

Legal Professional Privilege In-House

The Courts have recently confirmed that LPP can apply to in-house lawyers' communications. The cases suggest that additional considerations will apply to the determination of LPP for in-house lawyers. This is because of the variety of roles in-house lawyers often undertake for their employer organisations.

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A. WHAT IS LEGAL PROFESSIONAL PRIVILEGE ("LPP")

LPP is a legal right that protects from disclosure confidential communication (whether oral or written) between a lawyer and a client made for the dominant purpose of seeking or providing legal advice or for use in existing or anticipated legal proceedings.

B. GENERAL PRINCIPALS

1. Dominant Purpose Test

'Dominant' has been held to mean a 'ruling, prevailing or most influential' purpose. A primary or substantial purpose may not be sufficient.²

If a document is created for a dominant purpose, but it is also intended to be used for a subsidiary purpose that would not by itself have led to the creation of the document, that subsidiary purpose will not mean a loss of LPP.³

'Anticipated legal proceedings' has been held to mean:

- a) a reasonable probability or likelihood of proceedings to be determined by an objective view of the circumstances;⁴
- b) a real prospect of litigation, as distinct from a mere possibility, but it does not have to be more likely than not.⁵

2. Evidence Acts

Evidence Acts govern the production of evidence at trial in NSW, TAS, the ACT and the Federal Court.⁶ The Acts do not apply to pre-trial procedure, which is regulated by the common law.

The Commonwealth *Evidence Act* 1995 has a dominant purpose test for Client Legal Privilege ("CLP") (see sections 118 and 119).

CLP is slightly broader than LPP at common law:

- a) 'Client' is defined to include employer (not being a lawyer) of a lawyer and an employee or agent of a client thereby specifically extending the privilege to in-house lawyers (see s117).
- b) Communications between a client and a third party and/or a lawyer and a third party are included in the litigation arm of the privilege (see s119(a)).

3. Communications with Third Parties

At common law LPP has been recognised for communications that are made through an agent of the party seeking privilege or agent of the solicitor.

In *Pratt Holdings Pty Ltd v The Commissioner of Taxation* (2004) 207 ALR 217 or (2004) FCAFC 122 the Full Federal Court held that LPP extends to communications with third parties (other than agents) that are made for the dominant purpose where there is no actual or anticipated litigation. The decision also establishes that where the dominant purpose for commissioning a report from third parties is to obtain legal advice on it, whether it is commissioned by the client principal or the client's lawyers, privilege will exist.

In this case Pratt commissioned a report directly from its accountants. Pratt told the accountants that the intended use of the report was to prepare for the purpose of obtaining legal advice from its



solicitors. Pratt's accountants provided the report to Pratt and Pratt then forwarded it to its lawyers for legal advice.

The Full Federal Court held that the important consideration was not the nature of the accountant's relationship with Pratt but the function that it performed for Pratt. If the function was to enable Pratt to make a communication in order to obtain legal advice then LPP should apply.

The Full Federal Court did note some important limitations:

- a) the third party must be engaged or directed to prepare the communication by or on behalf of the client;
- b) commercial advice is unlikely to be privileged;
- c) there is no privilege merely because the document was provided to a lawyer; and
- d) the client must not treat the communication in a manner that is inconsistent with the dominant purpose - a client should not filter, adapt or exercise independent judgement in relation to a document from a third party.

The case was remitted to the trial judge who held that the dominant purpose test had not been satisfied on the facts.

4. Foreign Lawyers

In *Kennedy v Wallace* [2004] FCAFC 337 the Full Federal Court held that LPP was available in relation to legal advice from foreign lawyers. In this case, reports alleged that Kennedy was hiding money through dealings with Swiss banks. Kennedy made notes in preparation for his meeting with his Swiss lawyer whilst in a hotel in London. ASIC subsequently seized those notes. LPP was claimed over the notes.

At first instance Gyles J denied LPP. Although a significant purpose of the meeting was to obtain legal advice, this was not the dominant purpose. His Honour also held that the party claiming privilege must establish a connection between the communication and the administration of justice in

Australia. Gyles J held that Kennedy's conduct was aimed at preserving the secrecy of his dealings in Switzerland from ASIC.

The Full Federal Court upheld Gyles J's decision that LPP was denied. Kennedy had not established that the dominant purpose of the notes was to obtain legal advice. The Full Federal Court disagreed with Gyles J on two issues:

- a) LPP should not be treated as a jurisdictionally specific right. Administration of justice considerations extend beyond Australia; and
- b) It would not ordinarily be necessary to prove that foreign lawyers were subject to professional standards akin to those in Australia or to adduce evidence about the supervision of foreign lawyers by foreign courts.

C. IN-HOUSE LAWYERS AND LPP

1. LPP applies to in-house lawyers

The Courts have recently confirmed that LPP can apply to in-house lawyers' communications that satisfy the dominant purpose test.

In *Sydney Airports Corporation Ltd v Singapore Airlines Ltd and Qantas Limited* [2005] NSWCA 47 the New South Wales Court of Appeal stated "the fact that an in-house solicitor is entitled to claim privilege on behalf of his or her employer client is now well established" (per Spigelman CJ at 18). Spigelman CJ referred to the decision of *Waterford v Commonwealth* (1987) 163 CLR 54 and the *Ritz Hotel Ltd v Charles of the Ritz Ltd (No.4)* (1987) 14 NSWLR 100. Spigelman CJ also noted that this proposition was confirmed by the broad definition of a 'client' in the Evidence Act.

In *Commonwealth and Air Marshall McCormack v Vance* [2005] ACTCA 35 the ACT Court of Appeal looked at the issue of in-house LPP and supported the proposition outlined in the *Sydney Airports* case. In this case the Court also overruled the trial judge's view that privilege could not be afforded to in-house lawyers who did not hold current practising certificates.



In *Seven Network Ltd v News Ltd* [2005] FCA 142 the Federal Court noted that the “dominant purpose test has particular importance in relation to the position of in-house counsel because they may be in a closer relationship to the management than outside counsel and therefore more exposed to participation in commercial aspects of an enterprise” (at 4).

Whilst LPP may extend to in-house lawyers, the decisions highlight that the Court will more closely scrutinise in-house claims and that additional considerations will apply. This is because of the variety of roles, including non-legal roles, that in-house lawyers often undertake for their employer organisations. The following issues are especially relevant in the context of in-house lawyers.

a) Independence and practising certificates

LPP will only protect communications that are made in the course of a professional relationship of lawyer and client. The Courts have continued to pay particular attention to the independence of an in-house lawyer.

In *Waterford*, Brennan J explained the importance of independence. In obiter His Honour suggested that the law requires that a legal adviser must be independent of the client “in order that the personal loyalties, duties or interests of the adviser should not influence the legal advice which he gives or the fairness of his conduct of litigation on behalf of his client” (at 70). In *Waterford* the High Court extended LPP to in-house government lawyers.

Seven Network

In *Seven Network*, News Ltd claimed LPP over 22 documents. Most of these documents were internal communications between News executives and its Chief General Counsel. Seven objected on the basis that the General Counsel lacked the necessary independence.

The Federal Court examined each of the documents and concluded that the dominant purpose test was not satisfied for 17 out of the 22. This was so even though some of the documents were labelled ‘Privileged- contains legal advice’.

In this case the Chief General Counsel of News Ltd, was actively engaged in commercial decisions. He was a director and alternate director of six companies in the News group, he was a member

of the Partnership Executive Committee, and was actively involved commercial negotiations.

Tamberlin J was not convinced that the in-house lawyer was acting in a legal context or role in relation to all the documents for which LPP was claimed nor that the claims for privilege were based on an independent and impartial legal appraisal (at 38).

Tamberlin J made the following comments on independence:

- > The “courts recognise that being a lawyer employed by an enterprise does not of itself entail a level of independence. Each employment will depend on the way in which the position is structured and executed” (at 4).
- > His Honour acknowledged that the commercial reality meant that In-House lawyers may provide commercial advice. This should not disqualify the documents from LPP. LPP was an issue of “the fact and degree and involves a weighing of the relative importance of the identified purpose” (at 5).

Vance

Vance was an appeal from the decision of Crispin J in the ACT Supreme Court. The case examined a claim for LPP over communications involving legal officers employed by the Australian Defence Force who did not hold practising certificates.

At first instance, Crispin J held that the ADF lawyers’ failure to hold practising certificates was fatal to their claim for LPP. His Honour stressed the importance of independence notwithstanding the In-House environment. He noted that ADF lawyers were not sufficiently independent of the rules and culture of the ADF. His Honour was critical of the fact that the performance reviews involved input from the ADF formal chain of command, ADF lawyers were employed within an authoritarian structure in which obedience could be enforced by penal sanctions and there was no requirement to be a member of the Law Society or like professional association.⁷

ACT Court of Appeal held that the failure to hold a practising certificate was not fatal to a claim for LPP (at 22).⁸ However, it held that holding a practising certificate could be a very “relevant fact” to take



into account in determining whether an in-house lawyer was “acting in accordance with appropriate professional standards or providing independent professional legal advice” (at 30).

The ACT Court of Appeal did not disagree with the principles outlined by Crispin J at first instance relating to an organisation’s culture. In relation to In-House lawyers “real questions as to the nature of their role and duty may arise” (at 25).

Note – this decision relates to the interpretation of the *Evidence Act* and not the common law.

b) Dominant Purpose and whose purpose?

In *Sydney Airports* an in-house lawyer at SACL requested a report in relation to the malfunction of an aerobridge at Sydney Airport. Singapore Airlines instituted proceedings against SACL and the company that constructed the aerobridge.

The In-House lawyer’s written instructions to the expert specified that the report was commissioned in contemplation of litigation and anticipated liability on SACL’s behalf and that its contents were to be kept strictly confidential. LPP was claimed over the report pursuant to the litigation arm of the *Evidence Act* privilege (section 119).

At first instance McDougall J denied LPP. It was held that the dominant purpose test was not satisfied. SACL had failed to establish objectively that its dominant purpose in commissioning the report was for use in litigation, even though His Honour accepted that this was the solicitor’s subjective intention and this was mentioned in the instructions.

McDougall J held that the report was commissioned for four purposes (at 15).

1. for use in litigation which the In-House lawyer thought was likely;
2. to enable SACL to understand the cause of the accident;
3. to allay concerns of the regulatory body and get the aerobridge back in service; and
4. for SACL operational reasons - to avoid further similar accidents.

The Court of Appeal held that SACL failed to establish that the report was commissioned for the dominant purpose of seeking litigation advice and denied LPP. Even though the litigation purpose may have been the most important single factor that led to commissioning of the report, when all of the other purposes were considered together, that purpose was not shown to be dominant (at 55).

The Court of Appeal upheld the finding that the subjective intention of the in-house lawyer was to be given weight in the assessment of privilege and that LPP should be determined at the time the report was commissioned (at 8 and 9).

Further, the Court of Appeal held that the trial judge had not erred in considering the special status of the legal practitioner as a corporate solicitor. The Court stated “an in-house solicitor is, by reason of his or her position, more likely to act for purposes unrelated to legal proceedings than an external solicitor who, in the normal course, has no relevant function other than that involving legal proceedings and/or legal advice” (at 24).

c) Waiver of Privilege

LPP is a privilege that attaches to the client and can only be waived by the client. LPP may be waived by doing something inconsistent with the confidentiality the privilege is supposed to protect. Waiver may be express or implied. The in-house environment may increase the potential risk of waiver. The *Evidence Act* also deals with the loss of client legal privilege in sections 121 to 126.

Switchcorp Pty Ltd & Ors v Multimedia Ltd [2005] VSC 425

Switchcorp sought access to all documents constituting or recording legal advice referring to Multimedia’s announcement to the Australian Stock Exchange that “The Board’s lawyers have been instructed to vigorously defend the claim and have advised that the plaintiff’s claim will not succeed.”

Justice Whelan noted that the issue regarding implied waiver “is whether, informed by considerations of fairness where necessary, the Court perceives inconsistency between the particular disclosure and the maintenance of confidentiality” (at 17 and see 11).



LPP was denied on the basis that:

- > there had been a clear and deliberate disclosure of the gist or conclusion of legal advice received by Multimedia from its lawyers about the outcome of the proceeding” (at 21); and
- > there was an inconsistency between the statement and the confidentiality of the advice it referred to. It was unfair to permit Multimedia to cast aside confidentiality of the advice to make the statement and then insist upon that confidentiality when inspection was sought of an otherwise discoverable document (at 22).

D. PROTECTING LPP IN-HOUSE

The cases outlined above suggest that additional considerations will apply to the determination of LPP for in-house lawyers.

End notes

¹ See *Daniels Corporation International Pty Ltd v Australian Competition Consumer Commission* (2002) 213 CLR 543 and *Eso Australian Resources Limited v Commissioner of Taxation* (1999) 201 CLR 49

² See *Commissioner of Taxation v Spotless Services Limited* (1996) 141 ALR 92 at 98 & *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority* (2002) 4 VR 332

³ See *Eso Australian Resources Limited v Commissioner of Taxation* (1999) 201 CLR 49

⁴ *ACCC v Australia Safeway Stores Pty Ltd* (1998) 81 FCR 526 (at 29) – here the Court held that it was difficult to ascribe a dominant purpose before the evidence gathering/ investigative process phase was well advanced.

⁵ See *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority* (2002) 4 VR 332 per Batt JA at 341

⁶ *Evidence Act Cth 1995, Evidence Act NSW 1995, Evidence Act Tas 2001*

⁷ See Crispin J’s decision of *Vance v Air Marshall McCormack* (as Chief of Air Force) 18 December, 2004, Supreme Court of ACT (especially paras 25, 40, 47, and 84)

⁸ The appeal also succeeded because Crispin J had considered evidence in breach of the *Parliamentary Privilege Act 1987*.

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MORE INFORMATION

If you would like to learn more about intellectual property law, or any other area of intellectual property, Davies Collison Cave can customise a presentation to suit your intellectual property requirements.

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