ALRC REPORT 107: CLIENT LEGAL PRIVILEGE IN FEDERAL INVESTIGATIONS

The Australian Law Reform Commission (ALRC) has recommended 45 changes to the handling of claims of client legal privilege over material sought by federal investigatory bodies and royal commissions of inquiry. The ALRC report *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, tabled in Parliament on 13 February 2008, is the culmination of a year-long public inquiry into this controversial area highlighted in the report of the AWB Royal Commission.

'Our inquiry found general support for maintaining privilege as a fundamental right of clients, which only should be abrogated or modified in exceptional circumstances,' said ALRC President, Prof David Weisbrot. 'When properly exercised, privilege encourages compliance with the law, by creating an environment in which clients can make full and frank disclosure and receive accurate legal advice. **'**

'However, privilege must be balanced with the other public interest in ensuring efficient, effective investigations. Unfortunately, there are cases in which it appears claims of privilege have been used primarily to delay or frustrate investigations—with some disputes taking years to resolve. Many of our recommendations focus on streamlining the process for handling claims of privilege, and deterring or punishing abuses.'

Professor Rosalind Croucher, Commissioner in charge of the Inquiry, said that the central idea behind the ALRC's recommendations is the need for a single federal statute addressing the application of privilege in all federal investigations.

'Our research identified over 40 federal investigatory bodies with coercive information-gathering powers, as well as Royal Commissions. These include: law enforcement agencies, such as the Australian Federal Police; bodies concerned with the collection or administration of public funds—such as the ATO, Medicare and Centrelink; the major corporate regulators, such as ASIC and the ACCC; and a number of smaller, specialised regulators focusing on specific industries, such as the Fisheries Management Authority.

'There are many dozens of federal laws that address the powers of these bodies. However, most of this legislation is silent on the application of client legal privilege, and where it is addressed, there is no consistent approach—creating confusion and cost for clients, lawyers and investigators. A single federal statute would make clear that privilege applies unless expressly modified or abrogated by another statute, as well as establishing a system in which regulators and clients would have to operate in a much more open and transparent manner, according to published policies.'

Other key proposals include:

- extending privilege to advice on tax law provided by accountants, where that advice is sought by the Australian Taxation Office (ATO)—in effect, formalising the ATO 'accountants concession'.
- introducing a model fast-track procedure for resolving disputes about privilege;
- improving lawyers' understanding of their legal and ethical obligations in this complex area, through targeted legal education; and

- clarifying and strengthening the professional disciplinary procedures to apply in cases where the assertion or maintenance of privilege claims may amount to unethical conduct.

The report *Privilege in Perspective: Client Legal Privilege in Federal Investigations* is available electronically from the ALRC website, www.alrc.gov.au.

Background

The ALRC was asked to undertake this Inquiry into federal bodies with coercive information-gathering powers in relation to the application of client legal privilege in the context of federal investigations and Royal Commissions of Inquiry.

A number of high profile federal Royal Commissions in recent years, including: the inquiry into the Australian Wheat Board; HIH Insurance; and the building and construction industry have highlighted the need for clarification of the application of privilege in the context of federal investigations. In *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (*Daniels*), concerning the ACCC's coercive power under s 155 of the *Trade Practices Act 1974* (Cth) (TPA), the High Court of Australia held that client legal privilege only could be abrogated expressly or by necessary implication.

Other recommendations included: the enactment of a statute of general application to cover aspects of the law and procedure governing client legal privilege claims in federal investigations; the setting out of procedures with respect to the making and resolution of client legal privilege claims; and the extension of privilege, in defined circumstances, to include tax advice.

The ALRC also recommended certain circumstances where it may be appropriate to abrogate privilege in federal investigations; the safeguards that should apply when privilege is abrogated; and suggestions to lawyers when handling claims of client legal privilege through better education and the disciplinary process.

When abrogation may be appropriate

The ALRC considered that federal bodies could achieve greater efficiency and effectiveness in relation to claims of client legal privilege by giving higher priority to the interests of investigatory agencies in accessing information than to the interests served by maintaining privilege—as, for example, in the *James Hardie (Investigations and Proceedings) Act 2004* (Cth), that abrogated client legal privilege in relation to certain material and allowed its use in investigations of the James Hardie Group and any related proceedings; and the *Royal Commissions Act 1923* (NSW).