Law Society to extend its appeal to the merits in order to consider WorkCover's internal working documents exemption claim as well as the additional grounds it relied upon of confidentiality and secrecy. It later held that WorkCover had not made out any of those grounds and ordered it to grant access to the disputed documents.

The privilege decision: the Tribunal decision

28 WorkCover tendered the disputed documents as a confidential exhibit before the Tribunal. Judicial Member Robinson made the following findings concerning their preparation:

"6 There is no significant contest between the parties as to the relevant background in these proceedings. It is set out in the two statements of evidence. Relevantly, the disputed documents were commissioned by the respondent in circumstances where the responsible Minister had announced major reforms to the workers compensation system in New South Wales in June 2000 and introduced to Parliament significant amendments on 29 Mar 2001. In mid 2001, the respondent commenced a fundamental review of the regulation of legal costs in the workers compensation jurisdiction. Costs in such matters were then assessed by the amount of time expended on a particular matter ('time-based costing'). In September 2001 the respondent decided to obtain external advice.

7 An agreement was entered into between the respondent and Michelle Castle, trading as Thomson Castle, solicitors and DIG Legal Services Pty Ltd, trading as DG Thomson Legal Costs Assessors in October 2001. A copy of the agreement is annexed to the affidavit of Mr McInnes. The 'consultants' (as they were referred to in the agreement) were required to review a draft policy paper and a draft costs scale and provide advice on a number of matters set out in the Annexure to the agreement. The draft costs scale and policy paper related to events-based legal costing in workers compensation as opposed to time-based costing. The consultants were asked to provide advice on:

'1 The effectiveness of the proposed cost scale in controlling legal costs within the workers compensation system;

2. Whether the proposed cost scale provides adequate remuneration for the provision of certain legal and agents services;

3. Whether the proposed cost scale will have any adverse impacts on the rights of injured workers to legal representation;

4. Whether the proposed cost scale creates adequate incentives to settle legal disputes within the workers compensation system, early and the dispute resolution system;

5. Possible adverse impacts of the proposed cost scale, including but not limited to incentives that may be created to provide unnecessary legal services, or create delays in the dispute resolution system;

6. Any other impacts of the proposed scale;

Advice on options to address any problems or issues arising in relation to matters identified under 1 to 6.'

8 This agreement plainly constituted the retainer between the solicitors and the respondent. It also provided for review of the relevant material to be undertaken 'from time to time'.

9 I presume that certain advice was given by the consultants as the respondent completed its review of legal costs and the *Workers Compensation (General) Regulation* 1995 was amended by the *Workers Compensation (General) Amendment (Costs) Regulation* 2001 which commenced on 1 January 2002 and introduced a system of events-based costing for workers compensation matters. Prior to the regulation being made, it was agreed between representatives of the New South Wales Government and the applicant that there would be a review of the operation of the new regulation and formal arrangements were made which included participation of both the applicant and the respondent as well as the newly-established Workers Compensation Commission. A 'review panel' was formed with these members to advise the responsible Minister by 30 September 2002. A number of meetings were held, some of which were attended by solicitors from the legal firm Thompson Castle. Mr McInnes was the Chairperson of the review panel.

10 In mid-September 2002 the agreement referred to above was extended between the parties so as to include advice and expert assistance in connection with the new review and, in particular, to advise the applicant in connection with its dealing with very lengthy submissions that were delivered by the applicant to the respondent on 9 October 2002. Under these contractual and retainer arrangements, Ms Michelle Castle consulted with nominees of the applicant. I am satisfied that this was only for the purposes of obtaining information from them, such as, various legal costs scenarios. At about the same time, the applicant engaged its own legal costs consultant, Ms Sharon Brabiner to advise it in the review process.

11 I have read the five disputed documents carefully. One of them is the proposed methodology for how the consultant can advise the respondent on how to deal with the applicant's submission. The other documents comprise versions of an undated draft report by Ms Castle to the respondent, a cover letter and 4 'dummy' bills of costs for demonstration or explanation purposes".

29 The Judicial Member considered (at [12]) that "[the disputed documents were] plainly the legal advice of a lawyer who is also experienced in matters concerning costs assessments" and that "notwithstanding that a fair proportion of the subject documents contained material that could be considered as going to 'policy' issues alone, they [were] largely also appropriately characterised as legal advice on legal issues." Based on his reading of the documents and having regard to the manner in which Ms Castle was retained to provide advice, he concluded the disputed documents were subject to legal professional privilege. He found the dominant purpose for their creation was to obtain legal advice to assist WorkCover to respond to the Law Society's submissions concerning the new events-based legal costs system. He held that "the fact that policy issues were wrapped up in the request [did] not change the fact that legal advice was sought and obtained from a person fully qualified to give it": *Law Society of New South Wales v General Manager, Workcover Authority of New South Wales (GD)* at [14].

30 The Judicial Member then considered whether the Tribunal should, exercise what the Law Society submitted was an "override discretion" to release the exempt documents: s 25(1), *FOI Act.* He concluded (at [18]) that to the extent such a discretion may be said to exist (*Neary v The Treasurer, New South Wales* [2002] NSWADT 261 at [67]), it was not appropriate, as a matter of discretion, to release the

disputed documents. The Law Society does not pursue that point in this Court and it need not be considered further.

31 Having found in favour of WorkCover on its privilege claim, the Judicial Member concluded he did not need to determine WorkCover's internal working documents exemption claim.

The privilege decision: the Appeal Panel

32 The Law Society appealed to the Appeal Panel seeking to set aside the Tribunal's determination on the basis that it was affected by errors of law. As I have noted, it also sought leave to extend the appeal to the merits in relation to WorkCover's internal working documents exemption claim: *Administrative Decisions Tribunal Act*, s 113(2)(b).

33 The Law Society asserted that having regard to the subject of Ms Castle's retainer as described in paras [7] and [10] of the Tribunal's decision and the description of the documents she created (para [11]), her advice appeared to have been that of a costs consultant rather than a lawyer and of a policy or administrative nature rather than legal advice. It contended that, in the light of these matters, Judicial Member Robinson had failed to apply the principles concerning legal professional privilege correctly and had therefore erred in law in finding the disputed documents were subject to privilege.

34 The Law Society also claimed that the Judicial Member erred in law in that he failed to take into account various factual matters which the Appeal Panel (at [16]) identified as including:

"(i) the addition of Ms Castle's law firm to the agreement so as to satisfy the need for professional indemnity cover; (ii) the agreement's provision (cl 4) that payment be made to her consultancy firm; (iii) the nature and description of the services contracted for, which on their face relate to matters of policy and administration, not law; (iv) the renewal of the consultancy agreement in September 2002 was in the specific context of the provision of cost consultancy services, not legal services; (v) the advice forwarded by Ms Castle was forwarded to the agency under cover of the email address of her consultancy firm, not her law firm; and (vi) the agency repeatedly referred to Ms Castle providing it with services in her capacity as costs consultant, not legal adviser."

35 The Law Society asserted the Judicial Member took a "seriously mistaken view of the facts" relevant to the question whether Ms Castle gave her advice as a costs consultant as opposed to a lawyer, sufficient to constitute a constructive failure to exercise jurisdiction, had applied the wrong legal test and that there was "no evidence" to support the finding that the dominant purpose of the relationship was the giving of legal advice. In the alternative, the Law Society submitted the Judicial Member should have exercised his powers to provide access to so much of the disputed documents as was not covered by privilege, in light of his observations that a "fair proportion" of the subject documents contained material that went to policy issues alone.

36 WorkCover resisted the appeal principally on the basis that there was ample evidence before the Judicial Member to allow him to reach his conclusion. It asserted that there was no evidence before the Judicial Member to support the submission that Ms Castle's law firm was added to the agreement so as to satisfy the need for professional indemnity cover.

37 On 9 September 2004 the Appeal Panel allowed the Law Society's appeal and ordered that WorkCover's determination be set aside insofar as it relied on the legal professional privilege exemption.

38 Like the Tribunal, the Appeal Panel was provided with copies of the disputed documents, again as a confidential exhibit. Although this does not emerge from the judgment under appeal, it was common ground and, in any event, was plainly stated in the *Working Documents Decision*: see *Law Society of New South Wales v General Manager, WorkCover Authority of New South Wales (No 2) (GD)* at [15].

39 In addition to the facts found by the Judicial Member, the Appeal Panel noted the following matters:
"10 The agreement [with Ms Castle] stated in the preamble that:
'WorkCover has a need for expert advice on proposals for regulations relating to legal and agents costs in the workers compensation scheme. Michelle Castle and DGT Legal Services Pty Ltd has [sic] been selected following an expressions of interest process to provide the necessary services.'

11 Clause 2 of the agreement provided that 'The Consultant must provide the Services set out in the Annexure'. The Annexure stated that WorkCover is conducting a review of the arrangements for regulating legal and agent costs. It went on to state … [The judgment then set out the six paragraphs extracted in the Judicial Member's decision at [7]].

…

12 The agreement included a professional indemnity clause binding the consultant to indemnify the agency in respect of any losses occasioned by the consultant in respect of the services. She was obligated to have current professional indemnity cover.

13 While it is true, as the agency asserted in the course of the appeal, that there is no Tribunal finding going to this matter, it is, the Appeal Panel considers, clear from the material annexed to WorkCover's affidavit that a material consideration in naming Ms Castle and her solicitor's firm as the first party was that the firm held professional indemnity cover (see Annexure C to Ex A)".

40 Before the Appeal Panel the parties accepted that the Tribunal had applied the relevant statements of principle in *Esso Australia Resources Ltd v Commissioner of Taxation* [1999] HCA 67; (1999) 201 CLR 49 as amplified in *Daniels Corp International Pty Limited v Australian Competition and Consumer Commission* [2002] HCA 49; (2002) 213 CLR 543 to determine whether the disputed documents were subject to legal professional privilege. The Appeal Panel identified (at [22]) that principle as being that legal professional privilege can be invoked by the client in respect of any confidential communications made by or to a legal adviser if they were made for the dominant purpose of obtaining or giving legal advice or assistance, or for use in legal proceedings.

41 The Appeal Panel referred (at [23]) to the Tribunal's finding that Ms Castle had a retainer in her capacity as a solicitor and that the "dominant purpose" of the retainer was to render "legal advice" and that the documents, read as a whole, constituted "legal advice" although a "fair proportion constituted policy advice". It recognised (at [24]) that these findings appear to be findings of fact which would not ordinarily be open to disturbance unless an error of law was identified of sufficient importance to warrant extending the appeal to the merits, applying *Brandusoiu v Commissioner of Police* [1999] NSWADTAP 8 and *Commissioner of Police, NSW Police v Mooney (No 3)* (EOD) [2004] NSWADTAP 22 at [16-17], ([24], [32]. I note in passing that it has now been held that that approach is unduly narrow: see *Lloyd v Veterinary Surgeons Investigating Committee* [2005] NSWCA 456 at [57] per Tobias JA (with whom Spigelman CJ (at [14]) agreed on this point; see also Handley JA at [22].

42 The Appeal Panel recognised (at [27]–[29]) that in order for a communication between a government agency and a person practising as a solicitor to be subject to legal professional privilege it was necessary to show that the dominant purpose of the relationship was the rendering of legal advice and assistance. Once that relationship was established, the Appeal Panel accepted (at [30]) the privilege could extend to broader advice of a non-legal character, including documents of an administrative character connected to the giving of the legal advice.

43 The Appeal Panel also observed (at [33]–[38]), however, that "[legal professional privilege] ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle".

44 The Appeal Tribunal accepted (at [39]) that there was "an independent professional relationship between WorkCover and Ms Castle". It identified the question as being whether Ms Castle was involved in performing the duties or functions of a legal adviser. It then said, in a passage of which WorkCover complains in its first and second grounds of appeal, that:

"For advice to be characterised as 'legal advice' it must, in our view, be of a kind which involves the application of technical legal skills (or 'legal principles' to use the words of Preuss PM in *Re Cole and the Department of Justice* (1994) 8 VAR 132 at 133); and it must be provided in a context that involves the 'administration of justice' as distinct from other types of administration."

45 The Appeal Panel (at [42]) illustrated the technical skills it considered characteristic of "legal advice" as:

"… those involved in the drafting or interpretation of a provision in a public instrument such as a bill, ordinance or statute or of a private instrument such as a contract; those that might be involved in giving advice as to how the present law might impact on conduct that has occurred or is contemplated; or those that might be involved in advising on how the law should be amended to enable a proposed course of conduct to be lawfully pursued."

46 It noted (at [43]) WorkCover's submission that Ms Castle's advice was "legal advice" as it "could only have been given by someone with legal training and

experience" with "an understanding of the legal issues arising in the workers compensation system, the procedures by which claims are made and adjudicated upon, including questions as to the necessity for particular legal services, and the costs of providing those services and representation in such matters", but said (at [44]):

"Many legislative schemes are complex, and include schedules of a detailed kind. The provision of advice by experts in relation to schemes of such a kind is a commonplace of government. It so happens that this case involves a system connected with the resolution of disputes over workers compensation entitlements, and that system has been conducted via judicial and quasi-judicial institutions in this State. It is logical therefore to seek advice on operational and equity issues from someone well versed in the system.

45 In this case the expert was a costs consultant. The matters she was called on to address did not, we consider, in any significant way involve the application of technical legal skills but were of a policy or administrative nature, as submitted by the Law Society.

46 The matters she was asked to advise on under the terms of reference contained in the agreement were, to reiterate: the effectiveness of the proposed cost scale in controlling legal costs within the workers compensation system; whether the scale provided adequate remuneration for the provision of certain legal and agents services; whether the scale would have any adverse impacts on the rights of injured workers to legal representation; whether the scale created adequate incentives to settle legal disputes within the workers compensation system and the dispute resolution system; and the possible adverse impacts of the scale, including but not limited to incentives that might be created to provide unnecessary legal services, or create delays in the dispute resolution system …

47 All of the terms of reference were, we consider, of a political character, using the term 'political' in the broad sense. Clearly it was desirable that the consultant have a good knowledge of the practical workings of the legal system.

48 Ms Castle's position was no different to that of a medical costs consultant (who may well also be a medical practitioner) engaged by health insurance authorities to advise on proposed fees to be paid to general practitioners and various types of specialists. It cannot, we consider, be seriously contended that the medical costs consultant is thereby involved in giving 'medical advice' to the authority even though he or she may have to bring a close knowledge of medicine or the medical profession to the formulation of an opinion about an appropriate fee.

49 Ms Allars submitted that the fact that costs assessors were required under the *Legal Profession Act* 1987 to be legal practitioners of not less than 5 years' standing (Schedule 7 cl 1) was an indicator that the advice they rendered constituted legal advice. It is unnecessary to address in this case whether a costs assessor renders legal advice when engaged in the process of assessing the reasonableness of professional fees and disbursements in respect of litigation.

50 Here the advice was of a more abstract type, and could, we consider, only be

characterised as advice, like that of a medical costs consultant, of a 'work value' character in relation to which the possession of relevant professional knowledge was, at least arguably, an asset.

51 To take another example, a prosecutor might be approached by the government to advise on the impact that proposed changes to the criminal law might have on the flow of cases through the system. This does not make the advice that follows 'legal advice' though it draws on valued experience of the legal system. (There have been a number of cases dealing with the scope of the privilege as it applies to public prosecutors. See, for example in the FOI context *DPP v Smith* [1991] 1 VR 63 at 70; *Re Cole*, cited above; and in the discovery context, *Nye v State of New South Wales & ors* [2002] NSWSC 1267 (O'Keefe J).)"

47 The Appeal Panel then turned to the issue of the administration of justice. It noted (at [52]) that in *Waterford v Commonwealth* [1987] HCA 25; (1987) 163 CLR 54 at 67, Mason and Wilson JJ emphasised the need for a "connection" to be shown between the document in issue and an activity that formed part of the administration of justice – in that case the conduct of legal proceedings, saying, "[i]t is the connection between the document and legal proceedings that establishes its character and thus attracts the privilege". The Appeal Panel concluded (at [54]) that advice of the kind given by Ms Castle could not be connected with "the fundamental rationale for the privilege – the public interest in the administration of justice". It said:

"In our view the policy-making exercise that Government undertakes in developing new schemes of regulation or reviewing the early operation of such schemes does not involve the 'administration of justice' in the way the courts have used that term. There may be aspects of these policy making exercises which call upon legal expertise and involve the giving of legal advice. At this point the public interest in the administration of justice is being served, in that the provision of legal advice seeks to safeguard the community's interest in ensuring that executive conduct is lawful."

48 It held (at [55]) that "the Tribunal's findings that the relationship was one of lawyer-client involving the giving of legal advice, let alone one predominantly of that kind, were not open on the evidence presented".

The privilege decision: WorkCover's submissions

49 WorkCover's written submissions undertook a painstaking analysis of the Appeal Panel's decision and numerous authorities concerning privilege. The following account may not do justice to their length, but reflects, I believe, their substance.

50 WorkCover submitted that the Appeal Panel's statement that in order that advice be characterised as "legal advice" it must involve the application of "technical legal skills" (or "legal principles") was a restriction which found no support in authority.

51 WorkCover also argued that the "technical legal skills" requirement was inconsistent with observations in *Waterford v The Commonwealth of Australia* (at 66, 67 per Mason and Wilson JJ, at 103 per Dawson J) to the effect that a communication may attract legal professional privilege notwithstanding that it contains policy and legal advice. WorkCover argued that although the Appeal Panel (at [31]) had accepted

these principles, its technical legal skills requirement indicated it had failed to apply them.

52 WorkCover argued that although the Appeal Panel's reference (at [55]) to "predominantly" appeared to be drawn from *Esso Australia Resources Ltd v Commissioner of Taxation*, the principle in that case was that a communication between lawyer and client must be made for the dominant purpose of giving legal advice if it is to attract the privilege but not that the dominant or predominant content of the advice must involve the application of technical legal skills.

53 WorkCover submitted that the content of legal advice may extend beyond "technical" application of principles of law, may take many forms and may involve the provision of a variety of documents within a continuum of ongoing advice to the client. The only limitation, WorkCover submitted, was whether the communication was made for the dominant purpose of providing legal advice.

54 WorkCover argued that the Tribunal had made a finding of fact that Ms Castle gave legal advice in her capacity as a lawyer and that there was no basis on which the Appeal Panel could disturb that finding.

55 Insofar as its second ground of appeal was concerned, WorkCover complained the Appeal Panel fell into error in finding that, in order to attract legal professional privilege, advice must be given in a governmental decision-making context connected to the public interest in the administration of justice, and have a subject matter connected with the public interest in the administration of justice: *Privilege Decision* at [39]-[40], [52], [53] and [54].

56 WorkCover submitted that while the rationale of legal professional privilege was the public interest in the administration of justice, that did not mean the privilege could not apply in a governmental decision-making context. It argued that the Appeal Panel's approach confused the rationale of the privilege with the principle governing its availability. While, it argued, the rationale described the democratic goals served by the privilege, to import the rationale into the principle, was an impermissible qualification which restricted the scope of the privilege. WorkCover submitted the Appeal Panel's approach found no support in authority.

57 Dealing with the third ground of appeal, WorkCover accepted that error of law attracting appellate intervention could be established where there was no evidence to support a factual finding (*Hope v Bathurst City Council* [1980] HCA 16; (1980) 144 CLR 1; *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321; *Minister for Immigration and Multicultural Affairs; Re: Ex parte Applicant S 20/2002;* [2003] HCA 30; (2003) 77 ALJR 1165; *Bruce v Cole* (1998) 45 NSWLR 163 at 187-9), but sought to argue that the Appeal Panel's decision did not explain why there was an absence of evidence for the Tribunal's findings of fact so as to warrant setting them aside.

58 In further submissions filed with leave following the argument in the privilege appeal WorkCover accepted that if the Appeal Panel's decision should be read as meaning it had extended the hearing of the privilege appeal to the merits

(*Administrative Decisions Tribunal Act*, s 113(2)(b)), despite there being no express order to this effect, it would not press the no evidence ground of appeal.

The privilege decision: the Law Society's submissions

59 The Law Society submitted that the Appeal Panel's statement that legal advice must demonstrate the application of "technical or legal skills" or "legal principles", in a "significant way" was consistent with the requirement that to attract legal professional privilege, confidential communications must be made by or to a lawyer acting in that capacity. It submitted the Appeal Panel's emphasis on legal skills or principles was particularly appropriate where, as in the instant case, persons who also happened to be lawyers provided advice to government agencies. It drew attention to the Appeal Panel's observation that governments in their executive and policy making functions will often seek advice from a range of sources, including persons qualified as lawyers who are either internal or external to government administration and that such advice may or may not be "legal advice": *Privilege Decision* (at [40]).

60 The Law Society argued that the Appeal Panel's findings (at [45]) that WorkCover used Ms Castle's expertise as a costs consultant and that the matters she was called on to address did not "in any significant way" involve the application of technical legal skills, but were rather of a "policy or administrative nature" were entirely open, having regard to the terms of the original Consultancy Agreement (Appeal Panel at [46]), and also to the extension of that agreement, to preparing a response to the Law Society's submission. The fact that the review in which the parties were engaged involved an assessment of the adequacy of the costs scale did not mean that the preparation of a submission on that subject necessarily involved legal advice.

61 Turning to the second ground of appeal, the Law Society submitted that the distinction the Appeal Panel drew (at [39]) between the "administration of justice as distinct from other types of administration" was an unobjectionable expression of the underlying rationale for privilege being "the furtherance of the administration of justice through the fostering of trust and candour in the relationship between lawyer and client": *Attorney-General (NT) v Maurice I* [1986] HCA 80; (1986) 161 CLR 475 at 487.

62 Insofar as WorkCover's "no evidence" point was concerned, the Law Society argued that the Appeal Panel had not made a "no evidence" finding, but had properly held (at [60]) that the Tribunal had failed to apply the principles of legal professional privilege correctly to the facts, which had been the basis upon which it had advanced its appeal to the Appeal Panel: see *Privilege Decision* (at [15]).

The privilege decision: consideration

63 WorkCover bore a statutory onus to establish that its determination the documents were exempt from production was justified: *FOI Act*, s 61. It was no doubt in recognition of that burden that WorkCover tendered the disputed documents as confidential exhibits before both the Tribunal and the Appeal Panel. The utility of making documents the subject of a disputed privilege claim available for the Court's inspection was underlined in *Grant v Downs* [1976] HCA 63; (1976) 135 CLR 674 (at 689) where Stephen, Mason and Murphy JJ observed, "in many instances the

character of the documents the subject of the claim will illuminate the purpose for which they were brought into existence"; see also *Alfred Crompton Amusement Machines Ltd v Customs & Excise Commissioners (No 2)* [1972] 2 QB 102 at 129 per Lord Denning MR.

64 WorkCover's appeal to this Court faced a formidable obstacle, entirely of its own making, in that it did not consent to the Court inspecting the disputed documents. This placed the Court under a virtually insuperable limitation insofar as aspects of the Tribunal and Appeal Panel decisions turned on an examination of the disputed documents. It made the Appeal Panel's decision unchallengeable except for error of law on the face of its reasons.

65 The Court put to Ms Allars, who appeared for WorkCover, that its refusal to produce the disputed documents made parts of its first and second grounds of appeal which challenged the finding that the disputed documents did not satisfy the indicia necessary to attract privilege were untenable. Although, at times, Ms Allars appeared to accept that proposition, WorkCover did not formally abandon those aspects of its appeal.

66 It was within WorkCover's province not to accede to the Court inspecting the disputed documents, however, as was said in *Grant v Downs* (at 688-689), legal professional privilege is not "necessarily or conclusively established by resort to any verbal formula or ritual". Inspection of the documents determines whether the privilege is "rightly claimed or not": *Alfred Crompton Amusement Machines Ltd v Customs & Excise Commissioners (No 2)* at 129 per Lord Denning MR.

Legal professional privilege

67 Legal professional privilege is a rule of substantive law which enables a person to resist the giving of information or the production of documents to a third party which would reveal confidential communications between the person 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: *Daniels Corporation International Pty Ltd and Anor v Australian Competition and Consumer Commission* (at [9]) per Gleeson CJ, Gaudron, Gummow and Hayne JJ; *Esso Australia Resources Ltd v Commissioner of Taxation*.

68 The rationale of legal professional privilege is "that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline": *Grant v Downs* (at 685); *Attorney-General (NT) v Maurice* (at 487); see also *Baker v Campbell* [1983] HCA 39; (1983) 153 CLR 52 per Mason J (at 74), per Deane J (at 114), per Dawson J (at 128).

69 *Waterford v The Commonwealth of Australia* confirmed that legal professional privilege extends to confidential professional communications between government agencies and their legal representatives if made with the requisite purpose. In that case, after referring to the "much-cited passage" in *Grant v Downs* identifying the rationale of the privilege which I have already set out, Mason and Wilson JJ said (at 61-64):

"To our minds it is clearly in the public interest that those in government who bear the responsibility of making decisions should have free and ready confidential access to their legal advisers. Whether in any particular case the relationship is such as to give rise to the privilege will be a question of fact. It must be a professional relationship which secures to the advice an independent character notwithstanding the employment. …

The common law, in the view that we have taken, recognizes that legal professional privilege attaches to confidential, professional communications between government agencies and their salaried legal officers undertaken for the sole purpose of seeking or giving legal advice or in connexion with anticipated or pending litigation. Provided that the sole purpose test enunciated in *Grant v Downs* is satisfied, there is no warrant to draw an arbitrary line through the functions of government in order to exclude the privilege from those described as of an administrative nature. All the functions of the executive government may be so described. No distinction can be drawn between a decision to grant a pension and a decision whether to defend a claim in tort or contract. The growing complexity of the legal framework within which government must be carried on renders the rationale of the privilege, as expressed in *Grant v Downs*, increasingly compelling when applied to decision-makers in the public sector. The wisdom of the centuries is that the existence of the privilege encourages resort to those skilled in the law and that this makes for a better legal system. Government officers need that encouragement, albeit, perhaps, for reasons different to those which might be expected to motivate the citizen." (emphasis added)

Their Honours' application of the "sole purpose" test must now be read in the light of *Esso Australia Resources Ltd v Commissioner of Taxation* in which (at [61]) the majority of the High Court (Gleeson CJ, Gaudron and Gummow JJ) preferred a dominant purpose test.

70 Brennan J also said (*Waterford*, at 74-75):

"…[T]he public interest is truly served by according legal professional privilege to communications brought into existence by a government department for the purpose of seeking or giving legal advice as to the nature, extent and the manner in which the powers, functions and duties of government officers are required to be exercised or performed. If the repository of a power does not know the nature or extent of the power or if he does not appreciate the legal restraints on the manner in which he is required to exercise it, there is a significant risk that a purported exercise of the power will miscarry. The same may be said of the performance of functions and duties. The public interest in minimizing that risk by encouraging resort to legal advice is greater, perhaps, than the public interest in minimizing the risk that individuals may act without proper appreciation of their legal rights and obligations. In the case of governments no less than in the case of individuals, legal professional privilege tends to enhance application of the law, and the public has a substantial interest in the maintenance of the rule of law over public administration." (emphasis added)

71 While Deane J (*Waterford*, at 82) expressed some reservation about the proposition that legal professional privilege may extend to protect communications with or within the Executive Government, he accepted nevertheless that it was

consistent with the rationale of the privilege that it extend to public officials seeking confidential legal advice and legal representation.

72 Legal professional privilege will only apply if the legal practitioner received or created the communication in that capacity for the purpose of the client obtaining professional legal advice: see *Alfred Crompton Amusement Machines Limited v Customs & Excise Commissioners (No 2)* (at 129) referred to with approval in *Waterford* (at 60-61) by Mason and Wilson JJ; see also *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48; [2005] 1 AC 610 (*"Three Rivers (No 6)"*) at [57], [111].

73 Once it is established that the legal practitioner was acting in the requisite capacity, a confidential communication will attract privilege even if it contains extraneous matter as long as it was prepared for the dominant purpose of giving legal advice. The difficulties the inclusion of extraneous matter may cause where lawyers provide advice in a government context was discussed in *Waterford* where Mason and Wilson JJ said (at 66):

"The questions raised under this head of the argument are not without difficulty. The fact that the Attorney-General was also the Minister administering the Act might create difficulty in a particular case in determining the purpose or purposes attaching to a document. Matters of policy and legal advice may be intermingled in the one document as appears to be the case with document numbered 29, which was made available to the appellant prior to the hearing of his appeal to the Federal Court. However, we do not think that the allegation of error of law by the Tribunal can be sustained. The appellant's submission fails to appreciate that the sole purpose test is a test that looks to the reason why the document was brought into existence. If its sole purpose was to seek or to give legal advice in relation to a matter, then the fact that it contains extraneous matter will not deny to it the protection of the privilege. The presence of matter other than legal advice may raise a question as to the purpose for which it was brought into existence but that is simply a question of fact to be determined by the Tribunal and its decision on such a question is final… ." (emphasis added).

74 It was common ground between the parties, and the Appeal Panel accepted (at [53]), that the effective administration of justice which is at the heart of the rationale for legal professional privilege included, in the government context, advice on the operation and application of laws, proposed laws, and their drafting. That is consistent with *Waterford.* I note, too, that in *Three Rivers (No 6)* (at [41]) Lord Scott of Foscote accepted that advice given by parliamentary counsel in relation to the drafting and preparation of public Bills should qualify for legal advice privilege, saying "the relevant legal context is unmistakable."

75 The present case was conducted on the basis that if the disputed documents were brought into existence for the dominant purpose of giving legal advice in relation to the costs regulation they would attract privilege. Having regard to the decision I have reached it is unnecessary to consider whether that common understanding was correct.

76 The present case concerns legal advice privilege, one of the two heads of legal professional privilege, the other being litigation privilege: *Three Rivers (No 6)* at [10]

per Lord Scott of Foscote; see also at [105] per Lord Carswell. Legal advice privilege attaches to confidential communications between lawyers and their clients seeking or giving legal advice. Although the "need and justification" for legal advice privilege has been questioned, the exception is "well established": *Pratt Holdings Pty Ltd v Commissioner of Taxation (Cth)* [2004] FCAFC 122; (2004) 136 FCR 357 at [4] per Finn J.

77 The scope of the proposition that privilege is not lost if a communication from a lawyer containing legal advice also contains extraneous matter was considered in *Balabel v Air India* [1988] Ch 317. That case concerned the question whether legal advice privilege extended only to communications seeking or conveying legal advice, or to all that passes between solicitor and client on matters within the ordinary business of a solicitor. Taylor LJ (with whom the Master of the Rolls, Lord Donaldson and Parker LJ agreed) said (at 330) that:

"… [T]he purpose and scope of the privilege is still to enable legal advice to be sought and given in confidence…the test is whether the communication or other document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. [L]egal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context."

78 The House of Lords comprehensively reviewed the scope of legal advice privilege in *Three Rivers (No 6)* which concerned the question whether advice from the Bank of England's lawyers as to how it should present its case to the Inquiry into its supervision of the Bank of Credit Commerce International SA ("BCCI") so as to lead to a favourable conclusion to it, qualified for legal advice privilege. One of the main purposes of the Inquiry was to examine whether, in relation to BCCI, the Bank had properly discharged its public law duties of supervision imposed by the Banking Acts: see [37]. As Baroness Hale observed at [62] all the Law Lords endorsed the approach taken in *Balabel v Air India*, and, in particular, Taylor LJ's observation (at 330) that legal advice may include "advice as to what should prudently and sensibly be done in the relevant legal context".

79 Lord Scott of Foscote (with whom Lord Rodger of Earlsferry (at [49]) and Baroness Hale of Richmond (at [61]) agreed) examined the development of legal advice privilege and the policy reasons for its retention. After referring (at [30] – [33]) to authorities in England, the United States, Australia and New Zealand dealing with the principles underlying legal professional privilege, his Lordship said (at [34]):

"None of these judicial dicta tie the justification for legal advice privilege to the conduct of litigation. They recognise that in the complex world in which we live there are a multitude of reasons why individuals, whether humble or powerful, or corporations, whether large or small, may need to seek the advice or assistance of lawyers in connection with their affairs; they recognise that the seeking and giving of this advice so that the clients may achieve an orderly arrangement of their affairs is strongly in the public interest; they recognise that in order for the advice to bring about that desirable result it is essential that the full and complete facts are placed before the lawyers who are to give it; and they recognise that unless the clients can be assured that what they tell their lawyers will not be disclosed by the lawyers without

their (the clients') consent, there will be cases in which the requisite candour will be absent … the dicta to which I have referred all have in common the idea that it is necessary in our society, a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyers' legal skills in the management of their (the clients') affairs, should be secure against the possibility of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busybodies or anyone else (see also paras 15.8 to 15.10 of *Zuckerman's Civil Procedure*(2003) where the author refers to the rationale underlying legal advice privilege as 'the rule of law rationale'). I, for my part, subscribe to this idea. It justifies, in my opinion, the retention of legal advice privilege in our law, notwithstanding that as a result cases may sometimes have to be decided in ignorance of relevant probative material."

80 He concluded (at [35]) that "[l]egal advice privilege should … be given a scope that reflects the policy reasons that justify its presence in our law" and (at [36]) that "legal advice privilege must cover also advice and assistance in relation to public law rights, liabilities and obligations".

81 Lord Scott emphasised (at [38]) Taylor LJ's statement in *Balabel* (at 330) "[t]hat there must be a 'relevant legal context' in order for the advice to attract legal professional privilege …" He also described as "plainly correct", Taylor LJ's statement (at 331) that:
"… to extend privilege without limit to all solicitor and client communication upon matters within the ordinary business of a solicitor and referable to that relationship [would be] too wide."

He then said:

"If a solicitor becomes the client's 'man of business', and some solicitors do, responsible for advising the client on all matters of business, including investment policy, finance policy and other business matters, the advice may lack a relevant legal context. There is, in my opinion, no way of avoiding difficulty in deciding in marginal cases whether the seeking of advice from or the giving of advice by lawyers does or does not take place in a relevant legal context so as to attract legal advice privilege. In cases of doubt the judge called upon to make the decision should ask whether the advice relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law. If it does not, then, in my opinion, legal advice privilege would not apply. If it does so relate then, in my opinion, the judge should ask himself whether the communication falls within the policy underlying the justification for legal advice privilege in our law. Is the occasion on which the communication takes place and is the purpose for which it takes place such as to make it reasonable to expect the privilege to apply? The criterion must, in my opinion, be an objective one."

82 Lord Rodger of Earlsferry (with whom Lord Scott agreed (at [45])) also stressed (at [58]) that "In relation to legal advice privilege what matters …[is] … whether the lawyers are being asked *qua* lawyers to provide legal advice." Lord Carswell spoke in like vein when he said (at [111]):

"… all communications between a solicitor and his client relating to a transaction in which the solicitor has been instructed for the purpose of obtaining legal advice will be privileged, notwithstanding that they do not contain advice on matters of law or construction, provided that they are directly related to the performance by the solicitor of his professional duty as legal adviser of his client."

83 In *DSE (Holdings) Pty Ltd v InterTAN Inc* [2003] FCA 1191; (2003) 135 FCR 151 Allsop J undertook an exhaustive review of authorities concerned with the scope of legal advice privilege in the context of documents which contained both legal advice and extraneous matter. After referring approvingly to Taylor LJ's statement in *Balabel* (at 330), he said (at [45]):

"…what legal advice is, however, goes beyond formal advice as to the law. This recognition does not see the privilege extend to pure commercial advice. In any given circumstance, however, it may be impossible to disentangle the lawyer's views of the legal framework from other reasons that all go to make up the 'advice as to what should prudently and sensibly be done in the relevant legal framework'…"

84 Allsop J observed (at [31]) that "the privilege…will not be allowed to be undermined by an overly narrow or technical approach to questions involved, such as the identification of the relevant advice in question." Nevertheless, he cautioned, that the importance of the privilege "does not…provide a foundation for extending the protection beyond its proper bounds".

85 Allsop J referred with approval (at [58]) to *The Sagheera* [1997] 1 Lloyd's Rep 160 at 168 where Rix J said:

".....In legal advice privilege, I would suggest, the practical emphasis is upon the purpose of the retainer. If the dominant purpose of the retainer is the obtaining and giving of legal advice, then although it is in theory possible that individual documents may fall outside that purpose, in practice it is unlikely. If, however, the dominant purpose of the retainer is some business purpose, then the documents will not be privileged, unless exceptionally even in that context advice is requested or given, in which case the relevant documents probably are privileged." (emphasis added)

The privilege appeal: decision

86 In my view the Appeal Panel recognised and applied the legal principles concerning legal advice privilege to which I have referred in determining WorkCover's privilege exemption claim. The Appeal Panel (at [22]) tested the question whether the disputed documents attracted legal professional privilege by applying the dominant purpose test. It acknowledged (at [30]) that as long as "the overall environment is one of legal advice the courts will allow the privilege to cover broader advice which is of a non-legal character, and will protect documents of an administrative character connected to the giving of the legal advice."

87 WorkCover's first ground of appeal concerns the Appeal Panel's use of the expression "technical legal skills". The Appeal Panel first used that expression (at [39]) when explaining that for advice to be characterised as "legal advice" it must involve the application of "technical legal skills". That statement, as is apparent from

the Appeal Panel's illustration (at [42]) of the kind of skills to which it was referring, served to underline the proposition that a communication by a legal practitioner must have been created in that capacity to attract privilege.

88 The Appeal Panel's second reference to the "technical legal skills" test (at [45]) was made in the context of it characterising the matters Ms Castle was asked to address as being of a "policy or administrative nature". That conclusion plainly turned both on its examination of Ms Castle's retainer and the disputed documents. The terms of the retainer are before this Court and, in my view, the Appeal Panel's characterisation of it was correct. The importance of a legal practitioner's retainer in determining whether or not their communications with clients were brought into existence for the dominant purpose of giving legal advice is self-evident and was emphasised both by Allsop J in *DSE* (at [52]) and in the passage from *The Sagheera* to which his Honour referred (at [58]).

89 The Appeal Panel also concluded (at [44]) whether by reference only to its opinion about the nature of Ms Castle's retainer, but most probably also by reference to its examination of the disputed documents, that the nature of Ms Castle's advice concerned operational and equity issues, of a "work value character" (at [50]).

90 As the authorities demonstrate, in order to qualify as legal advice, a lawyer must make a communication in that capacity. It was appropriate, therefore, for the Appeal Panel to test the question by reference to whether the disputed documents themselves demonstrated the application of the author's professional skills or, as it chose to describe them, Ms Castle's "technical legal skills".

91 WorkCover's submission that the Appeal Panel's reference to "technical legal skills" failed to recognise that legal advice could contain extraneous matter which, of itself, would not reflect the application of such skills does not represent the Appeal Panel's decision. The Appeal Panel recognised (at [27]-[29]) that once a relationship involving giving legal advice and assistance was established, privilege could extend to material of a non-legal character connected to giving the advice. In its view the disputed documents fell at the first hurdle: they were not prepared in the course, or for the purposes, of a relationship of lawyer and client but, rather were given in the course of a retainer which addressed policy and administrative matters. The question of the significance of the inclusion of any extraneous matter did not arise.
92 I turn to WorkCover's second ground of appeal, that the Appeal Panel erred in finding that in order to attract legal professional privilege, advice must be given in a government or decision-making context connected to the public interest in the administration of justice and having a subject matter so connected.

93 It was, strictly speaking, unnecessary for the Appeal Panel to consider this question. Having determined that the disputed documents were not created in the course of the relationship of lawyer and client, the question whether they fell "within the policy underlying the justification for legal advice privilege" was irrelevant: cf the two stage process of inquiry identified by Lord Scott in *Three Rivers (No 6)* (at [38]).

94 Nevertheless the point should be considered in case, by asking and answering this question, the Appeal Panel misdirected itself in a determinative manner. Again it is necessary to have regard to the context in which the Appeal Panel made this

observation. While, as I have earlier stated, it might be accepted that legal professional privilege can attach to communications made on the operation and application of laws, proposed laws and their drafting, it is essential to ensure, particularly in the government context, that the purpose for which a document was brought into existence was one which related to legal advice as opposed to operational, administrative or policy matters. As Lord Scott emphasised in *Three Rivers (No 6)* (at [38]) in order for privilege to apply advice must be given in "the relevant legal context".

95 In my view the Appeal Panel's statement (at [39]) concerning the administration of justice was an uncontroversial reference to the rationale of legal professional appeal (assisting and enhancing the administration of justice) to which the authorities refer. The Appeal Panel accepted (at [53]) that legal advice privilege could attach to advice given in connection with proposed laws and their drafting. It was not satisfied on its examination of the disputed documents, and in the context in which they were prepared, that the documents were given in that context or for such purposes.

96 WorkCover's complaints under each of its first two grounds of appeal concerning the Appeal Panel's conclusions about the disputed documents are complaints which must fail because this Court has not had access to the disputed documents.

97 Finally I turn to the third ground of appeal, that the Appeal Panel erred in holding there was no evidence to support the Tribunal's finding that the documents were provided in a legal professional capacity.

98 Turning first to WorkCover's intimation that this ground would be withdrawn if the Appeal Panel should be understood to have extended the hearing of the privilege appeal to the merits, I do not understand the decision in this light. Had the Appeal Panel extended the hearing of the privilege appeal to the merits it would have adverted to that fact. Instead, it made it clear that it regarded the appeal as confined to error of law when, for example, it commented (at [24]) that its task might be circumscribed unless the appeal was extended to the merits, then proceeded to conclude, in error of law language, that the Tribunal's findings had not been open on the evidence. Accordingly this ground of appeal should be considered, although it can be disposed of shortly.

99 To the extent that the nature of the disputed documents can be gleaned from observations made by the Tribunal and the Appeal Panel, they do not appear to relate to legal advice. To the extent that the Appeal Panel's decision turned on inferences, it could conclude that the Tribunal's finding that the disputed documents constituted legal advice was not open on the evidence: *Australian Gaslight Co v Valuer-General* (1940) 40 SR (NSW) 126 at 137-138; *Hope v Bathurst City Council* (at 8-9); *Australian Broadcasting Tribunal v* Bond (at 355-356 per Mason CJ).

100 In my view, WorkCover has not demonstrated any error of law in the Appeal Panel privilege decision.

The working documents appeal: the Appeal Panel's decision

The Appeal Panel: internal working documents exemption

101 The Appeal Panel held that the disputed documents constituted "'opinions, advice and recommendations' obtained and prepared in 'the course of the decision-making functions of the government', as well as the agency": cl 9(1)(i), Sch 1, *FOI Act*. The Law Society does not dispute that finding.

102 The Appeal Panel tested the question whether disclosure of the disputed documents would "on balance, be contrary to the public interest": (cl 9(1)(b), Sch 1, *FOI Act*) at the time it was considering the issue and not when the original decision to refuse access was made: *Working Documents Decision* (at [68]). WorkCover does not complain of that approach. It relied upon events subsequent to the provision of Ms Castle's advice in November 2002 as being relevant to the question whether disclosure of the disputed documents would be contrary to the public interest.

103 That evidence disclosed the following. In February 2003 the *1995 Regulation* was further amended by the *Workers Compensation (General) Amendment (Costs in Compensation Matters) Regulation* 2003 (the "*2003 Regulation*"). The object of the *2003 Regulation*, as described in the Explanatory Note, was (inter alia) to provide for some additional costs to be recoverable by legal practitioners or agents acting in a claim for workers compensation and to increase the amount of costs currently recoverable for some activities or events.

104 In July 2003, following representations by the Law Society, the Hon John Della Bosca MLC appointed the Hon John Clarke QC to undertake a further review of the *1995 Regulation*. On 29 June 2004 Mr Clarke provided a confidential report to the Minister which emphasised the importance of regular reviews of workers compensation costs to ensure the system continued to work efficiently (CB 140). On 4 August 2004 the Minister gave the Law Society a copy of Mr Clarke's report.

105 Two witnesses addressed the asserted public interest in non-disclosure of the disputed documents: Ms Grant, the Director of the Legal Group of WorkCover and Mr McInnes, the Assistant General Manager in the Insurance Group of WorkCover. They said the disputed documents came into existence as part of a continuing review of the workers compensation costs scheme about which WorkCover and the Law Society held divergent views. They contended it was in the public interest that WorkCover should not be inhibited from seeking advice and that it would be if the disputed documents were released. Disclosure would inhibit WorkCover in formulating advice to the Minister and would lead to an imbalance in the review process. The Law Society would obtain access to WorkCover's information but WorkCover would not obtain access to information in the Law Society's possession.

106 Ms Grant referred to the difficulties the Workers Compensation Commission had had in persuading the legal profession of the desirability and adequacy of the new arrangements. She opined that release of the disputed documents could detrimentally affect the development of a relationship that was essential if the Commission was to continue work effectively: *Working Documents Decision* at [54]. She also said that, in WorkCover's view, Ms Castle's documents contained errors, misunderstandings or false assumptions and their release would "not promote … productive dialogue with the Law Society": *Working Documents Decision* at [55]-[56].

107 Mr Richardson, the Chief Executive Officer of the Law Society, gave evidence that the Law Society had understood the 2002 review to be "collegiate in nature and information provided by participants was to be shared": *Working Documents Decision* at [31]. To that end, Mr Richardson deposed that the Law Society had "in good faith, shared its information with WorkCover and Ms Castle in the context of the Review, believing this would be reciprocated". He asserted that the Law Society believed there was "a strong public interest in ensuring that partnerships between government and non-government bodies, such as is embodied in the review process, remain viable" and that "the withholding from a review process partner of the documents the subject of this action would make a mockery of the process": *Working Documents Decision* at [34]-[35].

108 WorkCover argued before the Appeal Panel that the public interest militated against disclosure of the disputed documents because they had been commissioned at a high level of government in order to enable it to advise the Minister on proposed amendments to legislation and because of "the sensitive and high level at which discussions occurred within the review panel": *Working Documents Decision* at [64].

109 The Appeal Panel rejected the Law Society's collegiality argument. It concluded that WorkCover had not guaranteed "openness" in the process insofar as it related to the disputed documents. It found that WorkCover had turned to Ms Castle for confidential advice: *Working Documents Decision* at [59]-[60].

110 The Appeal Panel noted (at [61]) that "[p]ublic interest considerations in favour of disclosure relate… 'to the fulfilment of the democratic objectives of the *FOI Act* to promote openness, accountability and responsibility of government' " and observed that "[t]hese objectives are promoted through the transparency of government decision-making processes, even when such transparency involves the revelation of information embarrassing to, or critical of, the government agency concerned." It then considered the circumstances in which the public interest in disclosure of government documents may be outweighed by other public interest considerations.

111 WorkCover relied on three of the "Howard Factors" Davies J formulated (see *Re Howard and Treasurer of Commonwealth of Australia* (1985) 7 ALD 626) in support of its "high level of communication" argument. Those factors were (*Re Howard* at 634-635):

"(a) the higher the office of the persons between whom the communications pass and the more sensitive the issues involved in the communication, the more likely it will be that the communication should not be disclosed;

(b) disclosure of communications made in the course of the development and subsequent promulgation of policy tends not to be in the public interest;

…

(e) disclosure of documents which do not fairly disclose the reasons for a decision subsequently taken may be unfair to a decision-maker and may prejudice the integrity of the decision-making process."

112 Dealing with that argument, the Appeal Panel referred to *Re Eccleston and Department of Family Services, Aboriginal & Islander Affairs* [1993] 1 QAR 60 in

which the Queensland Information Commissioner was critical of Davies J's formulation of general principles to indicate when disclosure of a deliberative process document was likely to be contrary to the public interest, preferring (at [140], [150]) a test which required scrutinising the documents sought "for factors that may point to tangible harm" which would follow from their disclosure. The Appeal Panel agreed (at [68]) that the emphasis should be "more on the question of what 'tangible harm' will result from release".

113 The Appeal Panel also referred (at [69]) to observations in *Re Chapman & Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 43 ALD 139 (at [26]) to the effect that Davies J, in *Re Howard*, had envisaged a flexible approach to the identification of what was contrary to the public interest and had qualified his enunciation of principles by saying that the "extent to which disclosure of internal working documents is in the public interest will more clearly emerge" over time.

114 In the light of these authorities, the Appeal Panel held (at [70]) that the high level at which communications take place was neither a "determinative or even a highly influential factor in deciding whether it is in the public interest for documents to be disclosed" and that this approach was consistent with the object of the *FOI Act* "to extend, as far as possible, the rights of the public to obtain access to information held by the Government (s 5(1)(a))". Accordingly it concluded (at [71]) that "although Ms Castle's report was commissioned in the context of the formulation of policy conducted in a politically sensitive environment at a high level of government, these [were] merely considerations to be weighed in the balance, and are not determinative."

115 WorkCover submitted that there was an ongoing public interest in the confidentiality of the disputed documents as the matters to which they related were still under active consideration by government and "disclosure might seriously impair the continuing process of decision-making within WorkCover". This submission was based on the second of the Howard Factors.

116 The Appeal Panel recognised (at [72]) that there was a public interest in maintaining the confidentiality of documents when internal deliberations had not been finalised. There was a factual controversy before it as to whether the review process of which the disputed documents formed part was ongoing. WorkCover submitted that the review was part of its continuing consultation with the Law Society concerning solicitors' costs in workers compensation matters. The Law Society argued that the *2003 Regulation* represented the end of the 2002 process, that the Clarke review was a new stage and that although Ms Castle's 2002 report was not described as "final", it was the last report she wrote and there was no suggestion that she was continuing to work on it: *Working Documents Decision* at [74]-[75].

117 The Appeal Panel (at [78]) distinguished *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236, upon which WorkCover relied, on the basis that the interim report whose disclosure was sought awaited comments by a person adversely affected by it, whereas "Ms Castle's report was her last report."

118 The Appeal Panel concluded (at [82]) that while the question whether deliberations could be regarded as final was one of degree, a point of "intermediate

conclusion" had been reached when the *2003 Regulation* was made. It said (at [83]), in relation to the disputed documents, "a report was left in draft, and there was no reasonable prospect of it being revisited after the making of the relevant costs regulation". It acknowledged the *2003 Regulation* remained subject to review and also that some of the issues dealt with by the 2002 Review Committee remained relevant, but concluded "the original process of decision-making ended with the Minister's decision as to the appropriate scale of costs": *Working Documents Decision* (at [85]).

119 It therefore rejected WorkCover's argument that the disputed documents related to an ongoing controversy between the Law Society and WorkCover over the costs scale in workers compensation matters. It observed that, even without disagreement, there would always be dialogue over issues of remuneration between the Law Society and WorkCover and that that "ongoing dynamic" could not be given "any significant weight in determining whether release of the Castle documents is against the public interest".

120 The Appeal Panel also rejected WorkCover's "informational imbalance" argument. First, it pointed out that such an "imbalance" was "a necessary result of the legislative policy of confining the right of access to official documents to those documents held by government": *Working Documents Decision* at [87]. Secondly, it observed:
"88 We do not think that any significant weight can be given to the 'imbalance' argument as such. It is, of course, a different matter if it can be shown that some tangible harm might result …."

121 It concluded that adopting the informational imbalance argument would "have a significant chilling effect on the availability of documents connected with past controversies in ongoing relationships": *Working Documents Decision* at [89].

122 In dealing with WorkCover's contention that Ms Castle's documents contained errors, the Appeal Panel noted that while Ms Castle had not had the opportunity to respond to that assertion, on its perusal of her work it was not apparent that it was "not competently responsive to the instructions that she received". The Panel also observed that it found it "difficult to understand what risks there are to the effective functioning of government in releasing a document that is seen to be affected by mistakes or mistaken assumptions, especially if the government agency takes the extra step and provides information as to what the mistakes and mistaken assumptions were": *Working Documents Decision* at [90].

123 Finally, while the Appeal Panel acknowledged that WorkCover's original decision to refuse access insofar as it relied on the internal working document exemption might have been correct in February 2003, it did not consider the interests favouring non-disclosure were as strong as they may have been in 2003. It concluded that the internal working documents claim for exemption had not been made out: *Working Documents Decision* at [91]-[96].

The Appeal Panel: confidential material exemption

124 Ms Castle's retainer with WorkCover contained a clause requiring her to maintain the confidentiality of information provided to her pursuant to the retainer. WorkCover

argued that it was an implied term of her retainer that it would not disclose her draft reports to third parties. The Appeal Panel concluded that the absence of an express clause in Ms Castle's retainer requiring it to maintain confidentiality suggested that WorkCover was at liberty to disclose her report (*Working Documents Decision* at [102]) and it rejected WorkCover's reliance upon the confidentiality ground of exemption.

The Appeal Panel: the secrecy exemption

125 WorkCover argued the disputed documents were exempt from production because all WorkCover employees were obliged to keep information they acquired in the course of their duties confidential. It submitted that obligation arose from s 243 of the *Workplace Injury Management and Workers Compensation Act* 1998 (the "1998 Act") which provides:

"**243. Disclosure of information**
(1) A person must not disclose any information obtained in connection with the administration or execution of this Act unless that disclosure is made:
(a) with the consent of the person from whom the information was obtained, or
(b) in connection with the administration or execution of this Act, or
(c) for the purposes of any legal proceedings arising out of this Act or of any report of any such proceedings, or
(d) in accordance with section 72 (Inspection of relevant claims information etc), or
(e) in accordance with the requirement imposed under Ombudsmen Act 1974, or
(f) with other lawful excuse.
Maximum penalty: 50 penalty units or imprisonment for 2 years.

126 The Appeal Panel noted the tension between cl 12(1) and (2) of Schedule 1 of the *FOI Act* (quoted at [17[) insofar as sub-cl (1) confers a secrecy exemption where disclosure would be an offence even if it was subject to qualifications, whereas sub-cl (2) provides that a document is not exempt unless its disclosure to the person seeking access would constitute such an offence.

127 The Appeal Panel resolved this tension by saying cl 12 should be interpreted so as to preserve the effective operation of the *FOI Act*. It said that the clearest case where cl 12 would be applicable was where there was "a close or precise correspondence between the type of matter the subject of the claim for exemption and then a description of matter of the same type in the offence provision"*: Working Documents Decision* at [113]. It characterised WorkCover's claim under the secrecy exemption and s 243 as a global, rather than selective, one: *Working Documents Decision* at [119]

128 It noted that provisions like s 243 were "a common place of public service administration in Australia" and cited many examples in New South Wales legislation: *Working Documents Decision* at [130]. It construed sub-cl 12(2) as an attempt to ameliorate the possibility that the secrecy exemption would "operate as a vehicle which would … allow an agency to refuse any agency document on the basis that disclosure under the *Freedom of Information Act* would infringe a global provision concerning confidentiality on all documents held by the agency": *Working Documents Decision* at [133]-[134].

129 The Appeal Panel concluded that if it gave cl 12 the broad and literal interpretation WorkCover advocated, the *FOI Act* "would, as a practical matter, cease to have any application to many parts of the New South Wales Public Service": *Working Documents Decision* at [137].

130 It then noted (at [140] that the disputed documents were obtained "to assist WorkCover in its negotiations to achieve implementation of Government policy" and was the "kind of advice … often released selectively to bolster positions taken in deliberations and negotiations". It observed that there was "no specific guidance in the legislation as to how such advices are to be treated". Presumably this was a reference to the 1998 Act.

131 The Appeal Panel then turned to consider whether WorkCover had discharged its s 61 onus of establishing that the nature of the disputed documents was such that their disclosure would constitute an offence. It listed some factors it considered should be taken into account in this respect, being (at [144]):

"(a) the degree of direction given by the legislation to the agency as to how the kind of information under notice is to be managed and divulged;
(b) the breadth of any powers given to the agency to release the kind of information under notice;
(c) the intrinsic sensitivity of the information; and
(d) the likelihood that information of this kind would ever be released to the applicant having regard to the wider circumstances of the relationship between the applicant and the agency, to the extent that they are known."

132 It noted (at [145]) that "under global confidentiality provisions maximum latitude and discretion as to how its information is handled is left to the officers of the agency … [as] a matter of operational judgment".

133 It held (at [153]) that the closing words of cl 12(1) ("whether or not the provision that creates the offence is subject to specified qualifications or exceptions") were not intended to create a blanket prohibition of disclosure under the *FOI Act* where the qualifications and exceptions in a secrecy provision would permit disclosure.
134 The Appeal Panel concluded (at [176]), albeit in somewhat obscure terms, that having regard to the global nature of the s 243 prohibition, WorkCover had not discharged its s 61 onus.

135 The Law Society had argued that disclosure of the disputed documents would not constitute an offence under s 243, either because their disclosure pursuant to an *FOI Act* request would be consistent with the lawful administration of WorkCover's functions under the 1998 Act (s 243(1)(b)) or because such disclosure would be with lawful excuse (s 243(1)(f)). The Appeal Panel accepted those contentions (*Working Documents Decision* at [168], [171]).

Internal working documents claim: submissions

136 WorkCover's first ground of appeal is that the Appeal Panel misconstrued cl 9(1)(b) by adopting a tangible harm test and had, therefore, misdirected itself on the question whether disclosure of the documents would be contrary to the public interest.

137 WorkCover also submitted that by adopting a tangible harm test, the Appeal Panel excluded from consideration the matters of public interest it had advanced to justify non-disclosure. It argued that the question whether it may be contrary to the public interest for a document to be released was a different question from whether release would result in tangible harm and that the latter question set too high a threshold, and effectively precluded the cl 9(1)(b) balancing exercise. It contended the Appeal Panel should have adopted a test of possibility, probability or real chance of harm.

138 WorkCover's second complaint concerns the Appeal Panel's conclusion that a point of intermediate conclusion in the review process had been reached. WorkCover submitted this conclusion showed a fundamental misunderstanding of the relevance to the public interest test of the interim or draft nature of a report.

139 WorkCover argued that the Appeal Panel had taken an irrelevant consideration into account in having regard to the level of disagreement between the parties. It contended that the question whether disclosure would harm the relationship between the parties could not be a relevant consideration in determining the public interest.

140 WorkCover criticised the Appeal Panel's assessment (at [91]) that different factors were in play when the Law Society first sought access to the disputed documents compared to those existing at the time of its decision.

141 WorkCover's final ground of appeal under the internal working documents exemption was that the Appeal Panel had erred in failing to take into account that the integrity of government may be damaged by assuming the relevant agency can issue a correcting statement.

142 It contended there was no basis in the *FOI Act* for limiting the construction or operation of the exemptions by the consideration that any damage to the public interest may be remedied by the agency issuing a rectifying statement. It argued that it was for the Appeal Panel to balance the competing public interest appropriately, without resort to any assumption that agency action would be taken, or would be effective, to protect the integrity of its decision-making in the aftermath of disclosure. It referred, in this respect to *Re McKinnon and Secretary, Department of Family and Community Services* [2004] AATA 1364; (2004) 86 ALD 138 at [49] where Downes J was critical of a submission that release of documents might not mislead because Treasury had adequate facilities to explain them or put them in context, saying, relevantly, "…the [Commonwealth FOI] Act does not provide that an exempt document can cease to be exempt if the Commonwealth or its relevant agency can publish further information which will correct the circumstance which caused the document to be exempt"

143 The Law Society submitted that the Appeal Panel approached its task correctly on the basis that it was required to weigh the competing public interests and that it had not substituted a test of "tangible harm". It contended that the Appeal Panel's

references to “tangible harm” were made in the context of it conducting the public interest balancing exercise. It submitted that the Appeal Panel’s approach was consistent with authorities which emphasised that the question where the public interest lies is a discretionary factual judgment to be made by reference to undefined factual matters having regard to the subject, scope and purpose of the statutory context (*O’Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210 at 216) and was not easily susceptible to judicial review (*Australian Securities Commission v Deloitte Touche Tohmatsu* (1996) 70 FCR 93 at 123-124).

144 The Law Society next argued that many of the matters raised by WorkCover did not involve a question of law but were a thinly veiled attempt to have this Court review the merits of the Appeal Panel’s decision.

145 The Law Society contended that the Appeal Panel was entitled to take into account in the balancing exercise the level of disagreement between the parties. It submitted that the Appeal Panel’s conclusion that, by the time it was considering the issue of release, dealings between the Law Society and WorkCover were “constructive” was a finding of fact which was not an irrelevant consideration in the sense described in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24. It argued that WorkCover’s complaint that the Appeal Panel dismissed the informational imbalance issue and therefore failed to take into account a relevant consideration was incorrect. Rather, it submitted, the Appeal Panel had not attributed “significant weight” to that issue (at [88]) an approach which was open to it.

Internal working documents exemption: consideration

146 “The expression ‘in the public interest’, when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only ‘in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view’”: *O'Sullivan v Farrer* (at 216 per Mason CJ, Brennan, Dawson and Gaudron JJ). Determining where the public interest lies is a question of fact and degree: *Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia* [1987] HCA 27; (1987) 61 ALJR 393 at 395.

147 The *FOI Act* enshrines a “general policy of disclosure” of official information, reflected in its long title which relevantly describes it as, “[a]n Act to require information concerning documents held by the Government to be made available to the public, to enable a member of the public to obtain access to documents held by the Government”: see *Commissioner of Police v District Court of New South Wales & Anor* (1993) 31 NSWLR 606 at 613 per Kirby P. It operates on the premise that there is a public interest in the public having access to Government information to facilitate the public’s ability to “discuss, review and criticize government action”: see *The Commonwealth of Australia v John Fairfax & Sons Ltd* [1980] HCA 44; (1980) 147 CLR 39 at 52 per Mason J. This reflects the proposition in that “governments act, or … are constitutionally required to act, in the public interest … information is held, received and imparted by governments, their departments and agencies to further the public interest”: *Attorney-General (UK) v Heinemann Publishers Pty Ltd* [*No 2*] (1987) 10 NSWLR 86 at 191 per McHugh JA; see also *Australian Capital Television*

Pty Ltd v Commonwealth (No 2) [1992] HCA 45; (1992) 177 CLR 106 at 137-140 per Mason CJ.

148 Section 5(3) of the *FOI Act* requires that it be interpreted and applied so as to further its objects. In *Victorian Public Service Board v Wright* [1986] HCA 16; (1986) 160 CLR 145 at 153, the High Court observed in relation to the substantially similar objects provisions of the *Freedom of Information Act* 1982 (Vic), that it was "proper to give to the relevant provisions of the Act a construction which would further, rather than hinder, free access to information."

149 In *News Corporation Ltd v National Companies & Securities Commission (No 4)* (1984) 1 FCR 64 at 66, Bowen CJ and Fisher J said, when considering rights of access pursuant to the *Freedom of Information Act* 1982 (Cth), that they did not favour adopting the approach of leaning towards "a wide interpretation of the provisions of the Act but when considering exemptions … lean[ing] towards a narrow interpretation", saying "[t]he rights of access and the exemptions are designed to give a correct balance of the competing public interests involved…[and] [e]ach is to be interpreted according to the words used, bearing in mind the stated object of the Act." *News Corporation* was followed by the Full Federal Court in *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Anor* (1992) 36 FCR 111 at 115.

150 This Court should follow, as a matter of judicial comity, the approach taken by the Full Federal Court; *Australian Securities Commission v Marlborough Gold Mines Limited* [1993] HCA 15; (1993) 177 CLR 480 at 482. It accords with Mahoney JA's observation in *Commissioner of Police v District Court of New South Wales & Anor* (at 639–640) that in s 16 (which provides that a person has a legally enforceable right to be given access to an agency's documents in accordance with *the Act*) the legislature had "adopted the principle that a citizen should have access to documents held by Government agencies", but added that "that principle must be subject to exceptions and qualifications" and that "[t]he precise terms of the [exception] clause should govern the extent of the remedy available."

151 The Full Federal Court's approach, in my view, accords with the s 5(3) obligation to interpret and apply the *FOI Act* so as to further its objects, bearing in mind that while the *Act* gives a legally enforceable right to be given access to documents held by the Government, that right is subject to such restrictions as are reasonably necessary for the proper administration of the Government: s 5(2)(a) and (b). Determining whether documents should be disclosed involves balancing those two matters. Thus, as Beaumont J said, testing whether disclosure of documents would be contrary to the public interest requires the decision-maker "to weigh the public interest in citizens being informed of the processes of their Government and its agencies on the one hand against the public interest in the proper working of Government and its agencies on the other: *Harris v Australian Broadcasting Corporation* (at 246).

152 Davies J's formulation of the Howard Factors was informed by authorities dealing with Crown privilege and exemption (b)(5) in the *Freedom of Information Act* (US) which, he said (at 634) "throw light upon the elements of the public interest to be considered and the circumstances in which traditionally it has been thought that the reservation of documents from public view should be maintained." While he accepted

that each case required an examination of the whole of the circumstances, "including any public benefit perceived in the disclosure of the documents sought", he thought it appropriate to devise the list of factors upon which WorkCover sought to rely.

153 *Re Howard* was decided early in the operation of the Commonwealth *Freedom of Information Act* 1982. Davies J was acutely conscious of this as is made plain when, after articulating the Howard Factors, he observed (at 635):

"As time goes by, experience will be gained of the operation of the Act. The extent to which disclosure of internal working documents is in the public interest will more clearly emerge. Presently, there must often be an element of conjecture in a decision as to the public interest."

His Honour may well have had in mind, in so remarking, the shift in emphasis which occurred over time in the interpretation of the deliberative processes exemption, (b)(5), of the United States' *Freedom of Information Act* 1966: see Beaumont J's discussion in *Harris v Australian Broadcasting Corporation* (at 561-563).

154 With the benefit of hindsight it might more confidently be said that the Crown privilege authorities to which Davies J referred for guidance were not an apt point of reference. They were decided in an era in which, as Kirby P explained in *Commissioner of Police v District Court of New South Wales & Anor* (at 611), "the administrative tradition of New South Wales followed that of Britain, from which it was derived [and] embraced a high measure of secrecy and was far from open". Case law tended to reflect that stance, as might be seen in the passage from *Conway v Rimmer* [1968] AC 910 (at 952) to which Davies J referred (*Re Howard* at 634). Freedom of information legislation, as the earlier discussion reveals, was intended to cast aside the era of closed government and principles developed in that era may, with the benefit of twenty or more years of experience, be seen as anachronisms.

155 In *Re Eccleston* the Queensland Information Commissioner sought to articulate the concept of public interest in the freedom of information context. It was in that light that he observed (at [101]) that the Howard Factors were "with the benefit of hindsight … an ill-advised attempt to formulate a list of five general principles to indicate when disclosure of a deliberative process document is likely to be contrary to the public interest". It is unnecessary to examine *Re Eccleston* in detail. It suffices to observe that the Commissioner's criticism of *Re Howard* might be thought, with respect, to have placed insufficient weight on what Davies J himself acknowledged was of necessity a somewhat conjectural exercise.

156 *Re Eccleston* emphasised that agencies considering freedom of information act applications should not determine them by a mechanistic application of the Howard Factors but, rather, should consider whether, in the particular case, "tangible harm" would flow from disclosure of the contents of the documents sought: *Re Eccleston* at [139] – [140], [150]. At one level, the Commissioner was emphasising that claims for exemption based on disclosure being contrary to the public interest should have a demonstrated factual basis rather than baldly iterate one or other of the Howard Factors. At another, he was emphasising that the public interest test should not be circumscribed.

157 I also accept that the operation of cl 9(1)(b) should not be constrained by rigid rules. As one commentator has observed, the formulation of determinative guidelines "runs contrary to the rationale for including a flexible, open-ended test": *Freedom of Information and Privacy in Australia: government and information access in the modern state"*, Moira Paterson, 2005, LexisNexis Butterworths at [7.12]. That does not mean that guidelines such as the Howard factors are to be discarded, although it would be wise to have regard to the historical context in which they were formulated. They may be regarded as "empiric conclusions … not … determinative guidelines": *Re Rae and Department of Prime Minister and Cabinet* (1986) 12 ALD 589 at 597.

158 I do not understand that the Appeal Panel substituted an impermissible "tangible harm" test for the cl 9(1)(b) balancing exercise. It looked at the public interest in favour of disclosure and tested against it the matters favouring non-disclosure advanced by WorkCover. It rejected, correctly in my view, the proposition that that question could be resolved by formulaic recourse to the Howard factors. Its references to "tangible harm" were made in the context of WorkCover's obligation to demonstrate, as a factual rather than theoretical proposition, that disclosure would be contrary to the public interest.

159 WorkCover's primary challenge to the Appeal Panel's consideration of its cl 9(1)(b) exemption must fail.

160 I turn to WorkCover's second (intermediate conclusion) complaint and its submission that the Appeal Panel misunderstood the relevance to the public interest of the interim or draft nature of a report. It complained, in particular, that the Appeal Panel had erroneously distinguished *Harris v Australian Broadcasting Corporation* in which Beaumont J held that disclosure of an interim report was contrary to the public interest because it might "create a misleading, perhaps unfair, impression in the minds of readers who do not have the benefit, if there be any, of knowing the response of the applicant".

161 *Harris v Australian Broadcasting Corporation* is not authority for a principle of law that disclosure of draft reports is contrary to the public interest because of their potential to mislead. Moreover it was decided in a significantly different legislative context in that the Commonwealth *Freedom of Information Act* does not, and did not then, contain a provision like s 59A of the *FOI Act.*
162 Section 59A(b) provides that the possibility that disclosure may cause the applicant to misinterpret the information is irrelevant in considering whether disclosure is contrary to the public interest. Ms Allars accepted the force of s 59A in the context of release of the disputed documents to the Law Society, but sought to maintain WorkCover's position by reference to the potential for the draft reports to mislead the public at large. The cl 9(1)(b) public interest issue should, in my view, be determined by reference to the facts of the particular application, not by reliance upon theoretical possibilities which might flow if disclosed documents thereafter gained wider release.

163 The Appeal Panel did not refer to s 59A but its provisions, in my view, reinforce its decision on this aspect.

164 Section 59A(a) renders matters such as the embarrassment or loss of confidence in the Government resulting from disclosure of documents irrelevant to the question whether disclosure is contrary to the public interest. This is consistent with the policy of the Act.

165 I can discern no error of law in the Appeal Panel's disposition of the draft document submission.

166 WorkCover's irrelevant/relevant considerations grounds of appeal appears to strike at the balancing exercise the Appeal Panel undertook on the public interest point. In this regard the Court must be careful not to trespass on the merits. As Mason CJ, Wilson and Dawson JJ observed in *Re Queensland Electricity Commission; Ex parte Electrical Trade Union* at 395, 396:

"Ascertainment in any particular case of where the public interest lies will often depend on a balancing of interests, including competing public interests, and be very much a question of fact and degree … Failure by the Commission to give sufficient weight to a relevant factor in coming to its decision would not establish a constructive refusal to exercise jurisdiction. Indeed, generally speaking, such a failure does not even entitle an appellate court to overturn the discretionary decision of a primary judge: see *Gronow v Gronow* (1979) 144 CLR 513 at 519–20; 29 ALR 129. A fortiori, in a case such as the present, to embark on an evaluation of the weight accorded by the Commission to competing public interests necessarily involves an impermissible inquiry into the merits of the case."

167 WorkCover's attempt to attack the matters the Appeal Panel took into consideration raised issues of fact. To the extent the Appeal Panel observed that WorkCover could issue a correcting statement if necessary, I do not accept WorkCover's submission that this could never be a relevant consideration. Each case must turn on its facts. The question of the potential of a document to mislead must be weighed in the balance in determining whether a document is exempt, as too, must the potential to correct any misleading impression. Moreover s 59A demonstrates a legislative intention that disclosure of incomplete or possibly misleading documents does not detract from the public interest in disclosure.

168 The argument that the Appeal Panel failed to give weight to Ms Grant's uncontradicted evidence that the release of the documents would damage effective dialogue between the parties did not raise a question of law.

169 Finally WorkCover complained that the Appeal Panel failed to deal with its submission that there was a public interest in maintaining confidentiality of draft reports provided by external consultants to government agencies, but no error of law arises merely because a decision-maker fails to address each submission made to it (see *Kiama Constructions Pty Ltd v Davey* (1996) 40 NSWLR 639 at 648-649). I also accept, as the Law Society argued, that the Appeal Panel dealt with this issue when it rejected the cl 13 (confidentiality) exemption.

170 In my view the Appeal Panel did not err in law in determining WorkCover's internal working documents claim for exemption.

Confidential documents exemption: consideration

171 WorkCover's complaint that the Appeal Panel erred in rejecting its submission that it was an implied term of Ms Castle's retainer that any draft report she provided to WorkCover on the basis that it would not be disclosed to third parties was somewhat faintly made.

172 WorkCover argued that an implied term that neither party to the contract would disclose a draft or final report to the Law Society was necessary to make Ms Castle's retainer work and was so obvious that it went without saying: *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* [1982] HCA 24; (1982) 149 CLR 337 at 354, 404. It submitted that the circumstances imported an obligation of confidence on its part as well as Ms Castle's, and the Appeal Panel had erred in concluding that it had not established the cl 13(a) exemption.

173 The Law Society relied on the Consultancy Agreement which imposed an express obligation of confidentiality on Ms Castle, but none on WorkCover and submitted that that a wider confidentiality obligation was not to be implied because the parties would not have regarded such a clause as necessary to give the retainer business efficacy.

174 The Appeal Panel concluded (at [107]) that the retainer placed "no explicit… obligation" of non-disclosure on WorkCover, that none could be implied and that the disputed documents did not contain matters whose disclosure would "disclose information obtained in confidence": cl 13(b)(i). No error of law is identified in relation to it.

175 The Appeal Panel did not err in law in rejecting WorkCover's confidentiality claim for exemption.

Secrecy exemption: consideration

176 Ms Allars accepted that disclosure of the disputed documents because of a requirement under the *FOI Act* would be a disclosure "with lawful excuse" within s 243(1)(f) of the *Workplace Injury Management and Workers Compensation Act* 1998. She also accepted that such a disclosure would not, therefore, constitute an offence. She accepted that the consequence of this was that the disputed documents fell within cl 12(2) (quoted at [17]) but asserted that cl 12(1) was, prima facie, applicable and the documents were exempt.

177 The Law Society argued that WorkCover's proposed construction would produce absurd consequences and impermissibly read down cl 12(2).

178 In my view the tension between cl 12(1) and cl 12(2) which concerned the Appeal Panel is more apparent than real. Clause 12(1) is a general provision which establishes that a document is prima facie exempt if its disclosure would constitute an offence, whether or not the provision creating the offence is subject to defeasance by virtue of one or more qualifications or exceptions.

179 Clause 12(2) is a specific provision which provides that if disclosure of the documents would not constitute an offence because it would fall within some

qualification, exception or excuse, they are not exempt.

180 This construction recognises the presumed intention of parliament that where there is a conflict between general and specific provisions, the specific provision prevails (*generalia specialibus non derogant*): see *Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation* [1948] HCA 24; (1948) 77 CLR 1 at 29 per Dixon J; *Smith, Ferguson, Forti, Grimshaw & Coburn v R* [1994] HCA 60; (1994) 181 CLR 338 at 348 per Mason CJ, Dawson, Gaudron and McHugh JJ.

181 Accordingly the Appeal Panel did not err in law in rejecting WorkCover's secrecy exemption claim.

Orders

182 Both appeals should be dismissed with costs.

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Amendments

24/04/2006 - dates is full - Paragraph(s) cover sheet