OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	**File Ref: F0412000** **Decision Ref: D0402000**

Participants:

Kerry White
Complainant

- and -

Water Corporation
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – report prepared for agency about cyclone damage at Onslow – clause 7 – legal professional privilege – confidential communications between legal adviser and third party – whether for purposes of litigation anticipated or commenced – whether waiver of privilege – whether waiver by conduct – estoppel – whether agency estopped from claiming privilege for requested document.

Freedom of Information Act 1992 (WA) Schedule 1 clause 7(1).
Water Corporation Act 1995, s.68
Social Security Act 1947 (Commonwealth) *s. 6AC*

Esso Australia Resources Ltd v Commissioner of Taxation [1999] 74 ALJR 339
Brambles Holdings Pty Ltd v WMC Engineering Services Pty Ltd 14 WAR 239
Nickmar Pty Ltd v Preservatrice Skandia Insurance ltd (1985) NSW LR 44
Attorney General (NT) v Kearney (1985) CLR 500
Waterford v The Commonwealth of Australia (1987) 163 CLR 54
Tooheys Ltd v Housing Commission of New South Wales (1953) 53 SR (NSW)
Trade Practices Commission v Sterling [1978] 36 FLR 244
Goldberg v Ng (1995) 185 CLR
Attorney General (NT) v Maurice (1986) 161 CLR 475
British Coal v Dennis Rye Ltd (No.2) (1988) 3 All ER 816
Commonwealth v Verwayen (1990) 170 CLR 394
Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387
Re Millner and Secretary to the Department of Social Security No. N86/118 AAT No. 2903 (1986)
Re Kintominas v Secretary, Department of Social Security No. 86/136 AAT No. 6117 (1990)
Re Cotel Pty Ltd and Australian Trade Commission (1987) 13 ALD 54
Re Lordsvale Finance Ltd and Department of the Treasury (1985) 9 ALD 16

Re Sullivan and Department of Industry Science and Technology CLS 1996 AAT 233

DECISION

The decision of the agency is confirmed. The disputed document is exempt under clause 7 of Schedule 1 to the *Freedom of Information Act 1992*.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

21 July 2000

REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision made by the Water Corporation ('the agency') to refuse Ms White ('the complainant') access to a document requested by her under the *Freedom of Information Act 1992* ('the FOI Act').

2. In March 1999, Cyclone Vance passed through Onslow causing significant damage. During the cyclone, a levee bank was breached and part of the Town of Onslow was inundated with seawater. On 4 May 1999, a public meeting was held at Onslow ('the Onslow Meeting') to consider the reasons for the flooding. Present at the Onslow Meeting were 3 representatives of the agency, 2 representatives of the Shire of Ashburton ('the Shire') and a number of Onslow residents. The complainant chaired the meeting and the agency prepared the minutes ('the Minutes'). The Minutes record that those present agreed:

> "*to appoint an independent consultant to investigate the drainage reserve and detail the reasons for the failure of the section of embankment that lead to the flooding of 2nd and 3rd avenue* [sic].
>
> *The consultant should also investigate previous flood damage as a result of cyclones in the area."*

3. The Minutes record that Mr Lloyd Leith, one of the agency's representatives at the Onslow meeting, was to arrange for the appointment by 14 May 1999 of an independent consultant whose investigation was to be completed by 28 May 1999. The Minutes also record that the consultant was expected to "[a]*dvise all parties on the completion of the investigation on the reasons for the failure and suggested improvements to reduce future events*".

4. On 19 May 1999, the agency informed the complainant that Port and Harbour Consultants Pty Ltd ('P&H Consultants') had been appointed and the investigation would commence the following week. The agency sought the complainant's assistance in arranging a meeting with interested residents on 24 May 1999 for the purpose of discussing the flooding at Onslow. P&H Consultants completed the report on 3 June 1999. However, the report was not disclosed to the complainant, the Shire or Onslow residents.

5. In the Legislative Assembly of the Parliament of Western Australia, on 21 October 1999, the Hon Clive Brown, MLA, directed a grievance to the Minister for Water Resources ('the Minister') concerning the Onslow Meeting (see Hansard at pp.2457-2458). The Hon Clive Brown, MLA, requested that the report be provided to the Onslow community. In his reply, the Minister stated that "[*t*]*he study on this report was split into two components*". The first was an internal agency report for insurance purposes dealing with claims against the agency. The second was a study commissioned by the Shire from consulting engineers, Halpern Glick Maunsell, ('the HGM report'). The Minister informed the Parliament that the report sought by the Onslow residents was the HGM

report and that it would be a publicly available document. Neither the Minister, nor Mr Brown, referred to P&H Consultants by name.

6. On 1 November 1999, the complainant's solicitors made an application to the agency for access under the FOI Act to documents concerning the laying of sewerage pipes on and around certain sites in Onslow, the report by P&H Consultants and all documents pertaining to storm surge flooding at Onslow.

7. On 17 December 1999, the agency identified 6 documents that fell within the ambit of the complainant's access application and granted the complainant access in full to 4 of those documents, but refused access to 2 others on the ground that those two were exempt. On 6 January 2000, the complainant sought an internal review of the agency's decision in respect of one document, Document 6. On 21 January 2000, the internal reviewer confirmed the decision to refuse access to Document 6. On 18 February 2000, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

8. I obtained the disputed document from the agency, together with the file maintained by the agency in respect of the complainant's access application. Inquiries were made to determine whether this complaint could be resolved by conciliation between the parties. In the circumstances, conciliation was not an option.

9. I received substantial submissions from solicitors representing the parties to this complaint containing legal arguments about the exempt status of the disputed document. On 17 April 2000, after considering the material before me, I informed the parties in writing of my preliminary view of this complaint, including my reasons. It was my preliminary view that the disputed document may not be exempt on the ground of legal professional privilege because, on the information then before me, I considered that the privilege in the document may have been waived.

10. I received further submissions from both parties, and those submissions were exchanged between them.

THE DISPUTED DOCUMENT

11. The one document in dispute is a report by P&H Consultants, dated 3 June 1999, entitled *"Investigation into Drainage Bank Failure at Onslow"*.

THE EXEMPTION

Clause 7 - Legal professional privilege

12. The agency claims that the disputed document is exempt under clause 7(1) of Schedule 1 to the FOI Act. Clause 7(1) provides:

> ***"7. Legal professional privilege***
>
> ***Exemption***
>
> *(1) Matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege."*

13. The law, as it now stands, protects confidential communications between a client and his or her legal adviser for the dominant purpose of giving or seeking legal advice or for use in existing or anticipated legal proceedings: *Esso Australia Resources Ltd v The Commissioner of Taxation* [1999] 74 ALJR 339.

Privileged communications

14. The agency submits that its in-house lawyer directed P&H Consultants to prepare the disputed document for the sole purpose of advising on the agency's potential legal liability and in contemplation of litigation from the residents of the Town of Onslow. The agency informs me that its in-house lawyer recommended a consultant be engaged to investigate the failure of the drainage levee bank at Onslow for the purpose of defending any claims that might be made against the agency, and that the consultants were engaged for that purpose before the date of the Onslow Meeting.

15. It is clear from the documents provided to me by the agency that, at the time of the meeting in Onslow on 4 May 1999, P&H Consultants had not been approached or engaged to conduct the investigation. However, other documents provided by the agency indicate that, on 5 May 1999, the officer of the agency responsible for arranging the consultancy received contact details of a number of coastal engineering consultancies operating in Western Australia. Further, on or about 6 May 1999, the agency's in-house lawyer advised relevant officers of the agency that the consultant's report should be commissioned for the purpose of defending any legal proceedings and to protect the agency's position in relation to any potential claims. On that date, the agency wrote to P&H Consultants providing information regarding the investigation brief. The latter was instructed to determine the possible causes for the failure of the sea wall at Onslow and investigate whether the agency or its contractor contributed to that failure. It was stipulated that the investigation must include a site visit to Onslow to ascertain community views as to why the sea wall failed.

16. On 17 May 1999, the agency received a proposal from P&H Consultants. The engagement of P&H Consultants was confirmed by the agency in writing on 17 May 1999. Although copies of the disputed document were provided to its insurers, the agency informs me that the report was not commissioned for insurance purposes. The agency also informs me that the disputed document

remains in the possession of its in-house lawyer and is held securely in his office.

17. The agency claims that the disputed document is a confidential report prepared by a third party on the instructions of the agency's legal adviser to enable him to provide the agency with legal advice in respect of potential claims, and for use in anticipated legal proceedings.

18. The complainant claims that "*…the dominant, if not the sole, purpose of the P&H report was to 'advise all parties…on the reasons for the failure and suggested improvements to reduce further events', ie the dominant purpose was not to furnish confidential advice to the agency in connection with the provision of legal advice or possible litigation.*" The complainant submits that, but for the direction by the agency's legal adviser that the report was to be commissioned for the purpose of defending legal proceedings, the report would have been commissioned by Mr Leith on behalf of the agency and submitted by P&H Consultants to fulfil the agreement reached at the Onslow Meeting, and clearly would not have attracted legal professional privilege.

19. The complainant submits that the agency had undertaken to provide an independent report such as the P&H report for public discussion and that, even though the agency's legal adviser may have regarded the report as providing a basis on which to provide legal advice, on the evidence such was not the dominant purpose for the creation of the report. The complainant submits that the purpose did not change because the agency's legal adviser requested that the report be addressed to him, as a communication such as an investigator's report does not attract legal professional privilege merely because at the commissioning party's request it is addressed to that party's legal advisers: *Brambles Holdings Pty Ltd v WMC Engineering Services Pty Ltd* (14 WAR) 239, per Kennedy J at p241 and Owen J at p249, siting *Nickmars v Preservatrice Skandia Insurance Ltd* (1985) NSWLR44 at p58.

20. In a number of my decisions, I have noted that an agency is entitled to claim privilege in respect of advice obtained from salaried legal officers who are employed within government agencies as legal advisers. The advice given must be within the professional relationship between legal officer and client and independent in character: *Attorney-General v Kearney* (1985) 158 CLR 500 at pp.510, 521-22 and 530-531; *Waterford v The Commonwealth of Australia* (1987) 163 CLR 54 at pp.63-64, 70-73, 79-82 and 95-100. I consider that the agency's in-house lawyer, Mr Masarei, comes within that description for the purpose of the present case.

21. In *Trade Practices Commission v Sterling* (1979) 36 FCR 244, Lockhart J, at pp.245-246, summarised some of the classes of document which fall within the ambit of legal professional privilege. Those include:

> "*(d) … documents* [which] *… relate to information sought by the client's legal adviser to enable him to advise the client or to conduct litigation on his behalf…*

> *(e) Communications and documents passing between the party's solicitor and a third party if they are made or prepared when litigation is anticipated or commenced, for the purposes of the litigation, with a view to obtaining advice as to it or evidence to be used in it or evidence to be used in it or information which may result in the obtaining of such evidence…".*

22. McHugh J, in *Esso* at p.355 (citing *Tooheys Ltd v Housing Commission of New South Wales* (1953) 53 SR (NSW) 407), said:

> *"The communication need not come from the client; it may be a communication from a third party to a solicitor providing information at the request of the solicitor or the client".*

In my opinion, the disputed document falls within categories (d) and (e) referred to above by Lockhart J.

23. I have examined the disputed document. On page (ii), a disclaimer states: *"This report has been prepared on behalf of and for the exclusive use of Water Corporation* (sic)*..."*. In addition, the cover page has a hand written annotation stating that it was prepared for the sole purpose of defending claims by residents and that it is therefore protected by legal professional privilege, apparently signed by Mr Masarei. Clearly, the note on its own is not sufficient to establish that the document is protected by legal professional privilege.

24. However, on the basis of the documents and information provided to me by the agency, I accept that, whatever the complainant and others at the Onslow meeting may have been led to believe by the agency would be done, the report was prepared on the instructions of the agency's legal adviser for the sole purpose of enabling him to provide legal advice to the agency in respect of potential claims by Onslow residents against the agency and for use in anticipated legal proceedings. As I understand it, those anticipated legal proceedings eventuated and are currently on foot. Accordingly, as I accept that the document was brought into existence for that dominant purpose, my view is that privilege attaches to the confidential communication contained in it.

Waiver

25. The complainant initially submitted that, if legal professional privilege attaches to the disputed document, it was waived by the disclosure of the Minister, on 21 October 1999 in the Legislative Assembly, of a summary of the findings, or part of the findings, contained in the disputed document. After being informed of my preliminary view, the agency made further submissions asserting, among other things, that the Minister had not waived the privilege because the privilege is that of the agency, not the Minister, and therefore the Minister was not capable of waiving the privilege. The agency also argued that, in any event, the Minister's conduct did not amount to waiver.

26. After being given a copy of the agency's submissions, the complainant informed my office that it no longer pursed the argument that the Minister had waived the

privilege. Instead, it argued that the agency had, by its conduct in May 1999, waived privilege and further, or alternatively, that the agency is estopped from asserting privilege.

27. The privilege that attaches to a comunication is the privilege of the client, rather than the legal adviser, and may be waived by the client: *Calcraft and Guest* [1998] 1 QB 761. Waiver occurs when the client performs an act that is inconsistent with preserving the confidence protected by the privilege. The consequences of waiver are that the client becomes subject to the normal requirements of disclosure of the communication: see *Goldberg v Ng* (1995) 185 CLR 83 at p.95 and p.106.

28. A waiver of privilege may be express or implied. Express waiver involves the intentional disclosure of protected material to another person. The meaning of implied waiver was described by Mason and Brennan JJ in *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at pp.487-8:

> "*An implied waiver occurs when, by reason of some conduct on the privilege holder's part, it becomes unfair to maintain the privilege. The holder of the privilege should not be able to abuse it by using it to create an inaccurate perception of the protected communication…Hence, the implied waiver inquiry is at bottom focused on the fairness of imputing such a waiver."*

29. However, in *Goldberg v Ng* at pages 83, 95 and 106, the High Court of Australia, although it found in that case that privilege had been waived, recognised an exception for a limited disclosure, without loss of legal professional privilege, in certain circumstances. Those circumstances are where the client makes a disclosure to another person for a limited and specific purpose and on the clear understanding that the recipient is not to use or disclose the information for any other purpose.

30. The question of whether or not there has been an implied waiver of privilege most often arises when there has been a limited disclosure of the contents of the privileged material. The question will turn upon whether, in all the circumstances, it would be unfair to maintain the privilege, irrespective of the subjective intention of the privilege-holder: *Goldberg v Ng* at pages 82 and 96.

31. In the present case, I accept that the agency made a limited disclosure of the disputed document to its insurers, as it was obliged in law to do, without loss of legal professional privilege, as described in *Goldberg v Ng.*

Disclosure to the Minister

32. As to whether the agency can be said to have waived privilege by disclosing so much of the communication as it did to the Minister, the agency submits that the disclosure was for a specific and limited purpose and did not amount to waiver of the privilege. The agency submits that the case of *British Coal v Dennis Rye Ltd (No. 2)* (1988) 3All ER 816 established that, where a confidential communication is made available to a third party in litigation, but where the

disclosure is made for a specific and limited purpose without elements of unfairness to the opponent, waiver is not likely implied.

33. In that case, it was held that the privilege protecting certain documents which had been prepared in anticipation of civil proceedings was not waived by the plaintiff having provided the documents to the defendants in the course of and for the purpose of criminal proceedings. In that case, the court considered that making the documents available for a limited purpose only, being to assist in the conduct first of a criminal investigation and then of a criminal trial, could not be construed as a waiver of any rights available to the plaintiff in the civil action.

34. The agency submits that the advice given to the Minister in respect of the report was for a specific and limited purpose, being to respond to the grievance debate within the Parliament. The advice was given verbally to the Minister by the agency's legal adviser, who summarised the conclusions of the P&H report and informed the Minister that the confidential communication was protected by legal professional privilege. No copy of the document was given to the Minister or any of his staff, nor did the Minister or any of his staff inspect the document. The Minister did not table or otherwise disclose the document in Parliament.

35. The agency submits that the Minister, in carrying out his duties and responsibilities to the Parliament, sought advice from the agency as to whether or not the document should be released. That advice was sought for the purpose of addressing the subject matter of the grievance debate, and the agency submits that neither the act of the agency in providing that advice, nor the act of the Minister in relying on that advice in his response to the grievance debate, constituted implied waiver of the privilege.

36. I accept that disclosure for a specific and limited purpose may not amount to waiver of privilege: *British Coal v Dennis Rye Ltd (No.2); Goldberg v Ng.* I accept that the disclosure, such as it was, to the Minister of the advice received by the agency was for the specific and limited purpose of enabling the Minister to respond to the grievance motion and that it was understood by the Minister that the advice remained privileged. Further, s.68 of the *Water Corporation Act 1995* entitles the Minister to have any information and documents held by the agency, and to make and retain copies of any documents of the agency. The agency must comply with any request by the Minister for information and must make staff and facilities available to the Minister for the purpose of obtaining the information and furnishing it to the Minister. The Minister is also to be advised whether or not, in the opinion of the Chief Executive Officer or the Board, the public disclosure of the information provided would adversely effect the commercial interests of the agency or any of its subsidiaries. It appears to me that the agency could not refuse to give that information to the Minister and, therefore, I do not consider that it could be said to have been given voluntarily. I do not consider that that disclosure by the agency to the Minister constituted a waiver of privilege.

Waiver by conduct

37. Further, or alternatively, the complainant argues that the agency, by its conduct between 4 and 25 May 1999, waived any right it may otherwise have had to legal professional privilege in relation to the document. The complainant argues that the agency agreed at the Onslow meeting on 4 May 1999 to obtain an independent report and that, in all its subsequent dealings with the complainant and other residents, the agency acted as though *"… such remained the position and in full knowledge of the law and potential application of the doctrine of legal professional privilege"*. The complainant argues that waiver and privilege can be imputed from objective acts, even if such consequence was not the subjective intention of the party that waived the privilege. The complainant argues that the agency *"… took a step, which had the effect of changing the legal relationship of the parties, insofar as it brought about a relationship whereby the complainant and other potential claimants worked co-operatively with the agency and, in effect, helped the agency prepare its own defence."* The complainant argues that *"[t]hat situation or 'relationship' cannot now be undone, so the agency's waiver is irrevocable."*

38. I do not accept that the agency's actions had the effect of changing the legal relationship of the parties. It seems to me that there was no legal relationship between the parties and the actions of the agency neither created one, nor changed it. Further, for the reasons I have given above, I do not consider that the agency has waived legal professional privilege, either expressly or impliedly, in respect of the confidential communication contained in the disputed document, by the disclosures it has made to the Minister and to its insurer.

39. As to the agency's conduct, I do not accept, as was suggested by the complainant, that the situation is analogous to that in *Commonwealth v Verwayen* (1990) 170 CLR 394 where, the complainant submits, it was held that, by failing to plead certain defences that were open to it and by treating the case as if it was merely an assessment of damages, the Commonwealth made a fully informed decision to waive those defences. As I have said, the agency may have given an undertaking to the complainant and others that they would be informed of the results of the consultant's investigation, but there is nothing before me which establishes that any undertaking was given that access to the report would be given and it appears to me that on each occasion when access to the report has been requested, for example by the Minister and by the complainant and others, the agency has claimed privilege in respect of it. That is, I have not been informed of any occasion on which the opportunity to claim privilege arose and the agency failed to claim it. I do not consider that the agency has, by its conduct, waived privilege in the confidential communication contained in the document.

40. Accordingly, I find that privilege in the disputed document has not been waived by the agency.

Estoppel - the complainant's further submissions

41. The complainant made a number of additional submissions arguing, essentially, that the agency is estopped from claiming legal professional privilege in relation to the document. That argument by the complainant appears to me to be based on the view that *"…the agency raised the expectations of the complainant and other residents at the Onslow meeting on 4 May 1999…"* and that the agency's minutes of the meeting *"…record that the residents were to be advised in detail of the reasons for the failure of the embankment, arising from the investigation by the independent consultant…"* and, further, that *"…the agency did not advise the residence that the report, commissioned by the agency, would be a confidential document protected by legal professional privilege, even though Mr Leith was apparently aware of this…"*.

42. It is argued for the complainant that *"…the agency caused the complainant and others to assume that the report was being produced to give effect to the agreement on 4 May 1999, and in particular with a view to the results being shared with the complainant and the other residents…"*. It is argued that, on that assumption, the complainant and others *"…who were potential civil claimants against the agency…"* acted to their detriment by assisting and cooperating with the agency and P&H in the preparation of the report, and that they would not have done so if they had been made aware that the agency regarded the report as confidential to the agency and privileged. It is submitted for the complainant that it is *"…difficult to conceive of a more serious detriment to the complainant and other potential claimants in the context of the proposed litigation between the parties."* It is argued for the complainant that she and others were induced, in effect, to assist the agency to prepare its own defence and to disclose the evidence which the complainant and the other potential claimants had assembled and which was privileged to them.

43. The claims by the complainant raise a number of questions including whether estoppel can be claimed in proceedings before a Tribunal such as the Information Commissioner; whether it has any relevance to a claim for exemption under clause 7; and whether or not the agency is estopped from asserting its privilege.

44. In my opinion, the estoppel argument raised by the complainant can be rejected for the following reasons. Firstly, since the High Court decisions in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 and *Commonwealth v Verwayen* (1990) 170 CLR 394, although it is not entirely clear that the distinction still exists, traditionally common law estoppel and equitable estoppel are separate categories, although they have some similar characteristics. Common law estoppel operates upon a representation of existing fact where as equitable estoppel operates upon representations or promises as to future conduct. Whilst the expression of the complainant's submissions may suggest, or be intended to suggest, otherwise, it appears to me that the complainant is arguing estoppel on the basis of a representation by the agency as to future conduct, being the agency's alleged representation that a report would be commissioned for a particular purpose and that the complainant and others

would be informed of the results of the report. On that basis, it appears to me that the estoppel argued is an equitable estoppel.

45. In several cases decided by the Commonwealth Administrative Appeals Tribunal ('the Tribunal'), the Tribunal took the view that it was not for the Tribunal to decide claims of equitable estoppel. In *Re Millner and Secretary to the Department of Social Security* No. N86/118 AAT No. 2903 (1986), the Tribunal said *"…[t]he proper course for persons asserting a right to equitable relief depending upon equitable estoppel is to seek to have the right determined in a court exercising equitable jurisdiction, but not to expect such right to be determined by a purely statutory Tribunal. It would take clear words, in the Tribunal's opinion, to confer such jurisdiction upon it…"*. The Tribunal in that case, when reviewing a decision of the Secretary to the Department of Social Security under section 6AC of the *Social Security Act 1947*, expressed the following view:

> *"A further and more difficult problem is whether or not Parliament intended to confer upon the Secretary to the Department of Social Security and upon this Tribunal when reviewing his decision under section 6AC of the Act, the power to make determinations as to rights to assets based upon equitable doctrines such as estoppel by acquiescence. The difficulties acknowledged by common law courts in dealing with equitable defences are discussed in Meagher Gummow and Lehane (supra) in chapters I and II. It is hard to believe that Parliament intended the Secretary to decide rights which, in a court of equity, may be granted subject to the imposition of conditions (Meagher Gummow and Lehane, paragraph 151) or to consider equitable rights when matters such as election, innocent misrepresentation or undue influence may have some bearing upon the decision. It is the Tribunal's opinion that section 6AC confers no such power and that the Secretary and therefore this Tribunal are concerned with positive dispositive actions when making decisions under section 6AC."*

46. In *Re Kintominas v Secretary, Department of Social Security* No. 86/136 AAT No. 6117 (1990), the Tribunal agreed with the observations in *Re Millner* and went on to say:

> *"In an area of developing equitable theories and competing approaches, it is not practical to expect an administrator to conduct an extensive inquiry between parties (who would rarely, in any event, be at arm's length) so as to value the beneficial interest of the applicant in her property by anticipating what relief would be granted in equity. In the absence of any written agreement, or any formalisation of claims and entitlements, he must adopt a robust commonsense approach, not subordinated to subtleties and competing theories of equity. This approach has been approved in relation to administrators in other fields. Sales tax assessors are advised by Hope J.A. to "look at the substance and reality of the matter" (Federal Commissioner of Taxation v Kentucky Fried Chicken Pty Ltd 88 ATC 4363 at 4370). Customs officers are advised by Davies J to abjure "complexity of thought" when seeking to define the essential*

character of goods (Collector of Customs v Times Consultants Pty Ltd 6 AAR 226 at 230) and by a Full Court in the same case to approach tariff classification as "a practical wharf-side task" (76 ALR 313 at 328). I consider these judicial observations appropriate guidance in circumstances such as the present, for social security administrators."

47. In *Re Cotel Pty Ltd and Australian Trade Commission* (1987) 13 ALD 54, the Tribunal took the view that "*… whilst this Tribunal cannot consider doctrines of equitable estoppel which are solely the province of courts of equity…"* the Tribunal could apply a doctrine of estoppel at common law. In *Re Lordsvale Finance Ltd and Department of the Treasury* (1985) 9 ALD 16, the Tribunal considered that the doctrine did not apply in the circumstances of that matter (relating to the *Freedom of Information Act 1982* (Cth)), *"…the general rule being that there is no estoppel against a statute: - Society of Medical Officers of Health v Hope (1960) AC551 at 568, Re Callaghan and Defence Force Retirement and Death Benefits Authority (1978) 1ALD 227 at 231; Re Woods and Collector of Customs (NSW) (No. A84/195, 27 June 1985); Re Hitek Holdings Pty Ltd and Export Development Grants Board (No. A84/259, 2 July 1985)."*

48. In *Re Sullivan and Department of Industry Science and Technology* CLS 1996 AAT 233, however, the Tribunal (P Bayne) suggested that "*…[t]here might be some argument that despite the Drake principle the doctrines of waiver or of estoppel, or perhaps of abuse of process, could on appropriate facts operate to preclude the Tribunal from considering some justification for a refusal of access under the FOI Act; cf Repatriation Commission v Nation (unreported, full court, Federal Court No. TG25 of 1994, 2 June 1995 (at 18 and references there sited… But no such argument of this kind was put to the Tribunal and in view of my decision that the documents in issue are documents of an agency there is no need to pursue the issue any further"*, suggesting that estoppel may be arguable before, and determinable by, the Tribunal.

49. I have not found any superior court authority that settles the question. However, I consider that I should follow the approach adopted by the Tribunal. It is difficult to imagine that the Parliament, when enacting the scheme of access and exemptions provided by the FOI Act and in establishing the role of the Information Commissioner, intended that such complex legal matters be imported into the operation of the exemptions.

50. The clause 7 exemption requires me to make a decision as to whether or not a disputed document would be privileged from production in legal proceedings. The determination of that issue requires me, firstly, to find whether the document is a privileged document and, in my view, extends to requiring me secondly, to consider whether that privilege has been waived, where evidence suggests it may have been. Generally speaking, determining the second question is a matter which can reasonably be done once certain facts and the evidence supporting them have been ascertained. However, determining whether or not a court might find an equitable estoppel is, in my view, a more complex and less easily determined question for an adjudicator such as an Information Commissioner.

51. In any event, it does not appear to me, on the basis of the submissions made, that the complainant has established the required criteria for an estoppel to operate. As I understand it, the 4 factual elements of an estoppel which must be established are:

    - there must have been a representation made as to present or future fact, or present or future intentions;
    - the representor must have intended the representation to be relied upon;
    - the person seeking to enforce the estoppel must have relied on the representation to his or her detriment; and
    - it must have been reasonable to rely on the representation in the way in which it was relied upon.

52. In my view, the first difficulty for the complainant in establishing the above elements is that, as I understand it, the representation that was made was thata report would be commissioned and the complainant and other interested persons would be informed of the details of the reasons for the failure of the embankment, as found by the independent consultant. The representation was not that the complainant and others would be given a copy of the consultant's report, nor that the agency would waive its right to claim exemption for the report should application be made for it under the FOI Act.

53. Secondly, the complainant does not appear to me to have demonstrated any real detriment to herself or the other potential claimants through acting in reliance on the alleged representation. The complainant claims that she and others would not have cooperated with the private consultants by providing information but for the representation that they would be informed of the outcome of the investigation. That may well be the case. However, I do not consider that the information provided to date demonstrates that the complainant and others have yet suffered any detriment because of that cooperation. I understand that the complainant and others are presently engaged in litigation with the agency concerning the failure of the embankment. It is a matter of conjecture whether the contents of the report would assist them in that litigation, or whether disclosure of the report would have averted the litigation, or whether their having given information to the consultants will have caused them any detriment.

54. It may be morally reprehensible for the agency, having undertaken to inform the complainant and other interested persons of the results of the private consultant's investigation, not to have done so. However, whilst the breaking of a promise may be morally reprehensible, it is not necessarily unconscionable in the sense that equity will intervene to prevent it or remedy any detriment arising from it: *Verwayen* per Mason C J at p? As I understand it, estoppel is designed to remedy unconscionable behaviour, not morally reprehensible behaviour.

55. In my opinion, it is unlikely that the Parliament intended that an agency, when considering a request for access to a document under the FOI Act, would be required to embark on a consideration of the complex question of whether or not it might be estopped from claiming exemption for the particular document, or

for the Information Commissioner to embark on such an inquiry when considering a complaint under the FOI Act. I agree with the view of the Tribunal that this is not the appropriate forum in which to decide questions of equitable estoppel. However, even if that view is not correct, and such arguments are available to complainants, I do not consider that, in this case, the complainant has made out the claim.

60. Therefore, I find the disputed document would be privileged from production in legal proceedings on the ground of legal professional privilege and that it is exempt under clause 7.

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