Federal Court of Australia

CUB Australia Holding Pty Ltd v Commissioner of Taxation [2021] FCA 43

|  |  |
| --- | --- |
| File number: |  |
|  |  |
| Judgment of: | **MOSHINSKY J** |
|  |  |
| Date of judgment: | 2 February 2021 |
|  |  |
| Catchwords: | **TAXATION** – notice to give information – where Commissioner sought particulars of documents that were the subject of legal professional privilege claims – where the particulars sought comprised the titles of the documents, and the names of the authors and recipients of the documents – whether the notice was invalid on the ground that it was not authorised by the enactment, or that it was issued for an improper purpose, or that the Commissioner had taken into account an irrelevant consideration – where the taxpayer alleged that the Commissioner’s purpose in issuing the notice was to determine the validity of the taxpayer’s legal professional privilege claims – whether the taxpayer’s contention as to purpose was established |
|  |  |
| Legislation: | *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 13  *Income Tax Assessment Act 1936* (Cth), ss 264, 264A  *Income Tax Assessment Act 1997* (Cth), s 995-1  *Judiciary Act 1903* (Cth), s 78B  *Taxation Administration Act 1953* (Cth), Sch 1, s 353-10 |
|  |  |
| Cases cited: | *Australia and New Zealand Banking Group Ltd v Konza* (2012) 206 FCR 450  *Australia and New Zealand Banking Group Ltd v Konza* (2012) 87 ATR 779  *Binetter v Commissioner of Taxation* (2012) 206 FCR 37  *Brownells Ltd v Ironmongers’ Wages Board* (1950) 81 CLR 108  *Deloitte Touche Tohmatsu v Deputy Commissioner of Taxation* (1998) 40 ATR 435  *Emmett v McCormack* [2016] FCAFC 65  *Federal Commissioner of Taxation v Australia and New Zealand Banking Group Ltd* (1979) 143 CLR 499  *LHRC v Deputy Commissioner of Taxation (No 3)* (2015) 100 ATR 605  *May v Federal Commissioner of Taxation* (1999) 92 FCR 152  *Minister for Immigration and Ethnic Affairs v Arslan* (1984) 4 FCR 73  *Minister for Immigration and Ethnic Affairs v Taveli* (1990) 23 FCR 162  *Narain v Parnell* (1986) 9 FCR 479  *Parramatta City Council v Hale* (1982) 47 LGRA 319  *Telstra Corporation Ltd v Hurstville City Council* (2000) 105 FCR 322  *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 |
|  |  |
| Division: |  |
|  |  |
| Registry: |  |
|  |  |
| National Practice Area: |  |
|  |  |
| Number of paragraphs: | 100 |
|  |  |
| Date of hearing: | 29 October 2020 |
|  |  |
| Counsel for the Applicant: | Mr FD O’Loughlin QC with Mr HR Hassan and Mr R Chan |
|  |  |
| Solicitor for the Applicant: | Johnson Winter & Slattery |
|  |  |
| Counsel for the Respondent: | Mr PJ Hanks QC with Ms M Clarebrough |
|  |  |
| Solicitor for the Respondent: | Australian Government Solicitor |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | VID 213 of 2020 |
|  | | |
| BETWEEN: | CUB AUSTRALIA HOLDING PTY LTD  Applicant | |
| AND: | COMMISSIONER OF TAXATION  Respondent | |

|  |  |
| --- | --- |
| order made by: | MOSHINSKY J |
| DATE OF ORDER: | 2 FEBRUARY 2021 |

THE COURT ORDERS THAT:

1. Grounds 1, 2 and 3 of the applicant’s originating application for judicial review be dismissed.
2. The costs of the determination of grounds 1, 2 and 3 be reserved, to be the subject of submissions at the next case management hearing.
3. The proceeding be listed for a case management hearing on a date to be fixed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MOSHINSKY J:

## Introduction

1. The applicant, formerly known as ABI Australia Holding Pty Ltd and now known as CUB Australia Holding Pty Ltd (**CUB**), has sought judicial review of a decision of the Commissioner of Taxation (the **Commissioner**) to issue a notice dated 4 March 2020, purportedly pursuant to s 353-10 of Sch 1 to the *Taxation Administration Act 1953* (Cth), requiring the provision of certain information (the **March 2020 Notice**).
2. In brief outline, the background to the notice is as follows. On 30 May 2018, in connection with an audit, the Commissioner issued a notice to CUB pursuant to s 353-10 of Sch 1 to the *Taxation Administration Act* requiring the production of certain documents (the **May 2018 Notice**). CUB refused to produce some of the documents covered by the May 2018 Notice on the ground of legal professional privilege. It provided some details regarding these documents, but did not provide certain additional details requested by the Commissioner to enable him to assess whether the privilege had been properly claimed. In particular, CUB refused to provide the titles of the documents (or the subject lines for emails), the names of the persons who authored the documents, and the names of the persons who received the documents.
3. In that context, the Commissioner issued the March 2020 Notice, which was in the following terms:

To: ABI Australia Holding Pty Ltd

Level 20, 2 Southbank Boulevard

Southbank VIC 3006

Under section 353-10 of Schedule 1 to the *Taxation Administration Act 1953*, I require you to give the information described in the schedule:

1. for the purpose of the administration or operation of a taxation law,

2. to me,

3. in writing,

4. at:

Attention: Christopher Ferguson

Australian Taxation Office

747 Collins Street

Docklands VIC 3008

5. no later than 1 April 2020

The powers of the Commissioner of Taxation under section 353-10 of Schedule 1 to the *Taxation Administration Act 1953* have been delegated to me as Deputy Commissioner of Taxation under section 8 of the *Taxation Administration Act 1953*.

Dated: 4 March 2020

Rebecca Saint

Deputy Commissioner of Taxation

Per [signature in original]

Christopher Ferguson

1. The Schedule to the March 2020 Notice was as follows:

**Schedule**

1. For every document responsive to the notice issued under section 353-10 of Schedule 1 to the *Taxation Administration Act 1953* (Cth) on 30 May 2018 that was not wholly produced due to claims for legal professional privilege, provide:

a. the title of the document. Where the document is an email, the title of the document means the subject line of the email;

b. the name of the person who authored the document;

c. the name of each person to whom the document was communicated; and

d. where the document is an email, for each person who received the email, whether the email was sent directly to the person or copied to the person.

1. Section 353-10 of Sch 1 to the *Taxation Administration Act* provides in part:

**353-10 Commissioner’s power**

(1) The Commissioner may by notice in writing require you to do all or any of the following:

(a) to give the Commissioner any information that the Commissioner requires for the purpose of the administration or operation of a \*taxation law;

(b) to attend and give evidence before the Commissioner, or an individual authorised by the Commissioner, for the purpose of the administration or operation of a taxation law;

(c) to produce to the Commissioner any documents in your custody or under your control for the purpose of the administration or operation of a taxation law.

Note: Failing to comply with a requirement can be an offence under section 8C or 8D.

1. Following a request for reasons pursuant to s 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the **ADJR Act**), on 17 March 2020 the Commissioner provided a statement of reasons for the decision to issue the March 2020 Notice (the **Statement of Reasons**).
2. By originating application for judicial review filed on 30 March 2020 (the **originating application**), CUB seeks judicial review of the decision of the Commissioner that CUB be required to give him information pursuant to the March 2020 Notice. The originating application contains four grounds. The first three grounds challenge the validity of the March 2020 Notice. By these grounds, it is contended that: the notice was not authorised by s 353-10 or was otherwise beyond power; alternatively, that the Commissioner’s primary or substantial purpose was an improper purpose; alternatively, that the Commissioner took into account an irrelevant consideration. There is substantial overlap between the three grounds. In relation to all three grounds, CUB contends that, in issuing the notice, the Commissioner’s purpose (or substantial purpose) was *to determine the validity of CUB’s legal professional privilege claims*. CUB contends that this was not a proper purpose for the exercise of the power conferred by s 353-10. Accordingly, CUB contends, the notice was invalid.
3. The fourth ground in the originating application is quite different. By this ground, CUB contends that the *titles* of the relevant documents (being the information sought by paragraph 1(a) of the Schedule to the March 2020 Notice) are themselves privileged. It follows, CUB contends, that CUB is not required to produce that information. CUB seeks a declaration to that effect. In contrast with grounds 1-3, ground 4 requires a determination to be made, on a case by case basis, of whether the titles of the relevant documents are covered by legal professional privilege. It appears from CUB’s outline of submissions that there are 1,421 documents in issue, if emails in an email chain are counted as a single document. If each email in an email chain is counted as a separate document, there are 4,431 documents in issue.
4. In light of the above, the parties agreed that it was sensible for grounds 1, 2 and 3 to be tried separately and in advance of ground 4. Accordingly, it was ordered by consent that the questions whether any or all of grounds 1, 2 and/or 3 of the originating application are made out be determined separately and before the remaining question in the proceeding. These reasons deal only with grounds 1-3 of the originating application.
5. For the reasons that follow, I have concluded that none of grounds 1, 2 and 3 is made out. My reasons can be summarised as follows. In my view, CUB’s (factual) contention that, in issuing the March 2020 Notice, the Commissioner’s primary or substantial purpose was *to* *determine the validity of CUB’s legal professional privilege claims*, is not established*.* I find that the Commissioner’s purpose (or substantial purpose) was to obtain information that he considered necessary to determine whether to accept or challenge CUB’s legal professional privilege claims in respect of the relevant documents. Further, I find that the Commissioner considered that the documents, which were responsive to the May 2018 Notice, remained relevant to the statutory functions he was still carrying on. In light of these findings, I conclude that the March 2020 Notice was issued for the purpose of the administration of a taxation law.
6. The balance of these reasons will be structured under the following headings:
7. The hearing and evidence.
8. Background facts.
9. The originating application.
10. Applicable principles relating to s 353-10 and burden.
11. Consideration.
12. Conclusion.

## The hearing and evidence

1. The hearing of the separate questions took place by video, with the parties appearing remotely, due to the restrictions then in place because of the COVID-19 pandemic.
2. CUB relies on four affidavits of Stewart Grieve, a partner of Johnson Winter & Slattery, the solicitors for CUB. The affidavits are dated 1 April 2020, 25 May 2020 (comprising 70 paragraphs), 25 May 2020 (comprising 7 paragraphs) and 27 July 2020. Consistently with the Court’s practice guidelines relating to the pandemic, the first and fourth of these affidavits were filed in unsworn form. During the hearing, Mr Grieve took an oath and adopted these affidavits.
3. The Commissioner relies on two affidavits of Christopher Ferguson, Assistant Commissioner of Taxation, dated 25 June 2020 and 21 July 2020. Mr Ferguson was the decision-maker in respect of the decision to issue the March 2020 Notice.
4. There was no cross-examination.

## Background facts

1. The following background facts, which are largely drawn from Mr Ferguson’s first affidavit (as corrected by his second affidavit) and Mr Grieve’s second affidavit, do not appear to be controversial. I will deal later in these reasons with CUB’s contentions regarding the Commissioner’s purpose in issuing the March 2020 Notice.
2. Since approximately April 2013, the Commissioner has been examining the tax affairs of the SAB Australia Pty Ltd multiple entry consolidated group (the **SAB Group**).
3. Between 16 December 2011 and 11 October 2016, SAB Australia Pty Ltd, formerly known as SABMiller Australia Pty Ltd, was the provisional head company of the SAB Group. In these reasons, I will refer to that company, both before and after the change of name, as **SABM Australia**.
4. On 12 October 2016, CUB became the provisional head company of the SAB Group and SABM Australia became a subsidiary member.

### Current Australian Taxation Office (ATO) activity in relation to CUB

1. On 4 March 2014, the Commissioner commenced an audit of SABM Australia in relation to the 2012, 2013 and 2014 income years (the **first SABM audit**).
2. On 2 August 2019, the Commissioner commenced an audit of SABM Australia in relation to the 2014, 2015, 2016 and 2017 income years (the **second SABM audit**).
3. On 12 September 2019, the Commissioner amended SABM Australia’s income tax assessments for the 2012, 2013 and 2014 income years (the **Amended Assessments**).
4. On 11 November 2019, SABM Australia objected to the Amended Assessments.
5. On 18 December 2019, the Commissioner commenced an audit of CUB in relation to the 2017, 2018, 2019 and 2020 income years (the **CUB audit**).
6. The first SABM audit has not yet concluded because the Commissioner is currently considering whether SABM Australia is liable to administrative penalties under Div 284 of Sch 1 to the *Taxation Administration Act* in respect of the Amended Assessments. The Commissioner is currently considering SABM Australia’s objection to the Amended Assessments, which was lodged on 11 November 2019.
7. The Commissioner is currently conducting the second SABM audit.
8. The Commissioner is currently also conducting the CUB audit.

### Issue of notices in May 2018

1. On 30 May 2018, the Commissioner issued:
2. the May 2018 Notice; and
3. a notice under the former s 264A of the *Income Tax Assessment Act 1936* (Cth) (the **ITAA 1936**) (the **earlier offshore notice**),

(together, the **earlier notices**). Copies of these notices are set out in annexure “CJF-1” to Mr Ferguson’s first affidavit.

1. CUB sought a number of extensions of time to comply with the earlier notices. The Commissioner granted a number of extensions of time. The final extended due date for compliance with the earlier notices was 28 February 2019.
2. Between May 2018 and August 2019, the Commissioner and CUB exchanged correspondence in relation to CUB’s claims for legal professional privilege over information and documents covered by the earlier notices.
3. On 7 September 2018, CUB wrote to the Commissioner stating that details of its legal professional privilege claims would be provided to the Commissioner in a single tranche after CUB had responded to the earlier notices.
4. On 17 September 2018, the Commissioner wrote to CUB identifying the information that the Commissioner required to substantiate legal professional privilege claims and included links to the relevant legal professional privilege forms on the ATO’s website. The Commissioner also noted that a list of legal professional privilege claims must be provided by the extended due date for the earlier notices. The letter included the statement that:

Any claims for the accountants’ concession or legal professional privilege must be supplemented with information relevant to determining the appropriateness of each claim.

1. On 20 September 2018, CUB wrote to the Commissioner and said that, consistent with its prior practice, it would provide details of all legal professional privilege claims “necessary and sufficient to enable the Commissioner to assess whether he wishes to contest any claim”. CUB also stated that those details would be provided “as soon as reasonably practicable” and that it was unlikely that all the details could be provided by the extended due date for the earlier notices (which was then 30 November 2018).
2. On 1 November 2018, the Commissioner wrote to CUB stating that the details of its legal professional privilege claims should be provided by the extended due date for the earlier notices.
3. On 8 November 2018, CUB wrote to the Commissioner, maintaining that the Commissioner was wrong to assert that there was a formal requirement to produce schedules containing the details of any legal professional privilege claims within the time for the production of the relevant documents.
4. On 19 November 2018, the Commissioner wrote to CUB and reiterated that details substantiating CUB’s legal professional privilege claims should be part of CUB’s responses to the earlier notices and should be provided when the earlier notices were due.
5. On 23 November 2018, CUB wrote to the Commissioner maintaining its position that there was no formal requirement for the recipient of a formal notice to produce details of legal professional privilege claims within the time for production of the relevant documents but stated that it would provide details of the claims to the Commissioner as soon as was reasonably practicable.
6. On 21 December 2018 and 28 February 2019, CUB provided the Commissioner with schedules identifying its legal professional privilege claims in relation to documents responsive to the earlier notices (the **LPP schedules**).
7. Mr Grieve gives evidence in his second affidavit (and I accept) that SABM Australia instructed first Corrs Chambers Westgarth (**Corrs**) and later Johnson Winter & Slattery, and CUB instructed Johnson Winter & Slattery, to assist them with the exercises of:
8. identifying documents meeting the terms of document requests in the information requests and formal notices issued by the Commissioner;
9. from that document population, identifying documents that contained privileged communications or information or that contained information that was subject to the accountants’ concession; and
10. preparing tables setting out information concerning the documents in respect of which legal professional privilege and accountants’ concession claims would be made.
11. Mr Grieve gives evidence in his second affidavit (and I accept) that the document reviews for legal professional privilege and the accountants’ concession were conducted by qualified and practising lawyers from Corrs and Johnson Winter & Slattery, under his ultimate supervision. On occasion, assistance with first stage reviews of documents was obtained from paralegals who at the outset were trained by, and over the entire course of their involvement in the reviews were under the close supervision of, the qualified and practising lawyers. In addition, those Corrs and Johnson Winter & Slattery lawyers prepared schedules containing details of the legal professional privilege and accountants’ concession claims that were provided to the Commissioner.
12. Mr Grieve gives evidence in his second affidavit (and I accept) that the details of legal professional privilege claims provided to the Commissioner in the LPP schedules were refined over time. The details of the legal professional privilege claims comprised:
13. a document identification number for the document containing the privileged communication;
14. a description of the nature of the document (generally, emails and attachments to emails);
15. the number of documents and pages comprising the document containing the privileged communication;
16. the date of the privileged communication;
17. the name or names of the organisation/s that authored the privileged communication;
18. the name or names of the organisation/s that received the privileged communication;
19. a physical description of the document containing the privileged communication; and
20. an explanation of the subject matter of the privileged communication, being one of the following descriptions, each of which contained a defined term or terms:
    1. Legal Advice from an External Legal Advisor (including a summary of such advice);
    2. Legal Advice from an Internal Legal Advisor (including a summary of such advice);
    3. Request for Legal Advice from an External Legal Advisor (including a summary of such request);
    4. Request for Legal Advice from an Internal Legal Advisor (including a summary of such request); or
    5. a Forward Communication of any of the privileged communications referred to in (i) to (iv) above.
21. On 15 March 2019, the Commissioner wrote to CUB stating (under the heading “Confidentiality claims”) that the Commissioner “cannot undertake a meaningful consideration of your claims based on the limited information you have provided”.
22. On 6 June 2019, CUB wrote to the Commissioner and offered to give the ATO an explanation of the processes CUB had adopted to make legal professional privilege claims and requested an undertaking from the Commissioner that disclosure of those processes would not be regarded by the Commissioner as any form of waiver of the legal professional privilege claims.
23. On 2 July 2019, CUB provided the Commissioner with a schedule, setting out details of legal professional privilege claims in relation to redactions made to parts of a document that would otherwise be responsive to the earlier offshore notice.
24. On 26 July 2019, the Commissioner wrote to CUB acknowledging the offer in CUB’s 6 June 2019 letter to share their processes for making legal professional privilege claims. The letter included the following statements:

9. We continue to have concerns about the basis of the LPP claims made in relation to the formal notices issued to you …

10. We respect your right to claim LPP. However, our concerns stem from the quantum of your LPP claims (in excess of 20,000) in combination with the limited information provided to allow us to assess the validity of each claim.

11. We acknowledge your offer contained in your letter of 6 June 2019 to explain the processes adopted in connection with your claims of LPP. The Commissioner agrees that the mere disclosure of the processes which resulted in the making of LPP claims would not disclose the substance or gist of the advice associated with each claim and would therefore not be a waiver of that privilege.

12. We note that merely disclosing the processes connected to making LPP claims is unlikely to put the Commissioner in a position **to make an informed assessment of each claim.**

(Emphasis added.)

1. On 31 July 2019, CUB wrote to the Commissioner, contending that the information provided in the LPP schedules was sufficient to allow the Commissioner to form a view in relation to the claims made and stated that any further information concerning the claims “would not put the ATO in any better position than it is already in to form its view”.
2. On 9 August 2019, the Commissioner wrote to CUB reiterating his view that CUB had not provided sufficient particulars in respect of its legal professional privilege claims. The Commissioner’s letter also stated that:

13. We reiterate that the quantum of your LPP claims is not, in itself, our concern. As stated in our letter dated 26 July 2019, our concerns with your LPP claims arise due to the quantum of claims *in combination with* the limited information provided **to allow us to assess the validity of each claim**.

14. We reject the assertion in your letter dated 31 July 2019 that you have provided sufficient information to allow the Commissioner to form a view in relation to the claims made. It remains our view that you have not provided sufficient particulars in respect of your claims for LPP.

15. Moreover, where LPP claims have been made over only part of documents, the parts of those documents that have been redacted exceed what you would be entitled to redact on the basis of LPP.

16. Even where a document records a communication for the requisite dominant purpose, a privilege holder may redact the document only to the extent necessary to prevent the disclosure of the communication for that purpose.

17. The redactions made to the documents, which reflect the same level of detail as provided in your schedule, entirely obscure the participants in the correspondence, and the subject or title of the correspondence (which we would not ordinarily expect to disclose the substance or gist of any advice given). The redactions have left us unable to even identify which part claim listed in your schedule of LPP claims relates to which partially redacted document.

18. Further, you have not sufficiently described the purpose(s) of the relevant communications to the degree required to support a claim for privilege, **or to permit the Commissioner to engage with you regarding the claims**. The schedules provided include descriptions which are conclusory in nature.

(Bold emphasis added.)

1. On 16 August 2019, CUB responded by letter to the Commissioner’s letter dated 9 August 2019, maintaining the view that the level of detail in the LPP schedules was sufficient for the Commissioner’s purposes. The letter stated:

As you suggest, we are of the view, which we have expressed a number of times, that the level of detail contained in the LPP schedules is sufficient for the current purpose. The current purpose is limited to the Commissioner doing the only thing that is possible and appropriate for him to do in this setting, namely, without having any privileged material before him, **form a view on the LPP claims, and whether he should accept the claims that have been made or test some or all of those claims more formally**. In this setting, the Commissioner is not entitled to the content of the legal advice over which the LPP claims have been made, including its subject matter.

(Emphasis added.)

1. On 27 August 2019, CUB provided the Commissioner with a schedule setting out details of its legal professional privilege claims in relation to documents, which it had withheld from the Commissioner in their entirety but which were otherwise responsive to the earlier offshore notice. CUB also amended its legal professional privilege claims made in response to the May 2018 Notice, including making legal professional privilege claims in respect of additional documents responsive to that notice but which had been withheld from production.

### Issue of the March 2020 Notice

1. On 22 October 2019, Mr Ferguson, Grace Lynn and Harry Payavlas of the ATO met with CUB’s representatives. During that meeting, Mr Ferguson informed CUB’s representatives that the Commissioner intended to issue another notice to CUB under s 353-10 of Sch 1 to the *Taxation Administration Act* to seek particulars of the legal professional privilege claims made in response to the earlier notices (the **proposed notice**).
2. On 13 November 2019, Ms Lynn emailed CUB’s representatives and provided a draft version of the proposed notice.
3. On 21 November 2019, Mr Ferguson, Ms Lynn and Mr Payavlas attended a telephone conference with CUB’s representatives. Having regard to the affidavit evidence, I find that statements to the following effect were made during the conference:
4. Mr Grieve said that he was unconvinced that the Commissioner was authorised to issue the formal notice on the terms set out in the draft that had been provided. This was because the Commissioner was not authorised to make the actual assessment or determination as to whether a communication was privileged, which was ultimately the job of the Courts. Mr Grieve suggested the possibility of testing a representative sample (or, if that was unacceptable to the Commissioner, then all) of the legal professional privilege claims with an independent reviewer.
5. Mr Ferguson said words to the following effect (as recorded in a file note of the conference):

we’re confident that we can issue the doc as drafted and we are not issuing it to make a certain call on whether or not the documents are actually privileged but **we are issuing the notice so that we can make the call as to whether or not to challenge the claims**

(Emphasis added.)

1. On 6 December 2019, Mr Ferguson and Mr Payavlas attended a telephone conference with CUB’s representatives. During the conference Mr Ferguson and Mr Payavlas said that the Commissioner was prepared to revise the proposed notice to remove a significant portion of the information requested and request only the title of the document, the name of the person who authored the document and the name of the person to whom the document was communicated.
2. On 6 December 2019, Mr Payavlas emailed CUB’s representatives and confirmed the information that would be requested in the proposed notice following the revisions.
3. On 11 December 2019, CUB wrote to the Commissioner outlining its objections to the issue of the proposed notice.
4. On 4 March 2020, the Commissioner issued the March 2020 Notice under cover of a letter dated 4 March 2020. The decision to issue the notice was made by Mr Ferguson, as an authorised officer of the Deputy Commissioner of Taxation. The text of the March 2020 Notice has been set out in the Introduction to these reasons. The covering letter stated:

1. We refer to:

1.1 our email dated 6 December 2019 (the **6 December email**), in which the Commissioner identified the proposed particulars that your client would be required to provide in response to a notice to be issued pursuant to section 353-10 of Schedule 1 of the TAA 1953; and

1.2 your letter dated 11 December 2019.

2. As noted in the 6 December email, the Commissioner has taken into account concerns raised by you (without necessarily agreeing with those concerns) and significantly reduced the particulars that are required by the notice.

3. The Commissioner requires the particulars identified in the 6 December email **to allow the Commissioner [to] evaluate the legitimacy of your client’s LPP claims** over the documents that were the subject of the notice issued on 30 May 2018 – in particular, **to allow the Commissioner to make an informed judgement as to:**

**3.1 whether each document, for which LPP has been claimed, was brought into existence for the dominant purpose of requesting or providing independent legal advice, or reveals a communication made for that purpose; and**

**3.2 whether LPP in any of those documents has been waived.**

4. The notice does not require you or your client to disclose the substance of the communication contained in any document.

5. We remain of the view that the information that you have provided about the documents subject to the LPP claims is insufficient to enable the Commissioner to consider the matters identified in paragraph 3 above.

6. **The Commissioner also requires those additional particulars in order to make an informed decision as to whether an alternative dispute resolution process would be an appropriate method of resolving any disputed claims**.

(Emphasis added.)

1. On 6 March 2020, pursuant to s 13 of the ADJR Act, CUB sought reasons for the Commissioner’s decision to issue the March 2020 Notice.
2. On 17 March 2020, the Commissioner provided the Statement of Reasons to CUB. A copy of the Statement of Reasons was placed into evidence by CUB, as an annexure to Mr Grieve’s second affidavit. The Statement of Reasons was prepared by Mr Ferguson and structured under the following headings: Decision; Background; Findings on material questions of fact; Evidence and other materials on which these findings were based; and Reasons for decision. The last of these sections (Reasons for decision) was in the following terms:

40. I made the decision to issue the 4 March 2020 notice for the following reasons:

40.1 The Commissioner is engaged in considering SABM Australia’s objections to the amended assessments issued on 12 September 2019, in order to make a decision pursuant to section 14ZY of the TAA 1953. The Commissioner is also assessing SABM Australia’s possible liability to administrative penalty pursuant to Division 284 to Schedule 1 of the TAA 1953 in respect of the notices of amended assessment issued on 12 September 2019.

40.2 The Commissioner is also undertaking the second SABM audit – a process that may produce information relevant to assessments or amended assessments of income tax payable by SABM Australia for the 2014, 2015, 2016 and 2017 income years, pursuant to sections 166 and 170 of the *Income Tax Assessment Act 1936* (the **ITAA 1936**). When the Commissioner has finished considering the question of assessments and amended assessments for those income years, the Commissioner may also need to assess SABM Australia’s possible liability to administrative penalty pursuant to Division 284 to Schedule 1 of the TAA 1953.

40.3 In addition, the Commissioner is undertaking the [CUB] audit – a process that may produce information relevant to assessments or amended assessments of income tax payable by [CUB] for the 2017, 2018, 2019 and 2020 income years, pursuant to sections 166 and 170 of the ITAA 1936. When the Commissioner has finished considering the question of assessments and amended assessments for those income years, the Commissioner may also need to assess [CUB’s] possible liability to administrative penalty pursuant to Division 284 to Schedule 1 of the TAA 1953.

40.4 The documents sought in the 30 May 2018 notice and in respect of which LPP has been claimed remain relevant to the task of investigating, and in due course determining:

(a) the amount of SABMiller Australia’s income tax assessments and SABMiller Australia’s possible liability to administrative penalties; and

(b) the amount of [CUB’s] income tax assessments and [CUB’s] possible liability to administrative penalties;

and are relevant to the proper discharge by the Commissioner of his duty to:

(c) administer the taxation laws, including the TAA 1953 and the ITAA 1936;

(d) accurately ascertain the extent of the tax liability of each of SABMiller Australia and [CUB]; and

(e) pursue the recovery of tax-related liabilities.

40.5 The information sought in the 4 March 2020 notice will assist the Commissioner to determine:

(a) whether each document sought in the 30 May 2018 notice, and in respect of which privilege has been claimed, was brought into existence for the dominant purpose of requesting or providing independent legal advice;

(b) whether privilege in any such document has been waived; and

(c) whether the claim that each document is privileged is well-founded, or whether the Commissioner should continue to press for production of all or some of the documents sought pursuant to the 30 May 2018 notice so as to assist the Commissioner in the proper discharge of the Commissioner’s duty referred to in paragraph 40.4 above.

40.6 Accordingly, the information sought in the 4 March 2020 notice is required by the Commissioner for the purpose of the administration of a taxation law – in particular, the TAA 1953 and the ITAA 1936.

40.7 [CUB] has not provided the information now sought in the 4 March 2020 notice despite previous requests to do so.

1. Mr Ferguson gives evidence in paragraph 42 of his first affidavit that paragraph 40 of the Statement of Reasons accurately records his reasons for deciding to issue the March 2020 Notice. Mr Ferguson was not cross-examined.
2. On 30 March 2020, the Commissioner agreed to a request made by CUB to extend the time for compliance with the March 2020 Notice until the 28th day after the making of final orders in the present proceeding.

## The originating application

1. By the originating application, CUB seeks judicial review of the decision of the Commissioner that CUB be required to give him information pursuant to the March 2020 Notice.
2. As noted in the Introduction to these reasons, an order was made by consent that the questions whether any or all of grounds 1, 2 and/or 3 of the originating application are made out be determined separately and before the remaining question in the proceeding.
3. Grounds 1, 2 and 3 of the originating application are as follows:

1. The decision to give the Notice [i.e. the March 2020 Notice] was not authorised by s 353-10 of the Enactment in pursuance of which it was purported to be made [i.e. the *Taxation Administration Act*] within s 5(1)(d) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**), or is otherwise beyond the power conferred by s 353-10 of the Enactment.

**PARTICULARS**

A. S 353-10 of the Enactment does not authorise the Respondent to give a notice for the purpose of allowing the Respondent to determine for himself whether legal professional privilege has been properly claimed by the Applicant in respect of those documents the subject of the Notice.

B. S 353-10 of the Enactment does not authorise the Respondent to give a notice for the purpose of allowing him to determine for himself the limits of his own powers over documents the subject of legal professional privilege claims by the Applicant;

C. The Notice was not given for “the purpose of the administration or operation of a taxation law” within the meaning of s 353-10 of the Enactment.

2. Further and alternatively, the decision to give the Notice was an improper exercise of the power conferred by s 353-10 of the Enactment in pursuance of which it was purported to be made in that it was an exercise of a power for a purpose other than a purpose for which the power is conferred within ss 5(1)(e) and 5(2)(c) of the ADJR Act.

**PARTICULARS**

A A notice purportedly given under s 353-10 of the Enactment for the purposes of allowing the Respondent to determine for himself:

(i) whether legal professional privilege has been properly claimed by the Applicant in respect of those documents the subject of the Notice; and/or

(ii) the limits of his own powers over documents the subject of legal professional privilege claims by the Applicant,

is not given for purposes for which the power was conferred on the Respondent by s 353-10 of the Enactment.

B. The Notice was not issued for “the purpose of the administration or operation of a taxation law” within the meaning of s 353-10 of the Enactment.

3. Further and alternatively, the decision to issue the Notice was an improper exercise of the power conferred by s 353-10 of the Enactment in pursuance of which it was purported to be made in that the Respondent took an irrelevant consideration into account in exercise of the power within ss 5(1)(e) and 5(2)(a) of the ADJR Act.

**PARTICULARS**

A. In giving the Notice, the Respondent took into account the consideration that s 353-10 of the Enactment permitted him to issue a notice to determine whether legal professional privilege has been properly claimed by the Applicant in respect of the documents requested in the Schedule to the Notice, and that was a consideration which the Respondent was bound not to take into account.

1. The three grounds were dealt with together in CUB’s written and oral submissions. In relation to all three grounds, CUB contends that, in issuing the March 2020 Notice, the Commissioner’s purpose (or substantial purpose) was *to determine the validity of CUB’s legal professional privilege claims*. I note that the point was expressed slightly differently in CUB’s outline of submissions dated 11 September 2020 – in that document it was contended in paragraph 31(i) that the Court should make a factual finding that the Commissioner’s purpose (or substantial purpose) was “determining the propriety of the Applicant’s LPP claims” in respect of the relevant documents. However, in CUB’s outline of submissions in reply it was contended in paragraph 2 that the Commissioner’s purpose (or substantial purpose) was “to determine the validity of the Applicant’s claims for legal professional privilege and whether privilege in the relevant communications had been waived”. Similarly, in oral submissions, senior counsel for CUB submitted that “a substantial purpose, if not the sole purpose, in issuing the notice was to – to determine the validity of the applicant’s claims to privilege” (T26).
2. CUB contends that that was not a proper purpose for the exercise of the power conferred by s 353-10 because determining or resolving privilege claims is the role of a court of competent jurisdiction exercising judicial power. Accordingly, CUB contends, the notice was invalid.
3. I note that neither party suggested that the proceeding involved a matter arising under the *Commonwealth Constitution* or involving its interpretation, as referred to in s 78B(1) of the *Judiciary Act 1903* (Cth). Although CUB’s contentions included the proposition that determining privilege claims is for the courts rather than the Commissioner, its case did not extend to a constitutional challenge or otherwise raise a live issue under the *Constitution*: cf *Narain v Parnell* (1986) 9 FCR 479 at 489.

## Applicable principles relating to s 353-10 and burden

1. The text of s 353-10 of Sch 1 to the *Taxation Administration Act* is set out in the Introduction to these reasons. The term “taxation law” is defined to mean, among other legislation: “an Act of which the Commissioner has the general administration …”: see the *Income Tax Assessment Act 1997* (Cth) (the **ITAA 1997**), s 995-1. Those Acts include the *Taxation Administration Act*, the ITAA 1936 and ITAA 1997.
2. As the party challenging the exercise of the Commissioner’s power to issue the March 2020 Notice, the applicant, CUB, bears the burden of establishing that the notice was issued for an improper purpose: *Australia and New Zealand Banking Group Ltd v Konza* (2012) 87 ATR 779 at [139] per Lander J (appeal allowed in part: *Australia and New Zealand Banking Group Ltd v Konza* (2012) 206 FCR 450); *LHRC v Deputy Commissioner of Taxation (No 3)* (2015) 100 ATR 605 at [149] per Perry J and the authorities there cited.
3. The current s 353-10 is the successor to an earlier version of s 353-10 of Sch 1 to the *Taxation Administration Act* and former s 264 of the ITAA 1936. The wording of s 264(1)(a) was different from s 353-10(1)(a) as it currently stands, in that it did not expressly refer to the “purpose of the administration or operation of a taxation law”. Nevertheless, in construing the current version of the section, it is relevant to have regard to the authorities on the earlier provisions.
4. The authorities show that the Commissioner can validly exercise the power to seek information for various reasons, including to make wide-ranging or “roving” enquiries: *Federal Commissioner of Taxation v Australia and New Zealand Banking Group Ltd* (1979) 143 CLR 499 (***Smorgon’s case***) at 524 per Gibbs ACJ, at 535-536 per Mason J.In that case, Mason J stated at 535-536:

Except in one respect the powers given by s. 264 should be circumscribed only by reference to the limitations which are expressed in that section. Thus, in s. 264 (1)(b) the power to compel evidence is restricted to evidence “concerning his or any other person’s income or assessment” and the power to require production is confined to documentary records “relating thereto”, that is, to “his or any other person’s income or assessment”. However, the power to require information contained in par. (1)(a) is not similarly limited. As it is a power given to the Commissioner for the purpose of enabling him to perform his functions under the Act it must be circumscribed by reference to this purpose.

…

And, for a similar reason there is nothing in the suggestion that an issue or dispute of fact must first arise between a taxpayer and the Commissioner before the Commissioner can invoke s. 264. There is simply no basis for the implication of such a limitation. The strong reasons which inhibit the use of curial processes for the purposes of a “fishing expedition” have no application to the administrative process of assessing a taxpayer to income tax. It is the function of the Commissioner to ascertain the taxpayer’s taxable income. To ascertain this he may need to make wide-ranging inquiries, and to make them long before any issue of fact arises between him and the taxpayer. Such an issue will in general, if not always, only arise after the process of assessment has been completed. It is to the process of investigation before assessment that s. 264 is principally, if not exclusively, directed.

1. In *Deloitte Touche Tohmatsu v Deputy Commissioner of Taxation* (1998) 40 ATR 435, Goldberg J referred at 449-450 to the above passage and other relevant cases. His Honour stated at 452:

As the cases to which I have referred make clear, a formal issue or dispute of fact between the taxpayer and the Commissioner does not have to exist before the Commissioner is entitled to exercise power under s 264(1)(a).

1. In *May v Federal Commissioner of Taxation* (1999) 92 FCR 152, Branson, Finn and Kenny JJ stated at [16]:

It is clear enough that “the powers contained in s 264(1) ... must be exercised for the purposes of the [ITA Act]”: *Industrial Equity Ltd v Deputy Commissioner of Taxation* (1990) 170 CLR 649 at 659. But subject to that, they “should be circumscribed only by reference to the limitations which are expressed in that section”: *Commissioner of Taxation (Cth) v Australia and New Zealand Banking Group Ltd* (1979) 143 CLR 499 at 535. They may, without any issue or dispute of fact having arisen with a taxpayer, be used to conduct a “fishing expedition” in the sense of “a wide-ranging inquiry to ascertain a taxpayer’s taxable income”: *Industrial Equity Ltd v Deputy Commissioner of Taxation* at 662.

1. In *Australia and New Zealand Banking Group Ltd v Konza* (2012) 206 FCR 450, Kenny, Edmonds and Robertson JJ stated at [39]-[41]:

39 A notice under s 264(1)(a) is not required to identify the person or persons in connection with whose income or assessment the request for information is made: *Fieldhouse* at 207 per Hill J; and it does not need to be evident in advance that the information sought in fact relates to the assessment of a particular person or persons: *McCormack v Deputy Commissioner of Taxation* (2001) 114 FCR 574 at [70]. There is no requirement that an issue or dispute of fact must first arise between a taxpayer and the Commissioner before the Commissioner can invoke s 264: *Smorgon No 2* at 536, see also at 524, 546; *May* at 159; *McCormack* at [31]-[33]. A notice may be issued under s 264(1)(a) for the purposes of a “preliminary inquiry” — that is, in order to obtain information necessary for further investigations directed to the ascertainment of the taxable income of Australian taxpayers and the assessment and recovery of income tax: *Deloitte Touche Tohmatsu v Deputy Commissioner of Taxation* (1998) 40 ATR 435 at 451; *Geosam Investments Pty Ltd v Australia and New Zealand Banking Group Ltd* (1979) 9 ATR 836 at 836-837; 25 ALR 445 at 446.

40 Accordingly, there is no requirement that the Notices must be limited (expressly or otherwise) to information directly relating to the assessable income of Australian taxpayers. That would effectively preclude an exercise of the investigatory power for the purpose of ascertaining whether persons may have assessable income. The Commissioner may “fish” in a “pool” that contains (or might contain) persons who are subject to an Australian tax liability — that is sufficient to attract the purpose necessary to exercise the power. The fact that some information furnished may not in the end relate to Australian taxpayers does not invalidate the notice: as was illustrated in *Deloitte* at 440, 441, 451, 452; and *McCormack* at [1] and [79].

41 In determining whether the power to issue a notice under s 264(1)(a) has been exercised for a permitted purpose (that is, for the purposes of enabling the Commissioner to perform his or her statutory functions: *McCormack* at [73]), it is not necessary for the notice to reveal on its face that the Commissioner is entitled to require the information specified: it is enough for the notice or the covering letter to record that the information is required for the purposes of the ITAA 1936 or ITAA 1997, that being the only relevant constraint on the exercise of the statutory power: *McCormack* at [46], [47].

1. In *Binetter v Commissioner of Taxation* (2012) 206 FCR 37, the Full Court (Edmonds, Perram and Jagot JJ), at [37], rejected a submission (made in attacking the validity of a notice issued under former s 264 of the ITAA 1936) that the objection decision could have been made without the material sought in the notice. The Full Court agreed with the primary judge that to accept the submission would be “to invert the inquiry” and that the submission “[does] not recognise that the better the information before the Commissioner at the objection stage the better the decision on the objection”.
2. In my view, these authorities are equally applicable to the current version s 353-10.

## Consideration

1. It is convenient to start by considering CUB’s contention that, in issuing the March 2020 Notice, the Commissioner’s purpose (or substantial purpose) was *to determine the validity of CUB’s legal professional privilege claims*.
2. CUB submits that this is a question of fact, to be determined by reference to the evidence. Further, CUB submits that a purpose may be ascertained by drawing reasonable inferences from a consideration of the whole of the evidence (*Telstra Corporation Ltd v Hurstville City Council* (2000) 105 FCR 322 at [339]; not disturbed on appeal in *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at [83]), including what the person did or said or omitted to do or say (*Parramatta City Council v Hale* (1982) 47 LGRA 319 at 345-346). CUB submits that the character, operation and effect of a decision may inform the appropriate conclusion as to the decision-maker’s purpose: see *Brownells Ltd v Ironmongers’ Wages Board* (1950) 81 CLR 108 at 119, 120, 130. I accept the submissions set out in this paragraph, which I did not understand to be the subject of any real dispute.
3. CUB submits that, having regard to the terms of the March 2020 Notice, the nature, character and relevant effect of that notice, the circumstances in which it was issued, and paragraph 40.5 of the Statement of Reasons, the purpose (or substantial purpose) for issuing the notice was to allow the Commissioner to pursue his purpose of determining the validity of CUB’s legal professional privilege claims in respect of the documents claimed to be privileged.
4. CUB submits that the Commissioner repeatedly said words to the effect that he was judging or determining the legal professional privilege claims. Further, CUB submits that the Commissioner repeatedly omitted to engage with CUB’s lawyers when they asserted to him that he was only entitled to decide whether or not he should test the claims. CUB submits that the Commissioner declined to accept CUB’s invitations to understand its processes in making the privilege claims and CUB’s invitations to have a sample reviewed and, if necessary, to have the whole population independently reviewed.
5. In my view, CUB’s factual contention that, in issuing the March 2020 Notice, the Commissioner’s primary or substantial purpose was *to* *determine the validity of CUB’s legal professional privilege claims*, is not established*.* I find that the Commissioner’s purpose (or substantial purpose), in issuing the March 2020 Notice, was to obtain information that he considered necessary to determine whether to accept or challenge CUB’s legal professional privilege claims in respect of the relevant documents.
6. It may be accepted that parts of the Statement of Reasons, and some of the communications made on behalf of the Commissioner, if taken in isolation, suggest that the Commissioner sought the information set out in the March 2020 Notice in order to determine or resolve CUB’s legal professional privilege claims. In particular, in the covering letter dated 4 March 2020, enclosing the March 2020 Notice, it was stated that the Commissioner required the particulars:

… to allow the Commissioner to make an informed judgement as to:

3.1 whether each document, for which LPP has been claimed, was brought into existence for the dominant purpose of requesting or providing independent legal advice, or reveals a communication made for that purpose; and

3.2 whether LPP in any of those documents has been waived.

1. Similarly, paragraphs 40.5(a) and (b) of the Statement of Reasons stated:

40.5 The information sought in the 4 March 2020 notice will assist the Commissioner to determine:

(a) whether each document sought in the 30 May 2018 notice, and in respect of which privilege has been claimed, was brought into existence for the dominant purpose of requesting or providing independent legal advice;

(b) whether privilege in any such document has been waived; …

1. Also, some of the earlier communications on behalf of the Commissioner, if taken in isolation, may suggest that the Commissioner was seeking further particulars in order to determine the legal professional privilege claims. I refer to the letter dated 17 September 2018 (see [32] above), paragraph 12 of the letter dated 26 July 2019 (see [45] above), and paragraph 13 of the letter dated 9 August 2019 (see [47] above).
2. However, when these statements are viewed in context, it is clear that the Commissioner was seeking the particulars in order to determine *whether to accept or challenge* CUB’s legal professional privilege claims in respect of the relevant documents, rather than to himself determine or resolve the claims.
3. First, it is difficult to see how, even with the particulars, the Commissioner would be able to determine the validity of the legal professional privilege claims. The particulars sought by the Commissioner comprised the title of each document (or the subject line if the document was an email), the name of the person who authored the document, the name of each person to whom the document was communicated, and certain additional information for emails. While these details would assist the Commissioner to form a view as to whether to *accept or challenge* the legal professional privilege claims, they would not enable him to *determine* the claims. Access to the documents themselves would likely be required in order to do that.
4. Secondly, the covering letter dated 4 March 2020 and the Statement of Reasons need to be read as a whole and in the context of the facts and circumstances, including the point made in the preceding paragraph of these reasons. Read as a whole and in context, these documents are consistent with the Commissioner’s purpose being to form a view as to whether to accept or challenge the legal professional privilege claims. While the documents refer to the dominant purpose test for legal professional privilege, this does not necessarily indicate that the test would be applied to determine the validity of the legal professional privilege claims, as distinct from deciding whether to accept or challenge the claims.
5. Other parts of the covering letter dated 4 March 2020, and of the Statement of Reasons, are consistent with the Commissioner’s purpose being to obtain information that he considered necessary to determine whether to accept or challenge CUB’s legal professional privilege claims. The covering letter, in paragraph 6, referred to the Commissioner requiring the additional particulars “in order to make an informed decision as to whether an alternative dispute resolution process would be an appropriate method of resolving any disputed claims”. If the Commissioner’s purpose was to himself determine the validity of the privilege claims, there would be no need for an alternative dispute resolution process to resolve disputed claims; they would already have been resolved by the Commissioner.
6. Paragraph 40.5(c) of the Statement of Reasons is consistent with the Commissioner seeking the information in order to determine whether to accept or challenge the privilege claims. That paragraph was in the following terms:

40.5 The information sought in the 4 March 2020 notice will assist the Commissioner to determine:

…

(c) whether the claim that each document is privileged is well-founded, or whether the Commissioner should continue to press for production of all or some of the documents sought pursuant to the 30 May 2018 notice so as to assist the Commissioner in the proper discharge of the Commissioner’s duty referred to in paragraph 40.4 above.

The statement that the information would assist the Commissioner to determine “whether [he] should continue to press for production of all or some of the documents” is consistent with the Commissioner’s purpose being to decide whether to accept or challenge the privilege claims.

1. Thirdly, other parts of the communications between the parties indicate that the Commissioner sought the further particulars in order to decide whether to accept or challenge(rather than to determine the validity of)the privilege claims in relation to the relevant documents. I refer to paragraph 18 of the 9 August 2019 letter (see [47] above) and the statements made by Mr Ferguson during the telephone conference on 21 November 2019 (see [52] above).
2. Fourthly, the terms and effect of the March 2020 Notice are consistent with the Commissioner seeking the particulars in order to decide whether to accept or challenge the privilege claims.
3. Fifthly, to the extent that CUB in its submissions relies on the fact that the Commissioner did not take up CUB’s invitations to have some or all of the documents reviewed by an independent arbiter, I fail to see how this supports an inference that the Commissioner’s purpose was as alleged by CUB. It is equally consistent with the Commissioner seeking the further particulars in order to decide whether to accept or challenge the privilege claims. Similarly, the fact that the Commissioner declined to accept CUB’s invitations to understand its processes in making the privilege claims is neither here nor there.
4. In light of the above facts and matters, I find that the Commissioner’s purpose (or substantial purpose), in issuing the March 2020 Notice, was to obtain information that he considered necessary to determine whether to accept or challenge CUB’s legal professional privilege claims in respect of the relevant documents.
5. It follows from the above, that the factual premise of all three of the grounds that are presently in issue, is not made out.
6. I now turn to the question whether the information sought by the Commissioner, which related to documents sought in the May 2018 Notice that had been the subject of a claim of legal professional privilege, was required “for the purpose of the administration or operation of a taxation law”, as referred to in s 353-10(1)(a).
7. There is some suggestion in CUB’s outline of submissions that the documents (in respect of which privilege had been claimed) were no longer needed by the Commissioner, as the Commissioner’s investigations were almost complete. This point was not the subject of any detailed oral submissions. However, senior counsel for CUB did submit that paragraphs 40.4 and 40.6 of the Statement of Reasons (see [58] above) should be given no weight, and referred to cases concerning the (limited) weight to be accorded to statements of reasons in certain circumstances, including *Minister for Immigration and Ethnic Affairs v Arslan* (1984) 4 FCR 73 at 75 and *Emmett v McCormack* [2016] FCAFC 65 at [91].
8. Insofar as CUB submits that the documents were no longer needed by the Commissioner to discharge his statutory functions, I do not accept that submission. The facts set out in the first affidavit of Mr Ferguson, together with paragraph 40.4 of the Statement of Reasons, support a finding, which I make, that the Commissioner considered that the documents, which were responsive to the May 2018 Notice, remained relevant to the statutory functions he was still carrying on. The material facts are set out in Mr Ferguson’s first affidavit and are summarised in the Background Facts section of these reasons. This is not a case where the facts are merely set out in a statement of reasons. There is affidavit evidence that directly establishes the facts. Further, and significantly, Mr Ferguson gave evidence in paragraph 42 of his first affidavit that paragraph 40 of the Statement of Reasons accurately recorded his reasons for deciding to issue the March 2020 Notice, and he was not cross-examined. This provides a strong basis to accept the correctness of the statements in paragraph 40.4 of the Statement of Reasons.
9. As noted above, in oral submissions, senior counsel for CUB submitted that no weight should be given to paragraphs 40.4 and 40.6 of the Statement of Reasons. I do not accept that submission. First, a statement of reasons is evidence of the subjective views held by, and the findings made by, the decision-maker: see *Minister for Immigration and Ethnic Affairs v Taveli* (1990) 23 FCR 162 (***Taveli***) at 180 per French J. The statement is evidence that is to be weighed and assessed like any other evidence: *Taveli* at 180. Secondly, the factual material set out in Mr Ferguson’s first affidavit supports the proposition that the documents remained relevant to the statutory functions still being carried out by the Commissioner. Thirdly, as noted above, Mr Ferguson gave evidence in his first affidavit that paragraph 40 of the Statement of Reasons accurately recorded his reasons, and he was not cross-examined.
10. The fact that the information sought in the March 2020 Notice related to a claim of legal professional privilege does not preclude the notice being authorised by the provision. As the authorities discussed in [67]-[75] above make clear, the power is broad and wide-ranging. The information sought in the notice will assist the Commissioner to determine whether to accept or challenge the privilege claims. If the Commissioner decides to challenge some or all of the privilege claims, the dispute as to privilege could be resolved in a number of different ways. For example, in the course of discussion at the hearing, it was said that the Commissioner could apply to the Court for declaratory relief. Alternatively, a dispute resolution mechanism could be agreed between the parties to resolve the privilege issue. As a result of such processes, the Commissioner could obtain access to the documents. As discussed above, the documents remain relevant to the performance of the Commissioner’s statutory functions.
11. In light of the above findings, I conclude that the March 2020 Notice was issued for the purpose of the administration of a taxation law.

## Conclusion

1. It follows from the above that each of grounds 1, 2 and 3 of the originating application is to be dismissed. I will make an order to this effect. While it would appear to be appropriate that the costs of the determination of these grounds follow the event, I will give the parties the opportunity to make submissions about costs at the next case management hearing in the proceeding. In the meantime, I will reserve the costs of the determination of these grounds. I will also make an order that the matter be listed for a case management hearing on a date to be fixed, to deal with the further conduct of the proceeding in relation to ground 4.

|  |
| --- |
| I certify that the preceding one hundred (100) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Moshinsky. |

Associate:

Dated: 2 February 2021