

LEGAL PROFESSIONAL PRIVILEGE IN A REGULATORY ENVIRONMENT

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Work in Progress

Introduction

This paper focuses on recent developments which highlight the importance of legal professional privilege in a regulatory environment and for effective corporate governance, with a particular eye to the situation involving use of an in-house lawyer. It examines what are their ramifications and the implications for protecting legal professional privilege when in-house lawyers are involved. This paper maintains that, on the existing authorities, it is clear that an in-house lawyer attracts legal professional privilege. Moreover, in the abstract, the general principles that apply are substantially the same as with use of external lawyers engaged in private practice. However, in applying those general principles, this paper maintains that use of an in-house lawyer has special features, so that in demonstrating the necessary professional independence and other conditions required to sustain a claim for legal professional privilege, compliance with the general principles present unique challenges. This paper seeks to identify those special features and to analyse how they may impact upon corporate governance and management. For example, how does the requirement for independence impact upon appointing lawyers to Boards and on reporting lines? Can in-house lawyers assume non-legal duties or executive positions overseeing non-legal duties without putting legal professional privilege at risk? What are the ramifications for the position of General Counsel which frequently incorporates the role of Company Secretary?

These questions are important as legal professional privilege can play a central role in protecting a company during a regulatory investigation. Already in *Baker v Campbell*¹, the High Court of Australia held that legal professional privilege was applicable to an investigative process and was not limited to communications made in relation to actual or expected litigation where the purpose of such a communication was the giving or receiving of legal advice. Legal professional privilege is applicable to documents sought by the Federal Commissioner of Taxation in an investigative process.² It is also applicable to investigations by the Australian Competition and Consumer Commission.³ Consequently, the correctness or continued application to investigations by the

¹ (1983) 153 CLR 152.

² *O'Reilly v State Bank of Victoria Commissioners* [1982] HCA 74; (1983) 153 CLR 1.

³ *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49.

Australian Securities and Investments Commission of the decision in *Corporate Affairs Commission (New South Wales) v Yuill*⁴ is questionable.⁵ There, section 295 of the *Companies (New South Wales) Code* required the production of company books unless there was reasonable excuse. This provision was interpreted so that legal professional privilege was held not to be a reasonable excuse for non-compliance. In *Yuill*, Dawson J with whom Toohey J agreed, took the view that the limited protection given to privileged communications by sub-section 299(2)(d) and 308 of the Code rendered inescapable the conclusion that it was intended that, save as provided, legal professional privilege should play no part in an investigation under that Code.⁶ Gaudron and McHugh JJ each took the view that those sections were explicable on the basis that, in a context in which it was generally thought legal professional privilege could be availed of only in judicial and quasi judicial proceedings, they were intended to supply a measure of protection to privileged communications and, thus, could not be treated as the manifestation of legislative intent to otherwise abrogate the privilege.⁷ These decisions highlight the potential importance of legal professional privilege in a regulatory environment in order to protect documentation and oral communications in the event of an investigation. Failure to give careful attention to protecting legal professional privilege with the specific features involving use of an in-house lawyer could have serious ramifications.

The recent review of legal professional privilege in relation to investigations by Commonwealth regulatory bodies announced by the Federal Attorney-General, the Hon Phillip Ruddock MP, has highlighted the potential impact that legal professional privilege can have on corporate regulation. The report of the Hon Terence Cole included a recommendation that the Australian Law Reform Commission be asked to clarify existing provisions for the modification or abrogation of legal professional privilege. The President of the ALRC, Professor David Weisbrot, has said that the essence of what the Commission had been asked to do was to determine if there were circumstances in which legal professional privilege should bend to the broader public interest.

The ALRC review has every potential to reach beyond clarifying the modification or abrogation of legal professional privilege in relating to investigations by Commonwealth regulatory agencies. According to Professor Weisbrot legal professional privilege

⁴ (1991) 172 CLR 319.

⁵ See the discussion in *CCH Australian High Court & Federal Court Practice* 24-566, 60,815-6.

⁶ (1991) 172 CLR 336 and 337.

⁷ (1991) 172 CLR 319, 342 and 349.

works where an individual or small business wants legal advice on an issue. The problem is where big companies with disproportionate resources in time and money using the law as a shield in a cynical kind of way to forestall a just outcome rather than facilitate it.

According to Mr Ruddock, a number of agencies, particularly corporate regulators sometimes have to investigate very complex and difficult issues. Frequently, they can be matters on which there has been legal advice. The regulators argue that these sorts of issues should be looked at differently to the present way they are addressed.

The Managing Director of a litigation funding company, IMF, Mr John Walker, believes legal professional privilege is more often used to abuse the administration of justice. IMF would like the ALRC review to go much further by addressing the public interest that it would like to assert in having information subject to legal professional privilege made available in a broad range of cases.

There therefore is concern on the part of the President of the Law Society of New South Wales, Ms June McPhie, that there must be no undermining of the fundamental common law right of legal professional privilege long described as a bulwark against tyranny and oppression.⁸ An editorial in *The Australian Financial Review* on Friday, 1 December 2006 highlights the “split” between lawyers “advancing their clients’ interest and acting as officers of an efficient and fair legal system”.⁹ It acknowledges that most lawyers carry with competence their “dual” loyalties”. However, it asserts that the “privilege has been treated more than a right – something more like a rort” so “scrutiny is called for to discover a way to ensure the original purpose is met”. Given the “whiff of scandal remaining” the twelve months given to the ALRC to consider whether investigations by Federal agencies are being hampered by an excessive use of claims for legal professional privilege is appropriate. It notes the Australian Securities and Investments Commission and the Australian Competition and Consumer Commission as two bodies that frequently battle over access to documents that they believe could further their efforts to secure compliance with company regulations. While acknowledging use by regulators of ambit claims for documents in attempts to fish for evidence, it concludes that “Legal Professional Privilege must not be used as a blanket

⁸ Marcus Priest, “Legal professional privilege to be reviewed” *The Australian Financial Review* Friday, 1 December 2006, 3.

⁹ “Lifting the lid on legal privilege” *Ibid* 74.

under which offences can be hidden nor a trough under which to wash unsightly corporate linen".¹⁰

The ALRC has said that its new review of legal professional privilege could have a major impact on the way clients and lawyers will interact in the future. The ALRC inquiry will concentrate on the application of legal professional privilege to the coercive information gathering powers of Commonwealth bodies, such as the Australian Federal Police, the Australian Crime Commission, the Australian Securities and Investments Commission, the Australian Taxation Office and federal royal commissions. In two previous reports,¹¹ the ALRC had looked at legal professional privilege and highlighted the need for a review of legal professional privilege in the context of the coercive investigatory powers of federal regulatory agencies and royal commissions. This also was raised as an issue in the Cole inquiry into the AWB and, before that, in the report of the HIH royal commission. A conflict sometimes arises between the public interest in discovery of the truth, which is the prime function of a royal commission and the right of persons to communicate with their lawyers and obtain legal advice under conditions of confidentiality. The ALRC will focus on determining if there are circumstances in which maintaining client legal privilege must bend to the broader public interest given the consistent decisions of common law courts that legal professional privilege is a fundamental right and not merely a procedural safeguard.¹²

The modern case law on legal professional privilege has divided the privilege into two categories, legal advice privilege and litigation privilege. Litigation privilege covers all documents brought into being for the purposes of litigation. Legal advice privilege covers communications between lawyers and their clients whereby legal advice is sought or given. Litigation privilege has been described as "essentially a creature of adversarial proceedings", so that the privilege has been held to be unavailable to protect from disclosure a report prepared for use in non-adversarial proceedings.¹³ Legal advice privilege has an undoubted relationship with litigation privilege. Legal advice is frequently sought or given in connection with current or contemplated litigation. But it may equally well be sought or given in circumstances and for purposes that have nothing to do with litigation. If it is sought or given in connection with

¹⁰ Ibid.

¹¹ *Uniform Evidence Law* (ALRC 102, 2006) and *Principled Regulation* (ALRC 95, 2002).

¹² *Media release*, Australian Law Reform Commission, Thursday, 30 November 2006.

¹³ *In re L* [1997] AC 16, 26 per Lord Jauncey of Tullichettle. In Australia, as noted earlier, the High Court of Australia held in *Baker v Campbell* (1983) 153 CLR 152 that legal professional privilege is applicable to investigative processes, not involving actual or expected litigation.

litigation, then the advice would fall into both of the two categories. Where an enquiry takes place that might not be described as adversarial, but as an inquisitorial proceeding, a stand may be taken on legal advice privilege.¹⁴ In New South Wales, the Australian Capital Territory, and Australian federal proceedings, legal advice privilege is regulated by the *Evidence Act 1995* (NSW) and (Cth), section 118 and litigation privilege by section 119. A connection with litigation is not necessary for privilege to be attracted. On the other hand, litigation privilege can extend to communications between a lawyer or the lawyer's client and a third party or to any document brought into existence for the dominant purpose of being used in litigation. The connection between legal advice sought or given and the affording of privilege for the communication has thereby been cut.¹⁵ It has been said that judicial dicta do not tie the justification for legal advice privilege to the conduct of litigation:

“They recognise that in the complex world in which we live there are a multitude of reasons why individuals, whether humble or powerful, or corporations, whether large or small, may need to seek the advice or assistance of lawyers in connection with their affairs; they recognise that the seeking and giving of this advice so that the clients may achieve an orderly arrangement of their affairs is strongly in the public interest; they recognise that in order for the advice to bring about that desirable result it is essential that the full and complete facts are placed before the lawyers who are to give it; and they recognise that unless the clients can be assured that what they tell their lawyers will not be disclosed without their (the clients') consent, there will be cases in which the requisite candour will be absent. It is obviously true that in very many cases clients would have no inhibitions in providing their lawyers with all the facts and information the lawyers might need whether or not there were the absolute assurances of non-disclosure that the present law of privilege provides. But the dicta to which I have referred all have in common the idea that it is necessary in our society, a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyers' legal skills in the management of their (the clients') affairs, should be secure against the possibility of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busy-bodies or anyone else...It justifies, in my opinion, the retention of legal advice privilege in our law, notwithstanding that as a result cases might sometimes have to be decided in ignorance of relevant probative material.”¹⁶

With in-house lawyers, protection of legal professional privilege by companies will have special ramifications that might not arise where a company receives its legal services

¹⁴ *Three Rivers District Council & Ors v Governor and Company of the Bank of England* [2004] UKHL 48, paras 10 and 27 per Lord Scott of Foscote.

¹⁵ *Three Rivers District Council & Ors v Governor and Company of the Bank of England* [2004] UKHL 48, para 27 per Lord Scott of Foscote.

¹⁶ *Three Rivers District Council & Ors v Governor and Company of the Bank of England* [2004] UKHL 48, para 34 per Lord Scott of Foscote.

from an external practitioner in private practice. In-house lawyers employed by companies have unique features. Whereas companies engage external lawyers under a contract for services, a company employs an in-house lawyer under a contract of service. Accordingly, an in-house lawyer can be required in the course of executing of the work to do not only what the company demands, but also how the company commands he or she shall do the work.¹⁷ The corporate employer might not be able to interfere in or control the precise manner in which the in-house lawyers' skill could be exercised for want of the essential expertise. However the corporate employer would have the power to subject the in-house lawyer to its directions in all other respects.¹⁸ "The question is not whether in practice the work was done subject to direction but whether the right of supervision resided on or in the employer."¹⁹

For example, the corporate employer lawfully could direct that the in-house report to a manager who in turn reports to a general manager who in turn reports to the executive director who in turn reports to the Board. The corporate employer might direct the in-house lawyer to perform company secretarial or other non-legal duties such as managerial functions. It might want the in-house lawyer to serve on the Board or accept appointment as a director of a subsidiary company. All these can have significant ramifications. With an in-house lawyer, the corporate employer will usually be providing the office, equipment, materials and most of the other facilities to enable or assist the employee to do her or his work.²⁰

The issues were expressed succinctly in *Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)*,²¹ by Lord Denning MR stating the view of the Court of Appeal:

The law relating to discovery was developed by the Chancery Courts in the first half of the 19th century. At that time nearly all legal advisers were in independent practice on their own account. Nowadays it is very different. Many barristers and solicitors are employed as legal advisers, whole time, by a single employer. Sometimes the employer is a great commercial concern. At other times it is a government department or a local authority. It may even be the government itself, like the Treasury Solicitor and his staff. In every case these legal advisers do work for their employer and for no one else. They are paid, not by fees for each piece of work, but by a fixed annual salary. They are, no doubt, servants or agents of the employer. ... They are regarded by the law as in every respect in the same position as those who practise on their own

¹⁷ *Humberstone v Northern Timber Mills* (1949) 79 CLR 389, 404 per Dixon J.

¹⁸ *Zuijs v Wirth Bros Pty Ltd* (1955) 93 CLR 561, 571.

¹⁹ *Graham v Bentley* (1959) 76WN(NSW) 603.

²⁰ *Humberstone v Northern Timber Mills* (1949) 79 CLR 389; *Graham v Bentley* (1959) 76 WN(NSW) 603.

²¹ [1972] 2 QB 102.

account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privileges.²²

Lord Denning MR acknowledged that such a legal adviser may sometimes perform work for his employer in another capacity than as a lawyer. The consequence would be that their communications in that capacity would not attract privilege:

Being a servant or agent too, he may be under more pressure from his client. So he must be careful to resist it. He must be as independent in the doing of right as any other legal adviser. ... There is a safeguard against abuse. ... If there is any doubt as to the propriety or validity of a claim for privilege, the master or the judge should without hesitation inspect the documents himself so as to see if the claim is well-founded, or not.²³

This aspect of the decision was not challenged when the case went on appeal to the House of Lords,²⁴ as noted by Mason and Wilson JJ in *Waterford v The Commonwealth of Australia*.²⁵ The High Court decision in this case, and its decision two years earlier in *Attorney-General (NT) v Kearney*,²⁶ represent the highest Australian authorities to date on whether work undertaken by salaried lawyers for their employers can attract legal professional privilege. It is important to observe that these decisions were handed down in the context of:

The independence of State Crown Solicitors and the Australian Government Solicitor in the giving of legal advice is – or ought to be – protected by the respective Attorneys-General as the first law officers of the Crown, and is buttressed by the laws relating to the public service and sometimes by specific legislation.²⁷

As noted by Brennan J in *Waterford*, the Commonwealth, State and Territorial statutes under which officers are employed in the offices of Crown Solicitors, the Australian Government Solicitor and in the Departments of the respective Attorneys-General give them a certain security of tenure and those statutes would be construed, in the absence of contrary express provisions, as leaving those officers completely professionally independent. The protection of the respective Attorneys-General, as the first Law Officers of the Crown, should extend to all of these officers so that none of

²² Ibid 129.

²³ Ibid.

²⁴ [1974] AC 405.

²⁵ [1987] HCA 25; (1987) 163 CLR 54.

²⁶ [1985] HCA 60; (1985) 158 CLR 500.

²⁷ *Attorney-General (NT) v Kearney* [1985] HCA 60; (1985) 158 CLR 500, 517 per Mason and Brennan JJ.

them will be affected in the performance of their professional duty by any sense of loyalty or duty to, or hope of reward from, the government of the day.²⁸

The thrust of this paper is twofold. First, it is maintained that there is clear authority from the High Court of Australia to support the proposition that legal professional privilege applies to the work of in-house lawyers employed by a client to undertake work exclusively for that client in return for payment of a salary. The position might to some extent have become obscured by the fact that both *Kearny* and *Waterford* involved work undertaken within a government legal department, not a private company. As well, the actual decisions in those cases could be sustained by reference to dicta narrower than the broad application to legal professional privilege to in-house lawyers. In particular, in *Kearney* the fundamental issue was whether there had been communications that came into being as part of a plan to defeat a land claim that the Northern Land Council had made to the Aboriginal Land Commissioner. In *Waterford* Brennan J who supported the majority decision saw the Commonwealth Attorney-General's Department and the Australian Government Solicitor, and their staff, as being placed in an environment that guaranteed their professional independence. By contrast, Dawson J who dissented (but agreed with the majority Justices that salaried lawyers in a private company attract legal professional privilege) saw this structure as potentially exposing such staff to loss of professional independence through too close an integration into the political process. However, with the exception of the judgment of Brennan J, there are clear enough statements in the judgments in *Waterford* to maintain that legal professional privilege can be attracted to work undertaken by in-house salaried lawyers. The second aspect of this paper is the need for special precautions to protect legal professional privilege for work undertaken by in-house lawyers. To substantiate these matters, it is convenient to look at each judgment in *Kearney* and *Waterford*.

Kearney – Gibbs CJ

In *Kearney*, Gibbs CJ had said:

Further, it was not argued that legal professional privilege does not extend to communications with legal advisers who are salaried employees. I do not doubt the correctness of the decision of the Court of Appeal in *Crompton Ltd v Customs and Excise Commissioners (No 2)* 2 QB 102 that the privilege extends to legal advice given by such employees provided that in giving the advice they are acting in their capacity as legal advisers. The decision of the Court of

²⁸ [1987] HCA 27, para 6.

Appeal on that point was not challenged when the case went to the House of Lords [1974] AC 405 and has been followed by the Supreme Court of Ireland in *Geraghty v Minister for Local Government* [1975] IR 300. In the United States also, it appears that legal professional privilege attaches to communications between a government agency and the lawyers on its staff for the purpose of giving or receiving legal advice: see *Coastal Corporation v Duncan* (1980) 86 FRD 514, at p 520 and cases there cited, *Hearn v Rhay* (1975) 68 FRD 514, at p 579, and the article by Ronald I Keller in (1982) 62 *Boston University Law Review*, at pp 1003 et seq. The European Court of Justice has limited the privilege to communications exchanged between an independent lawyer (i.e. one not bound to his client by a relationship of employment) and his client (*A M & S Europe v Commission* [1983] QB 878, 951) but that of course is not a decision of the common law. The advice will not be privileged if the legal adviser gives it in some other capacity (e.g. as an officer of a non-legal department) and will be privileged only if the lawyer who gives it has been admitted to practice and (I incline to think) remains subject to the duty to observe professional standards and the liability to professional discipline. However, these matters were not explored before us in argument.²⁹

Gibbs CJ found that in the present case the finding of Kearney J confirmed in the Full Court, that there was prima facie evidence that the communications with the legal advisers came into being as part of a plan to defeat the land claims was plainly sustainable. The charge that the power was used for an ulterior purpose was clearly made, and it had sufficient colour to displace legal professional privilege.³⁰

Kearney – Mason and Brennan JJ

Mason and Brennan JJ in their joint judgment in *Kearney* agreed with Gibbs CJ on the outcome that it would be contrary to the public interest which legal professional privilege is designed to secure – the better administration of justice – to allow legal professional privilege to be used to protect communications made to further a deliberate abuse of statutory power and by that abuse to prevent others from exercising their rights under the law. That principle was applicable because there was a prima facie finding that “the communications with the legal advisers came into being as part of a plan to defeat the land claims”. The principle was an exception to the rule that communications which were the subject of legal professional privilege were exempt from inspection. Mason and Brennan JJ said that disposing of the case as one that fell within the exception meant that it was not necessary to consider whether the general rule would otherwise apply.³¹ It was therefore unnecessary to consider whether legal professional privilege covered communications between a public

²⁹ [1985] HCA 60, para 10.

³⁰ [1985] HCA 60, para 20.

³¹ *Ibid* para 1.

authority and its legal advisers in connection with the making of regulations and the exercise of its law-making powers.³² They went on to say that:

“It is unnecessary to consider a second question of some importance that would otherwise have fallen for decision, namely, whether communications with a legal adviser who is not independent of the client are capable of attracting legal professional privilege. Nevertheless, it should be mentioned that the respondents did not argue that the Northern Territory Department of Law stood in any different position from the position occupied by Crown Solicitors of the States or the Australian Government Solicitor. The independence of State Crown Solicitors and the Australian Government Solicitor in the giving of legal advice is – or ought to be – protected by the respective Attorneys-General as the first law officers of the Crown, and is buttressed by the laws relating to the public service and sometimes by specific legislation.”³³

Mason and Brennan JJ concluded that without giving these two questions further consideration they should not wish to commit themselves.³⁴

Kearney – Wilson J

Wilson J agreed with the outcome that the Aboriginal Land Commissioner in hearing the two land claims lodged by the Northern Land Council to consider whether in fact the regulations were made for a bona fide town planning purpose based on the future urban needs of the towns in question and if so the consequences that would flow from such a conclusion and that it was “wholly inconsistent with the reasons for the privilege that it should protect a government’s deliberate abuse of its statutory powers”.³⁵ Implicit in the judgment of Wilson J was that legal professional privilege ordinarily was attracted to communications between a government and its professional legal advisers, including its employed legal advisers.³⁶ According to Dawson J who noted that the legal advisers in respect of whose advice legal professional privilege was claimed were salaried employees in the Northern Territory Law Department:

“This is, however, no reason for denying privilege to communications passing between them and their client provided that they are consulted in a professional capacity in relation to a professional matter and the communications are made in confidence and arise from the relationship of lawyer and client.”³⁷

³² Ibid para 2.

³³ Ibid para 2.

³⁴ Ibid para 3.

³⁵ Ibid para 17.

³⁶ Ibid para 10. “It has been held that the rationale underlying legal professional privilege is relevant and applicable to a government’s relationship with its employed legal advisers”.

³⁷ Ibid para 12.

Dawson J concluded that the Aboriginal Land Commissioner ought to have turned his attention to a consideration of the possible application of Crown privilege. If in so doing he found himself required to adjudicate the question whether public interest required the disclosure or continued secrecy of a particular document, then he should have determined the matter, thereby leaving no room for the application of legal professional privilege.³⁸ After noting that if legal professional privilege were the only applicable doctrine, the matters prima facie found by the Aboriginal Land Commissioner did not bring the crime or fraud exception into play and the privilege ought to be upheld,³⁹ Dawson J agreed that the convenient course would be to allow the appeal and order that the matter be referred back to the Aboriginal Land Commissioner for further consideration.⁴⁰

Waterford

In *Waterford*, the central question at issue was whether it was open to the Commonwealth to claim legal professional privilege in respect of documents the subject-matter of which was legal advice obtained from within the Government and concerned with proceedings pending in the Commonwealth Administrative Appeals Tribunal. However, there was an issue as to whether, given the Commonwealth Attorney-General's Department's administrative responsibilities for the *Freedom of Information Act 1982* (Cth), some or all of that "advice" was actually legal advice or rather properly categorised as policy or administrative directives, and how that matter should be dealt with in any remission back to the Tribunal. So it was open to the Court to decide against the Commonwealth Government without actually ruling on whether the actual legal work of a salaried lawyer, let alone one working for a private employer, attracts legal professional privilege.

Counsel for Mr Waterford submitted that legal professional privilege could never be claimed in respect of communications passing between an instrumentality of the Crown and a government lawyer, except perhaps in the case of commercial litigation. However, he frankly acknowledged that, with the possible exception of a ruling of the European Court of Justice in *A M & S Europe Ltd v Commission of the European Communities*,⁴¹ all the authorities were against him. There, in a ruling given not in a common law context, the European Court of Justice acknowledged the protection given

³⁸ Ibid para 20.

³⁹ Ibid para 20

⁴⁰ Ibid para 21.

⁴¹ [1983] QB 878.

by the laws of the European Communities to the confidentiality of written communications between an independent lawyer and his client made for the purposes and in the interests of the client's right of defence.

Waterford – Mason and Wilson JJ: government legal officers attract privilege

In *Waterford*, according to Mason and Wilson JJ given the safeguards to which reference was made in the various citations, there was no reason to place legal officers in government employment outside the bounds of legal professional privilege. Mason and Wilson JJ said that the proper functioning of the legal system was facilitated by freedom of consultation between the client and the legal adviser,⁴² quoting a much-cited passage:

The rationale of this head of privilege, according to the traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This is done by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant evidence is available.⁴³

To Mason and Wilson JJ, it was clearly in the public interest that those in government who bore the responsibility of making decisions should have clear and ready confidential access to their legal advisers. Whether in any particular case the relationship was such as to give rise to the privilege would be a question of fact. There had to be a professional relationship, which secured to the advice an independent character notwithstanding the employment.⁴⁴

Mason and Wilson JJ considered that the common law recognised that legal professional privilege attached to confidential, professional communications between government agencies and their salaried legal advisers undertaken for the sole purpose of seeking or giving legal advice or in connexion with anticipated or pending litigation.⁴⁵

⁴² [1987] HCA 27, para 4.

⁴³ *Grant v Downs* [1976] HCA 63; (1976) 135 CLR 674, 685, per Stephen, Mason and Murphy JJ.

⁴⁴ *Waterford v The Commonwealth of Australia* [1987] HCA 25, para 4 per Mason and Wilson JJ.

⁴⁵ *Ibid* para 6.

In *Waterford*, Mason and Wilson JJ believed that the growing complexity of the legal framework within which government must be carried out rendered the rationale of the privilege increasingly compelling when applied to decision makers in the public sector. The wisdom of the centuries was that the existence of the privilege encouraged resort to those skilled in the law and that this made for a better legal system. Government officers needed that encouragement, albeit, for reasons different to those which might be expected to motivate the citizen.⁴⁶

While focusing on the specific features of government employment of legal advisers, the judgment of Mason and Wilson JJ was given in the context of the broader issue of whether salaried employment disqualified a lawyer from attracting legal professional privilege. As Mason and Wilson JJ did not indicate that there was any difference in principle between a government and a private employed lawyer, their joint judgment in *Waterford* must be construed as authority for the proposition that the existence of an employment relationship does not, on its own, disqualify the work of a lawyer from attracting legal professional privilege and that the kind of considerations that resulted in legal professional privilege in *Waterford* also would attract legal professional privilege in private employment.

Sole purpose now replaced by dominant purpose

The sole purpose test referred to by Mason and Wilson JJ reflected the majority decision in *Grant v Downs* where Stephen, Mason and Murphy JJ rejected the extension of legal professional privilege to material obtained by a corporation from its agents with a double purpose. In the context of a discussion about the operation of legal professional privilege in relation to the advent of the large corporation in which documents necessarily proliferate, many of them brought into existence to serve a variety of purposes, the test was described as follows:

All that we have said so far indicates that unless the law confines legal professional privilege to those documents which are brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings the privilege will travel beyond the underlying rationale to which it is intended to give expression and will confer an advantage and immunity on a corporation which is not enjoyed by the ordinary individual. It is not right that the privilege can attach to documents which, quite apart from the purpose of submission to a solicitor, would have been brought into existence for other purposes ...⁴⁷

⁴⁶ *Waterford v The Commonwealth of Australia* [1987] HCA 25, para 6.

⁴⁷ (1976) 135 CLR 674, 688.

With Barwick CJ dissenting in favour of a dominant purpose test, the majority in *Grant v Downs* therefore had held that legal professional privilege must be confined to documents brought into existence for the sole purpose of communications with legal advisers for legal advice or for use in litigation and other legal proceedings.

The *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW) now provides for legal advice privilege to be attracted for a confidential communication made between a lawyer and the client or a confidential communication made between two or more lawyers acting for the client or the contents of a confidential communication (whether delivered or not) prepared by the client, or one or more of the lawyers, providing legal advice to the client.⁴⁸ Litigation privilege is attracted to a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made or the contents of a confidential document (whether delivered or not) that was prepared for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding, or an anticipated or pending Australian or overseas proceeding.⁴⁹

In *Esso Australia Resources Ltd v Commissioner of Taxation*,⁵⁰ a majority of the High Court⁵¹ pointed out that these statutory provisions would not cover all the circumstances in which a claim for privilege might arise; for example, an attempt to seize documents pursuant to a search warrant.⁵² Moreover, being only a Commonwealth and a New South Wales Act, the Acts were far from applying in all Australian courts. There was no consistent pattern of legislative policy to which the common law could adapt itself. There was but one common law in Australia and that common law was the law declared by the High Court as the final court of appeal. It therefore was not correct to treat the common law as having been modified by analogy or derivation so as to accord with the statutory test. However, on a reconsideration of the balance struck in *Grant v Downs*, the correct test in claiming legal professional privilege in relation to the production of discovered documents was the dominant purpose test as expounded by Barwick CJ in *Grant v Downs*. According to the Court, the dominant purpose test should become the common law test for claiming legal professional privilege. Dominant purpose therefore is now the test for claims of legal

⁴⁸ S 118.

⁴⁹ S 119.

⁵⁰ [1999] HCA 67; (1999) 201 CLR 49.

⁵¹ Gleeson CJ, Gaudron, Gummow and Callinan JJ.

⁵² Eg, *Baker v Campbell* [1983] HCA 39; (1983) 153 CLR 52.

professional privilege in relation to search warrants and other information-gathering powers where the privilege is not displaced by applicable legislation.⁵³

Waterford – Brennan J: independence of government lawyers results in privilege

Brennan J examined at length the independence of an employed legal advisor and citing his joint judgment with Mason J in *Kearney* distinguished legal services provided by a salaried legal officer employed under the direct or indirect supervision of the Commonwealth Attorney General, or a State or Territory Attorney General, from salaried lawyers employed under different arrangements, for example, by a private corporation. According to Brennan J, the purpose of legal professional privilege was to facilitate the seeking and giving of legal advice and thereby to ensure that the law be applied and litigation be properly conducted.⁵⁴ If the purpose of the privilege was to be fulfilled, the legal adviser had to be competent and independent. Competent, in order that the legal advice be sound and the conduct of litigation be efficient; independent, in order that the personal loyalties, duties or interests of the adviser should not influence the legal advice given or the fairness of conduct of litigation on behalf of a client. If a legal adviser were incompetent to advise or to conduct litigation or unable to be professionally detached in giving advice or in conducting litigation, there would be an unacceptable risk that the purpose for which privilege were granted would be subverted. From Brennan J's viewpoint, as to competence, admission to practise as a barrister or solicitor seemed to be the sufficient and necessary condition for attracting the privilege, although this question was not argued and therefore needed no decision.

Brennan J noted that the standard of independence was raised in argument and it was a question of judicial policy, not yet a question of law, whether the privilege should apply where the legal adviser was an employee of the client: to what extent did a contract of employment by the contract impair a legal adviser's independence? No general legal rule had been declared judicially in Australia. Judicial policy therefore had to determine whatever rule was to be adopted. The rule had to be generally applicable; not a rule which depended for its operation on the facts of each case. As the rule would be designed to make the principle of legal professional privilege operate satisfactorily in a professional environment where increasing reliance was placed on

⁵³ *CCH Australian High Court & Federal Court Practice* 24-566 60,797.

⁵⁴ *Greenough v Gaskell* (1833) 1 My and K 98, 103; 39 ER 618,620-1; *Grant v Downs* (1976) 135 CLR 674, 685; *Baker v Campbell* (1983) 153 CLR 52, 66, 74, 108, 114-5, 128.

“in-house” legal advice, it was prudent to refer to the considerations which had weighed with the courts of other legal systems. Brennan J preferred the view of the European Court of Justice that an independent lawyer was “one who was not bound to his client by a relationship of employment”⁵⁵ Brennan J believed that this view faced up to the reality; by contrast, to the aspirations which Lord Denning MR expressed in *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No. 2)* [1972] 2 QB 102. In Brennan J’s ears, Lord Denning MR’s in *Crompton* sounded pious but unreal. The view expressed by Lord Denning MR that salaried legal advisers “must uphold the same standards of honour and etiquette... (and) are subject to the same duties to their client and to the Court” as are legal advisers who are not salaried sounded pious but unreal. The difficulty was that the employment relationship created a conflict between the independence necessary for a legal adviser and the loyalties, duties and interests of an employee. It seemed overly optimistic to assume that the admonition that an employed legal adviser being a servant or agent too, must be careful to resist pressure and be as independent in the doing of right as any other legal adviser, seemed overly optimistic in ensuring that independence of mind essential to the purpose of legal professional privilege. Brennan distinguished cases where legal advisers were the salaried employees of Government from the position of salaried employees of other clients. Although it was not strictly necessary to express a general view as to legal professional privilege when the legal adviser was a salaried employee of a non-Government client, the approach of the European Court of Justice in *A M & S Europe v Commission* seemed to identify the relevant considerations:

“It should be stated that the requirement as to the position and status as an independent lawyer, which must be fulfilled by the legal adviser from whom the written communications which may be protected emanate, is based on a conception of the lawyers role as to collaborating in the administration of justice by the Courts and as being required to provide, in full independence, and in the overriding interests of that course, such legal assistance as the client needs. The counterpart of their protection lies in the rules of professional ethics and discipline which are laid down and enforced in the general interests by the institutions endowed with the requisite powers for that purpose.”⁵⁶

Brennan J believed that the disincentive of sanctions which professional disciplinary tribunals may impose for breach of ethical rules was diminished when the breach was committed in the interests of an employer and the security and environment of employment tended to insulate a salaried lawyer from the chief professional influence of the profession – the opinion of one’s professional peers. Brennan J therefore was

⁵⁵ *A M & S Europe v Commission* [1983] QB 878, 951.

⁵⁶ [1983] QB 878, 950.

unable to accept the notion that the salaried lawyers were generally to be assimilated to the position of the independent legal profession for the purpose of determining the availability of legal professional privilege. Although this view may seem to have given insufficient acknowledgement to the personal integrity, as well as the competence, of many salaried lawyers, Brennan J was concerned with the general legal rule which was framed not with regard to the characteristics of individuals but with regard to the influences that necessarily attend the relationship of employer and employee.⁵⁷ However, those influences were not so significant when the legal adviser was in the employment of the Crown. Brennan J cited his joint judgement with Mason J in *Attorney-General (NT) v Kearney* in demonstrating the manner in which the adviser's independence was protected there as contrasted with private employment:

“The independence of State Crown Solicitors and the Australian Government Solicitor in the giving of legal advice is – or ought to be – protected by the respective Attorneys-General as the first law officers of the Crown, and is buttressed by the laws relating to the public service and sometimes by specific legislation.”⁵⁸

According to Brennan J the Commonwealth, State and Territorial statutes under which officers were employed in the offices of Crown Solicitors, the Australian Government Solicitor and in the Departments of the respective Attorneys-General gave them a certain security of tenure and those statutes would be construed, in the absence of contrary express provisions, as leaving these officers completely professionally independent. The protection of the respective Attorneys-General, as the first Law Officers of the Crown, should extend to all of these officers, so that none of them would be effected in the performance of their professional duty by any sense of loyalty or duty to, or hope of reward from, the Government of the day. Counsel for Mr Waterford had expressly declined to argue that the Department of the Treasury's advisers in this case lacked the independence which the safeguards to which Mason J and Brennan J had referred in their joint judgment in *Kearney* were intended to secure. Brennan J therefore rejected the submission that the officers of the Attorney-General's Department or the Commonwealth Crown Solicitor's office lacked the independence which was essential if legal professional privilege was to attach to documents brought into existence for the purpose of their giving advice or for the purpose of obtaining advice from them.⁵⁹ Brennan J cited *National Labor Board v Sears, Roebuck & Co*⁶⁰ and *Jupiter Painting Contracting Inc v United States*.⁶¹

⁵⁷ [1987] HCA 25, Para 5.

⁵⁸ (1985) 158 CLR 500, 517.

⁵⁹ [1987] HCA 25, Para 6.

Waterford – Deane J: salaried legal advisers attract privilege provided “independence”

Deane J observed that the primary question involved in the appeal was one of general principle. It was whether documents brought into existence within the Executive Government of the Commonwealth for the sole purpose of obtaining, furnishing or recording professional legal advice sought by and given to the Department of Treasury from and by the Department of the Attorney-General in relation to proceedings pending in the Administrative Appeals Tribunal were documents of a nature that they would be privileged from production in legal proceedings on the grounds of legal professional privilege. Deane J agreed that they were. Involved were two distinct propositions. The first was that legal professional privilege could apply to protect the confidentiality of communications notwithstanding that the persons furnishing the professional legal advice were not in independent practice but were salaried employees. The second was that the Executive Government could claim the benefit of that privilege in respect of professional legal advice furnished by a salaried legal officer or officers in its employ in the Attorney-General's Department.⁶²

Citing the views expressed by the European Court of Justice in *A M & S Europe Ltd v Commission of the European Communities*⁶³ Deane J thought that the proposition that legal professional privilege extended to protect the confidentiality of advice given by salaried employees was not without its difficulty. There was plainly force in the views expressed by the European Court of Justice.⁶⁴

Deane J noted that contrary to the approach of the European Court of Justice, was that propounded by Lord Denning MR (with the concurrence of Karminski and Orr LJ) in *Crompton Ltd v Customs and Excise Commissioners*⁶⁵. Lord Denning MR had said that he himself in his early days settled scores of affidavits of documents for the employers of salaried legal advisers:

“I have always proceeded on the footing that the communications between the legal advisers and their employer (who is their client) are the subject of legal professional privilege; and I have known it questioned. There are many cases

⁶⁰ 421 US 132, 154-5 (1975).

⁶¹ 87 FRD 593, 598 (1980) ED (Pa).

⁶² [1987] HCA 25, Para 1.

⁶³ [1983] QB 878, 950.

⁶⁴ *Ibid* para 2.

⁶⁵ [1972] 2 QB 102, 129.

in the books of actions against railway companies where privilege has been claimed in this way. The validity of it has never been doubted.”⁶⁶

Deane J thought that the reference to the “many” railway cases was somewhat unhelpful since the judgments in those cases would have been concerned to consider a claim for privilege on the basis that the relevant material was “procured as materials upon which professional advice should be taken in proceedings pending, or threatened, or anticipated”.⁶⁷ It has long been recognised that claims of privilege based upon the fact that the relevant materials were procured for the purposes of anticipated litigation (in which independent counsel would in any event be expected to be briefed) were plainly distinguishable from a claim to privilege based upon the mere fact that a document contained or concerned confidential professional advice. One was left to speculate about whether the claim to privilege in the cases in which Lord Denning settled affidavits in his early days at the bar was likewise based on the “anticipated proceedings” ground. Lord Denning MR’s remark about that the validity of the view which he espoused had “never been doubted” did little to advance legal argument in a context where Forbes J, at first instance in the same case⁶⁸ had rejected that view as “an unwarrantable extension of the privileges rules unsupported by any authority”. A third and more significant criticism was that Lord Denning appeared to Deane J to unduly discount the importance, from the point of view of both the need for and the prevention of abuse of the privilege, of the matters mentioned by the European Court of Justice, particularly the importance of the full independence of the independent lawyer.⁶⁹

On the other hand, there was obvious validity in the perception that the considerations of public policy which underlay and enlighten the principle of legal professional privilege were generally applicable to the case where the person providing the legal professional advice was a salaried employee. Moreover, the conclusion that legal professional privilege could extend to protect the advice given within an organisation by a salaried legal adviser conformed with the approach that had been accepted in the United States of America⁷⁰ and which had subsequently prevailed generally throughout the common law world. That conclusion was referred to with approval by a majority of the High

⁶⁶ [1972] 2 QB 102, 129.

⁶⁷ *Birmingham and Midland Omnibus Company, Limited v London and North Western Railway* [1913] 3 KB 850, 856; *Seabrook v British Transport Commission* [1959] 1 WLR 509, 513 – 29; [1959] 2 All ER 15, 19-31; and *Longthorn v British Transport Commission* [1959] 1 WLR 530, 532-6; [1959] 2 All ER 32, 34-7.

⁶⁸ [1972] 2 QB 102, 109.

⁶⁹ [1987] HCA 25, Para 4.

⁷⁰ *United States v United Shoe Machinery Corporation* 89 FED Supp 357, 360 (1950).

Court in *Kearney*.⁷¹ Subject to an important reservation, it therefore appeared to Deane J that it should be accepted as correct for this country. The reservation was that it was unnecessary to investigate here what, if any qualification should be placed upon that conclusion to avoid potential abuse. In particular, it was unnecessary for present purpose to seek to identify the minimum academic or practical qualification which must be held by a salaried legal adviser before the confidentiality of his or her professional legal advice would enjoy the protection of the privilege since it had not been suggested that any officer of the Attorney-General's Department whose advice was involved in *Waterford* would fail to satisfy any such minimum academic or practical qualification. It would, however, seem that Lord Denning's statement that salaried legal advisers were regarded by the law "as in every respect in the same position as those who practice on their own account" with the only difference "...that they act for one client only, and not for several clients" would not be true of this country unless one restricted the category to persons who, in addition to any academic or other practical qualifications, were listed on a roll of current practitioners, held a current practising certificate, or worked under the supervision of such a person. Deane J added the conclusion that legal professional privilege extended to protect the confidentiality of advice given by appropriately qualified salaried legal advisers made it unnecessary to consider whether, in any event, the whole Attorney-General's Department and its officers should when providing professional legal advice to other branches of the Executive Government, be seen as acting in the role that was more akin to that of the independent professional firm than to that of the ordinary employed salaried lawyer (in reference to the remarks of Forbes J about communications with the Treasury Solicitor in *Crompton*).⁷²

Waterford - Dawson J: government lawyers more exposed to non-professional work

According to Dawson J, whilst there was something to be said for the distinction drawn by the European Court of Justice between independent and employed lawyers, it was not a statement of the position of common law and there was authority in the High Court of Australia and elsewhere for the proposition that legal professional privilege may attach to communications passing between a salaried legal adviser and his or her employer, provided that the legal adviser was consulted in a professional capacity in relation to a professional matter and the communications were made in confidence and arose from the relationship of lawyer and client. For this reason the legal adviser had

⁷¹ (1985) 158 CLR 500, 5110 per Gibbs CJ; 521–22 per Wilson J; 530-1 per Dawson J.

⁷² [1972] 2 QB 102, 109. [1987] HCA 25, Para 5.

to be qualified to practise law and it seemed subject to the duty to observe professional standards and the liability to professional discipline.⁷³

Dawson J concluded that, subject to the qualifications expressed in *Attorney-General (NT) v Kearney*, he did not think, as he had remarked in that case, that there was any sufficient reason for denying privilege for communications passing between salaried legal advisers and those who employed them.⁷⁴ However, those qualifications pointed, particularly in the case of government employees, to the special difficulties to which he had already adverted. Notwithstanding that government employees may be required to give legal advice, they may not be consulted in a professional capacity in relation to a professional matter – at all events if what is professional is to be determined, as Dawson J thought it must, by reference to the private practice of the law. Considerations could arise in the Government sphere which did not arise in private practice and which required different treatment.⁷⁵ The legal advice which a government received in its capacity as a litigant or a potential litigant was in no different position from legal advice received by the ordinary citizen. Confidential communications between a government in that capacity and its qualified legal advisers for the purpose of giving or receiving advice would be privileged whether or not the legal advisers were salaried officers, because they would be consulted in a professional capacity in relation to a professional matter and the communications would arise from the relationship of lawyer and client. The occasion would be one for the application of legal professional privilege because the government would be engaging in the legal process in the same way as anyone else and it was that process, essentially based upon the adversary system, which legal professional privilege was designed to aid and protect.⁷⁶ Where, however, a Government was engaging, not in the legal process, but in the purely executive function of decision-making, there was no reason connected with the administration of justice which could require that any advice which it may be given to assist it in that process should be kept confidential.⁷⁷ The considerations supporting legal professional privilege, save possibly the encouragement of candour, had no application to the relationship between Government and its legal advisers whose advice was sought, not within the legal, but within the administrative process. If the promotion of candour in that situation was of concern, then the legal adviser stood in no different position to other advisers of Government –

⁷³ *Attorney-General (NT) v Kearney* (1985) 158 CLR 500, 510, 521-2, 530-1.

⁷⁴ [1987] HCA 25, Para 9.

⁷⁵ *Ibid* para 10.

⁷⁶ *Ibid* para 17.

⁷⁷ *Ibid* para 18.

economic, political or administrative – who had to look to public interest immunity to protect the confidentiality of their communications where necessary in the public interest.⁷⁸ While the fact that advice was given in the course of communications for the purposes of giving and receiving legal advice in relation to proceedings before the Administrative Appeals Tribunal, and for the reasons already given, the fact that advice of that kind was provided by salaried employees did not preclude reliance upon legal professional privilege, the difficulty arose that, even though the advice in question related to the proceedings before the tribunal, it was nevertheless not legal advice but advice of a policy nature.⁷⁹

Practising certificates

While not conclusive, a requirement that the salaried lawyer must have a current practising certificate to undertake work would seem to be prudent given the reservations and qualifications contained in the various judgments in *Waterford* over whether the work of a salaried lawyer attracts legal professional privilege.

Recently, there has been controversy over a decision in *Russell Vance v Air Marshall EG McCormack*⁸⁰ where at first instance Crispin J held that advice from legal officers employed by the Australian Defence Force could not be subject to a claim for legal professional privilege. According to Crispin J:

“The requirements for practising certificates are not mere formalities. They form an independent part of the legislative scheme for the regulation of the legal profession. For example, if the Professional Conduct Board of the Law Society of the ACT finds that a solicitor of the Territory is guilty of professional misconduct or unsatisfactory professional conduct warranting suspension from practise, its only statutory power to impose such a sanction arises from s 58 of the ACT Legal Practitioners Act which authorises it to “suspend for a specified period not exceeding 12 months any practising certificate held by the solicitor”.⁸¹

In the absence of any effective power to suspend defaulting practitioners the Professional Conduct Board's ability to compel compliance with proper professional standards would be substantially more limited. Hence, in a practical sense, lawyers without practicing certificates cannot be said to have the same liability to professional negligence as their colleagues.⁸² Accordingly, Crispin J concluded:

⁷⁸ Ibid para 19.

⁷⁹ Ibid paras 21 and 22.

⁸⁰ [2004] ACT SC 78.

⁸¹ Ibid para 45.

⁸² Ibid.

“In my opinion, privilege arises to protect the confidentiality of communications with a legal adviser only when he or she has an actual right to practise and not merely when he or she has been admitted and joined the ADF [Australian Defence Force], even if permitted to carry out ADF legal duties without holding a practising certificate by S123 of the Defence Act. If (sic) for this reason alone, the present claim for privilege must fail, at least in relation to communications with military or civilian DLO’s [Defence Legal Officers] who do not hold practising certificates and were not stationed at the relevant times in Queensland or Western Australia.”⁸³

The Court of Appeal of the Australian Capital Territory [constituted by Grey, Connelly and Tamberlin JJ agreed as to the importance of practising certificates but said that their existence in a particular case demonstrates, rather than concludes, the issue of it being evidence of the independent advice given professionally as to constitute it being legal advice and accordingly they would not be prepared to conclude as did Crispen J at first instance.⁸⁴ Of importance was the application of the *Evidence Act 1995* (Cth) which at section 4 provided for the application of this Act “in relation to all proceedings in a federal court or an ACT court”.⁸⁵ On that basis, they held that the evidence as found by Crispin J was that the six Defence Legal Officers who gave the legal advice for which privilege was claimed were legally qualified and had been admitted to practice. Admission to practice of itself carried with it an obligation to conform to the powers of the Court to remove or suspend a legal practitioner for conduct that the court considered justified such a determination. Section 55D(1)(b) of the *Judiciary Act 1903* (Cth) provided that only a person whose name was on the roll of barristers, solicitors, barristers and solicitors or legal practitioners of the Supreme Court of a State or Territory was entitled to practise as a barrister and solicitor in any Territory unless suspended or disentitled by Court order. The Court had power to order that any person on the roll not be entitled to practise if that person were guilty of misconduct. The person remained bound to uphold the standards of conduct and to observe the duties undertaken upon admission to the roll of practitioners. The holding of a practising certificate reinforced that regime and made it more immediately applicable than would be the case if a current practising certificate were not held. Importantly, the Court of Appeal made the significant observation that “by not holding a practising certificate, a person cannot necessary be seen as independent or as necessarily acting in a legal professional capacity as a person who holds one, so as to give the quality of that person’s advice the description ‘legal advice’”.⁸⁶

⁸³ Ibid para 47.

⁸⁴ *Commonwealth and McCormack v Vance* [2005] ACT CA 35, para 20.

⁸⁵ Refer to Ibid para 20.

⁸⁶ Ibid para 21.

However, the ACT Court of Appeal was influenced, first, as intimated above by the application of the *Evidence Act 1995* (Cth) in the following terms:

“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 advice such that would attract the 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”.⁸⁷

The other significant consideration was that it was not a requirement in all Australian jurisdictions to hold a practising certificate, and indeed in the Australian Capital Territory it was only necessary for solicitors to hold practising certificates, there being no statutory provision for a barrister’s practising certificate. While the possession of a practising certificate was an important factor that would go to establishing the statutory requirement of a confidential communication for the dominant purpose of providing legal advice, to hold that it was conclusive was incorrect. A legal adviser in Government or commercial practice may hold a practising certificate, and yet in some aspects of his or her employment, that person may act in a manner inconsistent with the assertion of legal professional privilege:

“It would not be an answer to the complaint about the conduct of the DLO who is said to have handed over the files of their advice as to the respondent to their superior officer to say that their conduct meet professional standards merely because they held a practising certificate. Equally, a legal adviser may act in an entirely professional manner, generating a claim to client legal professional privilege, in the absence of a practising certificate.”⁸⁸

There were a number of first instance decisions in other jurisdictions that had held that the absence of a practising certificate did not conclusively establish that a claim for legal professional privilege did not arise.⁸⁹

⁸⁷ Ibid para 30.

⁸⁸ [2005] ACT CA 35, para 31.

⁸⁹ Ibid para 32, citing *Australian Hospital Care (Pindara) Pty Ltd v Duggan* [1999] VSC 131, para 111 per Gillard J (fact that interstate practitioner did not hold practising certificate in Victoria did not impinge upon the question whether he was acting independently in giving legal advice); *McKinnon and Secretary, Department of Foreign Affairs and Trade* [2004] AATA 1365, para 51 per Downes J (requirement for practising certificates relatively recent and associated primarily with regulatory considerations irrelevant to role of employed lawyer and to test of whether advice has necessary quality of being independent which should be determined by substance not form); *Glengallan Investments Pty Ltd v Arthur Anderson* [2002] 1 Qd R233 (only necessary for a lawyer to be admitted to practice for a claim of legal professional privilege at common law to be sustainable).

The view of the Victorian Government Solicitor's office is that notwithstanding the ACT Court of Appeal decision in *Commonwealth of Australia & Air Marshall McCormack v Vance*, "it is still very much to the point that government lawyers in Victoria would have to show that they were acting independently and providing assistance that required knowledge of the law", so "the Victorian Government Solicitor and other senior lawyers now hold practising certificates to forestall this possible argument".⁹⁰ As pointed out by the Victorian Government Solicitor's office, "because of the provisions of the *Legal Profession Act 2004*, lawyers acting for the Crown in Victoria do not need practising certificates".⁹¹ For example, the provision in section 7(1) of this Act that a person must not engage in legal practice in the jurisdiction of Victoria unless the person is an Australian legal practitioner, does not apply where "a person does anything in the course of their employment with the Crown or a public authority ...".⁹² As an "Australian legal practitioner" is defined as "an Australian lawyer who holds a current practising certificate or a current interstate practising certificate"⁹³ and there is a penalty of imprisonment for 2 years for a person "engaging in legal practice in this jurisdiction unless the person is an Australian legal practitioner", there would not appear to be the requisite statutory authority in Victoria to sustain legal professional privilege with the requisite degree of certainty where an in-house legal team working for a private company did not have practising certificates.

Again, the situation of lawyers in a private company might be contrasted with that of the AusIndustry Legal Unit whose officers were regarded as legal practitioners able to provide advice of an independent character notwithstanding co-employment within the Department of Industry and Research with the officers seeking the advice on behalf of the Industry, Research and Development Board. The locus of the performance of the duties performed by the legal practitioners concerned was that of the Board and of the Department, namely, the Australian Capital Territory. All the practitioners had been admitted to, and remained on, a roll of practitioners maintained by a State or Territory. The terms of section 55D of the *Judiciary Act 1903* (Cth) appeared to authorise such a practitioner to practise as a barrister and solicitor in the course of discharging legal duties for the Department and the Board without being required to be the current holder of a practising certificate issued by a State or Territory. In the end, the question was

⁹⁰ James Ruddle (Deputy Victorian Government Solicitor), "Delegations, Legal Professional Privilege, and the High Court on liability of public authorities" (February 2006) *Lunchtime Seminar Series* 6-7.

⁹¹ *Ibid* 7.

⁹² *Legal Profession Act 2004* (Vic) s 2.2.2 (g).

⁹³ *Ibid* s 1.2.3(a).

one of fact, namely, whether the client and practitioner expected and accepted that the obligations of an independent legal practitioner were to be met by the practitioner. The terms and structure of the documents at issue bespoke the conclusion that officers of the AusIndustry Legal Unit were regarded as legal practitioners able to provide advice of an independent character.⁹⁴

In conclusion, it is likely that, without a current practising certificate, the work of salaried lawyers employed by a private company might have difficulty attracting legal professional privilege where this work does not involve existing or anticipated litigation and no external lawyer is involved.

Overview – same considerations apply whether in private practice or employment

In principle, the same kind of considerations should apply with legal professional privilege irrespective of whether the lawyer is an external solicitor or barrister engaged in private practise, or an in-house lawyer employed by the client. For the purposes of attracting legal professional privilege, legal advice is not confined to telling the client the law, it must include advice as to what should prudently and sensibly be done in the relevant legal context.⁹⁵ However, there must be a “relevant legal context” in order for the advice to attract legal professional privilege as “to extend privilege without limit to all solicitor and client communication upon matters within the ordinary business of a solicitor and referable to that relationship [would be] too wide”.⁹⁶ As enunciated by Lord Scott of Foscote in *Three Rivers District Council & Ors v Governor and Company of the Bank of England*⁹⁷:

“If a solicitor becomes the client’s “man of business”, and some solicitors do, responsible for advising the client on all matters of business, including investment policy, finance policy and other business matters, the advice may lack a relevant legal context. There is, in my opinion, no way of avoiding difficulty in deciding in marginal cases whether the seeking of advice from or the giving of advice by lawyers does or does not take place in a relevant legal context so as to attract legal advice privilege. In cases of doubt the judge called upon to make the decision should ask whether the advice relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law. If it does not, then in my opinion, legal advice privilege would not apply. If it does so relate then, in my opinion, the judge should ask himself whether the communication falls within in the policy underlying the justification

⁹⁴ *Candacal Pty Ltd v Industry Research & Development Board* [2005] FCA 649; see discussion in *CCH Australian High Court & Federal Court Practice* 24-566 60,799.

⁹⁵ *Balabeel v Air India* [1988] 1 Ch 317, 330 per Taylor L J.

⁹⁶ *Ibid* 331 per Taylor LJ.

⁹⁷ [2004] UKHL 48.

for legal advice privilege in our law. Is the occasion on which the communication takes place and is the purpose for which it takes place such as to make it reasonable to expect the privilege to apply? The criterion must, in my opinion, be an objective one.”⁹⁸

Conclusion - particular exposures to loss of privilege for work of in-house lawyers

In applying these general considerations, there are particular issues that expose the use of in-house lawyers to loss of legal professional privilege. While legal advice is not confined to telling the client the law but includes professional legal advice as to what should prudently and sensibly be done in the relevant legal context, and includes professional advice given by lawyers to a client as to what evidence and submissions should be placed before a commission of inquiry,⁹⁹ if an in-house lawyer is a “player in the transaction”, his or her legal advice in relation to that transaction will not be privileged.¹⁰⁰ So where a person holding concurrently the positions of General Counsel and Company Secretary has become directly involved in commercial negotiations relating to a disputed transaction, this is likely to create sufficient doubt as to whether the General Counsel and Company Secretary was acting independently at the relevant time, or in a professional legal capacity as distinct from an executive or secretarial one.¹⁰¹ Where a Chief General Counsel to News Limited held a number of directorships in News Group companies, was a member of the National Rugby League Executive Committee and was actively involved in a commercial role in a number of business activities, including negotiations of numerous important commercial arrangements, the Court was not persuaded that the Chief General Counsel was acting in a legal capacity in view of an active involvement in commercial decisions.¹⁰² The kind of risks involved in in-house lawyers not strictly confining their role to a professional legal one is highlighted as follows:

“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 inter-twined and privilege should not be denied simply on the basis of some commercial involvement. In the present case, however, I am persuaded that Mr Philip was actively engaged in the commercial decisions to such an extent that significant weight must be given to this participation. In many circumstances where in-house counsel are employed there will be considerable overlap between commercial participation and legal functions and opinions. ...I am not

⁹⁸ Ibid para 38.

⁹⁹ *AWB Ltd v Honourable Terrence Rohoderic Hudson Cole* [2006] FCA 571.

¹⁰⁰ *Zemanek v Commonwealth Bank of Australia* (Federal Court of Australia, 2 October 1997), unreported, at 4 per Hill J.

¹⁰¹ *Australian Hospital Care Pty Ltd v Vuggan (No. 2)* [1999] VSC 131.

¹⁰² *Seven Network Limited v News Limited* [2005] FCA 142.

persuaded that in this proceeding Mr Philip was acting in a legal context or role in relation to a number of the documents in respect of which privilege was claimed. Nor am I persuaded that the privilege claims were based on an independent and impartial legal appraisal.”¹⁰³

To safeguard legal professional privilege in an in-house environment, the Legal Department should be constituted as a separate organisation from the non-legal functions, clearly distinguish between consultations on internal administrative or commercial matters from professional legal ones ¹⁰⁴ be headed by a legal practitioner admitted to practise as a barrister and solicitor, or solicitor, in the relevant State or Territory, preferably holding a current unrestricted practising certificate.¹⁰⁵

It is not essential that the Head of the Legal Department report direct in an administrative sense to the Chief Executive Officer or the Board. However, it is essential that legal advice from the Legal Department proceeds directly to the addressee, whether the Board, the Chief Executive Officer or another “client” within the employer organisation. Where the legal advice is vetted by a non-lawyer or summarised by a non-lawyer, legal professional privilege will be lost. Clearly, while these exposures apply irrespective of whether an in-house lawyer is used or the company briefs external lawyers direct, the relationship of an in-house lawyer inevitably has certain features that can lead to loss of legal professional privilege more readily than is the case with an external lawyer. Accordingly, it is essential that companies are aware of the potential risks involved and actively plan to minimise them.

¹⁰³ Ibid para 38, per Tamberlin J.

¹⁰⁴ *Re Proudfoot v Human Rights and Equal Opportunity Commission* (1992) 28 ALD 734.

¹⁰⁵ *Lalogianni v Australian National University* [2001] AATA 347 (26 April 2001) – Australian National University Legal Department established in a way to ensure that it provided independent legal advice to the University and the University consulted the Head of the Legal Department in a professional capacity as a legal adviser.