Tim Donaghey
Barrister

Level 22, Aickin Chambers
200 Queen Street
Melbourne, Victoria 3000

Level 8, Latham Chambers
67 Castlereagh Street
Sydney, NSW 2000

CASENOTE: *Basseal v Access Programs Australia Ltd [2026] FCA 1655* (3 November 2026)

Mr Basseal (also '**Applicant'**) brought a proceeding against his former employer ('**Access'**) and against other respondents. On 18 June 2026, Registrar Morgan of the Federal Court of Australia ordered that:

> '*2. By 4.00 pm on 6 November 2026, the Respondents are to file and serve any lay and expert evidence sought to be relied on at trial*'.

On 16 October 2026, the Respondents filed an interlocutory motion seeking orders that the Applicant attend an independent medical examination ('**IME**') by a psychologist, Ms Skiadopoulos, on 10 November 2026.

As a result of the order in the interlocutory motion, the motion also seeks other orders, so that:

(a) only the respondents' lay evidence would be due on 6 November 2026, with any expert evidence due for filing on 4 December 2026;

(b) Mr Basseal would file any evidence in reply by 29 January; and

(c) a further case management hearing would occur after that date.

Despite being self-represented, the Applicant did not dispute the request to attend the IME. Rather, the dispute was as to the service of Ms Skiadopoulos's report on the Applicant. The Employer and the other respondents agreed to provide Mr Basseal with a copy of her report if they decide to rely on it in the proceeding. In response, the Applicant seeks an order that the respondents should provide the report to him in any event.

-Dispute as to IME-

The Applicant sought to invoke r23.21 of the Federal Court Rules. It provides in part:

> ***23.21 Examinations by a medical expert***
> *Application of this rule*
>
> *(1) This rule applies to a proceeding if:*
>
> *(a) a person's (the **relevant person's**) physical or mental condition is relevant to a matter in question; and*
> *(b) the relevant person is a party or a person for whose benefit a party is claiming relief.*

Other sub-rules deal with notices given that a person claiming must submit to an IME – and must cooperate, such as answering reasonable questions.

In answer, the respondents including the Employer sought an order for an IME under r23.21(6) of the Federal Court Rules 2011 ('**Rules of Court**'), which is a general provision permitting the Court to order an examination by a medical expert, and to make other orders which the Court

considers appropriate. The respondents argued that any report of Ms Skiadopoulos is to be obtained by their legal advisers for the purpose of advising on the proceeding (including whether the report should be sought to be relied on) and will for that reason at least initially be privileged. They further submit that that privilege, which is a substantive and not merely a procedural right (see reasoning of the High Court in Glencore International AG v Commr of Taxation,[1] should not be abrogated by a Court order requiring disclosure of that report. This is particularly so, they argued, if the respondents do not propose to rely upon the report (or if no decision has been made to that effect).

Kennett J of the Federal Court heard the motion, and accepted the respondents' submission. His Honour found that any report from Mrs Skiadopoulos will be subject to legal professional privilege (cf, AWB Ltd v Cole (No 5))[2] and would therefore not normally be required to be disclosed. By contrast, disclosure would be required *when such report was filed* in the proceeding (and privilege would be thereby waived). No such order abrogating a right such as privilege should be made.

Kennett J expressed doubt that the Court has any power broader than the express terms of the Rules of Court to abrogate a privilege enjoyed by a party, especially privilege in a communication that has not yet occurred.

His Honour decided not to order that the respondents obtain a report from Mr Skiadopoulos and serve it on Mr Basseal; but noted that the respondents would have to take those steps in the ordinary course if they wish to call her as an expert witness.

-Rationale of the decision-

IMEs are a regular feature of proceedings routine where medical, or psychological or similar evidence is sought. They are also (both during ongoing employment and later, during a proceeding) often a source of dispute.

The source of power to order an IME (as contained in the Rules of Court) is not universal, or unfettered – as it can be seen from this decision. And the approach to such power should be tempered not only by the limits of that power, but also by the strategic approach taken in relation to the litigation as a whole.

TIM DONAGHEY
AICKIN CHAMBERS
LATHAM CHAMBERS
6 November 2026

[1] [2019] HCA 26; 265 CLR 646 at [21] (per Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ.
[2] [2006] FCA 1234; 155 FCR 30 at [41] (per Young J).