# Administrative Appeals Tribunal of Australia



# Farnaby and Military Rehabilitation and Compensation Commission [2007] AATA 1792; (2007) 97 ALD 788; (2007) 47 AAR 11 (21 September 2007)

Last Updated: 22 December 2009

**Administrative Appeals Tribunal**

**DECISION AND REASONS FOR DECISION [2007] AATA 1792**

**ADMINISTRATIVE APPEALS TRIBUNAL )**

**) No T2003/85**

GENERAL ADMINISTRATIVE DIVISION **)**

**Re MARK GEORGE FARNABY**

**Applicant**

**And** **MILITARY REHABILITATION AND COMPENSATION COMMISSION**

**Respondent**

**INTERLOCUTORY DECISION**

**Tribunal** Justice Downes, President
The Hon R J Groom, Deputy President

**Date** 21 September 2007

**Place** Hobart

**Decision** The applicant is entitled to claim legal professional privilege with respect to:

1. The letter from the applicant's solicitors to Dr Sale dated 8 July 2005 and the response dated 18 July 2005; and

2. The letter from the applicant's solicitors to Dr Bohmer dated 11 December 2006 and the response dated 11 January 2007.

.....[sgd].....
Garry Downes
President

**CATCHWORDS**

*PRACTICE AND PROCEDURE – Legal professional privilege – litigation privilege – application to Administrative Appeals Tribunal – practical considerations – Tribunal proceedings are legal and sufficiently analogous to court proceedings to warrant application of privilege – privilege applies – no abrogation.*

*Administrative Appeals Tribunal Act 1975* (Cth) ss 25, 30, 32, 33, 34E, 34J, 35, 37, 40, 43

*Evidence Act 1995* (Cth) ss 3, 119

*Safety, Rehabilitation and Compensation Act 1988* (Cth)

*Seafarers Rehabilitation and Compensation Act 1992* (Cth) s 70

*AWB Ltd v Cole Ltd* [2006] FCA 571; (2006) 152 FCR 382

*Baker v Campbell* [1983] HCA 39; (1983) 153 CLR 52

*Becker and Minister for Immigration and Ethnic Affairs* (1977) 1 ALD 158

*Bushell v Repatriation Commission* [1992] HCA 47; (1992) 175 CLR 408

*Carter v Northmore Hale Davy and Leake* (1995) 183 CLR 121

*Commissioner of Australian Federal Police v Propend Finance Pty Limited and Others* [1997] HCA 3; (1997) 188 CLR 501

*Corporate Affairs Commission (NSW) V Yuill* [1991] HCA 28; (1991) 172 CLR 319

*Grant v Downs* (1976) 135 CLR 675

*Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* [2006] NSWSC 530; (2006) 233 ALR 369; 200 FLR 309

*Jones v National Coal Board* [1957] 2QB 55

*Muin v Refugee Review Tribunal* [2002] HCA 30; (2002) 190 ALR 601

*Pratt Holdings Pty Ltd v Commissioner of Taxation* [2004] FCAFC 122; (2004) 136 FCR 357

*In re L (A Minor)* [1997] AC 16

*SZHWY v Minister for Immigration and Citizenship* [2007] FCAFC 64

*The Daniels Corporation International Pty Ltd & Anor v Australian Competition and Consumer Commission* [2002] HCA 49; (2002) 213 CLR 543

*Waterford v the Commonwealth* [1987] HCA 25; (1987) 163 CLR 54

**REASONS FOR DECISION**

21 September 2007 Justice Downes, President
The Hon R J Groom, Deputy President

**Summary**

1. The Administrative Appeals Tribunal is a unique institution. It reviews administrative decisions made by the Commonwealth Government. It is not a court. It does not exercise judicial power. Yet it goes about much of its work in a court-like fashion.
2. This case raises the question whether the arm of legal professional privilege often called "litigation privilege" applies to proceedings in the Administrative Appeals Tribunal. Put simply, the argument is that proceedings in the Tribunal are not litigation and accordingly no litigation privilege arises. Bergin J in the Supreme Court of New South Wales has held that litigation privilege does not apply in the Tribunal (*Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* [2006] NSWSC 530; (2006) 233 ALR 369; 200 FLR 309).
3. We have come to the conclusion that litigation privilege does apply in the Administrative Appeals Tribunal, unless there is a clearly expressed abrogation of the privilege in the legislation governing the application. We regret that we do not agree with the conclusion or reasoning of Bergin J. Claims for litigation privilege in the Tribunal should be dealt with in accordance with these reasons.

**Facts**

4. Mark Farnaby applied to the Tribunal for review of a decision denying his claim for compensation under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) arising out of his service in the Royal Australian Navy.
5. Mr Farnaby engaged FitzGerald and Browne, lawyers, to represent him in the proceedings. On 8 July 2005 those lawyers wrote to Dr Sale and received a response dated 18 July 2005. On 11 December 2006 they wrote to Dr Bohmer and received a response dated 11 January 2007. The correspondence with Dr Sale was produced to the Tribunal in answer to a summons procured by the respondent. The correspondence with Dr Bohmer was produced to the Tribunal pursuant to a direction given by the Tribunal. The respondent has sought access to the correspondence. FitzGerald and Browne, on behalf of the applicant, claim that the correspondence is protected from disclosure because the circumstances in which it was written give rise to a claim for legal professional privilege. We must decide whether that claim is sustainable. We do so pursuant to the express power in s 40(1D) of the *Administrative Appeals Tribunal Act 1975* (Cth) relating to documents produced on summons and pursuant to the Tribunal's general power under s 33(1) to determine the Tribunal's procedure.
6. At the commencement of the hearing, the only material before us as to the nature of the correspondence (other than assertions on behalf of the applicant) was the names of the parties to the letters and their dates. To avoid the problem that adducing further evidence might effectively

render the claim of privilege nugatory, the President, who is unlikely to hear the proceedings, but not Deputy President Groom, examined the documents. The President informed the parties that he was satisfied that the letter from the lawyers, in each case, was a request for advice and information relating to issues concerning the proceedings and that each doctor's reply provided such information and advice. The letters were communications between a lawyer and a third party for the dominant purpose of providing legal services in connection with these proceedings. The hearing subsequently proceeded on that basis. The President informed the parties, however, that he had neither considered any issue as to whether the documents complied with or exhausted the terms of the summons or direction under which they had been produced, nor whether there had been any waiver which might affect the claim of privilege.

**Does litigation privilege apply in the Administrative Appeals Tribunal?**

7. The issue before us is whether proceedings before the Tribunal attract common law privilege. It has not been argued that the statutory privilege provided for in s 119 of the *Evidence Act 1995* (Cth) applies. The Evidence Act does not apply to proceedings before the Tribunal because the Tribunal is not bound by the rules of evidence (s 33(1)(c) of the AAT Act) and it is not "a federal court" (ss 3 and 4 of the Evidence Act).
8. There are two branches of common law legal professional privilege. It is attracted by:
   (1) Communications between a client and lawyer for the dominant purpose of seeking and receiving legal advice (the so-called "advice privilege"); and
   (2) Communications between a lawyer and client or third party for the dominant purpose of providing legal services in connection with pending or anticipated proceedings (the so-called "litigation privilege").
9. This case is concerned with the second branch. There may be occasions when communications between a lawyer and a third party are so bound up with the giving of legal advice that privilege may be attracted under the first branch, but no such argument is relied upon here.

**Practical considerations**

10. If the communications between FitzGerald and Browne and the doctors had been in their present form but had related to proceedings before a court, legal professional privilege would apply. It is useful to explore this consideration, and the consequences which would flow if there were no similar privilege relating to proceedings in the Tribunal, before turning to the questions of principle which will determine the matter. Several examples highlight the problems that would arise if privilege did not apply in the Administrative Appeals Tribunal.
11. Taxpayers may elect to challenge a taxation assessment in the Federal Court of Australia or in the Administrative Appeals Tribunal. Litigation privilege will apply to an application for review in the Federal Court. If litigation privilege does not apply in the Administrative Appeals Tribunal, the question of whether the privilege arises would depend upon which alternative is chosen. Even worse, because litigation privilege applies to anticipated proceedings, if a taxpayer elected to appeal to the Tribunal, privilege would be attracted by correspondence relating to whether and to which body the taxpayer might appeal, but not to the appeal itself.
12. Workers' compensation claims in state workers' compensation courts, which used to be prevalent but have now largely been replaced by tribunals and commissions, would attract privilege, while workers' compensation proceedings before the Administrative Appeals Tribunal, which are very difficult to distinguish in terms of procedure, would not.
13. One of the characteristics of the Administrative Appeals Tribunal, along with all the Commonwealth tribunals, is that it never exercises judicial power. It makes administrative decisions. The same is not true of tribunals in the states. Tribunals such as the Victorian Civil and Administrative Tribunal and the State Administrative Tribunal of Western Australia exercise judicial power as well as making administrative decisions. The resolution of tenancy disputes is an

example of an exercise of judicial power. Some tribunals only exercise judicial power. An example is the Consumer, Trader and Tenancy Tribunal of New South Wales.

14. Particularly troublesome would be proceedings before tribunals like VCAT and the SAT. Would the privilege apply when they are exercising judicial power and not when they are exercising administrative power, or would the position be uniform? In the latter event, would privilege apply or not?

**Legal considerations**

15. The question of whether litigation privilege applies in the Administrative Appeals Tribunal must ultimately be answered by resort to questions of principle. Bergin J assessed these questions in *Ingot* and so did Young J, in the context of a commission of inquiry, in *AWB Ltd v Cole Ltd* [2006] FCA 571; (2006) 152 FCR 382. Bergin J, who relied heavily on Young J, arrived at her conclusion in the following sentence:

> *... I am satisfied that the AAT stands outside what Young J referred to in AWB as the 'adversarial system of justice'.*

This sentence flows from a detailed analysis which places much emphasis on the characterisation of proceedings as either "inquisitorial" or "adversarial" and attributes consequences to the result.

16. With great respect to Bergin J, we are not sure that such an analysis is particularly useful. We think it is more useful to look at the proceedings themselves and enquire whether they carry features that warrant the recognition of privilege, rather than to strive for a label and then to attribute consequences to the label. That process runs the risk of promoting form over substance. We note, however, that Bergin J did engage in an analysis of the features of proceedings in the Tribunal.
17. As the President has said on other occasions (see, for example, Thirtieth Anniversary Remarks, http://www.aat.gov.au), the labels "inquisitorial" and "adversarial" are not particularly helpful. They sometimes seek to contrast a postulated investigation on behalf of society (often, wrongly, said to reflect the system in France) with a judge holding the balance between contending parties: *Jones v National Coal Board* [1957] 2QB 55 at 63 per Denning LJ. These descriptions indulge in generalisations which are apt to mislead. Lord Nicholls of Birkenhead echoed this sentiment when he made the following general observation (although in dissent) relating to legal professional privilege in family proceedings (*In re L (A Minor)* [1997] AC 16 at 31):

> *The special role of judges in family proceedings is of great importance. The role has attracted a variety of descriptions: parental, administrative, quasi-administrative, investigative, inquisitorial. These descriptions are contrasted with the adversarial nature of ordinary civil and criminal proceedings. These descriptions, and this contrast, do not in themselves provide an answer to the question raised by this appeal. Attaching the bewitching label of inquisitorial to family proceedings says nothing about whether legal professional privilege should or should not be available to a person who is a party to the proceedings.*

18. We add that the descriptions rely upon words with very wide connotations. For example, the following meaning of "inquisitorial" is given in the Oxford English Dictionary (Internet Edition): "Of the character of an inquisitor; like, or like that of, an inquisitor; offensively or impertinently inquiring, prying". Using a word which contains a distinctly pejorative connotation is best avoided.
19. Rather than seeking to characterise proceedings as either inquisitorial or adversarial and, from that basis, determining whether legal professional privilege applies in the Tribunal, the appropriate

course seems to us to be to look at the nature of proceedings in the Tribunal and to see whether they have characteristics sufficiently analogous to court proceedings to compel a conclusion that the proceedings attract legal professional privilege. In this process the nature of the exercise being undertaken will be more important than the procedure by which it is achieved.

**Proceedings in the Administrative Appeals Tribunal**

20. While the Administrative Appeals Tribunal makes administrative decisions rather than resolving disputes, it does make decisions which affect people's rights. To our minds, this is the most important feature to be considered. Proceedings in the Tribunal are easily distinguished from proceedings before commissions of inquiry, as Young J recognised in *AWB* (at 425; [161]). The Tribunal has power "to determine issues with legally binding consequences" (ss 25(4) and 43(1) of the AAT Act) while a commission of inquiry "simply carries out investigations, determines the facts and prepares a report and recommendations. It does not finally determine any rights or obligations". A commission of inquiry can be much more readily labelled inquisitorial than a tribunal determining rights.
21. It is important to look at some statutory characteristics of review in the Administrative Appeals Tribunal:

    (1) There are at least two parties to proceedings in the Tribunal (s 30(1));
    (2) The proceedings must be determined through a hearing unless the Tribunal and the parties agree otherwise (s 34J);
    (3) The hearing is to be in public unless special circumstances require some contrary order (s 35);
    (4) Parties before the Tribunal have a right to representation (s 32);
    (5) Although the Tribunal is not bound by the rules of evidence (s 33(1)), the manner in which it is required to conduct a hearing requires it to act on evidence which it admits (e.g. ss 34E, 40(5) and 43(2B));
    (6) The Tribunal has power to take evidence on oath or affirmation (s 40(1E)) and to summons persons to give evidence or produce documents (s 40); and
    (7) The Tribunal must give reasons for its decision which a party can require to be in writing (s 43(2) and (2A)).
22. These mandatory characteristics of review in the Tribunal parallel litigation in courts. President Brennan J, in *Becker and Minister for Immigration and Ethnic Affairs* (1977) 1 ALD 158, said (at 161):

    > *The legislature clearly intends that the Tribunal, though exercising administrative power, should be constituted upon the judicial model, separate from, and independent of, the Executive (see Pt II of the Act). Its function is to decide appeals, not to advise the Executive.*

Sir Anthony Mason, while Chief Justice of Australia, described the Tribunal as based on "the judicial model" and contrasted its procedure with that of the decisions of administrators (see Anthony Mason, *Administrative Review: The Experience of the First Twelve Years* (1989) 18 FLR 122 at 130).

23. Narelle Bedford and Professor Robin Creyke said in the conclusion of their recent monograph "Inquisitorial Processes in Australian Tribunals" (2006, published by Australasian Institute of Judicial Administration Inc.), after criticising the terms "inquisitorial" and "adversarial", (at 66):

    > *... [G]enerally speaking tribunals do not operate in an inquisitorial fashion. The culture of adversarialism in Australia is too strong for an alternative mode of procedure to be adopted. Although there is a range of processes which are adopted within tribunals, the trend in contested proceedings, particularly when*

> *parties are represented, is for the parties to behave much as they would in a courtroom. This result is in part the strength of legal culture, in part, the unwillingness to move from the known and well-established rules of evidence, and in part the fact that tribunals are sited in an adjudicative system the final tiers of which traditionally operate in an adversarial fashion.*

The authors' observations addressed tribunals generally, including the migration tribunals (the Migration Review Tribunal and the Refugee Review Tribunal), although the procedures in those tribunals are quite different to the procedures in the Administrative Appeals Tribunal. Kirby J has said of the migration tribunals (*Muin v Refugee Review Tribunal* [2002] HCA 30; (2002) 190 ALR 601 at 648; [208]):

> *... [T]he Tribunal has no contradictor, no respondent party, normally allows no legal representation and acts in an inquisitorial fashion...*

None of these statements are true of the Administrative Appeals Tribunal.

24. Although Brennan J, in *Bushell v Repatriation Commission* [1992] HCA 47; (1992) 175 CLR 408 at 424-425, described the substance of review in the Administrative Appeals Tribunal as "inquisitorial", he also went on to say that the proceedings "may sometimes appear to be adversarial".

**The authorities**

25. In *Waterford v the Commonwealth* [1987] HCA 25; (1987) 163 CLR 54, the substantial question was whether privilege attached to certain communications between Government and its salaried legal officers. The court held it did. However, the court divided on whether the claims to privilege were made out on the evidence before it. Dawson J, although in dissent on this issue, agreed that the privilege was available. The subject proceedings were proceedings before the Administrative Appeals Tribunal for review of decisions to deny access to documents under the *Freedom of Information Act 1982* (Cth). Section 42(1) of the Act exempts documents that "would be privileged from production in legal proceedings on the ground of legal professional privilege". Dawson J said (at 101):

> *The concept of litigation for the purpose of the doctrine of legal professional privilege is, I think, wide enough to embrace the proceedings before the Tribunal which were conducted upon adversary lines and contemplated legal representation. Communications for the purpose of giving and receiving legal advice in relation to those proceedings fell, in my view, within the privilege. For the reasons which I have already given, the fact that advice of that kind was given by salaried employees did not preclude reliance upon the privilege.*

26. Although Dawson J's statement about the Tribunal seems clear, Bergin J suggested (*Ingot* at 383; [34]) that his decision appears to be based on advice privilege. Some of his statements, such as the second sentence quoted, may support this. However, the clarity of the observation about the Tribunal, and the fact that Dawson J felt it was appropriate to make the statement, seems to us to warrant its being followed. Documents between lawyer and client containing legal advice may satisfy both the requirements for advice privilege and litigation privilege.

27. Young J, commenting on the passage in *AWB*, said (at 25; [161]):

> *In my opinion, it is one thing to extend litigation privilege to adversarial proceedings before the Administrative Appeals Tribunal. The Administrative Appeals Tribunal is vested with statutory authority to determine issues with legally binding consequences.*

Young J appears to have accepted the remarks of Dawson J as determinative.

28. In their joint judgment in *Waterford*, Mason and Wilson JJ considered, and rejected, the argument that (at 63):

*...the review proceedings in the Tribunal ought not be regarded as proceedings in which the Crown finds itself in an adversarial context requiring the protection of common law defences such as the privilege.*

Their Honours' decision seems to be squarely-based on litigation privilege. The documents in question were "documents the subject matter of which [was] legal advice obtained from within the Government and concerned with proceedings pending in the Tribunal" (at 60). In their conclusion, they said (at 67):

> *But the point of overriding importance to the appellant's argument focuses on the second category of documents to which the privilege attaches, that is to say, professional communications between a client and his legal adviser* ***in connexion with legal proceedings.*** *It was to this category of documents that much of the appellant's request for access related.*

Their Honours dealt with the matter as raising litigation privilege rather than advice privilege. They went on to conclude that documents may be privileged even if they deal with matters of policy as well as law. They held that, on the material before them, the documents under consideration were privileged.

29. It seems to us that the reasons of Mason and Wilson JJ in *Waterford*, as well as those of Dawson J, require a conclusion that litigation privilege arises with respect to proceedings in the Administrative Appeals Tribunal.
30. In *Corporate Affairs Commission (NSW) V Yuill* [1991] HCA 28; (1991) 172 CLR 319 at 322, Brennan J described legal professional privilege as applying "in judicial and quasi-judicial proceedings". Lander J recently used the same phrase in *SZHWY v Minister for Immigration and Citizenship* [2007] FCAFC 64 at [15] and [37]. However, the context in which Brennan J made his statement shows that he was referring to the circumstances in which the claim of privilege could be made, and not the circumstances in which the right to claim privilege arises. In many cases these two circumstances will not differ. In the present case, for example, the claim is made in this Tribunal and arises out of communications relating to proceedings in the Tribunal. By contrast, the claim in *Ingot* was made in the Supreme Court of New South Wales but arose out of proceedings in this Tribunal. Lander J, however, although citing Brennan J in *Yuill* (at [37]), used the phrase to describe the source of the claim (at [15]):

> *The privilege can arise also where the confidential communication is for the dominant purpose for use in existing or reasonably contemplated judicial or quasi-judicial proceedings.*

31. In our opinion, litigation privilege applies generally in the Administrative Appeals Tribunal. We consider that *Waterford* requires us to come to this conclusion. However, we would independently have come to the same conclusion as a matter of principle.

**The rationale for legal professional privilege**

32. The rationale for legal professional privilege is not associated with litigation as such. According to Stephen, Mason and Murphy JJ in *Grant v Downs* (1976) 135 CLR 675 at 685, the rationale:

> *... 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 complicated and complex discipline.*

33. McHugh J in *Carter v Northmore Hale Davy and Leake* (1995) 183 CLR 121 at 160-161 justified the privilege on the basis of the need for "freedom of communication". There is a helpful discussion of the rationale by Stone J in *Pratt Holdings Pty Ltd v Commissioner of Taxation* [2004] FCAFC 122; (2004) 136 FCR 357 at 376-383.
34. Whatever the ultimate rationale for the principle, it does not depend upon a narrow characterisation of the proceeding with respect to which a document was prepared. Advice privilege does not require a proceeding. For litigation privilege the most used phrase is "legal proceedings", although "judicial or quasi-judicial proceedings" is also used. The rationale for the principle appears to be found in wider considerations such as the public interest in enhancing the administration of justice and in protecting freedom of communication.
35. Proceedings in the Tribunal are legal proceedings. The procedure is legal. It is generally like a court. The Tribunal must proceed in accordance with law and it must ascertain and apply the law in making a binding decision. Proceedings in the Tribunal can be called quasi-judicial proceedings. Whatever the rationale for the privilege ultimately is, we see no basis upon which that rationale could sustain privilege in court proceedings and not in proceedings in the Administrative Appeals Tribunal.

**Abrogation**

36. We recognise that the legislature can abrogate the privilege by clear terms in a statute. Dawson J referred to this in *Baker v Campbell* [1983] HCA 39; (1983) 153 CLR 52 at 122 as follows:

*... and if the privilege does extend beyond judicial proceedings to administrative inquiries, the question is not whether the legislature has power to abrogate the privilege by appropriate legislation; clearly it has... It is merely whether the legislature has done so, having regard to the rule which requires the general words of statutes to be construed, if possible, so as not to effect an alteration of common law doctrines or a denial of common law rights.*

Kirby J has said any abrogation of legal professional privilege has to be "made plain because of the high public interest which the privilege defends" (*Commissioner of Australian Federal Police v Propend Finance Pty Limited and Others* [1997] HCA 3; (1997) 188 CLR 501 at 502). See also *The Daniels Corporation International Pty Ltd & Anor v Australian Competition and Consumer Commission* [2002] HCA 49; (2002) 213 CLR 543 at 553, 562, 576 and 591.

37. The Commonwealth Parliament has abrogated the privilege in particular circumstances. See, for example, s 70 of the *Seafarers Rehabilitation and Compensation Act 1992* (Cth) and s 37 of the

AAT Act (expressly limited to certain documents in the possession of the decision-maker). There is no abrogation of the privilege in the *Safety, Rehabilitation and Compensation Act 1988*.

**Decision**

38. The applicant is entitled to claim legal professional privilege in relation to communications between the applicant's solicitors and Doctors Sale and Bohmer.

I certify that the thirty-eight preceding paragraphs are a true copy of the reasons for the decision herein of Justice Downes, President and the Hon R J Groom, Deputy President.

Signed: .....[sgd].....

Julia Powles, Associate

Date of Interlocutory Hearing 17 August 2007

Date of Decision 21 September 2007

Counsel for the Applicant R Browne

Solicitor for the Applicant FitzGerald and Browne

Counsel for the Respondent B Morgan

Solicitor for the Respondent Australian Government Solicitor

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