SUPREME COURT OF QUEENSLAND

CITATION:	*Ferrington v WorkCover Queensland* [2012] QSC 354
PARTIES:	**TIMOTHY FERRINGTON** Applicant **v** **WORKCOVER QUEENSLAND** Respondent AND **NORTH GOONYELLA COAL MINES PTY LTD** Intervener
FILE NO/S:	S47 of 2012
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Mackay
DELIVERED ON:	24 October 2012
DELIVERED AT:	Supreme Court Rockhampton
HEARING DATE:	22 October 2012
JUDGE:	McMeekin J
ORDERS:	a) North Goonyella Coal Mine is ordered to produce to WorkCover Queensland: (i) The report of Mr Miller; (ii) Records of interviews conducted between its solicitors and witnesses relating to the circumstances of the event resulting in the alleged injury to the applicant, the applicant's alleged injury or the applicant's prospects of rehabilitation; (iii) Statements of witnesses relating to the circumstances of the event resulting in the alleged injury to the applicant, the applicant's alleged injury or the applicant's prospects of rehabilitation; (iv) Reports obtained from experts relating to the circumstances of the event resulting in the alleged injury to the applicant, the applicant's alleged injury or the applicant's prospects of

rehabilitation;

b) The documents referred to in (a) are to be produced within seven days of the finalisation of the prosecution of the summary charges arising out of the circumstances of the event resulting in the alleged injury to the applicant pending against North Goonyella Coal Mine and Mr Millard;
c) WorkCover is ordered to produce to the applicant's solicitors any documents produced to it by the employer pursuant to the order in paragraph (a) forthwith upon their receipt;
d) The application is otherwise dismissed;
e) There is no order as to costs;
f) The parties have liberty to apply within seven days.

CATCHWORDS: WORKERS' COMPENSATION – PROCEEDINGS TO OBTAIN COMPENSATION – DETERMINATION OF CLAIMS – EVIDENCE – DISCLOSURE OF DOCUMENTS AND PRIVILEGE – where opposition to the disclosure of documents

Coal Mining Safety and Health Act 1999 s 34

Workers' Compensation & Rehabilitation Act 2003 ss 273, 274, 275, 279, 280, 284, 286, 287

Citicorp Life Insurance Ltd v Lubransky; Bagiotas v Citicorp Life Insurance Ltd [2005] VSC 101

Cth DPP v Jo and Ors [2007] QCA 251

Environment Protection Authority v Caltex Refining Co Pty Ltd (1993) 178 CLR 477

Hearne v Street [2008] HCA 36; 248 ALR 609

State of Queensland v Shaw [2003] QSC 436

COUNSEL: P Cullinane for the applicant

G Crow SC for the respondent

P Roney SC for the intervener

SOLICITORS: Taylors Solicitors for the applicant

Swanwick Murray Roche for the respondent

Ashurst for the intervener

[1] **McMeekin J:** The applicant, Timothy Ferrington, complains that WorkCover Queensland has failed to comply with its disclosure obligations under the *Workers' Compensation & Rehabilitation Act* 2003 ("the Act"). WorkCover disagrees. It is supported in that by the applicant's former employer North Goonyella Coal Mines Pty Ltd ("NGCM") who sought and obtained leave to appear.

[2] The obligation in question is imposed on WorkCover Queensland by ss 279 and 284 of the Act.

[3] The documents about which complaint is made fall into three categories:

(a) documents dealing with NGCM's termination of the applicant's employment;
(b) a report of Mr Greg Miller an industrial chemist; and
(c) "any further documents, including but not limited to reports and/or statements relating to the workplace incident and its investigations".

[4] To understand the arguments it is necessary to say something about the background to the application.

[5] The applicant claims to have suffered personal injury in the course of his former employment with NGCM when exposed to toxic chemical fumes ("the incident"). The injuries claimed to have been suffered consist of or include psychiatric harm.

[6] The applicant wishes to claim damages. The Act requires that a pre court procedure be followed before he can commence his proceedings. The applicant has served a Notice of Claim on NGCM and WorkCover pursuant to s 275 of the Act.

[7] The incident has given rise to prosecutions of NGCM and one Mr Millard, its then site senior executive (SSE) for breaches of the obligations imposed by the *Coal Mining Safety and Health Act* 1999. The same solicitors act for NGCM and the SSE in respect of the defence of those prosecutions. Those summary charges will be tried sometime in 2013. The charges are brought pursuant to s 34 of the *Coal Mining Safety and Health Act* 1999 and include an allegation that as a result of a failure to carry out their obligations the defendants caused bodily harm. The maximum penalties are 750 penalty units ($82,500)[1] or 1 year's imprisonment.[2]

[8] The opposition to the disclosure of documents in the first category that I have set out above is based on lack of relevance and a claim of legal professional privilege.

[9] The opposition to the disclosure of documents in the second and third categories is based on the impact that such disclosure would have on the defendants to the prosecution. It is not irrelevant that the applicant is the primary witness against the defendants in the prosecution. It is said that the SSE is entitled to a privilege against self incrimination which potentially would be infringed by such disclosure. It is said that both defendants would be potentially prejudiced as disclosure of the documents sought would lead to a disclosure of their defences before the prosecution case has been put.

[10] The relevant provisions of the Act appear in Part 5 of Chapter 5 and are as follows:

> **"273 Object of pt 5**
> The object of this part is to facilitate the just and expeditious resolution of the real issues in a claim for damages at a minimum of expense.
>
> **274 Overriding obligations of parties**

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1 Section 5 *Penalties and Sentences Act* 1992
2 Section 34 (c) *Coal Mining Safety and Health Act* 1999

(1) In accordance with the object of this part, this part is to be applied by the parties to avoid undue delay, expense and technicality and to facilitate the object.
(2) A party impliedly undertakes to other parties to proceed in an expeditious way.
(3) A court may impose appropriate sanctions if a party does not comply with a provision of this part.

279 Parties to cooperate
(1) The parties must cooperate in relation to a claim, in particular by—
(a) giving each other copies of relevant documents about—
(i) the circumstances of the event resulting in the injury; and
(ii) the worker's injury; and
(iii) the worker's prospects of rehabilitation; and
(b) giving information reasonably requested by each other party about—
(i) the circumstances of the event resulting in the injury; and
(ii) the nature of the injury and of any impairment or financial loss resulting from the injury; and
(iii) if applicable—the medical treatment and rehabilitation the worker has sought from, or been provided with, by the worker's employer or the insurer; and
(iv) the worker's medical history, as far as it is relevant to the claim; and
(v) any applications for compensation made by the claimant or worker for any injury resulting from the same event.
(2) Subsection (1)(a) applies to relevant documents that—
(a) are in the possession of a party; or
(b) are reasonably required by WorkCover from the worker's employer under section 280.
(3) A claimant and an insurer must give each other copies of the relevant documents within 21 business days after the claimant gives the insurer a notice of claim.
…
(5) This section is subject to section 284.
(6) In this section—
relevant documents means reports and other documentary material, including written statements made by the claimant, the worker's employer, a contributor, or by witnesses.

280 Employer to cooperate with WorkCover
(1) An employer against whom negligence is alleged in connection with a claim must cooperate fully with and give WorkCover all information and access to documents in relation to the claim that WorkCover reasonably requires. …

284 Nondisclosure of certain material
(1) A party is not obliged to disclose information or a document if the information or document is protected by legal professional privilege.
(2) However, the following must be disclosed even though otherwise protected by legal professional privilege—
(a) investigative reports;
(b) medical reports;
(c) reports relevant to the worker's rehabilitation;

(d) relevant documents mentioned in section 279, other than correspondence between a party and the party's lawyer.

…

286 Privilege and duties

Subject to this Act, information and documents disclosed under this chapter are protected by the same privileges, and are subject to the same duties, as if disclosed in a proceeding before the Supreme Court.

287 Court's power to enforce compliance with chapter

If a party fails to comply with a provision of this chapter, a court may order the party to comply with the provision, and may make consequential or ancillary orders that may be necessary or desirable in the circumstances of the case."

Termination Documents

[11] The applicant is not able to identify with any particularity the documents it seeks in this category. In correspondence the applicant's solicitor wrote: "We have reason to believe that there would have been a plethora of internal emails and other documents generated with regard to the termination of [the applicant's] employment which come within the ambit of s 279 of the [the Act]". In the course of argument Mr Cullinane, who appeared for the applicant, limited the request for documents to those falling within s 279(1)(a)(iii) and s 284(2)(c), that is documents relevant to the applicant's prospects of rehabilitation.

[12] The parties agreed that I should be given the documents in issue to determine the questions of relevance and privilege.[3] I have perused the documents.

[13] The documents fall into the following categories:

(a) Email communications between employees of NGCM regarding the applicant's entitlements under his contract of employment;

(b) Email communications between employees of NGCM concerning the options available to the employer and the applicant given the applicant's continued non attendance at work;

(c) Computer printouts of attendance and pay records pertaining to the applicant;

(d) Without prejudice communications to and from the CFMEU who acted on behalf of the applicant in the negotiations that led to the execution of a Deed of Settlement and the securing of a termination payout for the applicant;

(e) Email communications between employees regarding the negotiations with the CFMEU and in response to proposed draft Deeds of Settlement;

(f) Draft Deeds of Settlement apparently drafted by the employer's solicitors;

(g) Records of financial matters (invoices, receipts, vouchers) pertaining to the applicant.

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[3] Calling in aid the procedure provided for in r 223(5) of the *Uniform Civil Procedure Rules* 1999

[14] None of the documents have any relevance to the applicant's rehabilitation. Some are plainly the subject of privilege. None come within s 279(1)(a) and so there is no obligation to disclose.

Mr Miller's Report

[15] Mr Miller is an industrial chemist. The contents of his report, even in broadest outline, have not been revealed. It may be surmised that the report deals, at least, with the character and potential effects of the toxic chemical said to have been released in the incident, those matters one would expect being ones that fall within his expertise.

[16] It was contended by NGCM, but not WorkCover, that the report was not liable to be disclosed under these provisions. Given that the contents of the report have not been revealed it is difficult for the applicant to argue the contrary. But it seems to me plain that the report, if it is relevant at all, must relate to "the circumstances of the event resulting in the injury" and so fall within the terms of s279(1)(a)(i).

[17] It was then argued that plainly legal professional privilege attaches, and the abrogation of that privilege in s284(2)(a) does not apply because the term "investigative report" in that subsection means only internal investigative reports, not external expert reports. I cannot accept that distinction. The purpose of the statute is plainly to ensure that each side is fully informed of the other's evidence and arguments on questions of liability and damages. I note that expert reports are not protected by privilege and are required to be disclosed once proceedings are commenced.[4] It would be a strange result if that same rule did not apply to the pre-court stage with its emphasis on resolving disputes.

[18] Mr Miller's report was obtained by the prosecution and supplied to NGCM and the SSE as part of the prosecution's disclosure obligations. The Crown has declined to provide the report to the applicant's solicitors.

[19] As a result of the circumstances of its disclosure to the applicant the report is plainly subject to the "implied undertaking" discussed in *Hearne v Street*[5] not to use witness statements so obtained otherwise than for the purpose of the proceedings in which they were prepared.

[20] That being so NGCM was not at liberty to disclose the report so obtained, except with the leave of the court or else when compelled by statute.[6]

[21] That raises the question of the obligation that is imposed by s279 of the Act on an employer insured by WorkCover. Counsel informed me that the provisions in question have not been the subject of any prior decision of the Court.

[22] It is not entirely clear as to whether the obligation to disclose imposed by s 279(1) falls onto the employer or not. While it may make little practical difference it seems to me that it is WorkCover and not the employer who comes under the primary obligation. The obligation is imposed on "the parties", a concept that is not defined.

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4 Rule 212(2) *Uniform Civil Procedure Rules* 1999

5 [2008] HCA 36; 248 ALR 609; see also *Harman v Secretary of State for Home Department* [1983] 1 AC 280

6 *Esso Australia resources Limited v Plowman* (1995) 183 CLR 10 at 33 per Mason CJ

Other sections in the Act specifically deal with the employer's obligations as separate and distinct from the entities under the primary obligation. For example, s284(3) permits "an insurer or a contributor" to withhold documents in certain circumstances, but not an employer. Similarly ss 280 and 279(2) treat the employer as separate from the entity having the obligation there mentioned. The whole scheme of Chapter 5 Part 5 is to expect the insurer and the injured worker to engage in the processes contemplated with a view to resolving the claim, but again not the employer.

[23] If that is right it raises the interesting question as to whether the employer's right to claim legal professional privilege has been abrogated at all. Section 284 refers to a "party", again without definition, as losing its right to claim legal professional privilege in relation to a certain class of documents. The submissions proceeded on the basis that the privilege in the employer was abrogated by the Act and I will so assume. It would work some mischief if that were not so.

[24] It follows that the sole obligation on an employer insured by WorkCover is to co-operate with WorkCover as contemplated by s 280. Hence NGCM must provide such documents as WorkCover "reasonably requires".

[25] It might be said that WorkCover is obliged to "reasonably require" the production of any documents that fall within the purview of s 279 and for which privilege cannot be claimed. But it is by no means clear that the obligation on the employer to positively respond to a request is necessarily coincident with WorkCover's obligation to disclose. For one thing the Act does not say that and it could easily have done so. For another, the introduction of the concept of reasonableness must mean something.

[26] The better view, it seems to me, is that the requirement that the employer respond only to requests that are "reasonable" must permit an employer to bring into account matters other than the potential for a document to fall within s 279.

[27] An example might be that the employer may have thousands of documents, the production of which might be tedious and involve considerable expense, but the potential utility is evidently marginal at best, albeit the documents are relevant to the circumstances of the event resulting in the injury, the worker's injury or the worker's prospects of rehabilitation. Questions of reasonableness in requiring identification and disclosure would or may arise.

[28] Such an approach does not abrogate to the employer the decision as to what should be produced on request. What is "reasonable" is a question of fact and can be determined by a court. An employer would need to produce cogent evidence to expect to be relieved of an obligation to produce documents otherwise relevant to proceedings and liable to be produced. The issue here is whether the employer has done that.

[29] The principal issue that concerns NGCM is that disclosure of the report has the potential to enable the applicant to tailor his evidence to its contents at the pending prosecution. For example if the chemist discusses the characteristics that a chemical fume might display in terms of its colour or odour, or the likely symptoms to be expected from exposure to the chemicals involved, or the length of time of exposure

that there would need to be to have any effect, then there is the potential for the applicant to tailor his evidence accordingly, consciously or otherwise.

[30] The employer therefore claims a legitimate concern that proceedings involving the potential for severe penalties being imposed on it might be unfairly affected, and adversely to its interests, if it was obliged to disclose the report.

[31] The cases discussing the release of a party from its implied undertaking typically involve a request by the party bound to be released so that it can pursue some other forensic purpose in an unrelated matter. That obviously is not this case. Nonetheless it is useful to consider the circumstances in which a court might exercise a discretion to release a party from the implied undertaking.

[32] Essentially the question is always whether it would be in the interests of justice to permit the release[7] and that in turn depends on whether "special circumstances" exist.[8] Special circumstances have been said to exist where:

> "…there is a special feature of the case which affords a reason for modifying or releasing the undertaking and is not usually present. The matter then becomes one of the proper exercise of the court's discretion, many factors being relevant. It is neither possible nor desirable to propound an exhaustive list of those factors. But plainly they include the nature of the document, the circumstances under which it came into existence, the attitude of the author of the document and any prejudice the author may sustain, whether the document pre-existed litigation or was created for that purpose and therefore expected to enter the public domain, the nature of the information in the document (in particular whether it contains personal data or commercially sensitive information), the circumstances in which the document came into the hands of the applicant for leave and, perhaps most important of all, the likely contribution of the document to achieving justice in the second proceeding."[9]

[33] In *Citicorp Life Insurance Ltd v Lubransky; Bagiotas v Citicorp Life Insurance Ltd*[10] Hargrave J added to that list "[t]he extent to which the information contained in the documents under consideration has entered the 'public domain'..."

[34] Of the various factors mentioned two are particularly relevant here. First, the document has not entered the public domain and was not expected to enter the public domain until a particular time – namely in the course of the presentation of the prosecution's case and presumably at a time or in a fashion that would not influence the applicant's evidence. Abrogation of the implied undertaking would run counter to the expectation of the parties who brought the document into existence.

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7 *Holpitt Pty v Varimu Pty Ltd* [1991] FCA 269; (1991) 29 FCR 576 at 579 per Burchett J.

8 *Crest Homes Plc v Marks* [1987] AC 829 at 860; *Holpitt Pty Ltd v Varimu Pty Ltd* [1991] FCA 269; (1991) 29 FCR 576 at 579 per Burchett J; *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd* (1992) 38 FCR 217 at 225 per Wilcox J; *Citicorp Life Insurance Ltd v Lubransky; Bagiotas v Citicorp Life Insurance Ltd* [2005] VSC 101 at [63] per Hargrave J; *Fortis Business Holdings LLC v Commonwealth Bank of Australia* [2009] VSC 274 per Williams J at [41]

9 *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd* (1992) 38 FCR 217 at 225 per Wilcox J

10 [2005] VSC 101 at [65]

[35] Second, production of the document to the applicant might well contribute significantly to achieving justice in the second proceeding, that is, in his own damages action. But it might have precisely the opposite effect in the proceedings for which the document was brought into existence.

[36] The applicant led no evidence to show that production of the report is necessary now as opposed to later in the course of the pre court proceedings. I appreciate that any delay is unfortunate and to be avoided if it can be, consistently with the interests of justice. But here that does not seem to me to be possible. The interests of justice do not require that the report be produced now.

[37] The competing considerations can be met by delaying any requirement to disclose the report until after the report has been led in evidence in the course of the prosecution case.

Reports and/or Statements Relating to the Workplace Incident and its Investigations

[38] The applicant here seeks documents that pertain to "the circumstances of the event resulting in the injury" (s 279(1)(a)) or which may be "investigative reports" (within the meaning of s 284(2)(a)).

[39] NGCM concedes that it holds documents which include records of interviews between NGCM's (and the SSE's) solicitors and potential witnesses and possibly expert reports obtained by the defence.

[40] While it was not conceded that there was an obligation to hand over such documents, subject to the claims for privilege and associated arguments to which I will come, I am of the view that such documents ought to be handed over by NGCM on request by WorkCover pursuant to its obligation under s 280 and s 279(2).

[41] The considerations relevant to the disclosure of Mr Miller's report are also relevant here, but here there is an added dimension. The documents and records of interview either help or hinder the defence to be mounted by NGCM and the SSE to the charges that they face. So to require disclosure of these documents would be to force the defence to do one of two things – reveal its defence before the time has come when it is obliged to do so or provide evidence against themselves and so potentially lead to their successful prosecution.

[42] A corporate entity such as NGCM does not have the privilege against self incrimination but an individual such as the SSE does.[11]

[43] It is apparent that an accused person cannot be compelled to produce documents or other evidence whether the evidence is incriminating or not. So much is clear from the judgment of Deane, Dawson and Gaudron JJ in *Environment Protection Authority v Caltex Refining Co Pty Ltd*[12]:

> "The abolition of the Star Chamber and High Commission marked not only the end of the ex officio oath, but the rejection of inquisitorial procedures.

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11 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477

12 *Ibid* at 526

The so-called "right to silence" is often invoked in an attempt to express compendiously this rejection, although in truth there is not just one right but a number of rights, or immunities, of differing scope. There is, of course, the general right, which everyone has, not to answer questions, whether or not the answers might incriminate him. The law, generally speaking, does not oblige persons to answer questions if they do not wish to do so. But that right, or immunity, is not absolute. **There are exceptions, and perhaps the most important is that witnesses may not refuse to answer questions put to them in a court save where they are excused from doing so. The privilege against self-incrimination provides such an excuse, and extends beyond a court of law to other forms of compulsory examination.**

However, other inter-related rights or immunities have emerged which have become woven into the law, particularly the criminal law, both by way of procedure and in substance. For example, the fact that persons suspected of having committed a crime are immune from having to answer, under compulsion, the questions of police officers or others in authority, has led to the development of rules which render inadmissible in evidence confessions which are involuntary or unfairly obtained. And an accused person (who is a competent witness only as a matter of fairly recent history) has the right to refrain from giving evidence and to avoid answering incriminating questions.

The latter right is by no means wholly explained by reference to the maxim *nemo tenetur seipsum prodere*. Rather it is to be explained by **the principle, fundamental in our criminal law, that the onus of proving a criminal offence lies upon the prosecution and that in discharging that onus it cannot compel the accused to assist it in any way.** Thus, whilst the basic adversarial procedure of the criminal law may have roots in the seventeenth century, it has grown in a way that is not explained solely by reference to a specific immunity such as the privilege against self-incrimination. Rather it must be explained by reference to broader considerations which may in turn explain the privilege. As Gibbs CJ said in *Sorby v The Commonwealth:* "It is a cardinal principle of our system of justice that the Crown must prove the guilt of an accused person, and the protection which that principle affords to the liberty of the individual will be weakened if power exists to compel a suspected person to confess his guilt."

So far as documents are concerned, it may be thought that the maxim *nemo tenetur seipsum prodere* has a limited application, for documents are more in the nature of real evidence and speak for themselves in contrast to evidence of a testimonial kind. It is said, particularly in the United States, that there is a testimonial element in the production of documents because the person producing them identifies the documents produced as those being sought. There is a certain technicality about that explanation. **In reality, the privilege protects a person from being compelled to produce evidence which will incriminate him, whether testimonial or not. That is clear enough in a criminal trial where an accused cannot be compelled by the prosecution to produce documents. But the immunity enjoyed by an accused in a criminal trial extends to**

> **evidence of any kind, whether incriminating or not.** The immunity is, perhaps, better explained by the principle that the prosecution bears the onus of proving its case, than by the more confined principle that an accused has a privilege against self-incrimination, notwithstanding that both have a common origin.
>
> The privilege against self-incrimination was extended to the production of documents apparently as the result of Chancery influence. Discovery was an equitable remedy and the Court of Chancery would not order the production of documents if to do so would have exposed the party against whom discovery was sought to a penalty or forfeiture. The Court came to recognize self-incrimination as affording a similar protection. The same policy extended to the subpoena *duces tecum*, which was originally a Chancery writ. When the common law courts were given the power to use the subpoena, they used it consistently with Chancery practice. The general aversion in seventeenth century England to inquisitorial procedures meant that no distinction was drawn between documents and testimonial evidence. **But, as we have said, the immunity of an accused person from being compelled to produce documents in criminal proceedings now appears to rest more upon the principle that the prosecution bears the burden of proof than upon the privilege against self-incrimination,** even though the burden of proof has its beginnings in the same aversion to inquisitorial proceedings which gave birth to the maxim *nemo tenetur seipsum prodere*." (emphasis added)

[44] NGCM argues that even though it is not entitled to the privilege against self incrimination discussed in that passage, the fact that the SSE is so entitled is of great importance. NGCM remains entitled to the related privileges mentioned.

[45] There are two features of significance. First, the privilege that NGCM enjoys is not held solely by it but rather jointly with the SSE. Second, and this is allied to the first point, the actions of NGCM will impact on the SSE.

[46] As to the first point the submission is that while s 284 of the Act has the effect that NGCM cannot rely on its legal professional privilege to prevent disclosure the Act says nothing about abrogating someone else's right to legal professional privilege.

[47] As to the second point, while the SSE is not charged jointly with NGCM, the prosecutions I understand will be heard together and that is so because there is a substantial overlap in the particulars of the alleged offences. Compare for example para 29 of the particulars alleged against the SSE with para 32 and 33 of those alleged against NGCM. One mirrors the other. There seems little doubt that the disclosure of the documents in question would have the potential effect of revealing the defence of both NGCM and the SSE. Such disclosure may have the effect of substantially undermining the SSE's privilege against self incrimination.

[48] In those circumstances is it reasonable to expect NGCM to disclose the relevant documents?

[49] The potential abrogation, indirectly at least, of the SSE's privilege against self incrimination is a drastic step to take. As Margaret Wilson J observed in *Cth DPP v Jo and Ors*[13]:

> "The privilege against self-incrimination is a substantive right which has been described as "a cardinal principle of our system of justice", a "bulwark of liberty" and "fundamental to a civilised legal system". It affords protection against the risk of incrimination by both direct evidence and indirect (or "derivative") evidence. But a person has to claim the privilege in order to be entitled to its protection, and it may be waived or excluded by statute."

[50] I would be slow to make an order that had such an impact on a fundamental right absent some clear statutory intention that the right be abrogated. There is no such intention here. The statute implicitly preserves privileges other than legal professional privilege given that the abrogation of that latter privilege is the only one mentioned and is restricted to certain classes of nominated documents.

[51] The second point is that the disclosure sought would have the potential to reveal the defence. McKenzie J said in *State of Queensland v Shaw*[14]:

> "The case is one where there is a well defined and real advantage available to a person in criminal proceedings in respect of revealing evidence in advance. Depriving a defendant of such an advantage by requiring him to undergo prior proceedings where the State may, in effect, test-run the same case it proposes to lead in the prosecution proceeding and if necessary improve it if it can prior to that time is in my view sufficiently of the character of a demonstrated reason why the interests of justice would not be served by the forfeiture proceedings being heard in advance of the criminal proceedings. In my view the circumstances in which a stay is justified are established by the particular facts of the case."

[52] Those comments were quoted with apparent approval by Margaret Wilson J (with whom McMurdo P and Ann Lyons J agreed) in *Jo*.[15]

[53] Here the State is not involved in seeking early disclosure but the disclosure would be to the person who is a significant witness in the prosecution case and who would gain the advantage or potential advantage of knowing in advance of giving his evidence the likely attack to come on his evidence. The disadvantages to the defence are obvious.

[54] In my view there is nothing unreasonable in the attitude taken by NGCM in declining the request to disclose the relevant documents.

[55] I am conscious of the disadvantage that the applicant suffers. He may have his claim for damages delayed. He could proceed with his claim without the employer's material and so avoid that delay but may lose the advantages that s 279 and s 284 give him. That will be a matter for him. But orders can be framed such that the applicant will not lose his right to pursue his claim or these documents.

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13 [2007] QCA 251 at [21] - citation of authority omitted

14 [2003] QSC 436 at [25]

15 [2007] QCA 251 at [17]

[56] It was suggested at the hearing that an undertaking might be offered. The terms of such an undertaking were not explored. However it seems to me artificial to think that the applicant's solicitors could appropriately use the documents provided if they could not obtain the applicant's instructions on them. And therein lies the problem.

[57] In my view the interests of justice lie in preserving the position of the defendants until trial of the summary charges. The interests of the parties can be met by requiring disclosure of the documents but at a time after their potential to unfairly prejudice the employer and the SSE has passed.

[58] Submissions were made as to the costs orders that were appropriate. The relevant matters include that the issues involved here were novel and difficult, the applicant has a right to the documents he seeks and, in a sense, both sides have been successful. As well I am not prepared to expose the applicant to the additional costs of a party that it did not bring to court and where the interests of the respondent and the intervener were coincident.

[59] As I have not heard the parties on the precise orders to be made I will give the parties liberty to apply.

[60] The orders will be, subject to any a party seeking to vary the orders within the time allowed:

(a) North Goonyella Coal Mine is ordered to produce to WorkCover Queensland:
    (i) The report of Mr Miller;
    (ii) Records of interviews conducted between its solicitors and witnesses relating to the circumstances of the event resulting in the alleged injury to the applicant, the applicant's alleged injury or the applicant's prospects of rehabilitation;
    (iii) Statements of witnesses relating to the circumstances of the event resulting in the alleged injury to the applicant, the applicant's alleged injury or the applicant's prospects of rehabilitation;
    (iv) Reports obtained from experts relating to the circumstances of the event resulting in the alleged injury to the applicant, the applicant's alleged injury or the applicant's prospects of rehabilitation;

(b) The documents referred to in (a) are to be produced within seven days of the finalisation of the prosecution of the summary charges arising out of the circumstances of the event resulting in the alleged injury to the applicant pending against North Goonyella Coal Mine and Mr Millard;

(c) WorkCover is ordered to produce to the applicant's solicitors any documents produced to it by the employer pursuant to the order in paragraph (a) forthwith upon their receipt;

(d) The application is otherwise dismissed;

(e) There is no order as to costs;

(f) The parties have liberty to apply within seven days.