fact sheet

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Legal professional privilege in an in-house environment

Attracting and maintaining legal professional privilege (LPP) (also sometimes called client legal privilege) over legal advice obtained by the agency is a topic of enduring relevance to in-house counsel. Following the interest in our *Express law* on *Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd* [2013] QSC 82 (*Aquila*) (discussed below), we have prepared the following snapshot of the recent cases that in-house counsel should be aware of on this topic. The cases in this fact sheet focus on establishing a client–lawyer relationship as between in-house counsel and their employer and avoiding inadvertent waiver of privilege in circumstances relevant to government business.

Dye v Commonwealth Securities Ltd (No 5) [2010] FCA 950

The respondent claimed LPP in respect of certain documents relating to sexual harassment claims brought by an employee. The documents, which were primarily email exchanges, were mostly not authored by the respondent's parent company's (the Commonwealth Bank) in-house solicitor, Mr Fredericks, although in a majority of cases they had been sent or copied to him. While Mr Fredericks had an unrestricted practising certificate, there was evidence that he provided non-legal advice to the respondent from time to time. It was, however, apparent that his role in relation to the applicant's claims was exclusively legal.

Katzmann J considered *Rich v Harrington* (2007) 245 ALR 106 (*Rich*),[1] where in-house counsel's closeness to the matters they were advising on led to a finding of insufficient independence. Her Honour distinguished *Rich* on its facts, finding Mr Fredericks was not involved in the factual substratum and had not met any of the individual employees whose conduct was in issue.

Because the in-house solicitor acted in multiple roles, it was necessary to analyse the capacity in which he received the relevant communications. The legal functions he had performed in relation to the applicant's claims involved providing the bank and the respondent with legal advice, interviewing witnesses, representing the respondent at a mediation before the Australian Human Rights Commission and retaining an external firm of solicitors. To the extent that the evidence demonstrated that communications related predominantly to his legal duties, the LPP claims were upheld.

Philip Morris Ltd and Prime Minister (2011) 122 ALD 619

Philip Morris sought documents under the *Freedom of Information Act 1982* (FOI Act), including legal advices prepared by the Department of Foreign Affairs and Trade (DFAT) in consultation with AGS and the Office of International Law within the Attorney-General's Department (called 'the DFAT advice')

1 In *Rich* the question of an in-house lawyer's independence arose in the context of an internal dispute between partners of the firm in which the legal unit was established. In this case the plaintiff partner claimed unlawful discrimination, harassment and victimisation by the firm against her. The lawyer in charge of the legal unit was a partner of the firm and a likely respondent in the litigation in prospect. Branson J held that in the circumstances, including the personal nature of the allegations, the relationship between the legal unit and the firm lacked the requisite degree of professional detachment. In *Dye v Commonwealth Securities Ltd (No 5)*, Katzmann J queried the correctness of the decision in *Rich* but ultimately distinguished it.

and prepared by AGS (called 'the AGS advice') for the Department of Health and Ageing (DHA). LPP was claimed over the advices. While the position in respect of AGS advice was clear, an issue arose as to the existence of a solicitor–client relationship with DFAT.

The evidence was that:

— The DFAT advice was done in 2 branches of the Department that primarily administered legal advice but also performed policy work.

— The Assistant Secretary of the WTO Trade Law Branch had a law degree but was not admitted to practice. There was no evidence that the person to whom that Branch's aspects of the DFAT advice was assigned was admitted to practice or had a law degree.

— The Assistant Secretary of the Trade Commitments Branch held a law degree and was admitted to practice, and the executive officer who prepared that Branch's aspects of the DFAT advice also held a law degree and was admitted to practice.

— The branches sat within a broader policy division rather than a dedicated and independent legal branch or office.

The Administrative Appeals Tribunal (the Tribunal) found that, although DFAT lawyers could be in a client–solicitor relationship with another part of the Commonwealth (or the Commonwealth itself), in this case DFAT was unable to establish independent legal adviser status. Undertaking the work in branches that have mixed responsibilities for legal work and policy work, and not in a dedicated legal branch or office separate from the line divisions and branches, and the fact that not all staff involved were admitted to practice, were factors against finding a solicitor–client relationship that secured the DFAT advice the necessary independent character.

Particularly important in the Tribunal's view was the absence of admission to practice, by which a lawyer vows to the courts to uphold the rule of law and the integrity of the legal system. While stating that admission to practice might not be essential, Forgie DP considered this to be a fundamental part of what gives a lawyer their independence. Its absence in this case, together with other factors, was decisively against finding the necessary solicitor–client relationship.

Notwithstanding that conclusion, the Tribunal ultimately held that LPP applied when considering the advice holistically. Following the authority in *Grofam*,[2] the Tribunal held that the recipient agency genuinely believed that it was being advised by qualified legal advisers:

> [198] … Legal professional privilege exists for the protection of the client and is intended to enable a client, including agencies of government, to seek legal advice. This is what DHA thought it was doing and it is entitled to have the advice, which is legal advice, protected by the privilege …

On that basis alone, the DFAT advice was held to be privileged from production in legal proceedings on the ground of LPP.

British American Tobacco Australia v Secretary, Department of Health and Ageing (2011) 281 ALR 75

In this case the applicant sought a copy of a legal opinion provided by the Attorney-General's Department (AGD) in 1995 to the then Department of Human Services and Health (Health). The opinion concerned legal and constitutional issues relating to the plain packaging of cigarettes. Health refused to disclose the legal opinion on LPP grounds. The fundamental issue on appeal to the Full

2 *Grofam Pty Ltd v Australia and New Zealand Banking Group Ltd* (1993) 45 FCR 445 (Grofam). In Grofam, discovery was sought of legal advice given to the Australian Taxation Office (ATO) by the Commonwealth Director of Public Prosecutions (CDPP). The question arose whether technically the CDPP was capable of being in a solicitor–client relationship with the ATO. The Federal Court declined to finally resolve that point, holding that the ATO genuinely believed the CDPP was its legal adviser and that as a matter of judicial policy this was sufficient to found client legal privilege (or LPP).

Federal Court was whether LPP in the opinion had been waived by disclosure. The relevant acts of disclosure were:

— A document ('the Government Response'), which referenced aspects of the legal opinion and summarised some of its conclusions, was tabled in the Senate.

— The Government Response was subsequently published on a government agency website (not the Parliament House website).

— A summary of the legal opinion was provided to the Tobacco Working Group (TWG) and the Ministerial Tobacco Advisory Group (MTAG) as part of their work on behalf of the Commonwealth Government. Those groups included non-Commonwealth participants.

The Court held that s 16(3) of the *Parliamentary Privileges Act 1987* (Cth) prevented regard being had to the tabling of the Government Response in the Senate when determining whether LPP in the legal advice was waived. The Court found that analysing whether that act amounted to waiver involved inviting the drawing of an inference that acts done in transacting the business of Parliament were inconsistent with seeking to maintain LPP. The Court held that this was forbidden by s 16(3).

However, the Court found that s 16(3) does not apply to the publication outside of Parliament by the executive government (or anyone else) of statements made in Parliament. The subsequent publication of the Government Response on a website by the executive government was not considered to be an act which is 'incidental' to the transacting of the business of the House or a committee and so fell outside of the protection of parliamentary privilege.

On the substantial waiver point, the Court found that the publication of the Government Response on the website did not effect a waiver of LPP in the legal opinion. The Court found the Government Response was not used for the purpose of achieving some advantage for itself or to disadvantage another person and there was no reason to apprehend that this would occur. Similarly, providing the Government Response to TWG and MTAG was not inconsistent with maintaining a claim of LPP in the underlying advice and so did not constitute an act of waiver. Further, the members of the TWG and the MTAG were counsellors to the government and could not be seen as outsiders.

Mullett and Attorney-General's Department (2012) 132 ALD 56

The applicant, Mr Mullett, became aware that he had been the subject of a warrant issued under the *Telecommunications (Interception and Access) Act 1979* (Cth) (TIA Act). Mr Mullett requested an investigation of the intercept from AGD, which declined to investigate. He then lodged a complaint with AGD. The complaint was received by Ms Smith, the Assistant Director of the Telecommunications and Surveillance Law Branch (TSL Branch). Ms Smith was a lawyer, as well as the officer responsible for the Act within AGD (which administered the Act under Administrative Arrangements Orders at the relevant time). She considered the complaint and wrote a preliminary advice on it for the Secretary's consideration.

Mr Mullett sought access to the advice under the FOI Act. The agency claimed exemption via s 42 on LPP grounds.

In this case Forgie DP was not satisfied that the requisite degree of independence had been established on the part of Ms Smith. Rather, the learned DP found that Ms Smith's personal responsibility for the administration of the Act and the relationship between that role and the task she was performing blurred the lines between her legal adviser role and her policy responsibility role:

> [59] The more difficult question centres on the capacity in which Ms Smith gave her preliminary advice. Did she do so in her capacity as an independent legal adviser or in some other capacity? ...

> [60] For the purposes of claiming legal professional privilege, Mr Wilkins [the AGD Secretary] is said to be her client. However Mr Wilkins is described, I am not satisfied that there was, on this occasion, a relationship of lawyer and client between him and Ms Smith in which she could be said to bring a mind professionally detached from, or disinterested in, the subject matter of the advice. In her role as the head of the TSL Branch, she had responsibilities for matters [arising] in the administration of the TIA Act. ... I am concerned with the legal and policy advice she gave in relation to the TIA Act for it seems to me that it is within this group of her functions that her preliminary advice falls.
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> [62] ... I accept that Ms Smith felt that she could change from her role playing a part in the administration of that legislation to a role providing disinterested advice but I do not accept that she could do so in fact.
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> [63] ... I have concluded that the preliminary advice was prepared by Ms Smith and her subsequent communication of that advice to Mr Wilkins undertaken in the course of her carrying out her duties associated with the administration of the TIA Act. The manner in which Mr Mullett's complaint would be handled was a matter arising under that administration. She cannot then be seen as stepping into a separate role as a legal adviser giving legal advice on a matter for which she has day to day responsibility and Mr Wilkins had supervised and, on this particular occasion, directed the course to be taken. She cannot be said to be a legal adviser who can advise Mr Wilkins from a position of independence.

This decision does not mean that a lawyer in an agency administering an act cannot give independent legal advice on that act which is capable of attracting LPP. But on the facts of this case, the duties Ms Smith was performing in relation to the administration of the TIA Act meant that she was not able to be viewed as independent in relation to the provision of her preliminary legal advice on this specific issue and therefore that advice fell outside of the sphere of LPP protection.

Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd [2013] QSC 82

The plaintiff, Aquila Coal Pty Ltd, sued the defendant, Bowen Central Coal Pty Ltd, in regard to an alleged breach of a mining joint venture arrangement between them. The defendant claimed LPP over 13 documents passing to or from its in-house counsel team. This team was headed by a general counsel who was not admitted to legal practice in Australia but was admitted overseas. It followed that he did not hold a local practising certificate.

The plaintiff contended that, as the defendant's general counsel was not admitted as an Australian legal practitioner, none of the advice provided by the defendant's in-house lawyers, and none of the instructions provided to the in-house lawyers, attracted LPP.

In upholding LPP over all but 1 document, Boddice J explained the requirement of independence for an in-house lawyer in the following terms:

> [8] Where the legal advisers are employees of the party to the litigation, legal professional privilege may still attach, provided the claim relates to a qualified lawyer acting in the capacity of an independent professional legal adviser. Independence is crucial, as an important feature of in-house lawyers is that at some point the chain of authority will result in a person who is not a lawyer holding authority, directly or indirectly, over the in-house lawyer. The relevant question for consideration is whether the advice given is, in truth, independent.

In this case the defendant led evidence from a member of the in-house legal team (not the general counsel) to the effect that the legal team was not subject to direction in the giving of its advice. That evidence was accepted and proved decisive in establishing the requisite degree of independence.

On the question of qualifications, Boddice J held that a practising certificate (or lack of one) is a 'very relevant factor' but is not determinative. While the judgment seems to accept that admission to

practice (as opposed to having a current practising certificate) is a fundamental requirement, in this case admission to practice in an overseas jurisdiction was seen as sufficient. Boddice J held that it would be contrary to the notion of LPP being that of the client that the client should lose the privilege merely by reason that the legal adviser, who is admitted elsewhere, is not admitted in Australia.

College of Law Ltd v Australian National University [2013] FCA 492

In a decision handed down on 25 May 2013, Griffiths J examined an in-house counsel LPP claim in the context of a trademark dispute. The relevant issue was whether the respondent, the Australian National University (ANU) had waived LPP in respect of legal advice received from the ANU Legal Office, which was staffed by solicitors who all held practicing certificates. There was no real question in this case of a solicitor–client relationship.

The relevant acts of disclosure were:

— making publically available agenda papers prepared for the ANU's governing authority, the Council, which referred to the legal advice the Legal Office had prepared

— referring to the Legal Office advice in an administration paper that was available to staff and students on the ANU intranet.

In ruling for the ANU, Griffiths J found that the acts of disclosure revealed very little about the actual content of the legal advice. There was no detail as to the subject matter or content of the advice other than to describe its overall effect or conclusion, and the disclosures did not reveal any of the reasoning in the advice.

Furthermore, Griffiths J held that a critical consideration was the purpose of publishing the Council agenda papers and the administration paper to ANU staff and students. His Honour found that ANU has an important public role and public nature, as evidenced by the fact it is established by Commonwealth legislation, receives public funding and is subject to the Commonwealth FOI Act. In that context, limited disclosure of the advice for the primary purpose of providing public accountability and transparency in respect of ANU's activities was not inconsistent with a desire to maintain the confidentiality of advice obtained from its in-house lawyers.

Drawing the threads together

Some themes emerging from these cases are:

— In-house counsel need not have a practising certificate, although that can be helpful evidence of independence. By contrast, admission to practice in at least 1 jurisdiction is of fundamental importance and its absence may be fatal to an LPP claim.

— The practical reality that at some point in the chain an in-house counsel is answerable to a non-lawyer (eg the secretary or CEO) does not negate the independence of in-house counsel. However, it is important that the person who is responsible for providing legal advice has functional separation and freedom from non-legal direction in the performance of that role.

— An in-house counsel who wears 2 hats must be scrupulous about maintaining a division of functions and be clear about when they are wearing each hat. That division will be more difficult to draw where the in-house counsel is responsible for the administration of an Act in respect of which she or he is also providing legal advice.

— Waiver must be judged in the circumstances of the case, and the use of privileged communications within the Commonwealth for transacting the Commonwealth's business may not waive LPP, even when outsiders are formally co-opted into a Commonwealth controlled process (such as an advisory group).
— Disclosing the gist of legal advice will not necessarily waive privilege, particularly if it is done for a policy-minded purpose (but this will be judged on a case-by-case basis and disclosing the gist of advice is not free from risk).
— Where legal advice is disclosed as part of the proceedings in Parliament, a party wishing to assert waiver in a court or tribunal process is likely to be prevented by the *Parliamentary Privileges Act 1987* from using the fact of that disclosure as evidence of a waiver.

These are, of course, general observations and should only be relied on after a proper assessment of the facts of any particular circumstances that present themselves. AGS has a strong track record in assisting agencies to manage LPP claims, both proactively and in the context of applications for access under the FOI Act and court processes.

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