

LEGAL PROFESSIONAL PRIVILEGE: *FARNABY v MILITARY REHABILITATION AND COMPENSATION COMMISSION*

The Hon Justice Garry Downes AM*

I think that you have all been told that I am going to talk about *Farnaby v Military Rehabilitation and Compensation Commission*¹. In a sense that is right, but you may be slightly relieved to hear that I am not simply going to talk about what the case is about and what it decided. Apart from that being a very boring way of dealing with cases, you could easily do it in a much shorter time by reading it yourself. So I thought what I would rather do is address some of the issues that arose in *Farnaby* relating to privilege and to throw up some talking points about issues of principle on three topics, two of them associated with privilege and one associated with the Tribunal itself.

The rationale that lies behind the law of privilege is not, of course, confined to legal professional privilege. There is also privilege against self-incrimination and there are still varieties of privilege associated with marital relationships. But the main privilege from the Tribunal's point of view is legal professional privilege. That divides itself into two parts now, but this is comparatively recent. It was not so when the rules relating to legal professional privilege were first being worked out. Legal professional privilege divides itself into two parts which now seem to be called 'advice privilege' and 'litigation privilege'.

The aspect of privilege which arose in *Farnaby's* case, and, importantly, in the Supreme Court of New South Wales case which it considered, *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Market Ltd*², is the so-called 'litigation privilege'. As the Tribunal's decision in the case may suggest, however, it may be that the label 'litigation privilege' is not wholly appropriate. This is particularly so if the word 'litigation' is understood to refer only to proceedings in a court. This Tribunal exercises administrative power and courts exercise judicial power. Only the latter may be strictly 'litigation'. I think, although she did not ultimately pin her decision to the label, that some of that kind of thinking perhaps lay behind the decision of Bergin J in *Ingot Capital* in which she held that litigation privilege did not apply in the Tribunal. However, the ultimate basis for her decision was her finding that proceedings in the Tribunal were not sufficiently in the judicial mould, whatever description was applied.

The two important issues thrown up by *Farnaby's* case are, first, what is the rationale of the rule (because that is quite an important base from which to determine whether the rule applies or not) and, secondly, in what circumstances can the rule be availed of.

So far as the rationale is concerned, I mentioned in my decision the judgment of Stone J in the Full Federal Court of Australia in *Pratt Holdings Pty Ltd v Commissioner of Taxation*³ in which she spent time working through the historic development of the rule. That is really quite an interesting discussion and is worth looking at. It is fair to say that the rule started off

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with the simple idea that lawyers should keep their clients' secrets and they should not be compelled to disclose them. Modern thinking challenges that sort of approach, which might be thought to be elitist. After all, why is it that if I tell my lawyer something in connection with his representing me he should not be compellable to disclose it, but if I tell someone else the same thing in another confidential context no such rule applies?

There seem now to be two related rationales for the rule. The first idea is that it is associated with the administration of justice. Justice will be better administered if, for example, clients are able to freely make disclosure to lawyers and lawyers are freely able to investigate the case, or seek advice from third parties, without there being liability of disclosure. There is something of the idea that litigation will be longer and more expensive and more complicated if this simple rule does not apply. That is the first rationale that seems to exist.

The second rationale, which was particularly identified by McHugh J in *Carter v Northmore Hale Davy and Leake*⁴, is another popular concept. It is associated with a human right, in this case freedom of communication. You ought to be able to speak freely and confidentially to your lawyer without subjecting yourself to the possibility of that confidential communication being disclosed to others.

Neither of those two rationales will work alone because the communication rationale does not protect a range of communications not involving legal advice or representation to which it would be equally applicable. However, the two can work together.

When Deputy President Groom and I were pondering what we should do in *Farnaby's* case, these kinds of considerations were quite important because Bergin J had really engaged in a similar approach. The matters which impressed DP Groom and myself were that if the kind of rights that were dealt with in the Tribunal and the process in which a result was arrived at were sufficiently analogous to the process in court proceedings, and if a rationale of protecting freedom of communication and the administration of justice arose just as much in the Tribunal as it did in a Court, then why should the two be distinguished? We drew on some analogies, or illustrations of problems that might arise, in the course of our reasons.

So, for example, we referred to taxation appeals. It would be odd if, when you were consulting your lawyer about a potential challenge to an assessment issued by the Commissioner of Taxation, you were entitled to privilege while you were thinking about it (because the privilege relating to litigation advice extends to the period of time before the litigation is commenced), and if you decided to take your tax appeal to the Federal Court you would still be protected by the privilege, but if you decided to take your appeal to the Administrative Appeals Tribunal you would not be protected. You would continue to be protected for the time you were thinking about whether you should go to the Tribunal or the Federal Court, but the moment you opted for the Tribunal the privilege would go prospectively. Well it did not seem to us that that was a particularly attractive approach as a matter of policy. We also thought that complicated issues could arise in tribunals like the Victorian Civil and Administrative Tribunal and the Western Australian State Administrative Tribunal, where they are exercising at the one time judicial power and also administrative power.

Although we examined all these issues in *Farnaby's* case, ultimately we did not think we really had to worry about them because it seemed to us that *Waterford v The Commonwealth*⁵ in the High Court decided the question directly.

That is a short introduction to the type of policy issues or rationales that potentially lie behind the rule and which are probably quite an important consideration in deciding when the rule might apply and to what tribunals it might apply. I guess there is a question as to whether it would apply in tribunals like the Migration Review Tribunal and the Refugee Review

Tribunal, as well as the Social Security Appeals Tribunal, where generally the Government is not represented and other distinctions can be drawn.

The other aspect of the rule that I thought was worth mentioning, because it arises directly out of *Farnaby*, or more accurately out of *Ingot Capital*, is to look at when the privilege can be availed of as opposed to what are the circumstances that give rise to the privilege. Ordinarily when you are dealing with the litigation privilege limb, as opposed to the advice limb, the place in which the existence of the privilege is going to be tested is the court or tribunal in which the privilege arose. We see this in connection with returns of summonses in the Tribunal; the parties battle over whether documents were or were not brought into existence in connection with representation in the Tribunal in the very same proceedings. But, of course, the privilege is completely general.

So, if the Commissioner of Taxation or someone from the Australian Securities and Investments Commission knocks on your door and wants to see documents pursuant to their coercive investigative powers, you may be entitled to make the same claim for privilege relating to them as you would in a court or tribunal, subject, of course, to abrogation of the right. There are lots of abrogations of the right in legislation but subject to abrogation of the right in legislation, the claim is available.

The Administrative Review Council is presently engaged in a project referred to it by the last Attorney-General on this topic and I think about two days ago there was a front page article relating to it in the *Australian Financial Review*. (The report has now been published: Administrative Review Council, *The Coercive Information Gathering Powers of Government Agencies*, Report No. 48, May 2008). One of the things that arose in that inquiry, and, indeed, in another inquiry that the ARC is about to complete, is the question of what abrogations there should be of rights to privilege in connection with regulatory agencies' powers. Importantly, the report is concerned with achieving consistency between the powers, because they grew up in a haphazard kind of way. That is, however, one circumstance in which privilege can be relied upon and which applies just as much to a document produced in connection with representation in legal proceedings as it does to advice privilege.

The other situation in which privilege can arise, and this is what happened in *Ingot Capital*, is in other legal proceedings. This is how Bergin J came to decide whether litigation privilege applied in the Administrative Appeals Tribunal. Disclosure was sought of documents brought into existence in connection with Tribunal proceedings for their use in completely separate proceedings in the Supreme Court of New South Wales.

The third matter that I was going to talk to you about associated with *Farnaby* is not associated with privilege itself but is associated with the reasoning in *Farnaby*. In a way, *Farnaby* created for me a kind of dilemma because I am sure most of you will know my views about the difference between proceedings in a court and proceedings in a tribunal. I think that if you look at decisions I have written you will find that in a number of them, maybe most of them, I have made reference to the fact that the Tribunal exercises administrative power and not judicial power.

Those of you who were present at the Tribunal's 30th Anniversary in Canberra in 2006 may remember that I said that although I did not like the descriptions 'inquisitorial' and 'adversarial', but rather preferred 'flexibility' as a description of the way the Tribunal dealt with its cases, I nevertheless recognised very clearly that the way the Tribunal proceeded was different to the way courts deal with their cases.

What the Tribunal is doing in making an administrative decision, or arriving at the correct or preferable decision, is very much like what the admiralty lawyers call acting '*in rem*'. It is

making a decision which is not just the resolution of a dispute between two people. If you are making a decision under the *Migration Act 1958* (Cth), I think in a very real sense, your decision relating to who may or may not gain a visa is an aspect of the executive determination of the way in which the Australian people shall be constituted as much as it is resolving a difference of opinion between the Department of Immigration and Citizenship and the applicant. If you are dealing with a tax case you are dealing with revenue raising for the country. At every step, everything we do is much more than simply resolving a dispute.

One of the tests of whether I am right or not is how easy it is for an administrative decision to be remade. It is true that under the *Administrative Appeals Tribunal Act 1975* (Cth), applicants can withdraw at any time, but they cannot simply require us to make a decision agreed upon in place of the decision that is subject to review. The *AAT Act* requires us (s 42C) to consider, first, whether we have got power to do what they are asking us to do and secondly, and more importantly, whether it is appropriate to do so in the circumstances. That is an important part of how the Tribunal operates, which is to be contrasted with a Court in which the parties are king, so to speak. In the Federal Court, and this applies even when someone is seeking judicial review, the parties can go up and say: 'We have settled the case. We have worked out some terms of settlement and that is the end of it.' The Court really does not have any power to qualify what the parties can do.

When I came to the hearing in *Farnaby*, and particularly to the reasoning of Bergin J which was based on the very type of distinction that I have just been drawing, I felt in something of a dilemma because my views about the differences between administrative decision-making and judicial decision-making needed to be given weight. In one paragraph of our reasons we identified the aspects of the work of the Tribunal which were rather court-like. Sir Gerard Brennan and Sir Anthony Mason have both said that the Tribunal goes about much of what it does in a court-like fashion. There are some things about the Tribunal that are referred to in the *AAT Act* which do make us court-like.

Section 30(1) of the *AAT Act* has the consequence that there must be two parties in the Tribunal. The word 'parties' is used so the Tribunal is necessarily dealing with opposed parties. Secondly, s 34J shows that there must be a hearing unless the Tribunal and the parties agree otherwise. If the Tribunal does not agree, or both parties do not agree, then there must be a hearing. Next, the hearing must be in public, pursuant to s 35. That implies that a hearing will have some of the formalities of a court proceeding. Fourthly, the parties have a right to representation. That is quite significant. Fifthly, although we are not bound by the rules of evidence, the *AAT Act* refers both to 'evidence', using that word, and to evidence being 'admitted' (ss 43(2B) and 34E). We do not have rules of evidence but we do have a process in which there is an adjudication as to the admission of oral or written evidence. Sixthly, we have power to take evidence on oath or affirmation and we have power to summons persons to give evidence and produce documents. Finally, we must give reasons for our decisions and the parties can require that those reasons should be in writing.

It may not be that people turn up in hearing rooms in a wig and gown. It may not be that the formality that occurs in the Tribunal is quite the same as the formality in some courts (and I hope it never will be). It may be that we deal with evidential issues in a way that is less rigid than a court does, but when you look at the essence of how we go about our work, I think that it is close enough to the way in which a court goes about its work to be able to say, if I had not been bound by what the High Court had said in *Waterford*, that there is not a sufficient distinction for privilege not to apply.

Endnotes

- 1 [2007] AATA 1792
- 2 (2006) 233 ALR 369; 200 FLR 309
- 3 (2004) 136 FCR 357 at 376-383
- 4 (1995) 183 CLR 121 at 160-161
- 5 (1987) 163 CLR 54