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In-house counsel update

Legal professional privilege – independence declines and the purpose dominates

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Legal professional privilege, also known as client legal privilege, is an important tool to facilitate frank legal advice between lawyer and client, going beyond a mere rule of evidence to be considered a '*fundamental condition on which the administration of justice as a whole rests*'.¹

The privilege arises where a communication or document is confidential and is made or brought into existence for the dominant purpose of providing legal advice, or to conduct or aid in the conduct of litigation (whether actual or reasonably anticipated). It is well accepted that privilege may apply to legal communication involving an employed lawyer. The in-house lawyer need not hold a practising certificate in the jurisdiction in which the claim for privilege is made.² However, following references to '*independence*' by the High Court in its seminal decision,³ it has often been held that to substantiate a claim of privilege an in-house counsel must '*act independently of any pressure from his employer*', without influence or loyalty and with '*professional detachment*'.⁴

This element of independence has generally required, when challenged:

- The leading of evidence as to the structure and reporting lines of the in-house legal team;
- The professional qualification and experience of the relevant lawyer;
- The maintenance of dedicated legal files and their security against access by non-legal personnel (physical and electronic); and
- The absence of interference in the legal function by management.

A failure to lead evidence of this nature may be fatal to a claim of privilege,⁵ notwithstanding that a qualified lawyer is entitled to a presumption of independence.⁶

Considerable concern arose as to the erosion of legal professional privilege for in-house lawyers following the decision in *Rich v Harrington*.⁷ In that matter, legal advice was provided by the internal legal department of PwC in relation to a claim of sexual discrimination and harassment by a female partner against the firm and its other partners. Notwithstanding the significant evidence in relation to the separation of the legal

department,⁸ the Federal Court found that no privilege arose because the head of the legal department was also a partner of PwC and thus a potential respondent, and the personal nature of the allegations were *'by reason of their content inherently likely to engage the personal loyalties and the duties and interests of all partners of PwC – and probably many employees of the firm as well'*.



being consulted in a legal capacity for the purpose of a legal issue? While *Dye* and *Archer Capital* are single judge decisions, and were obiter in the sense that on both occasions the court went on to find that, if it was required, the element of independence had been established in any event, they represent positive developments for in-house counsel.

Accordingly, the court concluded that the relationship between PwC and its legal department in the circumstances of the particular claim *'was not such as to secure the advice ... the objectively independent character necessary to support the ... claim of client legal privilege'*.

The implications of *Rich* were significant, at its broadest undermining the role of in-house legal where claims were internal to an organisation. However, *Rich* is more properly confined to its facts given the lawyers themselves were likely respondents to the claim, stemming from the partnership model adopted by many professional firms. In any event, pleasingly for in-house counsel, more recent Federal Court decisions have moved away from a requirement that independence be a stand alone element. In *Dye v Commonwealth Securities Ltd [No 5]*,⁹ Katzmann J questioned the reasoning in *Rich*, and considered the better view was that nothing more was required than the legal adviser be professionally qualified and be acting in a professional capacity. This more liberal view was strongly endorsed by Wigney J in *Archer Capital 4A Pty Ltd as trustee v The Sage Group*,¹⁰ focussing instead on the purpose for which the lawyer was acting in the giving of advice:

'Were it necessary for me to decide, I would err on the side of concluding that there is no separate requirement of independence in the case of privilege claims where the relevant lawyer is an employed or in-house lawyer. The better view is that any requirement of independence on the part of an in-house lawyer is an aspect of the relationship between the lawyer and the employer (client) and the capacity in which the lawyer is consulted. Legal professional privilege will attach ... if it is established that the communication arises as a result of the employer consulting the employed solicitor in a professional capacity in relation to a professional matter that arises from the relationship of lawyer and client.'

Ultimately this approach redirects the focus away from evidence of independence and instead towards the fundamental issue to any claim of privilege, namely whether the dominant purpose of the communication was professional legal advice. Is the in-house lawyer

As to the key issue of dominant purpose, it will be all too familiar to in-house counsel that very often the nature of their involvement in matters straddles both legal and commercial. In this respect, a court will take a *'broad, practical and common sense approach'*¹¹ and due regard and weight should be given to the evidence of the in-house counsel as to the underlying purpose of a communication if it is not clear on its face. The fact that in-house counsel may have managerial, administrative or financing functions in no way dilutes the privilege that attaches to communications arising for the purpose of legal advice, even if other non-legal matters are intertwined. As stated by Tamberlin J in *Seven Network Ltd v News*:¹²

'I am cognisant of the fact that there is no bright line separating the role of an employed legal counsel as a lawyer advising in-house and his participation in commercial decisions. In other words, it is often practically impossible to segregate commercial activities from purely 'legal' functions. The two will often be intertwined and privilege should not be denied simply on the basis of some commercial involvement ... In many circumstances where in-house counsel are employed there will be considerable overlap between commercial participation and legal functions and opinions.'

Application of privilege to third party documents

It is not necessary that a lawyer be the creator or recipient of the communication for legal professional privilege to attach. Similarly, merely including a lawyer on a communication does not generate privilege. The question remains what was the intended use (or uses) for which the communications were brought into existence. In certain circumstances, reports, opinions and other documents may be commissioned to investigate and collate underlying facts and evidence so as to enable subsequent legal advice to be effectively obtained, and privilege may still attach to both the request and the work product. As aptly summarised by Stone J in *Pratt Holdings Pty Ltd v Commissioner of Taxation*:¹³

'... The complexity of present day commerce means that it is increasingly necessary for a client to

have the assistance of experts, including financial experts such as accountants, in formulating a request for legal advice and in providing legal advisers with sufficient understanding of the facts to enable that advice to be given. ... Provided that the dominant purpose requirement is met I see no reason why privilege should not extend to the communication by the expert to the client.'

However, at a practical level establishing that a document was created for legal purposes can be much more difficult if a lawyer was not directly involved, particularly where other purposes could be reasonably attributed to the communication. For instance, following a workplace incident an employer may commission factual investigations into the circumstances of the incident. Even where the intent was to obtain legal advice as to any potential legal exposure of the company or its officers or employees, absent that investigation being commissioned by counsel for that explicit purpose at the outset, it may be difficult to establish privilege in any future proceedings given competing intentions that may be reasonably inferred, such as a general understanding of the circumstances of the incident, improving workplace conditions and addressing hazards, and preparing any reports required by statute or an internal health and safety system.

It should also be borne in mind that the purpose for the creation of a document may only come into question some years in the future and divining historical intent may be difficult absent unequivocal recordings at the time. Furthermore, a regulatory request or legal discovery process may be undertaken by a lawyer unfamiliar with the original transaction or event, and may involve thousands of documents, and if there are no red flags reflected in the communication itself (whether an express marking of privilege and/or the inclusion of a lawyer as the recipient), so as to draw attention to the issue, there is risk that privilege could be inadvertently waived... the proverbial needle in a haystack. For these and other reasons, where feasible, including counsel in the communication or having counsel commission the relevant exercise in the first place is advisable.

Abrogation of privilege

Finally, it is always prudent to bear in mind the circumstances in which legal professional privilege may be abrogated, the two most common being by statute and by waiver. It is presumed that a statute is not intended to alter or abolish such a right in the absence of express words or necessary implication.¹⁴ Common examples of an express abrogation are found in state based personal injury legislation¹⁵ which require disclosure of factual investigations and medical reports notwithstanding that such documents may be protected from disclosure by legal professional privilege. In fact, taking things a step further, in Queensland in certain circumstances documents created for the specific purpose of

investigating and responding to a claim for injury under the statutory pre-court processes may never have legal professional privilege attached in the first place because, having regard to the purpose of the pre-court process of disposing of claims without litigation, there may be no reasonable expectation of litigation ever eventuating.¹⁶

Waiver is often a significant issue in disputes regarding privilege, arising where disclosure or other conduct has taken place which is inconsistent with maintaining the confidentiality that the privilege is intended to protect. While a topic in and of itself, some considerations are worth noting:

- Disclosure of privileged communications in circumstances where the recipient is reasonably obliged to maintain confidentiality, such as to a financial advisor or investment banker, ought not amount to a waiver.¹⁷
- Care must be taken in pleading a case, as to how issues are put in contention. Pleading reliance on a document, for instance, would necessitate disclosure of the document and any other documents incorporated by reference within it. As succinctly stated in *DSE (Holdings) Pty Ltd v Intertan Inc*:¹⁸

'the party entitled to the privilege makes an assertion (express or implied), or brings a case, which is either about the contents of the confidential communication or which necessarily lays open the confidential communication to scrutiny and, by such conduct, an inconsistency arises between the act and the maintenance of the confidence, informed partly by the forensic unfairness of allowing the claim to proceed without disclosure of the communication.'

Pleading a '*belief*' may waive privilege in the legal advice on which the belief is based.¹⁹

Pleading that conduct was '*in good faith*', which puts in issue the state of mind of the party, does not by itself amount to a waiver of privilege in connection with any legal advice regarding the conduct, notwithstanding that such advice may have influenced the state of mind. There may still be risks in this respect in particular circumstances and it is prudent to consider the issue of waiver of privilege when corresponding or pleading.

- Reference to the existence of legal advice ought not, without more, waive privilege. However, disclosure of the contents or conclusion of legal advice to persons not obliged to maintain confidence will amount to a waiver:

*'... The voluntary disclosure of the gist or conclusion of the legal advice amounts to waiver in respect of the whole of the advice to which reference is made including the reasons for the conclusion.'*²⁰

Summary take-aways

1. Maintaining legal professional privilege, even in the context of commercial transactions, can be vitally important in the event a dispute or regulatory investigation subsequently arises.
2. The key issue remains the dominant purpose for which the relevant communications were brought into existence.
3. A statement within a document, such as in a header or subject line, that the document is 'confidential and for the purpose of legal advice' is not by itself determinative, nor is its absence ruinous. However, such a statement provides clear and unequivocal evidence of the subjective intent of the creator at the time of its creation, is highly persuasive, and can be a very useful practical tool in the discovery process to aid in the identification of privileged documents.
4. Notwithstanding positive indications questioning the concept of independence as a stand alone requirement, if challenged before a court on the current state of the law it remains prudent to tender evidence of the structure and independence of the in-house legal function. The General Counsel should preferably report to the CEO or other executive, as distinct from operational personnel, and should have systems in place to restrict access to their hard and soft copy files.
5. Be particularly cautious in connection with internal disputes or transactions where the lawyer may be construed as having some personal involvement or interest. Ethical obligations also arise for the lawyer in acting where the lawyer has some personal interest or connection.²¹
6. Where feasible, consider separating legal and non-legal communications. However, a court ought to adopt a practical approach and the fact that an in-house lawyer may be dealing with commercial and administrative matters intertwined with legal advice will not detract from privilege provided, at a global level, the communication satisfies the dominant purpose test.
7. Be careful with audit representation letters. Auditors commonly ask in house counsel to write to external legal providers for confirmation of the conduct of certain matters, legal costs incurred and estimates of exposure. In *Westpac Banking Corporation v 789TEN Pty Ltd*²² the New South Wales Court of Appeal upheld a finding that there was no privilege in the request or in the response of external counsel because the dominant purpose was advice to the auditors for statutory auditing purposes, not legal advice to the client.

¹ *R v Derby Magistrates' Court, Ex parte B* [1996] 1 AC 487 at 507

² *Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd* [2013] QSC 82; *Archer Capital 4A Pty Ltd v Sage Group plc (No 2)* [2013] FCA 1098.

³ *Waterford v The Commonwealth* (1987) 163 CLR 54.

⁴ *Australian Hospital Care (Pindara) Pty Ltd v Duggan* [1999] VSC 131.

⁵ *Telstra Corporation Limited v Minister for Communications, Information Technology and the Arts (No. 2)* [2007] FCA 1445.

⁶ *Australian Hospital Care (Pindara) Pty Ltd v Duggan* [1999] VSC 131; *Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd* [2013] QSC 82.

⁷ [2007] FCA 1987.

⁸ Which included operating a separate functional unit, being located on an administrative floor separate to operating units, opening of dedicated legal files and securing of those files in locked cabinets, and all lawyers holding current practising certificates.

⁹ *Dye v Commonwealth Securities Ltd (No 5)* [2010] FCA 950.

¹⁰ [2013] FCA 1098.

¹¹ *DSE Holdings Pty Ltd v Interlan Inc* (2003) 135 FCR 151.

¹² [2005] FCA 142.

¹³ (2004) 136 FCR 357 at [103], [105].

¹⁴ *Baker v Campbell* (1983) 153 CLR 52 at 96 7, 116 118, 123

¹⁵ In Queensland, see s 30(2) of the *Personal Injuries Proceedings Act* and s 284(2) of the *Workers Compensation and Rehabilitation Act*. See also *State of Queensland v Allen* [2012] 2 Qd R 148.

¹⁶ *Watkins v State of Queensland* [2008] 1 Qd R 564.

¹⁷ *DSE (Holdings) Pty Ltd v Interlan Inc* (2003) 127 FCR 499.

¹⁸ (2003) 127 FCR 499.

¹⁹ *Hancock & Anor v Rinehart & Ors* [2013] NSWSC 1402.

²⁰ *Bennett v Chief Executive Officer of the Australian Customs Service* (2004) 140 FCR 101.

²¹ See for example rules 12 and 17 of the Australian Solicitors' Conduct Rules.

²² [2005] NSWCA 321.

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