



Express law fast track information for clients

26 August 2005

Limitations of legal professional privilege

The ACT Court of Appeal has held that the possession of a practising certificate by government lawyers is not a prerequisite for client legal privilege (CLP) under the *Evidence Act 1995*.

Commonwealth and Air Marshal McCormack in his capacity as Chief of the Air Force v Vance

Australian Capital Territory Court of Appeal, 23 August 2005 (Gray, Connelly and Tamberlin JJ) [2005] ACTCA 35

The Court of Appeal allowed the Commonwealth's appeal from the decision of Crispin J at first instance, which was the subject of an earlier *Express law*.

Background

The plaintiff had been a serving officer of the RAAF. He instituted a claim for damages and other relief against the Chief of the Air Force and the Commonwealth for what he alleges was unlawful termination of his employment in the RAAF in August 1998.

LPP claim

On discovery, the defendants opposed production for inspection of a number of documents on the ground of legal professional privilege (LPP).

The LPP claim involved communications with lawyers who were part of the then Defence Legal Office, essentially the in-house lawyers of the Department of Defence or military lawyers (DLOs).

The civilian and military DLOs apparently did not have practising certificates, and had no statutory right to practise.

Decision on appeal

The Court held that Order 34 Rule 3 of the ACT Supreme Court Rules (dealing with the discovery of documents) displaced the common law on LPP in favour of provisions of the Evidence Act dealing with CLP.

The Court agreed with Crispin J that practising certificates were important in demonstrating that advice was independent and given professionally. However, a practising certificate was not conclusive in this regard. A person could still be seen as 'independent' or 'as necessarily

acting in a legal professional capacity' for the purposes of giving 'legal advice' without holding a practising certificate.

The Court said:

It seems to us that the possession of a current practising certificate can be a very relevant fact to take into account in determining whether or not an employed lawyer, whether or not in government service, is employed in circumstances where they are acting in accordance with appropriate professional standards and providing the independent professional legal advice such that would attract a claim for client legal privilege under the *Evidence Act*. To make the holding of a practising certificate a pre-condition for such a claim, however, seems to us to go beyond the requirements of the *Evidence Act*, and to amount to appellable error. [30]

Even though the Court did not conclusively determine whether the outcome would have been the same had the common law applied, the decision may be persuasive in favour of a ruling that a practising certificate is not a prerequisite to LPP at common law.

Parliamentary Privileges Act issue

At first instance a transcript of evidence given to a committee of the Senate by a former legal officer in the RAAF was admitted, and oral evidence and submissions were put to the Court in relation to this evidence. This evidence was relied upon by Crispin J in making an adverse finding on independence. The Court of Appeal held that the admission of the transcript of the evidence to the Senate committee was contrary to section 16 of the Parliamentary Privileges Act. The Court held further that no waiver of the privilege could be imputed by the defendants' failure to object to the admission of the transcript on the ground of parliamentary privilege. As this privilege belonged to the Parliament, it was incapable of being waived by a party to a court proceeding.

Outcome

The Court of Appeal remitted the claims of CLP to the trial judge for further consideration in accordance with its reasons. For further information on LPP and CLP, see [AGS Legal Briefing No. 65](#), 'Legal Professional Privilege and the Government', 2 October 2002.

Text of the decision is available at:

<http://www.courts.act.gov.au/supreme/judgmentsca/vance1.htm>

AGS acted as solicitor for the appellants.

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