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Recent decision clarifies legal professional privilege for in-house lawyers

A recent decision of the Supreme Court of Queensland sheds more light on the question of whether legal professional privilege applies to the communications of an in-house lawyer – an issue that has been a cause of some contention in recent years.

The matters raised in [Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd \[2013\] QSC 82](#) (28 March 2013) (*Aquila*) are of interest to Australian Government departments and agencies, and to in-house and external lawyers who act for or advise them.

Background

The question of whether legal privilege applies to the communications of an in-house lawyer fundamentally turns on whether the subject lawyer was acting with sufficient independence in making the communication in point.

At one end of the spectrum, a strict position was taken by the Supreme Court of the ACT at first instance in *Vance v McCormack and The Commonwealth* [2004] ACTSC 78. There, Crispin J ruled that the privilege did not apply to certain Defence Force and Commonwealth Government in-house lawyers who were not the holders of practising certificates in the local jurisdiction. This decision was overturned on appeal by the ACT Court of Appeal (see *Commonwealth v Vance* [2005] ACTCA 35; (2005) 158 ACTR 47; (2005) 224 FLR 243). However, more recently, there seems to have been a growing trend for the privilege to apply to communications of a wider range of in-house lawyers than previously.

The decision of Boddice J in *Aquila* confirms this trend.

Facts

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 legal professional privilege to 13 documents. These contained communications to or from the defendant's in-house counsel team. This team was headed by lawyer who was not admitted to legal practice in Australia but was admitted overseas. It followed that he did not hold a local practising certificate.

Decision

Boddice J accepted that the defendant's in-house legal team acted as independent legal advisers without any personal loyalties, duties or interests influencing their professional legal advice. His Honour ruled that all but 1 of the 13 documents in question attracted legal professional privilege.

Reasoning

In coming to his decision, Boddice J explained the requirement of independence for an in-house lawyer in the following terms (see para [8] – references excluded):

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.

Boddice J went on to look at what the party claiming privilege must do to demonstrate the in-house lawyer's independence. He started by pointing out that there is 'no presumption of a lack of independence' (see para [9]). He quoted the following words of Gillard J in *Australian Hospital Care (Pindari) Pty Ltd v Duggan (No 2)* [1999] VSC 131 (at para [67]):

[O]nce the client swears the affidavit of documents claiming legal professional privilege in a way which leads the Court to the conclusion that the claim is properly made, then the prima facie position is that the legal adviser was acting independently at the relevant time.

A party disputing the privilege claim would then incur the evidentiary burden of rebutting this prima facie position. To do this, the party would need to demonstrate that the personal loyalties, duties or interests of the in-house lawyer did influence the professional legal advice given (see para [10]).

Later in his judgment, Boddice J addressed, in passing, the holding by an in-house lawyer of a practising certificate as relevant to whether independence existed. He said (at para [23] – references excluded):

Further, the lack of a current practising certificate, whilst a very relevant factor in determining whether legal professional privilege exists in respect of advice given by inhouse legal representatives, is not determinative of the existence of privilege.

On the separate issue of the defendant's head in-house lawyer not being admitted in an Australian jurisdiction, Boddice J did not see the communications of an in-house lawyer who is a qualified lawyer admitted to practice elsewhere as excluded from legal professional privilege locally. He said (at para [24]):

A conclusion that legal professional privilege can attach to the documents in question, notwithstanding that the defendant's general counsel is not admitted as a legal practitioner in Australia, is consistent with the purpose of, and rationale behind, the doctrine of legal professional privilege.

Implications for clients

The decision confirms the position that in-house lawyers must remain independent and not be under the authority, directly or indirectly, of a person who is not a lawyer.

For further information please contact:

Elena Arduca
Senior Executive Lawyer
T 03 9242 1473
elena.arduca@ags.gov.au

Justin Davidson
Senior Executive Lawyer

T 02 6253 7240
justin.davidson@ags.gov.au

Jane Lye
Senior Executive Lawyer
T 07 3360 5736
jane.lye@ags.gov.au

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