or implied term, Mason P was not prepared to determine as on a rehearing what conclusion should have in fact been drawn on the question of breach.

Conclusion

In concluding that there was no tortious duty of good faith at common law, the Court of Appeal's judgment has effectively overruled the decision in *Gibson*, insofar as that decision has in the past been invoked as authority for the existence of such a tortious duty at least on the part of a workers compensation insurer, and thereby brought the position in the New South Wales into line with that under Victorian, Queensland and English law. Although in its judgment the Court of Appeal also provided some guidance as to how a claim that seeks to extend the existence or scope of a tort, including a novel tort, should in the future be dealt with, it also reveals the difficulties that are likely to be encountered in that regard by a claimant seeking to advance such a claim, particularly at first instance and which requires travelling beyond long established authorities.

By Greg Nell SC

Legal professional privilege: AWB Limited v Cole (No1) (2006) 152 FCR 382

This decision arose out of the Australian Government's Inquiry into Certain Australian Companies in relation to the United Nations Oil for Food Programme (Oil for Food Inquiry), conducted by former Supreme Court judge, Terence Cole, from late 2005 through until November 2006.

The case involved a claim by AWB Limited (*AWB*) for legal professional privilege in relation to a document, a draft statement of contrition, which had been produced to the Inquiry by one of AWB's employees (in response to a notice to produce) and subsequently tendered during the examination of the then Managing Director of AWB, Mr Lindberg, in the course of the Inquiry's public hearings. The document was said by AWB to have had been mistakenly produced to the Inquiry and that there had been no intention to waive the privilege which AWB claimed attached to it. After the document had been tendered, AWB applied to the Commissioner for its return and removal from the exhibits before the Inquiry. The Commissioner (assuming in favour of AWB that the document had been produced inadvertently and any privilege that might have attached to it had not thereby been waived), ruled that the document did not attract legal professional privilege, giving detailed reasons in support of that ruling.

AWB applied to the Federal Court of Australia for a declaration that the draft statement of contrition was privileged and for a review of the commissioner's ruling to the contrary. That application was opposed by the Commonwealth, Commissioner Cole having filed a submitting appearance and advised the court that he would take no part in the proceedings and would abide the court's determination of AWB's claim. In support of its application, AWB claimed that the draft statement was protected by both 'advice privilege' and 'litigation privilege'. The issues raised by the former were whether the draft statement was brought into existence for the dominant purpose of obtaining legal advice or whether it recorded legal advice provided by AWB's lawyers for the benefit of AWB? The issues raised by the second basis of AWB's claim were whether the document had been brought into existence for the dominant purpose of being used in connection with litigation that was reasonably in prospect and what amounted to 'litigation' for the purposes of that privilege? The onus was of course upon AWB to establish the privilege claimed.

The proceedings were heard by Justice Young who held that, having regard to its contents and the circumstances in which it had come into being, the draft statement of contrition did not fall within any of the established categories of legal professional privilege and was therefore not properly the subject of a claim for privilege.

In his detailed reasons for judgment, Justice Young has provided both a comprehensive discussion as to what qualifies as 'advice privilege' and a useful summary of the principles that are to be applied in determining whether or not a document is properly the subject of that privilege. In the course of that discussion, his Honour has also collated many of the recent authorities, both Australian and English, on the content of advice privilege and what is required to be proved in order successfully to establish a claim for that privilege. Space does not permit an examination of his Honour's discussion of either these principles or authorities to be included in this case note. Suffice it to say that his judgment (especially paragraphs [60] – [63] and [85] – [110]) as well as his Honour's later judgment in *AWB Limited v Cole (No. 5)* (2006) 155 FCR 30 are a useful resource for those seeking to assert or challenge a claim for legal professional privilege, particularly advice privilege.

In rejecting AWB's claim that the draft statement was protected by litigation privilege, Justice Young held that the rationale for litigation privilege did not support its extension to a commission of inquiry and that the privilege therefore did not extend to documents brought into existence for the dominant purpose of being used in connection with such an Inquiry. That is of course not to say that legal advice privilege may not attach to work undertaken in connection with an Inquiry, provided that the dominant purpose is satisfied. Justice Young also rejected, on the facts before him, AWB's claim that the draft statement of contrition had been brought into existence for the dominant purpose of being used in connection with any litigation which might follow on from the inquiry or the commissioner's final report. In those circumstances, his Honour did not decide whether potential future litigation of that kind fell within the scope of the litigation privilege.

Leaving aside the substantive questions raised by AWB's application, Justice Young also held that :

- the *Royal Commissions Act 1902* (Cth) did not abrogate legal professional privilege and that the provisions of that Act should be read down so as not to require production of documents that were properly the subject of a claim for legal professional privilege; and

- under the Royal Commissions Act a commissioner has no power either to determine whether a claim for privilege should be upheld or to inspect a document that may be required to be produced under a notice issued by the commission or inquiry and that is the subject of a claim for privilege. In particular, his Honour rejected the submission (advanced by the Commonwealth) that a royal commissioner had an implied authority under the Act to require production of a document that is claimed to be the subject of legal professional privilege for the limited purpose of inspecting it in order to determine whether the claim for privilege is made out.

In relation to this second matter, his Honour acknowledged that a commissioner has an administrative power or capacity, for the purposes of determining his (or her) own actions and procedures to 'decide', in the sense of forming an opinion, whether a particular document was required to be produced under a notice to produce because it was not legally privileged. In this sense, a commissioner has the power to accept or reject a claim for privilege when made. But any ruling made or opinion expressed by a commissioner in that regard had no binding force or effect in law. His Honour had no doubt that it was obviously administratively convenient and practical that the Royal Commissions Act be construed as giving a commissioner the implied authority to make such a non-binding decision. But his Honour concluded that it was open to the party claiming privilege to agitate that issue directly in declaratory proceedings in the Federal Court without embarking upon a review of the commissioner's decision or ruling.

In response to this part of his Honour's decision, the Australian Government almost immediately passed the *Royal Commissions Amendment Act 2006* (Cth), to amend the Royal Commissions Act *inter alia* to henceforth confer upon a commissioner under the Act both power to determine a claim for legal professional privilege in certain circumstances, including in relation to documents required to be produced by a commission or inquiry under a notice to produce, and power (in certain circumstances) to inspect for the purpose of such a determination the documents in respect of which privilege is claimed and to compel the production of those documents for the purposes of that inspection. However, these amendments did not go so far as to confer the power to determine questions of privilege exclusively on the commissioner and a party asserting a claim for privilege in respect of any documents required to be produced to a commission or inquiry (or resisting the production of documents to the commission or inquiry on the grounds that they are privileged) may still approach the Federal Court to determine that claim and issue. Accordingly, this part of Justice Young's judgment must now be read subject to this amending legislation.

In relation to his Honour's conclusion that the Royal Commissions Act did not abrogate legal professional privilege, in his final report Commissioner Cole recommended that consideration be given to amending the Royal Commissions Act to permit the governor-general in council by Letters Patent to determine that in relation to the whole or particular aspect of matters the subject of inquiry, legal professional privilege should not apply. On 3 May 2007, the Australian Government responded to this recommendation, in particular noting that on 30 November 2006 it had announced an inquiry by the Australian Law Reform Commission (ALRC) into legal professional privilege as it relates to the activities of Commonwealth investigatory agencies. In April 2007, the ALRC issued (as part of its inquiry) an Issues Paper entitled *Client Legal Privilege and Federal Investigatory Bodies.* In July 2007, a submission was made by the Law Council of Australia to the ALRC in response to this Issues Paper, in which the Law Council stressed the importance of client legal privilege to the legal system and stated that it did not support sweeping changes to the current rules for corporations, royal commissions or in any other investigatory or regulatory context. The Law Council also recommended the development of guidelines and 'best practice' procedures to enable the efficient and effective resolution of client legal privilege claims raised in the context of investigations by Commonwealth agencies.

On 26 September 2007 the ALRC released a Discussion Paper entitled *Client Legal Privilege and Federal Investigatory Bodies* (DP 73), containing 42 proposals aimed at addressing disputes over client legal privilege in federal investigations. Included amongst these was proposal 6-1 recommending that:

> Federal client legal privilege legislation should provide that, in special circumstances, the Australian Parliament may legislate to abrogate client legal privilege in relation to a particular royal commission of inquiry or investigation undertaken by a federal investigative body.

The factors to be considered in determining whether such legislation should be enacted are:

- the subject of the royal commission of inquiry or investigation, including whether the inquiry or investigation concerns a matter (or matters) of major public importance that has (or have) a significant impact on the community in general or on a section of the community or is a covert investigation;
- whether the information sought can be obtained in a timely and complete way by using alternative means that do not require abrogation of client legal privilege; and especially
- the likelihood and degree to which the privileged information will benefit the royal commission or investigation, particularly where the legal advice itself is central to the issues being considered by the commission or federal body.

The ALRC's final report is due to be completed by December 2007 and the ALRC is currently seeking feedback to its Discussion Paper. Submissions close on 1 November 2007.

By Greg Nell SC

(Note: although the author was one of the counsel assisting in the Oil for Food Inquiry, he did not participate in the hearing of these proceedings)