

Before the High Court

Australian Competition and Consumer Commission v The Daniels Corporation International Pty Ltd and Another

SUZANNE B MCNICOL*

The High Court has granted the Daniels Corporation special leave to appeal¹ against the decision of the Full Federal Court in *Australian Competition and Consumer Commission v The Daniels Corporation International Pty Ltd and Another*.² The appeal raises the important question of whether s155 of the *Trade Practices Act 1974* (Cth) displaces legal professional privilege by necessary implication. Legal professional privilege can only be abrogated or displaced by the manifestation of a clear legislative intention. This intention may be demonstrated by express words or necessary implication. The appeal therefore presents the High Court with the opportunity of reviewing the uncertain law concerning the implied abrogation of legal professional privilege by statute and, in particular, deciding authoritatively on the question of legislative intention manifested in the *Trade Practices Act 1974* (Cth) to abolish a fundamental common law privilege by ‘necessary implication’.

The High Court is specifically called upon to consider s155 of the *Trade Practices Act 1974* (Cth) which is silent on the doctrine of legal professional privilege.³ Indeed, as Gaudron J stated at the application for special leave to appeal, ‘So, what is in issue is what is the better view of section 155’,⁴ that is, whether legal professional privilege is or is not a valid answer to a notice under s155 of the *Trade Practices Act*. However it is hoped that the High Court might also seize the opportunity to pronounce some ‘aids to interpretation’ on the more general question of statutory abrogation of privilege by necessary implication or intentment.⁵ In doing this, it is also hoped that the High Court might express a

* LLB (Hons) BA (Melb), BCL (Oxon), PhD (Mon), Barrister and Solicitor (Vic), Associate Professor of Law, Monash University.

1 *Daniels Corporation International Pty Ltd and Another v Australian Competition and Consumer Commission* [2001] HCA 72.

2 (2001) 108 FCR 123;182 ALR 114.

3 That is, there is no express reference to legal professional privilege whereas s155(7) refers to the privilege against self incrimination by expressly abolishing it and conferring use immunity. On the issue of express mention of one privilege and the omission of the other (that is, inferring an intention to abolish the privilege from the application of the *expressio unius* principle), see Suzanne McNicol, *The Law of Privilege* (1992) at 122–123 and Dawson J in *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 335.

4 Above n1 at 4.

5 On some of the existing aids to interpretation on the statutory abrogation of privilege, see McNicol, above n3 at 264–267. Generally, on ‘implication’ in legislative intention, see J Goldsworthy, ‘Implications in Language, Law and the Constitution’ in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) and Jeffery Goldsworthy, ‘Legislative Intentions, Legislative Supremacy, and Legal Positivism’ in Jeffery Goldsworthy & Tom Campbell (eds), *Legal Interpretation in Democratic States* (2002).

view on the differences, if any, between legal professional privilege and the privilege against self incrimination where both privileges are regarded as having the potential to defeat or stultify the purpose for which a coercive and investigative power is conferred.

It is proposed in this paper, first, to set out briefly the facts and decision of the Full Federal Court in the *Daniels* case. Second, the three judgments of the Federal Court are analysed in detail. Third, a possible process of reasoning to be employed by the High Court is suggested. In this section it is argued by the present author that the High Court should dismiss the Daniels Corporation's appeal and endorse the decision of the Federal Court. Fourth, the question of whether there is any difference between the privilege against self-incrimination and legal professional privilege when it comes to stultifying the purpose and operation of the *Trade Practices Act* is considered. Fifth, other incidental ramifications flowing from a decision of the High Court that s155 of the *Trade Practices Act* impliedly abolishes legal professional privilege are explored. Finally, the paper concludes with a strong plea to the High Court to embrace the decision of the Federal Court that legal professional privilege is not a valid answer to a notice served under s155 of the *Trade Practices Act* 1974 (Cth).

1. The Facts and Decision in the Case

The applicant, the Australian Competition and Consumer Commission (ACCC) was investigating the first respondent, the Daniels Corporation International Pty Ltd, to determine whether it had engaged in conduct which contravened the *Trade Practices Act* 1974 (Cth). As part of the investigation the ACCC served the Daniels Corporation with a notice to produce documents and information, pursuant to s155 of the *Trade Practices Act* 1974 (Cth). The Daniels Corporation referred the notice to its solicitors, the second respondents. The second respondents produced some documents but refused to produce others, arguing that those documents were protected from disclosure by legal professional privilege. The ACCC then served the second respondent with a notice to produce information and documents pursuant to s155 of the *Trade Practices Act* 1974 (Cth). The information sought by the notice included information about communications during 1998 between the second respondent solicitors and Daniels in respect of a particular subject. The applicant, the ACCC, applied to the court for declarations that: (i) The power granted to it by s155 is not subject to legal professional privilege; or (ii) the particular documents requested by the notice were not covered by the privilege. The primary judge, Wilcox J, directed the issue raised in (i) be dealt with separately as a preliminary question. As this issue was purely a question of law and was likely to be appealed regardless of the result before a single judge, Black CJ directed it to be dealt with by a Full Court exercising original jurisdiction pursuant to s20(1A) of the *Federal Court of Australia Act* 1976 (Cth).

The Full Federal Court (Wilcox, Moore and Lindgren JJ) granted the declaration and held that legal professional privilege is not a valid answer to a notice served under s155 of the *Trade Practices Act* 1974 (Cth). Accordingly the court ordered

and declared that the second respondent was not entitled to refuse to comply with the notice issued by the applicant on the ground of legal professional privilege.

Section 155 of the *Trade Practices Act 1974* (Cth) relevantly provides:

(1) Subject to subsection (2A), if the Commission, the Chairperson or the Deputy-Chairperson has reason to believe that a person is capable of furnishing information, producing documents or giving evidence relating to a matter that constitutes, or may constitute, a contravention of this Act ... a member of the Commission may, by notice in writing served on that person, require that person:

- (a) to furnish to the Commission, by writing signed by that person or, in the case of a body corporate, by a competent officer of the body corporate, within the time and the manner specified in the notice, any such information;
- (b) to produce to the Commission, or to a person specified in the notice acting on its behalf, in accordance with the notice, any such documents; or
- (c) to appear before the Commission at a time and place specified in the notice to give any such evidence, either orally or in writing, and produce any such documents.

....

(3) The Commission may require evidence referred to in paragraph (1)(c) to be given on oath or affirmation and for that purpose any member of the Commission may administer an oath or an affirmation.

....

(5) A person shall not:

- (a) refuse or fail to comply with a notice under this section to the extent that the person is capable of complying with it;
- (b) in purported compliance with such a notice, knowingly furnish information on the evidence that is false or misleading; or
- (c) obstruct or hinder an authorized officer acting in pursuance of subsection (2).

....

(6A) A person who contravenes subsection (5) or (6) is guilty of an offence, punishable on conviction:

- (a) in the case of a person not being a body corporate — by a fine not exceeding \$2,000 or imprisonment for 12 months; or
- (b) in the case of a person being a body corporate — by a fine not exceeding \$10,000.

(7) A person is not excused from furnishing information or producing or permitting the inspection of a document in pursuance of this section on the ground that the information or document may tend to incriminate the person, but the answer by a person to any question asked in a notice under this section or the furnishing by a person of any information in pursuance of such a notice, or any document produced in pursuance of such a notice or made available to an authorized officer for inspection, is not admissible in evidence against the person:

- (a) in the case of a person not being a body corporate — in any criminal proceedings other than proceedings under this section; or
- (b) in the case of a body corporate — in any criminal proceedings other than proceedings under this Act.

All three judges held that the requirement in s155(5)(a) that a person shall not ‘refuse or fail to comply with a notice under this section to the extent that the person is capable of complying with it’ is inconsistent with legal professional privilege.⁶ Further, all three judges held that applying legal professional privilege would prevent s155 from operating as intended. Indeed they emphasized that the purpose for which the power is conferred by s155 would be *hampered*⁷ or *defeated* if legal professional privilege were to apply. Wilcox and Moore JJ decided that the practical and policy problems arising from claiming the privilege against self incrimination, which greatly influenced the High Court in *Pyneboard Pty Ltd v Trade Practices Commission*,⁸ would be ‘equally apposite’⁹ to legal professional privilege. Wilcox J stressed that the ACCC would be unable to properly perform its statutory investigative function if legal professional privilege were available, particularly in the following passage:

Conduct that involves a contravention of the Act often comprises many separate acts, some of which may be effected through lawyers. Without information about contacts between the person under investigation and that person’s lawyer, it may be *impossible* for the ACCC to see the whole picture.¹⁰ [Emphasis added.]

2. *The Judgments*

A. *Wilcox J*

Wilcox J began his judgment by setting out s155 of the *Trade Practices Act*, the facts and the proceedings. His Honour then proceeded to summarise and discuss the ‘more important decisions focusing on the obligations imposed by s155’ and ‘the nature and ambit of legal professional privilege’.¹¹ First, the High Court decisions. In *Pyneboard*, the five justices were unanimously of the opinion that a person cannot refuse to comply with a notice under s155 of the *Trade Practices Act* on the ground that the information or documents required to be furnished might lead to exposure to a penalty. However, their Honours differed in their reasoning. Wilcox J referred first to certain passages of Mason ACJ, Wilson and Dawson JJ, including the following:

[I]t is necessary to bear in mind the general principle that a statute will not be construed to take away a common law right unless the legislative intent to do so clearly emerges, whether by express words or by necessary implication.¹²

Although remarking that the comments by Mason ACJ, Wilson and Dawson JJ in *Pyneboard* related to self incrimination and not to legal professional privilege,¹³

6 Above n2 at 136–137 paras 51–56, 60 (Wilcox J), at 140–142 paras 67–71, at 145 para 81 (Moore J), at 147–148 paras 90, 97 (Lindgren J).

7 *Id* at 146 para 83 (Lindgren J).

8 (1983) 152 CLR 328 (hereinafter *Pyneboard*).

9 Above n2 at 137 para 57 (Wilcox J); see also 146 para 84 (Moore J).

10 *Id* at 137 para 57 (Wilcox J).

11 *Id* at 128 para 14.

12 Above n2 at 128 para 18; above n8 at 341.

13 Above n2 at 129 para 20. Also note that the comments made in *Mortimer v Brown* (1970) 122 CLR 493 were in respect of the privilege against self incrimination on a public examination of company directors.

Wilcox J referred to the following important passage from Mason ACJ, Wilson and Dawson JJ's judgment:

It is significant that subs(5) makes it an offence for a person to refuse or fail to comply with a notice under subs(1) "to the extent that the person is capable of complying with it" for these words in themselves are quite inconsistent with the existence of a privilege entitling the recipient of a notice to refuse to comply, whether on the ground that compliance might involve self-incrimination or otherwise. Moreover, it is apparent that the purpose of conferring the power and imposing the obligation is to enable the Commission to ascertain whether any contravention of the Act has taken place, or is taking place, and to make the information furnished, the documents produced and the evidence given admissible in proceedings in respect of contravention of the Act, a purpose which would be *defeated* if privilege were available. As in *Mortimer* the comment may be made that the provision is *valueless* if the obligation to comply is subject to privilege. Without obtaining information, documents and evidence from those who participate in contraventions of the provisions of Pt IV of the Act the Commission would find it *virtually impossible* to establish the existence of those contraventions. The consequence would be that the provisions of Pt IV could not be enforced by successful proceedings for a civil penalty under s76(1).¹⁴ [Emphasis added.]

It is submitted by the present author that the above passage exercised the most significant influence on Wilcox J's ultimate decision that legal professional privilege could not be claimed in response to a notice served under s155 of the *Trade Practices Act*. Next, Wilcox J referred to *Baker v Campbell*¹⁵ where the High Court by a 4 : 3 majority (Mason ACJ, Wilson and Dawson JJ, Murphy and Brennan JJ dissenting) held that the doctrine of legal professional privilege is not confined to judicial and quasi judicial proceedings and that the *Crimes Act* did not evince an intention to oust the privilege. Wilcox J quoted some passages from the judgments which strongly supported the importance of legal professional privilege and suggested that any statutory mandate to impair or destroy that privilege should be framed in 'express and unambiguous terms',¹⁶ or 'unmistakably'.¹⁷ Wilcox J cited *Corporate Affairs Commission (NSW) v Yuill*¹⁸ where the High Court by a 3:2 majority (Brennan, Dawson and Toohey JJ, Gaudron and McHugh JJ dissenting) held that legal professional privilege cannot be claimed in response to the power to require information under the now defunct s295(1) of the Companies (NSW) Code. Here Wilcox J again emphasised the fact identified by Brennan J in the majority in *Yuill* that 'it would frequently be *impossible* for an inspector to carry out his function

14 Above n2 at 129 para 20; above n8 at 343. See also the reference by Wilcox J to the passages of Brennan J's judgment in *Pyneboard* where Brennan J refers to the purpose of investigating suspected contraventions of Pt IV as being 'frustrated by a qualification which makes the statute ineffective' and the privilege being rendered 'relatively valueless' if the penalty privilege were allowed and the investigation being 'so hobbled' as to render much of Pt IV unenforceable': id at 130 para 25.

15 (1983)153 CLR 52.

16 Id at 116-117 (Deane J); above n2 at 131 para 28 (Wilcox J).

17 Id at 90 (Murphy J); above n2 at 131 para 29 (Wilcox J).

18 Above n3 (hereinafter *Yuill*).

without disclosure of communications between the corporation and its legal advisers.¹⁹ [Emphasis added.]

Second, Wilcox J referred to the Federal Court decisions. The *Income Tax Assessment Act* cases were considered first. In *Commissioner of Taxation (Cth) v Citibank*,²⁰ the Full Court held that the power conferred upon the Commissioner of Taxation by s263 of the *Income Tax Assessment Act* 1936 (Cth) to have access to books, documents and papers for any of the purposes of the Act, is subject to the doctrine of legal professional privilege.²¹ Next, in *Stergis v Boucher*²² Hill J held that the privilege against self incrimination cannot be claimed in response to a notice issued under s264 of the *Income Tax Assessment Act* 1936 (Cth). In coming to his conclusion, Hill J drew attention to 1984 amendments to the *Taxation Administration Act* 1953 (Cth) inserting ss8C and 8D. These sections create offences, respectively, of failing to comply with a request to produce documents and failing to comply with a request to give evidence, in each case 'to the extent that the person is capable of' doing so. Hill J noted this was the same formula as was used in s155 of the Act and considered in *Pyneboard*.

Next, in *Fieldhouse v Commissioner of Taxation*,²³ Lockhart J held that legal professional privilege was an available response to a s264 notice (notwithstanding the lack of argument on the point), whilst Burchett and Hill JJ assumed that legal professional privilege was available.²⁴ Next, in *Donovan v Deputy Commissioner of Taxation*²⁵ Wilcox J held that the privilege against self incrimination cannot be claimed in response to a notice issued under s264 of the *Income Tax Assessment Act* 1936 (Cth). *Stergis* and *Donovan* were then approved by a Full Court in *Commissioner of Taxation v De Vonk*.²⁶ Wilcox J referred to that part of Foster J's judgment in *De Vonk* where he indicated that the phrase 'to the extent that a person is capable of doing so' achieves the result by impliedly excluding the privilege against self-incrimination.²⁷ Wilcox J also highlighted an important passage from the joint judgment of Hill and Lindgren JJ in *De Vonk* which pointed out that it would be *impossible* for the Commissioner to interrogate a taxpayer about sources of income if the taxpayer could claim the privilege against self incrimination and that 'such an argument would totally *stultify* the collection of income tax'.²⁸ [Emphasis added.]

Finally, Wilcox J mentioned *Commissioner of Taxation v Coombes*²⁹ where the Full Court stated that s264(1)(a) is subject to legal professional privilege but there was no argument, no reasons given and no authority cited.

19 Above n2 at 132 para 32; see also id at 323.

20 (1989) 20 FCR 403.

21 It should be noted that this point was not actually argued in *Citibank's* case: Hill J at the Law Council of Australia Workshop, Business Law Section, 28th October 2001.

22 (1989) 20 ATR 591.

23 (1989) 25 FCR 187.

24 Id at 191 (Lockhart J), at 203 (Burchett J) and at 208 (Hill J).

25 (1992) 34 FCR 355.

26 (1995) 61 FCR 564 (hereinafter *De Vonk*).

27 Id at 567.

28 Id at 583.

29 (1999) 92 FCR 240.

Wilcox J then distinguished the corporations and bankruptcy cases of the Federal Court as of little assistance for two significant reasons. First, neither the *Corporations Law* nor the *Bankruptcy Act* contained the formula ‘to the extent that the person is capable of doing so’, as in s155 of the *Trade Practices Act* or ss8C or 8D of the *Taxation Administration Act*. Second, neither the *Corporations Law* nor the *Bankruptcy Act* requires a suspicion of wrongdoing before a notice requiring information is issued. In contrast, a notice may be given under s155 of the *Trade Practices Act* only where the ACCC has reason to believe the recipient is capable of furnishing information ‘relating to a matter that constitutes, or may constitute, a contravention of the Act’.³⁰ Wilcox J concluded this section with six general propositions that are said to emerge from the authorities. In the present author’s view, the sixth is the most important in the present case, namely,

(vi) in determining whether the “words” used by Parliament impliedly exclude legal professional privilege, in a particular case, it is necessary to have regard to the nature of the relevant statutory functions and powers and the extent (if any) to which legal professional privilege might *impede* the discharge of those functions of the exercise of those powers.³¹ [Emphasis added.]

Wilcox J then identified the ‘critical question’ in the present case (which Gummow J described at the application for special leave as the part of Wilcox J’s judgment where he ‘comes to the point’)³² as:

the meaning of the words, in s155(5)(a) of the Act, “to the extent that the person is capable of complying with it”, reading those words in the context of the s155 as a whole. If the natural meaning of those words, in that context, is such as to exclude the doctrine of legal professional privilege, that is the end of the matter. If it is not, legal professional privilege is available in this case.³³

Wilcox J applied the *Pyneboard* reasoning to these words, noting that Mason ACJ Wilson and Dawson JJ in *Pyneboard* had stated that the words ‘to the extent that the person is capable of complying’ were ‘quite inconsistent with the existence of a privilege entitling the recipient of a notice to refuse to comply, whether on the ground that compliance might involve self-incrimination *or otherwise*’. [Emphasis added.]³⁴

Wilcox J concluded that Mason ACJ, Wilson and Dawson JJ must have intended that the emphasised words ‘or otherwise’ were referring to legal professional privilege and as such their Honours’ observations ‘command great weight’. This was so despite the fact that legal professional privilege was not in issue in *Pyneboard* and hence any observations on the relationship between legal professional privilege and s155 were obiter.³⁵ Wilcox J found support for the *Pyneboard* interpretation of the words ‘is capable of complying with it’ in the

30 Above n2 at 135 para 48. In the present author’s view it should also have been noted here that the *Income Tax Assessment Act* is more like the *Corporations Law* and the *Bankruptcy Act* in relation to the second reason, that is, there is also no requirement of some suspicion or wrongdoing for a notice to be issued under s264 of the *Income Tax Assessment Act*.

31 Id at 136 para 49.

32 Above n1 at 3.

33 Above n2 at 136 para 51.

34 Above n8 at 343.

35 Above n2 at 136 paras 53–54.

judgment of Hill J in *Stergis*, which held that the adoption of the same formula in ss8C and 8D of the *Taxation Administration Act* was effective to exclude the privilege against self incrimination. Wilcox J helpfully explained that the word ‘capable’ in its natural meaning refers to what a person is *able* to do and is not limited by reference to what a person is entitled not to do.³⁶ Finally, Wilcox J analogised legal professional privilege and the privilege against self-incrimination insofar as both privileges could present substantial obstacles to the ACCC in carrying out their investigative functions and ‘see[ing] the whole picture’.³⁷

B. *Moore J*

The second judgment was delivered by Moore J. After setting out the facts, s155 of the *Trade Practices Act* and related sections, Moore J commenced with the meaning of the words ‘is capable of complying’ in s155(5) of the *Trade Practices Act*. Moore J first considered the meaning of those words in ss8C and 8D of the *Taxation Administration Act* 1953 (Cth), referring to the fact that the legislature enacted ss8C and 8D (changing the formulation from ‘just cause and excuse’ to ‘capable’) the year following the judgment of the High Court in *Pyneboard*.³⁸ Moore J noted that both Wilcox J in *Donovan v Deputy Commissioner of Taxation*³⁹ and Hill and Lindgren JJ in *Commissioner of Taxation v De Vonk*⁴⁰ had observed that the drafter of the amendment had most likely relied on the *Pyneboard* interpretation that the words ‘capable of complying’ evidenced an intention to exclude the privilege against self incrimination.⁴¹ Moore J decided that ‘capable of complying’ in s155(5) comprehends circumstances where the recipient is physically able to comply, as the second respondent solicitors are in the present case.⁴²

Moore J then considered the passage (referred to in Wilcox J’s judgment) from *Pyneboard* where Mason ACJ, Wilson and Dawson JJ stated that the words ‘capable of complying’ in s155(5) are quite inconsistent with the existence of a privilege entitling the recipient to refuse to comply, whether on the ground of self incrimination *or otherwise*.⁴³ Moore J inclined towards the view that Mason ACJ Wilson and Dawson JJ had legal professional privilege in mind when using the words ‘or otherwise’.⁴⁴ However his Honour conceded that *Pyneboard* cannot be treated as authoritative and binding on the relationship between s155 and legal professional privilege. Nevertheless, Moore J added that the *Pyneboard* decision ‘must be taken to indicate the expression “is capable of complying” imposes an obligation that is unlikely to permit of any exceptions’.⁴⁵

36 Above n2 at 137 para 56.

37 *Id* at 137 para 57.

38 *Id* at 140 para 65.

39 Above n25 at 364.

40 Above n26 at 583.

41 Above n2 at 140 para 65.

42 Above n2 at 141 para 67, relying on Carr J’s decision on this point in *De Vonk v Commissioner of Taxation (Cth)* (1995) 59 FCR 203.

43 Above n8 at 343; *id* at 141–142 paras 69–71.

44 *Id* at 142 para 70.

45 *Id* at 142 para 71.

Moore J then considered the scope of s155 and held that the principle of *contemporanea expositio est optima et fortissima in lege* (a statute should be interpreted according to its meaning at the time at which it was enacted) is inapplicable in Australia (except perhaps in the case of archaic words and/or very old statutes) and should not be applied to s155.⁴⁶ His Honour noted that the language of s155(5) is emphatic and requires compliance if the recipient of the notice is capable, notwithstanding the fact that doing so is in derogation of a common law right.⁴⁷ Further, Moore J concluded that the purpose of the power under s155 may be *hampered, fettered* or *stultified* if it were subject to legal professional privilege.⁴⁸ This is particularly so where the aims of the investigation include the prosecution of offences and the institution of civil proceedings. There follows an interesting comparison between legal professional privilege and the privilege against self incrimination in terms of which privilege would be more likely to stultify the statutory purpose for which s155 was enacted. Moore J conceded that documents and information resisted on the grounds of the privilege against self incrimination may be thought, in the ordinary course, to be likely to have a greater bearing on the question of whether there had been contravention of the *Trade Practices Act*.⁴⁹ Nevertheless, in relying on certain observations regarding legal professional privilege from Dawson J in *Yuill*⁵⁰ Moore J concluded that legal professional privilege would create a significant practical impediment to investigations under s155 and the practical problems arising from a claim of privilege based on self incrimination adverted to in *Pyneboard* would be no less if the asserted privilege were legal professional privilege.⁵¹ Hence Moore J concluded that the power granted by s155 is not subject to legal professional privilege.

C. *Lindgren J*

The third and final judgment was that of Lindgren J. His Honour agreed with the reasons of Wilcox and Moore JJ and held that a client served with a notice under s155 of the *Trade Practices Act* is not rendered not 'capable of complying with it' for the purpose of subsection (5)(a) by reason of the fact that he/she enjoys the common law legal professional privilege. Lindgren J further held that solicitors served with a notice under s155 also cannot refuse to do so on the ground that they owe their client a duty to attempt to protect their client's privilege: they can be in no better position than their client.⁵² Lindgren J agreed that 'capable' means at least 'immediately physically able without unreasonable practical difficulty and without in any respect acting unlawfully or committing a legal wrong',⁵³ and noted

46 Id at 142–144 paras 72–77.

47 Id at 145 para 81.

48 Id at 146 para 83.

49 Ibid.

50 Above n3 at 333. Note that at the application for special leave to appeal, Gummow J observed that '*Yuill* is an authority that might not be in a state of vigorous good health, I think ... and not a decision of the whole seven Justices': above n1 at 4.

51 Above n2 at 146 para 84.

52 Id at 148 para 96.

53 Id at 147 para 90.

that the court was not called upon to decide whether ‘capable’ refers to nothing more or less than physical capacity, or, on the other hand, imports a reference to legal concepts, such as contravening a statutory provision or breaching a court order.⁵⁴

3. *The Process of Reasoning to be Employed by The High Court*

In the view of the author, the decision of the Full Federal Court in the *Daniels* case is correct. It is submitted that the High Court should proceed as follows. The first step is to consider the meaning of the words ‘to the extent that the person is capable of complying with it’ in s155(5)(a) of the *Trade Practices Act*. This involves taking into account existing authority such as *Stergis* and *De Vonk* where similar words used in ss8C and 8D of the *Taxation Administration Act 1953* (Cth) were interpreted as meaning ‘physically capable’ and not being limited by what a person is entitled not to do. These cases also held that the words ‘capable of complying’ (and the change of formulation from ‘just cause and excuse’ to ‘capable’) reveal an intention on the part of Parliament to exclude as a defence, inter alia, the privilege against self incrimination.⁵⁵ As Hill and Lindgren JJ said in *De Vonk*, ‘the context of the legislation combined with the terms of ss8C and 8D lead to the conclusion that the privilege has been abrogated.’⁵⁶ The next step is therefore to consider whether those words would also operate to exclude legal professional privilege. This involves deciding whether there are any differences between the privilege against self-incrimination and legal professional privilege where both are regarded as having the potential to stultify the purpose for which the investigative power is conferred. This will be considered in the next section. The third and final step necessarily involves considering the overall purpose of the legislation (here the *Trade Practices Act*) and deciding whether legal professional privilege would operate as just as much a substantial impediment to the operation of the *Trade Practices Act* as the privilege against self incrimination.⁵⁷ For example, in *De Vonk*, Hill and Lindgren JJ considered the language and character of the coercive statutory power (s264) as well as the wider issue of the overall purpose of the legislation (the *Income Tax Assessment Act 1936* (Cth)). Their Honours stated:

If the argument were to prevail that the privilege against self incrimination was intended to be retained in tax matters it would be impossible for the Commissioner to interrogate a taxpayer about sources of income since any question put on that subject might tend to incriminate the taxpayer by showing that the taxpayer had not complied with the initial obligation to return all sources of income. Such an argument would totally stultify the collection of income tax.⁵⁸

⁵⁴ Id at 148 para 95.

⁵⁵ Above n40 at 583. See also *Hare v Gladwin* (1988) 82 ALR 307 where similar words used in s316 of the *Commonwealth Electoral Act 1918* were held to exclude the privilege against self incrimination because otherwise the Electoral Commission would find it very difficult to obtain sufficient information to make a decision whether the Act had been contravened; at 333, noted in McNicol, above n3 at 265.

⁵⁶ Above n40 at 583; above n2 at 134 para 45.

⁵⁷ As decided by the High Court in *Pyneboard*, above n8.

⁵⁸ Above n26 at 583; above n2 at 134 para 45.

Similarly, in *Pyneboard*, Mason ACJ, Wilson and Dawson JJ considered the language and character of the coercive power (s155) as well as the wider issue of the overall purpose of the legislation (the *Trade Practices Act*) and stated:

Moreover, it is apparent that the purpose of conferring the power and imposing the obligation is to enable the Commission to ascertain whether any contravention of the Act has taken place, or is taking place, and to make the information furnished, the documents produced and the evidence given admissible in proceedings in respect of contravention of the Act, a purpose which would be *defeated* if privilege were available ... the provision is *valueless* if the obligation to comply is subject to privilege. Without obtaining information, documents and evidence from those who participate in contraventions of the provisions of Pt IV of the Act the Commission would find it *virtually impossible* to establish the existence of those contraventions.⁵⁹

4. Differences Between the Privilege Against Self-Incrimination and Legal Professional Privilege

Is there any difference between the privilege against self-incrimination and legal professional privilege when it comes to stultifying the purpose and operation of the *Trade Practices Act*? It is submitted that there is no difference between the two privileges when considered in this context. Dawson J in *Yuill* stated that:

a claim of legal professional privilege might well *hamper* an investigation (under Part VII of the Companies (NSW) Code) as much as, *or more than*, a claim of privilege against self incrimination.⁶⁰ [Emphasis added.]

On the other hand, Moore J in *Daniels* conceded that:

different considerations arise in relation to communications for which a claim of legal professional privilege might be made. Privileged documents, for example, may be sought by a notice under s155 in circumstances where the documents could ultimately prove to have a *limited bearing* on whether there had or had not been a contravention of the *Trade Practices Act*. Documents or information resisted on the grounds of the privilege against self incrimination may be thought, in the ordinary course, to be likely to have a *greater bearing* on whether there had been a contravention.⁶¹ [Emphasis added.]

Wilcox J decided that the policy considerations and practical considerations in relation to the privilege against self-incrimination are:

equally apposite to legal professional privilege. Conduct that involves a contravention of the Act often comprises many separate acts, some of which may

59 Above n8 at 343; above n2 at 129 para 20.

60 Above n3 at 334. See also the discussion of this passage in McNicol, above n3 at 122–123.

61 Above n2 at 146 para 83. Note that Moore J goes on to conclude in para 84 (after citing a passage from Dawson J in *Yuill*, above n3 at 333) that the practical problems arising from a claim based on self-incrimination would be *no less* than if the asserted privilege was legal professional privilege.

be effected through lawyers. Without information about contacts between the person under investigation and that person's lawyer, it may be impossible for the ACCC to see the whole picture.⁶²

The author submits that legal professional privilege and the privilege against self incrimination should be treated on an equal footing for the purposes of the question whether the *Trade Practices Act* would be hobbled or thwarted if privilege were applied. The answer is that it would be *impossible* for the ACCC to properly perform its function if privilege were able to be claimed as a defence to notices issued under s155.⁶³

It is conceded that in other contexts, legal professional privilege and the privilege against self-incrimination are not 'joined at the hip'. In 1993 it was decided by the High Court that corporations, unlike a natural person, cannot claim the privilege against self incrimination.⁶⁴ No such equivalent change has occurred with legal professional privilege. Further, there had been a considerable expansion of legal professional privilege beyond its original definition. For example, legal professional privilege has been extended to copies of unprivileged documents⁶⁵ and the exception to the legal professional privilege in respect of documents which further the defence of an accused has been abolished at common law.⁶⁶ There has also been a growth of legal professional privilege via the doctrines of joint privilege and common interest privilege,⁶⁷ as well as the more recent replacement by the High Court of a dominant purpose test for a sole purpose test.⁶⁸ There has been no equivalent expansion of the privilege against self-incrimination. In fact, the statute books are replete with examples of the abrogation of the privilege against self-incrimination whereas there are very few examples of abrogation (or even mention) of legal professional privilege by statute.⁶⁹ However, when the two privileges are considered in the broader context of whether they operate to stultify the operation of the *Trade Practices Act*, it is submitted that there are no differences between them.

62 Above n2 at 137 para 57.

63 Note that Mr A Robertson SC who appeared for the ACCC stated at the special leave to appeal that the ACCC's 'present policy is generally to refrain from pressing for documents': above n1 at 3. See also *Australian Financial Review* (23 March 2001) where the Chairman of the ACCC, Professor Allan Fels indicated that the Commission had rarely sought to override the privilege during investigations. But he did add that the Federal Court's decision would allow the Commission to 'examine the seriousness of actions that fell foul of competition law without key information being withheld from it under the cloak of legal professional privilege'.

64 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1994) 123 ALR 503.

65 *The Commissioner, Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501.

66 *Carter v Northmore Hale Davey & Leake* (1995) 183 CLR 121. Note that s123 of the *Evidence Act* 1995 (Cth) reverses the common law position.

67 See Suzanne McNicol, 'Professional Privilege Spreads its Wings' (1996) 70 *LJ* 32.

68 *Esso Resources Australia Ltd v Federal Commissioner of Taxation* (1999) 168 ALR 123.

69 See, for example, s155(7) of the *Trade Practices Act* which expressly abolishes the privilege against self incrimination and confers use immunity compared with complete silence on legal professional privilege. For some rare examples of express abrogation of legal professional privilege by statute, see *Crimes (Confiscation and Evidence) Amendment Act* 1998 (Vic), s19D in relation to the Longford Royal Commission and the *Legal Practice Act* 1996 (Vic), ss83, 149, 189, 194 and 441B. For examples of statutory abrogation of the privilege against self incrimination, see McNicol, above n3 at 227-273.

5. *Other Policy Consequences Flowing from Implied Abrogation*

There are other incidental ramifications flowing from a decision of the High Court that s155 of the *Trade Practices Act* impliedly abolishes legal professional privilege. First, it is submitted that legal professional privilege has been expanded too far already beyond its intended rationale⁷⁰ and an endorsement by the High Court of the Federal Court decision in *Daniels* would put a brake on this unintended growth. Secondly, there is concern in some quarters that other regulators will argue that their own statutory coercive powers should and would also impliedly abolish legal professional privilege.⁷¹ This will, of course, depend on the language and character of the statutory powers as well as the wider issue of the overall purpose of the particular legislation. Thirdly, it is complained that there is no use-immunity conferred in cases of implied abrogation compared with express abrogation and this leads to disparity and inconsistency. That is, statutes expressly removing privilege contain greater protections than statutes interpreted by the courts as impliedly removing privilege. Hence, people may be treated differently depending on whether the privilege is removed expressly or by implication. However this can be partially rectified by judges granting discretionary immunity.⁷² Fourthly, the practical problems of testing claims for privilege outside a courtroom will be dissipated by a decision that legal professional privilege is abolished in respect of notices issued under the *Trade Practices Act*. Hence there will be no need for guidelines for access to be drawn up in situations where disputes as to the validity of claims to privilege occur.⁷³ Finally, it was seen from Wilcox J's summary of the cases that the law in this area

70 See above nn65–68 and Suzanne McNicol, 'Before the High Court: *Esso Resources Australia Ltd v Federal Commissioner of Taxation*' (1999) 21 *Syd LR* 656 at 665–666.

71 In areas such as taxation and environment protection: see *Australian Financial Review* (23 March 2001). The ATO has similar provisions to s155 of the *Trade Practices Act* in the combined effect of s264 of the *Income Tax Assessment Act* 1936 (Cth) and ss8C and 8D of the *Taxation Administration Act* 1953 (Cth). However, unlike s155 of the *Trade Practices Act*, there is also no requirement of some suspicion or wrongdoing for a notice to be issued under s264 of the *Income Tax Assessment Act*. See Umberto Torresi, 'Does s264 of the Income Tax Assessment Act 1936 Abrogate Legal Professional Privilege?' (2001) 30 *ATR* 117 who argues that 'when one properly understands the context in which the Commissioner performs his functions and discharges his duties and that claims of legal professional privilege will not stultify the Commissioner in his factual inquiry, it is clear that ss 8C and 8D do not abrogate legal professional privilege'. Note that the *Income Tax Assessment Act* also contains access powers in s263 and the Commissioner has granted an administrative concession to professional accountants to withhold certain confidential advice to their clients: see *Access to Professional Accounting Advisors' Papers: Guidelines for the Exercise of Access Powers. (One.Tel Ltd v Deputy Commissioner of Taxation* [2000] FCA 270). An abrogation of legal professional privilege for the purpose of a notice issued under s264 is arguably inconsistent with the maintenance of the privilege where physical access powers are used under s263 (see *Commissioner of Taxation (Cth) v Citibank*, above n20) and inconsistent with the ability of accountants to suppress documents in response to powers under both ss263 and 264.

72 See Ben Saul, 'Is Removing Legal Professional Privilege a Policy Imperative?' (2001) 39 *LSJ* 67 at 68–69.

73 See, for example, Suzanne McNicol, 'Unresolved Issues Arising From the Guidelines Between the Australian Federal Police and the Law Council of Australia' (1998) 72 *ALJ* 137.

is unsettled and unclear. Undoubtedly more consistency will be achieved in the cases which deal with the implied abrogation of legal professional privilege and the privilege against self incrimination by statutory investigative powers, especially under the *Trade Practices Act*, if the High Court endorses the Federal Court decision.

6. Conclusion

In conclusion it is clear that frustration of statutes has become the yardstick for determining whether there is a clear manifestation of a legislative intention to abrogate privilege by necessary implication. It is rare for the courts to find that the purpose of a particular piece of legislation would not be stultified if privilege were to apply.⁷⁴ It has been found that there is a stronger reason for saying that privilege has been abrogated where the object of imposing the obligation is to enable an authority or agency to ascertain whether an offence has been committed or the provision of the legislation itself has been contravened. There are many judicial statements that the privilege against self incrimination will be abrogated whenever the provision imposing the statutory obligation is rendered 'valueless',⁷⁵ or 'ineffective',⁷⁶ or is 'stultified',⁷⁷ 'defeated or frustrated',⁷⁸ if the claim to the privilege were allowed. As Brennan J pointed out in *Pyneboard*, quite often to allow a person to claim privilege would so 'hobble' investigation as to render much of the statute ineffective and unenforceable.⁷⁹ Although this principle is a very important one in practical terms, it will often be difficult to draw the line between those cases where the investigation is so hobbled by the claim to privilege and those cases where the investigation, although interrupted or interfered with by the claim to privilege, can still achieve its purpose.⁸⁰ However it is submitted that once the High Court decided that s155 of the *Trade Practices Act* would be rendered valueless and that the overall purpose of the legislation would be stultified if the privilege against self incrimination applied, there is no effective difference between this situation and one where legal professional privilege is claimed. Therefore, for all the reasons expounded above, it is hoped that the High Court will embrace the decision of the Federal Court that legal professional privilege is not a valid answer to a notice served under s155 of the *Trade Practices Act* 1974 (Cth).

74 Particularly in the case of the privilege against self incrimination: see, in particular, cases listed in McNicol, above n3 at 256, n783.

75 Above n8 at 343 (Mason ACJ, Wilson & Dawson JJ).

76 Above n8 at 349 (Brennan J).

77 *Martin v Police Service Board* [1983] 2 VR 357 at 364.

78 Above n8 at 343 (Mason ACJ, Wilson & Dawson JJ).

79 Above n8 at 349.

80 This may have been the reason for the suggestion by Latham CJ in *Kempley v The King* [1944] ALR 249 to confine the above principle to cases where the statute covered enquiries into suspected offences against the statute itself. In such cases Latham CJ pointed out that there were special reasons for special powers of enquiry into possible offences and as such the privilege should not be allowed.