

Jadwan Pty Ltd & the Department of Health and Human Services

Case reference: 0812-112

This application for review in part involved determining whether certain information which the Department of Health and Human Services had refused to disclose to Jadwan Pty Ltd was covered by the exemption in s 29 of the *Freedom of Information Act*.

The decision made departed from the approach taken by the Ombudsman to the application of s 29 in a decision made in December 2008, and in this respect included the following passage–

Section 29

Section 29 declares information to be exempt information if it is contained in a record of such a nature that the record would be privileged from production in legal proceedings on the ground of legal professional privilege.

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 v Australian Competition and Consumer Commission* [2002] HCA 49, per Gleeson CJ *et al* at para. 9. *Waterford v The Commonwealth of Australia* [1987] HCA 25 confirmed that legal professional privilege extends to confidential professional communications between government agencies and their legal representatives if made with the requisite purpose. Once it is established that a legal practitioner is acting in a relevant legal context, a confidential communication will attract privilege even if it contains extraneous matter so long as it was prepared for the dominant purpose of giving or receiving legal advice or the provision of legal services.

Section 29 does not itself provide for any public interest test to override the exemption, with the result that there is no right to information under s 29 on the ground that it is in the public interest. In that regard I note the observation in *Grant v Downs* (1976) 135 CLR 674 at 685 that 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*”.

I note that in a decision published in December 2008 (*Simon Cullen and the Department of Premier and Cabinet*, Case Reference 700-0808048), I applied s 29 with reference to s 118 of the *Evidence Act* 2001. I am now satisfied that this approach is erroneous. It is inconsistent with that taken in *Commonwealth of Australia v Dutton* (2000) 102 FCR 168, where Wilcox J said -

"Although other issues were raised at earlier points of time, the only question at the hearing of the appeal was the extent (if any) to which the subject documents were rendered exempt from production to the respondent by s42 of the Freedom of Information Act 1982, read with s50 of the Extradition Act 1988. As Moore J points out, both parties accepted that the concept of legal professional privilege embodied in s42(1) of the

Freedom of Information Act is that developed by the common law, not that (called "client legal privilege") covered by Division 1 of Pt3.10 (s117 - s126) of the Evidence Act 1995. It seems to me this is correct. That Division 1 is concerned only with the adduction of evidence in legal proceedings is inherent in the approach taken by the High Court of Australia in Esso Australia Resources Ltd v Federal Commissioner of Taxation [1999] HCA 67; 168 ALR 123."

Section 118 of the *Evidence Act* creates a rule about the adducing of evidence in court proceedings, whereas s 29 of the FOI Act refers to a concept which is wider than the adduction of evidence, namely "production in legal proceedings". Accordingly, the application of s 29 requires the application of the common law with respect to legal professional privilege, not the application of conceptually related provisions of the *Evidence Act*.

Against this background, the Ombudsman determined that most of the information which the Department claimed to be exempt under s 29 was indeed exempt. However, he determined that some of this information, relating to the payment of legal costs and routine matters concerning legal services, and not involving the giving or receiving of actual legal advice, was not exempt.