

## CASE NOTE

**ESSO AUSTRALIA RESOURCES LTD v  
COMMISSIONER OF TAXATION†**

CHESTER BROWN\*

## I. INTRODUCTION

In 1976, the High Court of Australia held in *Grant v Downs* (“*Grant*”)<sup>1</sup> by majority that the test at common law for determining whether legal professional privilege, or client legal privilege as it is now sometimes referred to, attaches to an oral or written communication, was the sole purpose test. Under that test, “privilege will only attach to a confidential communication, oral or in writing, made for the sole purpose of obtaining or giving legal advice or assistance or of use in legal proceedings”.<sup>2</sup> Since 1995, this has been at odds with the provisions of the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW), which provide that the test to be applied to determine whether legal professional privilege attaches to communications is the dominant purpose test.<sup>3</sup> This is also the test which applies in many other common law jurisdictions, such as England,<sup>4</sup> Canada,<sup>5</sup> New Zealand<sup>6</sup> and Ireland.<sup>7</sup> This question again came before

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\* BA (Hons) LLB (Hons) (Melb); Sir Robert Menzies Memorial Scholar, 2000; Solicitor, Mallesons Stephen Jaques, Melbourne. I would like to thank Emiliios Kyrou for his comments on an earlier draft of this case note. The views expressed in this case note are my own and do not necessarily reflect the views of Mallesons Stephen Jaques.

† [1999] HCA 67 (“*Esso*”).

1 (1976) 135 CLR 674.

2 Note † *supra*. The sole purpose test has been applied in many cases: see, for example, the cases listed in S McNicol, *The Law of Privilege* (1992) 69, fn 150.

3 *Evidence Act 1995* (Cth) ss 118-19; *Evidence Act 1995* (NSW) ss 118-19 (hereafter referred to jointly as “the *Evidence Acts*”).

4 *Waugh v British Railways Board* [1980] AC 521.

5 *Levin v Boyce* [1985] 4 WWR 702; *Milton Farms Ltd v Dow Chemical Canada Inc* (1986) 13 CPC (2d) 174; *Doiron v Embree* (1987) 16 CPC (2d) 70; *Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co [No 1]* (1988) 22 CPR (3d) 290.

6 *Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart* [1985] 1 NZLR 596.

the High Court in 1999 in *Esso Australia Resources v Commissioner of Taxation* ("Esso").<sup>8</sup> In its judgment dated 21 December 1999, the High Court effectively overruled the decision in *Grant*, the majority of Gleeson CJ, Gaudron, Gummow and Callinan JJ holding that the sole purpose test should be replaced by the dominant purpose test.

In their joint judgment in *Esso*, Gleeson CJ, Gaudron and Gummow JJ noted that the different test for legal professional privilege in the *Evidence Acts* had given rise to certain problems. The *Evidence Acts* only apply to proceedings in federal courts, Australian Capital Territory courts and New South Wales courts. Moreover, the provisions of the *Evidence Acts* only apply to the adduction of evidence, and the common law applies to pre-trial proceedings.<sup>9</sup> Many judges had regarded this situation as "anomalous",<sup>10</sup> and ingenious arguments had been put to "overcome the lack of congruence between the statute and the common law".<sup>11</sup> In *Esso*, the appellant "invited the Court to reconsider *Grant v Downs*, and to declare that the dominant purpose test now represents the common law of Australia".<sup>12</sup>

This case note summarises the separate judgments of the High Court, which was constituted by Gleeson CJ, Gaudron, McHugh, Gummow, Kirby and Callinan JJ. Hayne J did not sit on the case. In Part II of this case note, the litigation before the Federal Court is briefly outlined. Part III then reviews the arguments which the appellant had submitted to the Full Court of the Federal Court, and considers the joint judgment of Gleeson CJ, Gaudron and Gummow JJ. The concurring judgment of Callinan J is also reviewed. Part IV deals with the dissenting judgments of McHugh J and Kirby J. In Part V, the decision is analysed, and the opinion is advanced that while the joint judgment may be sound from a practical point of view, the reasoning of the dissenting judges is very compelling, in particular the argument that a broadening of the scope of legal professional privilege does not accord with the underlying rationale for the privilege's existence. The possible practical implications of the decision are then highlighted, and it is suggested that the introduction of the dominant purpose test will see an increase in pre-trial interlocutory applications challenging claims of legal professional privilege. Finally, it is speculated that a way to curb the now extensive coverage of legal professional privilege remains open to the High Court, being a broadening of the doctrine of waiver of privilege.<sup>13</sup> However, this case note concludes that it is unlikely that the common law principles relating to privilege and waiver will be revisited in the foreseeable future, and that if the judiciary is minded to restrict the operation of privilege, this will be done by a stricter application of the dominant purpose test by the lower courts.

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7 *Silver Hill Duckling v Minister for Agriculture* [1987] IR 289.

8 Note † *supra*.

9 *Esso Australia Resources Ltd v Commissioner of Taxation* (1998) 83 FCR 511.

10 Note † *supra* at [6].

11 *Ibid.*

12 *Ibid.*

13 For more on the doctrine of waiver, see especially *Mann v Carnell* [1999] HCA 66 at [28]-[32]; *Goldberg v Ng* (1995) 185 CLR 83; *Thomason v Council of the Municipality of Campbelltown* (1939) 39 SR (NSW) 347 at 355; S McNicol, note 2 *supra*, pp 91-7.

## II. THE LITIGATION BEFORE THE FEDERAL COURT

In 1996, the appellant commenced proceedings in the Federal Court of Australia, appealing against amended income tax assessments.<sup>14</sup> Orders for discovery were made, and privilege was claimed in respect of 577 documents. In all cases where the claim of privilege was disputed, the dominant purpose test as contained in the *Evidence Act 1995 (Cth)* was relied upon. At first instance, Foster J of the Federal Court held that "the correct test for claiming legal professional privilege in relation to the production of discovered documents [was] the 'sole purpose' test as formulated by the High Court in *Grant v Downs*".<sup>15</sup> This was substantially upheld by the Full Court of the Federal Court (Black CJ, Sundberg and Finkelstein JJ, with Beaumont and Merkel JJ dissenting).<sup>16</sup>

## III. THE HIGH COURT MAJORITY: GLEESON CJ, GAUDRON AND GUMMOW JJ, AND CALLINAN J

In the appeal to the High Court, the appellant argued that the Court should declare that, at common law in Australia, the dominant purpose test applies to legal professional privilege in accordance with the view expressed in the dissenting judgment of Barwick CJ in *Grant*. Before considering this argument, the majority judges considered the arguments that had been put to the Full Court of the Federal Court.

### A. Consideration of the Appellant's Arguments before the Full Court of the Federal Court

#### (i) *Application of the Evidence Act 1995 (Cth)*

The appellant's first argument before the Full Court of the Federal Court was that it was not obliged to make certain written communications available for inspection by the respondent, on the basis that the provisions of the *Evidence Act 1995 (Cth)* applied to pre-trial proceedings.<sup>17</sup> The majority decision of the Full Court of the Federal Court held that this claim did not accord with the terms of ss 118-19 of the *Evidence Act 1995 (Cth)*, as the application of these provisions was limited to the admissibility of evidence at trial, and not to the production of written communications for inspection.

Section 118 of the *Evidence Act 1995 (Cth)* provides protection in respect of the adduction of evidence that would result in the disclosure of:

- (a) a confidential communication made between a client and a lawyer; or

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14 Note 9 *supra* at 514, per Black CJ and Sundberg J.

15 *Ibid* at [2].

16 *Ibid*.

17 *Ibid* at 518.

- (b) a confidential communication made between 2 or more lawyers acting for the client; or
- (c) the contents of a confidential document (whether delivered or not) prepared by the client or a lawyer;

for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.<sup>18</sup>

Section 119 provides protection in respect of the adduction of evidence that would result in the disclosure of:

- (a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made; or
- (b) the contents of a confidential document (whether delivered or not) that was prepared;

for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.<sup>19</sup>

In the Full Court of the Federal Court, Black CJ and Sundberg J had held that:

[T]he plain language of the sections is confirmed by the only directly relevant extrinsic material, which shows that Parliament intended the consequence that is said by the appellant to be anomalous ... Whether ss 118 and 119 extend to ancillary processes has been considered in a number of cases, and the answer consistently given is that they do not.<sup>20</sup>

In the High Court, Gleeson CJ, Gaudron and Gummow JJ agreed with the Full Court of the Federal Court's rejection of the appellant's first argument.

### (ii) *Development of the Common Law in Line with Statutory Change*

The appellant's second argument was that the common law should be treated as modified to reflect statutory change.<sup>21</sup> Before the Full Court of the Federal Court, the appellant had submitted that "even if the provisions of the *Evidence Act* did not directly apply to claims for privilege made in relation to discovery and inspection of documents... the common law, by analogy or derivation, should be treated as modified to accord with the statutory test".<sup>22</sup> The appellant sought support from the decision of McLelland CJ in *Equity in Telstra Corporation v Australis Media Holdings [No 1]*,<sup>23</sup> where his Honour noted that it was "anomalous" and "verging on the absurd" that different tests should apply

18 *The Evidence Acts*, note 3 *supra*, s 118.

19 *Ibid.*, s 119.

20 Note 9 *supra* at 518-19.

21 Note † *supra* at [13].

22 *Ibid.*

23 (1997) 41 NSWLR 277.

to a claim for privilege made in an ancillary process and a claim made at the stage of adducing evidence.<sup>24</sup>

This approach of McLelland CJ in Equity was adopted by the Full Court of the Federal Court in *Adelaide Steamships Co Ltd v Spalvins*<sup>25</sup> and the Court of Appeal of NSW in *Akins v Abigroup Ltd*.<sup>26</sup> In *Adelaide*, the Full Court of the Federal Court (composed of Olney, Kiefel and Finn JJ) held that the *Evidence Act* 1995 (Cth) had "created an entirely new setting to which the common law must now adapt itself".<sup>27</sup> This development seemed to accord with the dicta of Lord Diplock in *Warnick v J Townend & Sons (Hull) Ltd*,<sup>28</sup> where he said:

Where over a period of years there can be discerned a steady trend in legislation which reflects the view of successive Parliaments as to what the public interest demands in a particular field of law, development of the common law in that part of the same field which has been left to it ought to proceed upon a parallel rather than a diverging course.<sup>29</sup>

In *Esso*, Gleeson CJ, Gaudron and Gummow JJ recognised that the common law can develop in line with and as a response to statutory change, such as the development of the crime of conspiracy<sup>30</sup> and the doctrine of part performance.<sup>31</sup> However, their Honours (and the Full Court of the Federal Court)<sup>32</sup> found a fundamental difficulty with this line of reasoning. First, the legislation in question does not apply throughout Australia. In this respect, and in view of the fact that there were other minor differences between the position in NSW and federal courts and other courts in Australia, "there is no consistent pattern of legislative policy to which the common law in Australia can adapt itself".<sup>33</sup> Moreover, the United Kingdom authorities referred to the position in a unitary system of government with a single Parliament, and not to a federal state, and "[w]hat has occurred in Australia... cannot be said to reflect a consistent legislative view of what the public interest demands in relation to the law of legal professional privilege".<sup>34</sup>

### (iii) *The Federal Court's Discretionary Power Under the Federal Court Rules*

Finally, the appellant had submitted to the Full Court of the Federal Court that the Court had the discretionary power under Order 15 Rule 15 of the Federal

24 *Ibid* at 279.

25 (1998) 81 FCR 360 ("*Adelaide*").

26 (1998) 43 NSWLR 539. See also *Towney v Minister for Land and Water Conservation for NSW* (1997) 147 ALR 402; *KC v Shiley Inc* (unreported, Federal Court of Australia, Tamberlin J, 11 July 1997); and *DPP v Kane* (unreported, New South Wales Supreme Court, Hunt CJ, 10 September 1997).

27 Note 25 *supra* at 373.

28 [1979] AC 731.

29 *Ibid* at 743.

30 See, for example, *Peters v The Queen* (1998) 192 CLR 493 at 513-15, per McHugh J, cited in *Esso*, note † *supra* at [19].

31 See, for example, *Cohen v Cohen* (1929) 42 CLR 91 at 100, per Dixon J, cited in *Esso*, note † *supra* at [19].

32 Note 9 *supra* at 524-5, per Black CJ and Sundberg J; at 546, per Merkel J; at 571-2, per Finkelstein J.

33 Note † *supra* at [23].

34 *Ibid* at [25].

Court Rules to order or refuse to order the production of documents, and that such an order could be made using the same test as that applying to the adduction of evidence at trial. Gleeson CJ, Gaudron and Gummow JJ held that the Full Court had rightly rejected this argument.<sup>35</sup>

## B. Legal Professional Privilege at Common Law

Gleeson CJ, Gaudron and Gummow JJ then set out the basic principles of the common law of legal professional privilege. They stated that “[l]egal professional privilege (or client legal privilege) protects the confidentiality of certain communications made in connection with giving or obtaining legal advice or the provision of legal services, including representation in proceedings in a court”.<sup>36</sup> The rationale behind the privilege, as expressed in *Grant*, is that “[t]he privilege exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers”.<sup>37</sup>

The majority judgment in *Grant* was delivered by Stephen, Mason and Murphy JJ, and Barwick CJ and Jacobs J delivered separate judgments. In *Esso*, Gleeson CJ, Gaudron and Gummow JJ said:

Although the judgment of Barwick CJ... is sometimes referred to as a dissenting judgment, that is not strictly accurate. All five members of the Court agreed in the result. They were all of the opinion that the test applied by Rath J, (that a purpose of obtaining legal advice or assistance was sufficient, even though there were other purposes), should no longer represent the common law in Australia.<sup>38</sup>

Their Honours went on to state that:

[N]owhere in their reasons did [Stephen, Mason and Murphy JJ] expressly consider a dominant purpose test as an alternative possibility, or give reasons for rejecting such a test. The reasons they gave were advanced as reasons for rejecting the prevailing test, which had been applied by Rath J. An examination of the transcript of the argument in the case shows that the question whether, if the prevailing test were rejected, the new test should be a sole purpose or dominant purpose test, was not debated... It did not matter to either party whether, if a test stricter than that applied by Rath J were adopted, it was a sole purpose or a dominant purpose test.<sup>39</sup>

Stephen, Mason and Murphy JJ argued in their judgment in *Grant* that unless “the law confine[d] legal professional privilege to those documents which are brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings”,<sup>40</sup> then the privilege could be used to the advantage of large corporations who could use it to protect documents from its agents which had a double purpose, ie for the purpose of obtaining legal advice, and also for the purpose of “arming central management of the corporation with actual knowledge of what its agents have done”.<sup>41</sup> This second purpose would be

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35 *Ibid* at [34].

36 *Ibid* at [35].

37 *Ibid*.

38 *Ibid* at [41].

39 *Ibid* at [42].

40 Note 1 *supra* at 687-8.

41 *Ibid*.

“quite unconnected with legal professional privilege”, and such information “cannot... be privileged”.<sup>42</sup>

According to their Honours in *Esso*, the reasoning of Stephen, Mason and Murphy JJ explains why the test applied by Rath J, whereby it was sufficient if one of the purposes was for submission to legal advisers or use in legal proceedings, should be rejected. However, “it does not necessarily demand rejection of a dominant purpose test”.<sup>43</sup> Indeed, Stephen, Mason and Murphy JJ did not consider any other alternatives in between Rath J’s test and the sole purpose test. On the other hand, Jacobs J and Barwick CJ did so. Gleeson CJ, Gaudron and Gummow JJ highlighted this weakness in the majority judgment in *Grant*, stating that:

The fact that a report which is prepared for a dominant purpose, which is a legal purpose, and for a subsidiary purpose as well, does not necessarily mean that, if the dominant purpose did not exist, the report would nevertheless still have come into existence... it might be the dominant purpose which alone accounts for the existence of the report.<sup>44</sup>

Barwick CJ’s formulation of the dominant purpose test in *Grant* was as follows:

[A] document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.<sup>45</sup>

Barwick CJ’s test was subsequently accepted by the House of Lords in *Waugh v British Railways Board*,<sup>46</sup> as the Law Lords unanimously found the sole purpose test unduly restrictive. In 1985, the New Zealand Court of Appeal also adopted the dominant purpose test in preference to the sole purpose test, for “unless read down by refusing to rank as a ‘purpose’ any considerations other than submission to legal advisers which were in mind, a sole purpose test would provide extraordinarily narrow support for the privilege”.<sup>47</sup> As mentioned earlier, the dominant purpose test has also been accepted in Canada and Ireland.<sup>48</sup>

Gleeson CJ, Gaudron and Gummow JJ noted that it was not submitted by the appellant in *Esso* that the decision in *Grant* be overturned, as that decision established that the previously accepted test for legal professional privilege was no longer appropriate, and the reasons given in that judgment do not require a preference for the sole purpose test over the dominant purpose test.<sup>49</sup> The appellant’s submission was that the Court should “reconsider the point upon

42 *Ibid.*

43 Note † *supra* at [45].

44 *Ibid.*

45 Note 1 *supra* at 677.

46 [1980] AC 521.

47 *Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart* [1985] 1 NZLR 596 at 605.

48 Note 5 *supra*; and note 7 *supra*.

49 Note † *supra* at [56].

which the judgment of Barwick CJ differed from the joint judgment; a point which was not the subject of argument in the case and which was not critical to the decision".<sup>50</sup>

Their Honours went on to look at the application of the sole purpose test, stating that, in principle, it looks like a "bright-line test, easily understood and capable of ready application".<sup>51</sup> However, their Honours questioned the validity of this view. For if the test was to be applied literally, "one other purpose in addition to the legal purpose, regardless of how relatively unimportant it may be, and even though, without the legal purpose, the document would never have come into existence, will defeat the privilege".<sup>52</sup> This had led the test to be applied somewhat less than strictly, such as by Deane J in *Waterford v Commonwealth*,<sup>53</sup> where he held that the test of whether a document is to be protected is whether "the cause of its existence, in the sense of both causans and sine qua non, [is] the seeking or provision of professional legal advice".<sup>54</sup> Gleeson CJ, Gaudron and Gummow JJ thought that this formulation of the test may be closer to the dominant purpose rather than the sole purpose test. Even the submission of the respondent in *Esso*, when arguing for the retention of the sole purpose test, formulated the test as follows:

[I]f a document is created for the purpose of seeking legal advice, but the maker has in mind to use it also for a subsidiary purpose which would not, by itself, have been sufficient to give rise to the creation of the document, the existence of that subsidiary purpose will not result in the loss of privilege.<sup>55</sup>

Gleeson CJ, Gaudron and Gummow JJ commented that this, too, was close to a dominant purpose test, and noted that "[i]f the only way to avoid the apparently extreme consequences of the sole purpose test is to say that it should not be taken literally, then it loses its supposed virtue of clarity".<sup>56</sup> Their Honours thus concluded that "the dominant purpose test should be preferred", as it "strikes a just balance... and it brings the common law of Australia into conformity with other common law jurisdictions".<sup>57</sup>

### C. Judgment of Callinan J

Callinan J agreed with Gleeson CJ, Gaudron and Gummow JJ that the common law test for legal professional privilege is the dominant purpose test. His Honour commenced by agreeing with the majority of the Full Court of the Federal Court in their rejection of the three arguments advanced by the appellant.<sup>58</sup> His Honour concurred with the submission of the appellant that "the decision in *Grant v Downs* did not rest upon a principle carefully worked out in a

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50 *Ibid* at [54].

51 *Ibid* at [58].

52 *Ibid*.

53 (1987) 163 CLR 54.

54 *Ibid* at 85.

55 Note † *supra* at [58].

56 *Ibid*.

57 *Ibid* at [61].

58 *Ibid* at [137]-[149].



succession of cases".<sup>59</sup> He also agreed that "the stating of a sole purpose test [by the majority in *Grant*] was not necessary for the decision ... [as] the distinction between the [dominant purpose and sole purpose] tests had no relevance to the outcome of the case".<sup>60</sup> His Honour also agreed with the observations of the authors of *Cross on Evidence*, who stated in 1979 that "a too rigid application of the principle in *Grant v Downs* will lead to an undesirable reluctance on the part of such persons [such as employees of insurance companies] to express opinions which might subsequently be used against their principals".<sup>61</sup> Finally, his Honour decided that a change in the law would not unduly inconvenience people who had "arranged their affairs on the basis of a well settled understanding of the law", as "[t]hose who satisfy a test of sole purpose should certainly be able to satisfy any lesser test".<sup>62</sup>

In concluding, Callinan J held that he did not regard the sole purpose test "as stating a convenient test, or a wholly fair one in accordance with the underlying rationale for legal professional privilege, of candour by clients in communications with legal advisers".<sup>63</sup>

#### IV. THE DISSENTING JUDGMENTS OF MCHUGH J AND KIRBY J

##### A. McHugh J

McHugh J dissented, as he was "unable to accept the proposition that the Court should now overrule the ratio decidendi of *Grant v Downs* and substitute a dominant purpose test of privilege for the sole purpose test".<sup>64</sup> While noting that the sole purpose test had been subject to much criticism since the decision in *Grant*, his Honour was not convinced that the Court should replace it with the dominant purpose test.

First, for McHugh J, adopting the dominant purpose test would restrict the amount of information that a person can be required to disclose on discovery or in answer to subpoenas, and courts would have less information before them, as the production of documents in discovery "may fairly lead... to a train of inquiry' which might either advance the case of the party seeking discovery or damage the case of the party resisting it".<sup>65</sup>

Second, McHugh J noted that "legal professional privilege is itself the product of a balancing exercise between competing public interests", and that "[i]n the

59 *Ibid* at [154]-[155].

60 *Ibid* at [158].

61 JA Gobbo, D Byrne and J D Heydon, *Cross on Evidence* (2nd ed, 1979) at [11.27].

62 Note † *supra* at [163]-[165].

63 *Ibid* at [166].

64 *Ibid* at [65].

65 *Ibid* at [71], citing *Compagnie Financière du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 at 63.

age of the Internet and freedom of information legislation", a move should not be made "to restrict the volume of information available to decision makers".<sup>66</sup>

Third, McHugh J commented that a dominant purpose test would be harder to apply than a sole purpose test, as it will often be necessary "to examine the state of mind of the person creating the document".<sup>67</sup> This may result in an increase in interlocutory litigation. For example, McHugh J questioned whether any court could realistically determine which of the purposes was dominant, in the situation where "a loss assessor sends [a] report to the insurer for a purpose such as settling a claim and also for the purpose of being used in litigation if it ensues".<sup>68</sup>

Finally, McHugh J thought it "contrary to the rationale of the privilege that communications made for non-legal purposes should be able to free-ride on the protected purpose and obtain protection".<sup>69</sup> McHugh J had trouble with the idea that a person could get the benefit of legal professional privilege for a communication which is for non-legal purposes, when that privilege "exists only because it is necessary so that people will communicate freely with their lawyers".<sup>70</sup>

McHugh J did not accept the argument that "the sole purpose test is never applied and that a dominant purpose test is effectively applied",<sup>71</sup> and in concluding, he stated:

But whatever the disadvantages of using the sole purpose test it has one great advantage over the dominant purpose test: it has a greater potential to lead to the production of documents that lead to other forms of evidence that will be admissible. Add to that advantage, the inevitable cost and expense of applying a dominant purpose test, and the case for overruling *Grant v Downs* is not persuasive.<sup>72</sup>

## B. Kirby J

Kirby J also dissented, repeating his words in *Commissioner of Australian Federal Police v Propend Finance Pty Ltd*,<sup>73</sup> where he held that "a brake on the application of legal professional privilege is needed... because it frustrates access to communications which would otherwise help courts to determine, with accuracy and efficiency, where the truth lies in disputed matters."<sup>74</sup> His Honour stressed that he was "alive to the issues of principle and policy which support a change", and that he had "not simply based [his] decision on authority".<sup>75</sup>

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66 Note † *supra* at [72], citing *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 583.

67 Note † *supra* at [73]-[77].

68 *Ibid* at [75].

69 *Ibid* at [78].

70 *Ibid*.

71 *Ibid* at [79].

72 *Ibid* at [83].

73 *Commissioner of Australian Federal Police* (1997) 188 CLR 501.

74 *Ibid* at 581, cited in *Esso* Note † *supra* at [86].

75 Note † *supra* at [92].

At the outset, Kirby J expressed the view that any test which is determined by reference to somebody's "purpose" is problematic, as it is "difficult at the best of times to ascertain the purpose which someone else had for particular conduct", for "[h]uman motivation is rarely linear".<sup>76</sup>

Kirby J's first reason for upholding the sole purpose test was that the principle in *Grant* was "a settled statement of the common law in Australia", and "[w]hile the common law can and should be changed when it is out of harmony with altered social conditions, or contemporary understandings of fundamental rights this was not a reason propounded for change in the present circumstances".<sup>77</sup> Kirby J was of the view that this "is not a case where change is necessary to secure a reconceptualisation of the common law or to simplify multiple categories by reference to unifying concepts... It is simpler and easier to apply the sole purpose test than any of the alternatives".<sup>78</sup>

A second reason advanced by Kirby J for retaining the sole purpose test was that "the tendency of the common law has been to confine, not to expand, the ambit of the privilege".<sup>79</sup> In this respect, Kirby J put weight on the importance of access of persons affected to all relevant information.

Third, Kirby J also noted the fact that the dominant purpose test had only been enacted in respect of federal courts and NSW courts, and that the other States had decided not to follow suit. Given that this was an area of the law where legislatures had considered change, and were advised by various law reform bodies and parliamentary committees, Kirby J was of the view that "the courts [should not] intrude and change the established common law when relevant legislative change has been proposed and, in part, has already been adopted".<sup>80</sup>

Fourth, Kirby J expressed concern at the practical effect of a change in the law, as in the present case, the "significant number of documents (originally 577) in respect of which a disputed claim for privilege is made gives some clue as to the ambit of exemptions from disclosure to a court which, if upheld, the dominant purpose test could produce".<sup>81</sup> Kirby J was concerned that this would erode the lines of inquiry which the production of these documents in discovery can open up,<sup>82</sup> and that pre-trial litigation concerning whether a document had been produced for the dominant purpose of legal advice or litigation would proliferate.<sup>83</sup>

Kirby J also had concerns that the dominant purpose test was more likely to advantage corporations and large administrative bodies at the expense of individuals, as such organisations "can, with minimal imagination, readily present documents as being for a dual purpose – to receive legal advice (perhaps in house) and also to effect a corporation or administrative purpose".<sup>84</sup>

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76 *Ibid* at [93].

77 *Ibid* at [100].

78 *Ibid*.

79 *Ibid* at [101].

80 *Ibid* at [105], referring to *Lipohar v The Queen* [1999] HCA 65 at [193].

81 Note † *supra* at [106].

82 *Ibid* at [107].

83 *Ibid* at [108].

84 *Ibid* at [109]-[110].

Kirby J's sixth reason for upholding the decision in *Grant* involved reconsidering the fundamental purpose of the privilege, whose objective is "of great importance to the protection and preservation of the rights, dignity and freedom of the ordinary citizen under the law and to the administration of justice and law".<sup>85</sup> As the privilege is founded upon a notion of "fundamental human rights, the idea of expanding the ambit of the privilege for the documents of corporations and administration recedes in urgency".<sup>86</sup>

Kirby J's final and, for him, most compelling reason to retain the 'sole purpose test' was that:

It is... for the appellant to establish a real case for the alteration of a principle settled for this country by a decision which has been followed in countless instances. Whilst the decisions of the courts of other countries are entitled to respect, the tendency of the technology of information and of the principles of corporate and administrative transparency since *Grant v Downs* point to the correctness of the sole purpose test. It is enough to say that none of the reasons advanced, nor all of them in combination, are enough to outweigh the reasons for adhering to the principle established in this country by authority.<sup>87</sup>

## V. COMMENT: SETTLED LAW, BUT UNSETTLED PRACTICE

### A. The Underlying Rationale of the Privilege

Undoubtedly, the decision will resolve many problems and uncertainties which have subsisted in the law of privilege since *Grant v Downs* and particularly since the enactment of the *Evidence Acts* in 1995. In 1992, Suzanne McNicol noted that:

Despite the repeated affirmation of the 'sole' purpose test in Australia, it is clear that the debate between the 'sole' purpose test and the 'dominant' purpose test is by no means resolved. Evidence of the continuing debate can be seen from the recommendation of a 'dominant' purpose test for legal professional privilege by the Australian Law Reform Commission in its draft Evidence Bill 1987 in contrast to the recommended 'sole' purpose test in the New South Wales Evidence Bill 1991.<sup>88</sup>

The position at common law is now settled – the High Court has held by a majority of four to two that the test for determining whether legal professional privilege attaches to a confidential communication between a legal adviser and their client is the dominant purpose test. Nonetheless, the concerns of the dissenting judges as to whether the dominant purpose test accords with the underlying rationale for the privilege are valid. In *Grant*, Stephen, Mason and Murphy JJ held that:

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85 *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 490.

86 Note † *supra* at [111].

87 *Ibid* at [113].

88 S McNicol, note 2 *supra*, p 70 (footnotes omitted).

[T]he rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances of the privilege.<sup>89</sup>

In the 1983 High Court decision in *Baker v Campbell*,<sup>90</sup> Deane J held that:

[T]he general and substantive principle underlying legal professional privilege is of fundamental importance to the protection and preservation of the rights, dignity and equality of the ordinary citizen under the law in that it is a pre-condition of full and unreserved communication with the lawyer.<sup>91</sup>

In the same case, Dawson J explained that the privilege existed to enable clients to be candid with their legal advisers, and he argued that if they were unable to make full and frank disclosure, this would be reflected "in the instructions [they give], the advice [they are given] and ultimately in the legal process of which the advice forms part".<sup>92</sup> McNicol suggests that the broad rationale for the privilege is to further and promote "both the administration of justice and an effective adversary system of litigation".<sup>93</sup>

Whilst the dominant purpose test can further these aims, the effect of the test may significantly impede access to justice, as the amount of information available to judicial decision-makers will be more limited. It is not disputed that the sole purpose test is one which is impractical to apply, for if it is applied strictly, it does not protect any communications which have a subsidiary non-legal purpose. However, the broadening of the doctrine does not necessarily further the administration of justice by promoting candour in the lawyer-client relationship. Communications between clients and their legal advisers have generally been adequately protected by the sole purpose test.

The doctrine's extension has the effect of protecting the dissemination of legal advice within large corporations and public authorities, and any non-legal information contained in the same documents, such as commercial information which may be relevant to a court in resolving a dispute. An example is provided by the case of a general counsel of a large corporation, who also acts as the company secretary. If this person prepares a report to be distributed to the board of directors or senior management which contains advice about litigation in

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89 Note 1 *supra* at 685.

90 (1983) 153 CLR 52.

91 *Ibid* at 118.

92 *Ibid* at 130.

93 S McNicol, note 2 *supra*, p 48. Similar explanations of the privilege's *raison d'être* can be found elsewhere. See, for example, the comments of Mason and Brennan JJ in *Maurice*, note 85 *supra* at 96: "The *raison d'être* of legal professional privilege is the furtherance of administration of justice through the fostering of trust and candour in the relationship between lawyer and client", see also Lord Langdale MR's formulation of the rationale in *Reece v Trye* (1846) 9 Beav 316 at 319: "The unrestricted communication between parties and their professional advisers has been considered of such importance as to make it advisable to protect it even by the concealment of matter without the discovery of which the truth of the case cannot be ascertained"; see also N Williams, "Discovery of Civil Litigation Trial Preparation Matter in Canada" (1980) 58 *Canadian Bar Review* 1, at 39-40; and note 9 *supra* at 559-60, per Finkelstein J.

which the company is involved, and also details of the company's latest pricing strategies and marketing campaigns, the sole purpose test would not have been satisfied in relation to such a report, as it was not produced for the sole purpose of giving or obtaining legal advice, or for use in actual or anticipated litigation. In order to maintain privilege over communications containing legal advice, two separate reports would have to be prepared: one containing the advice about the litigation, and another dealing with the commercial aspects. Under the sole purpose test, only the former communication would be privileged. However, under the dominant purpose test, legal professional privilege will apply to all the information in the consolidated report, if it can be shown that the dominant purpose for preparing the report was to provide advice about the litigation. As McHugh and Kirby JJ both noted in their separate dissenting judgments, this effect of the doctrine's broadening is not one which is consistent with the reason behind the privilege.<sup>94</sup>

### B. Difficulties in Ascertaining the Purpose of Producing a Document or Other Communication

Another problem with the dominant purpose test is that it is likely to result in a proliferation of interlocutory applications challenging the validity of privilege claims. This is because the High Court gave no clear indication of what "dominant purpose" actually means. Further, as Kirby J noted, when determining the purpose of a communication, the subjective intention of the author of the communication is relevant.<sup>95</sup> As noted above, McHugh J provided the example of a report sent by a loss assessor to an insurance company for the purpose "of settling a claim and also for the purpose of being used in litigation if it ensues",<sup>96</sup> and highlighted the difficulty of determining the dominant purpose of the communication. In *Carnell v Mann*,<sup>97</sup> the Full Court of the Federal Court held that the 'purpose' referred to in the context of ss 118-19 of the *Evidence Acts* is the purpose that led to the creation of the communication, and not the purpose or object sought to be achieved in, or by means of, the communication.<sup>98</sup> It is unclear whether this construction of 'purpose' also applies to the common law context. McNicol notes that:

[F]rom a practical point of view a 'dominant' purpose test will be more difficult than a 'sole' purpose test. For the sole purpose test to apply, each of the single identified purposes must be for legal advice or use in litigation. Hence, if one of the single identified purposes is not related to advice or litigation, the document will not be privileged. On the other hand, for the dominant purpose test to apply, a hierarchy of purposes must be constructed and the most important or 'predominant' purpose must be for legal advice or use in litigation for the document to be protected.<sup>99</sup>

94 Note † *supra* at [78], per McHugh J; at [109]-[110], per Kirby J.

95 *Ibid* at [93].

96 *Ibid* at [75].

97 (1998) 159 ALR 647.

98 *Ibid* at 653-4; see further Justice R Sackville, "Lawyer/Client Privilege" (1999) 18 *Australian Bar Review* 104 at 108.

99 S McNicol, "*Esso Australia Resources Ltd v Federal Commissioner of Taxation*" (1999) 21 *Syd LR* 656 at 665, fn 47.

Hence, the application of the test will be problematic. The possibility of deponents of affidavits of documents or authors of lists of documents being examined under oath as to the purposes for which particular documents were created, or the authors of those communications being examined, is one which could cause costly delays in matters getting to trial. It is unlikely that the administration of justice would be served if this situation were to arise.

### C. Practical Implications of the Decision

#### (i) *Preserving Privilege*

The effect of *Esso* on how external lawyers preserve privilege over their client's documents may be limited in nature, for the broadening of the privilege means that those lawyers can continue to act as they did under the sole purpose test, and be confident of satisfying the new broader test. In most cases, this involves eliminating (or restricting) any discussion of other matters from communications about legal issues, labelling documents as "privileged and confidential", and advising their clients to label any legally sensitive internal documents as being "created for the dominant purpose of [seeking or] giving legal advice [or for use in actual or anticipated litigation]", as the case may be. Otherwise, the same principles apply as before to avoiding loss of privilege over communications. The decision in *Esso* does nothing to alter the common law rules of waiver of legal professional privilege, which remain different to those applying in jurisdictions governed by the *Evidence Acts*. These principles may prove significant in the operation of the new test, and they will now be considered briefly.

#### (ii) *Avoiding Waiver of Privilege*

Waiver of privilege may be express or implied, and it may be intentional or unintentional.<sup>100</sup> Express waiver involves the client openly waiving privilege, for example, where a privileged document is provided to the opponent in litigation, where a privileged document is tendered in evidence or read out in court,<sup>101</sup> or where a privileged document is provided on an unrestricted basis to a third party who does not have a 'common interest' with the client holding the privilege.<sup>102</sup> Implied waiver involves a situation where a party is deemed to have waived privilege even if they did not intend to do so, and in such cases it may be said

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100 *Mann v Carnell* [1999] HCA 66 at [29], per Gleeson CJ, Gaudron, Gummow and Callinan JJ; S McNicol, note 2 *supra*, p 24; *Great Atlantic Insurance Co v Home Insurance Co* [1981] 2 All ER 485 at 491-2.

101 See, for example, *Great Atlantic Insurance* *ibid*.

102 For discussion of when privilege is not lost because the third party has a 'common interest' with the holder of the privilege, see *Butes Gas & Oil Co v Hammer* [No 3] [1981] QB 223; *Optus Communications Pty Ltd v Telstra Corporation Ltd* (unreported, Federal Court of Australia, Lockhart J, 2 March 1995); *Battery Group Ltd v FAI Insurance Co Ltd* (unreported, Supreme Court of Victoria, Hedigan J, 21 May 1993); *South Australia v Peat Marwick Mitchell* (1995) 65 SASR 72 at 76-7; *Bulk Materials (Coal Handling) Services Pty Ltd v Coal and Allied Operations Pty Ltd* (1988) 13 NSWLR 689; *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd* [1992] Lloyd's Rep 540; *Rank Film Distributors Ltd v ENT Ltd* (unreported, Supreme Court of Tasmania, Crawford J, 25 November 1994); and *Network Ten v Capital Television* (1995) 36 NSWLR 275.

that waiver is "imputed by operation of law".<sup>103</sup> Examples include disclosing a privileged document to a third party on a non-confidential basis, referring to the contents of a privileged document in a non-privileged document, and reading out the contents of a privileged document in court. In *Attorney-General (NT) v Maurice*,<sup>104</sup> Mason and Brennan JJ explained that an implied waiver may occur when, "by reason of some conduct on the privilege holder's part, it becomes unfair to maintain the privilege".<sup>105</sup> On the other hand, in jurisdictions where the *Evidence Acts* apply, the issue of whether privilege has been waived is governed by the principles set out in s 122 of the Acts. In essence, privilege will be lost if a client knowingly and voluntarily discloses the substance of a privileged communication to another person, and that disclosure is not on a confidential basis.<sup>106</sup>

#### D. Waiver as a Possible Method of Restricting the Privilege: Justice McHugh's Comments in *Mann v Carnell*

The decision in *Esso* now settles the common law position with respect to determining whether legal professional privilege attaches to communications between lawyers and their clients, and third parties where there is litigation, and it is unlikely that the sole purpose-dominant purpose test debate will be reopened in the foreseeable future. Thus, the valid concerns of McHugh and Kirby JJ regarding the increased scope of the privilege and the potential for large corporations and public authorities to use the privilege to justify the non-disclosure of non-legal information may best be addressed by use of the doctrine of waiver. The High Court decision in *Mann v Carnell*,<sup>107</sup> which was handed down on the same day as *Esso*, considered the common law principles governing waiver. In *Mann*, the High Court was called upon to determine whether legal professional privilege had been lost over four documents which "took the form of confidential communications between legal advisers and client, in relation to certain litigation".<sup>108</sup> In the joint judgment of Gleeson CJ, Gaudron, Gummow and Callinan JJ, their Honours applied the decision in *Goldberg v Ng*,<sup>109</sup> a case in which there had been "disclosure of a privileged communication to a third party,

103 *Goldberg*, note 13 *supra* at 95; *Mann*, note 100 *supra* at [29].

104 Note 85 *supra*.

105 *Ibid* at 487. See also the comments of Deane J at 492-3, affirmed by the High Court in *Goldberg*, note 13 *supra* at 95-8; *BTR Engineering (Aust) Ltd v Patterson* (1990) 20 NSWLR 724; and *Webster v James Chapman & Co* [1989] 3 All ER 939 at 947, per Scott J:

The future conduct of the litigation by the other party would often be inhibited or made difficult were he to be required to undertake to shut out from his mind the contents of the document. It seems to me that it would be thoroughly unfair that the carelessness of one party should be allowed to put the other party at a disadvantage.

However, an element of 'unfairness' will not always necessitate a waiver of privilege: *Ritz Hotel Ltd v Charles of the Ritz* (1988) 14 NSWLR 132; *Bond Media v John Fairfax Group Pty Ltd* (unreported, Supreme Court of New South Wales, Giles J, 7 December 1988).

106 *The Evidence Acts*, note 3 *supra*, s 122. See generally K Smark, "Privilege under the Evidence Acts" (1995) 18 UNSWLJ 95 at 100-2.

107 *Mann*, note 100 *supra*.

108 *Ibid* at [4].

109 *Goldberg*, note 13 *supra*.



for a limited and specific purpose, and upon terms that the third party would treat the information disclosed as confidential".<sup>110</sup> In *Goldberg v Ng*, which affirmed that considerations of 'fairness' were relevant in deciding whether privilege had been waived,

[t]he Court was divided upon whether, in the circumstances of the case, privilege was waived. However, the reasoning of all members of the Court was inconsistent with the proposition that any voluntary disclosure to a third party necessarily waives privilege. No application was made on the present appeal to re-open *Goldberg* or any of the earlier authorities on the subject.<sup>111</sup>

However, McHugh J dissented and said that "*Goldberg v Ng* was wrongly decided".<sup>112</sup> In his view, while in some cases, "notions of fairness may play a part in determining whether privilege has been waived", this should be regarded as a factual test, and the decision in *Goldberg* should not be taken as deciding "as a matter of law, that questions of waiver always depend on notions of fairness".<sup>113</sup> This "would be wrong in principle, and its application would have consequences detrimental to the administration of justice".<sup>114</sup> Most significantly, McHugh J further stated that:

If [*Goldberg*] is to be regarded as laying down a new legal test of waiver, it should be overruled. It should not be given refuge in the sanctuary of stare decisis. Once there is a voluntary disclosure of privileged material to a stranger to the privileged relationship (ie to a person who is not the lawyer or the client), privilege in that material is waived as against the world.<sup>115</sup>

Ultimately, McHugh J held that the documents in question were privileged on the basis of public interest immunity.<sup>116</sup> Accordingly, his comments on waiver of legal professional privilege should be treated as no more than obiter dicta. Nonetheless, whilst his comments may seem unorthodox, they could be used to construct a limitation on the effects of the broadening of the doctrine of legal professional privilege in *Esso*, and suggest that the common law approach to waiver should be broadened. Although McHugh J's suggestion that a "voluntary disclosure" to any third party should be treated as waiver appears to ignore the reality of the doctrine of third party 'common interest',<sup>117</sup> it is certainly arguable that a commensurate broadening of the doctrine of waiver may be used to offset the effects of the extension of the privilege. Although the possibility is remote, it is conceivable that a future court may reconsider the 'fairness' approach to common law waiver, should the ramifications of the *Esso* decision prevent large amounts of evidence being brought to trial. However, this is speculative. The High Court has now had several recent opportunities to reconsider the common law principles applying to privilege and waiver, and it is unlikely that these will be revisited in the near future. If *Esso* indeed prevents much evidence from being

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110 *Mann*, note 100 *supra* at [30].

111 *Ibid.*

112 *Ibid* at [134].

113 *Ibid.*

114 *Ibid.*

115 *Ibid.*

116 *Ibid* at [140].

117 See, for example, the authorities listed in note 102 *supra*.

adduced at trial, and an adjustment is deemed desirable by the judiciary, a more likely outcome is that lower courts will apply the dominant purpose test somewhat more strictly (or erratically) in determining which of several purposes was the dominant purpose in producing the communication in question.

## VI. CONCLUSION

The decision in *Esso* significantly broadens the scope of legal professional privilege, and its practical effect is to alleviate the problem of protecting privileged information in large corporations and public authorities. While the decision is sound from a practical point of view, the dissenting judges raise legitimate concerns over the extension of the privilege. These concerns include a possible increase in the amount of pre-trial applications challenging privilege claims, and an enhancement of the ability of large litigants to claim privilege over non-legal communications and, accordingly, frustrate the ability of judicial decision-makers to have access to relevant information. The obiter dicta comments of McHugh J in *Mann* provide an indication of how a future court could reconcile the shortcomings of the dominant purpose test for the administration of justice, by extending the scope of the doctrine of waiver. However, a revision of these common law principles is unlikely in the near future. Should problems persist in the adduction of evidence, lower courts may curb *Esso*'s effects by applying the dominant purpose test more strictly.