IS LEGAL PROFESSIONAL PRIVILEGE AN ENDANGERED SPECIES?

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Introduction

This paper considers the effect of some recent cases on the scope and application of legal professional privilege (also referred to as 'client legal privilege'[1]). Some recent cases have arguably operated to limit both the scope and the application of the privilege. The potential effect of the limitations may be of particular interest to in-house lawyers in government agencies.

What is legal professional privilege and why does it exist?

This question was recently answered by the High Court, in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*:

> …. legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings.[2]

In short, the privilege exists to ensure that there can be a full and frank exchange of confidence between a solicitor and his or her client, so that the client receives the necessary legal advice.

Waiver of privilege

Legal professional privilege can be waived, by the client, either expressly or by implication. In *Mann v Carnell*, the High Court stated:

> Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is "imputed by operation of law". This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege. …. What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.[3]

This concept of 'inconsistency' is referred to in more detail in the following discussion of the relevant cases.

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Lovegrove

In *Lovegrove Turf Services and Another v Minister for Education*,[4] a decision of the Western Australian Supreme Court, the issue was whether, in using legal advice in the course of making an administrative decision, the decision-maker impliedly waived the privilege that would otherwise attach to the advice.

The plaintiff, Lovegrove Turf Services, was contracted by the defendant, the WA Department of Education, to provide lawn-mowing services at schools. The Department decided to put the lawn-mowing services out to tender. The tender process was split into two rounds. The plaintiff was advised that it had been awarded a Round 1 contract. After the Round 2 tenders closed, a recommendation was given that the plaintiff be awarded the contract. Although that decision was endorsed by a State committee, an independent consultant was brought in to review a complaint concerning the tender evaluation process, as a result of which the tenders were recalled.

The plaintiff commenced legal proceedings against the Department, effectively seeking judicial review of the decision to recall the tender. In its defence, the Department pleaded that, in making the decision to terminate the tender process, the Department took into account, among other things, legal advice. The Department also pleaded that, in referring to the legal advice in the defence, it did not waive privilege in relation to the advice, either expressly or by implication.

There was no assertion by the plaintiff that the waiver arose because of the reference to the legal advice in the defence. The judge noted that the High Court's decision in *Mann v Carnell* established the principle that the inconsistency resulting in implied waiver must arise from the conduct of the party that enjoys the privilege. In this application, the plaintiff relied solely on the events that occurred when the decision was made. The plaintiff asserted that the Department, in taking the legal advice into account in making the relevant decision, had acted inconsistently with maintaining its privilege over that advice.

Justice Johnson considered the authorities on legal professional privilege and acknowledged that there was a large and developing body of case law on waiver of legal professional privilege. However, as her Honour could find no case directly on point, she proceeded to draw analogies from authorities on waiver of privilege in the case of expert witness reports. The essence of those authorities is that if an expert, in preparing a report that is to be used in legal proceedings, relies on what would otherwise be privileged material, then the confidentiality of that material (upon which the privilege relies) is destroyed. The basis of this proposition is that access to the privileged material is required in order for a court to understand the influence of the privileged material on the expert's opinion.

Applying this analogy to the case at hand, the judge agreed with the plaintiff's submission that, by taking into account legal advice in making the decision to recall the tender, the Department had acted inconsistently with maintaining the privilege over the advice. As a result, there was an implied waiver of the privilege. Further, the judge agreed that to find otherwise would be to deprive a person seeking judicial review of such a decision of the right to exercise such review, because precise knowledge of the material on which a decision was based is fundamental to any challenge to the decision. Her Honour stated that, in the context of the judicial review of a decision, there was an inconsistency in taking legal advice into account in making a decision but then declining to identify the content of that advice.

In the concluding paragraph of the judgment, Her Honour stated that, while legal professional privilege was a 'fundamental common law right' that should not lightly be interfered with, she was persuaded that 'incorporating legal advice into an administrative

decision is inconsistent with maintaining the confidentiality of that advice'. Her Honour concluded by stating:

> In my view, in the context of a judicial review of an administrative decision, maintaining the privilege creates a level of unfairness which serves to highlight the inconsistency which is the cornerstone of the relevant test of waiver. The result is an unintentional and implied waiver of legal professional privilege over the legal advice referred to in .... the amended defence.

The potential ramifications of *Lovegrove*

On its face, *Lovegrove* presents significant problems for decision-makers who rely on legal advice in making decisions since, by relying on the advice, it is arguable that they impliedly waive any privilege in the advice, should someone affected by the decision seek judicial review. Some comfort might be drawn, however, from the reference (late in the judgment) that the legal advice must be 'incorporated' into the decision for the privilege to be waived. This might be interpreted as requiring something more than that the decision-maker, at some stage, considered the advice. It might, for example, be interpreted as requiring that legal advice was provided to the effect that the decision-maker should do (or not do) 'x' and that the decision-maker, in fact, did 'x'. On its face, however, the analogy drawn from the expert opinion authorities applies equally to *any* advice given in the lead-up to an administrative decision, whether it was acted upon or not. On the analogy, it would apply equally to advice that the decision-maker did not act on, including advice that the decision-maker chose to ignore.

Adelaide Brighton Cement Limited v Victorian Rail Track

Lovegrove was recently considered by the Victorian Civil and Administrative Tribunal ('VCAT'), in *Adelaide Brighton Cement Limited v Victorian Rail Track*.[5] In that case, Adelaide Brighton Cement Limited ('ABC') sought access under the *Freedom of Information Act 1982* (Vic) to certain documents relating to a commercial dispute about a railway line between North Geelong and Fyansford. Victorian Rail Track denied access to some of the documents, on the basis that they were exempt under section 32 of that Act, which relates to legal professional privilege. Counsel for ABC relied on *Lovegrove*, arguing that any privilege in the documents had been waived, by virtue of their being integral to the making of, and reasons for, a review of an administrative decision.

Justice Bowman rejected ABC's arguments. His Honour began by noting that the High Court had stressed that legal professional privilege was 'an important common law immunity', which was not to be lightly swept aside. His Honour then distinguished *Lovegrove*, partly on the basis that he considered the respective fact situations were 'considerably removed' from each other and partly because he considered that acceptance of the interpretation advanced on behalf of ABC would render the protection afforded by section 32 of the Act 'useless'.[6]

Bennett

The inconsistency argument in relation to waiver of privilege was given more detailed consideration in the recent decision of the Full Federal Court in *Bennett v Chief Executive Officer of the Australian Customs Service*.[7] That case involved a dispute between the Australian Customs Service ('ACS') and Peter Bennett, in his capacity as President of the Customs Officers Association ('COA'). The particular issue was whether subregulation 7(13) of the (then operative) *Public Service Regulations 1935* operated to limit what Mr Bennett could say in public.

In the course of the dispute, the Australian Government Solicitor ('AGS'), on behalf of ACS, wrote to Mr Bennett's solicitors, stating (among other things):

> AGS has now advised Customs that Public Service Regulation 7(13) does not prohibit all public comment by an officer on matters of public administration.
>
> ……..
>
> AGS has advised Customs that your client is not correct in asserting that he is not subject to the [Public Service] Act and Regulations if he makes public statements about Customs-related matters in his capacity as President of the COA.

Mr Bennett sought access under the *Freedom of Information Act 1982* (FOI Act') to the legal advice on which these statements were based. Access was denied, on the basis of section 42 of the FOI Act, which provides an exemption in relation to documents protected by legal professional privilege. Mr Bennett argued that any privilege in the documents had been waived as a result to the references in the AGS letter to his solicitors.

The Full Federal Court (Gyles and Tamberlin JJ, Emmett J dissenting) agreed. Justice Tamberlin referred to the following passage from *Mann v Carnell*:

> Disclosure by a client of a confidential legal advice received by the client, which may be for the purpose of explaining or justifying the client's actions … will waive the privilege if such disclosure is inconsistent with the confidentiality which the privilege serves to protect …[8]

His Honour also referred to the following passage from Deane J's judgement in the High Court decision in *Attorney-General for the Northern Territory v Maurice*:

> … ordinary notions of fairness require that an assertion of the effect of privileged material or disclosure of part of its contents in the course of proceedings before a court or quasi-judicial tribunal be treated as a waiver of any right to resists scrutiny of the proprietary of the use he has made of the material by reliance upon legal professional privilege. ... If, in such a document, a party sets forth part of the contents of a particular identified document or communication or asserts the effect of or his reliance upon a particular identified document or communication, it may be that consideration of fairness might require that he be treated as having waived any legal professional privilege in relation to the whole document or communication. ... [9]

In *Maurice*, Deane J went on to say:

> Where, however, he does no more than make use of privileged material (e.g. legal advice, expert opinion or statements of potential witnesses) for the purpose of formulating the statement in such a document of the details of the case which he proposes to make, it would be an affront to ordinary notions of fairness to hold that the effect of his compliance with that procedural requirement was that he has waived his legal professional privilege ...'[10]

In *Bennett*, Tamberlin J went on to note that mere reference to the existence of legal advice does not waive the privilege in such advice, citing the High Court decision in *Ampolex Ltd v Perpetual Trustee Company (Canberra) Ltd*.[11] However, his Honour further noted that the 'substance' of legal advice may be disclosed if the 'ultimate conclusion' is disclosed, without the supporting reasoning, citing the NSW Supreme Court's decision in *Ampolex.*

Justice Tamberlin gave the example of a situation where it was disclosed that interpretation 'A' was preferred to interpretation 'B' of a legislative provision. In this situation, his Honour concluded, the reasoning and content of the advice leading to those conclusions may also be waived.[12]

His Honour also went on to say that the disclosure of one conclusion does not necessarily waive privilege in relation to any undisclosed conclusions. He also said, however, that if the conclusions and reasoning set out in an advice are so interconnected that they cannot be isolated then waiver may be implied in relation to the whole of the advice.[13]

Implications of *Bennett*

I have little or no difficulty with the Full Federal Court's reasoning in *Bennett*, as it seems to be a relatively unavoidable conclusion that, in the paragraphs of the AGS letter referred to, AGS had disclosed to Mr Bennett's solicitors the substance of the advice to ACS. The privilege in that advice had, as a result, been waived.

The role of practising certificates and independence

The second issue to be discussed in this paper is the role of practising certificates and independence in relation to legal professional privilege, with particular reference to the recent decision of Crispin J of the ACT Supreme Court in *Russell Vance v Air Marshall Erroll John McCormack in his capacity as Chief of Air Force and the Commonwealth*.[14] In *Vance*, Crispin J considered an application by the plaintiff (Mr Vance) for an order requiring the defendants to provide a large number of documents for inspection and/or copying by the plaintiff. The application was opposed by the defendants, on the ground that all the documents in question were the subject of a claim for legal professional privilege.

The proceedings involved a claim for damages in relation to the alleged unlawful termination of the plaintiff's employment as a Squadron Leader in the Royal Australian Air Force. Three categories of documents were in dispute. The first involved a document that contained advice from a legal officer employed by the Australian Defence Force who occupied a position referred to as a 'Departmental Legal Officer' ('DLO'). The second group of documents consisted mainly of communications between DLOs and counsel, relating to advice given by them regarding the termination of the plaintiff's employment. The third group of documents consisted of communications with DLOs in connection with requests for, or the provision of, legal advice.

There was a further categorisation of the documents, however, in the sense that some of the DLOs were civilian lawyers, some of the DLOs were military lawyers and some of the DLOs were Reserve lawyers.

Justice Crispin saw 2 issues in relation to the lawyers concerned:

- were they 'practising' lawyers?
- were they sufficiently independent of their employer for there to be a solicitor/client relationship?

'Practising' lawyers

In his judgment, Crispin J referred to the High Court's decision in *Waterford v The Commonwealth*.[15] In *Waterford*, the High Court upheld a claim for privilege in respect of Commonwealth documents that had been brought into existence for the sole purpose of seeking legal advice from salaried government lawyers or for the provision of such advice.

There was, however, an important distinction between *Waterford* and the situation before Crispin J, because in *Waterford*, the persons in question were not only lawyers but held practising certificates. Mr Vance argued that *Waterford* could be distinguished because, in this case, the DLOs did not.

In response, Defence argued that, in *Waterford*, the High Court had not said that a lawyer must have a practising certificate for his or her advice to be protected by privilege. Crispin J acknowledged this but noted that, in *Waterford*, Dawson J said that, for the privilege to apply,

> …the legal advisor must be qualified to practice law and, it seems, subject to the duty to observe professional standards and the liability to professional discipline.[16]

Justice Crispin said that it was difficult to see how Dawson J's conditions could be satisfied by lawyers who did not hold practising certificates or, perhaps, worked under the supervision of a lawyer with a practising certificate.

What, then, are the perceived advantages of a lawyer having a practising certificate? According to Crispin J, holding a current practising certificate indicates 'continued good standing in a profession that takes active steps to ensure the maintenance of appropriate ethical and professional standards'.[17] His Honour stated that the legal profession does this by:

- fostering awareness of its traditions of integrity and service;
- the influence of peers;
- the need for practitioners to demonstrate continuing compliance with ethical standards; and
- (in most jurisdictions) participation in continuing legal education in order to maintain practising certificates.[18]

It is significant to note that a Defence witness conceded that DLOs were not required to keep abreast of changes in rules of practice or legal ethics.[19]

Justice Crispin went on to say that practising certificate requirements were not 'mere formalities' but an important part of the legislative scheme for the regulation of the profession.[20] His Honour made particular reference to the role of the Professional Conduct Board of the Law Society of the ACT and the liability to professional discipline that this involved.[21]

His Honour concluded that lawyers need to hold a practising certificate or enjoy a statutory right to practise if communications with them for the purpose of obtaining legal advice are to enjoy the protection of legal professional privilege.[22]

A further requirement - Independence

Justice Crispin did not stop there. Again picking up from *Waterford*, Crispin J said that the 'broader issue' was whether the DLOs employment with Defence involved a professional relationship which allowed the advice to have 'an independent character notwithstanding the employment'.[23]

In the *Vance* situation, Crispin J noted that the military DLOs held commissions as full-time officers and were subject to an 'authoritarian' structure in which obedience could be enforced by penal sanctions.[24] His Honour rejected the argument that this was qualified by the proposition that only lawful commands were applicable.[25] Justice Cripsin further noted that:

- commanding officers could give orders to DLOs that conflicted with professional conduct rules;[26]
- many DLOs were under the command of superior officers who were not legally qualified;[27]
- there was no requirement for DLOs to be members of Law Societies;[28] and
- there was evidence of an 'ADF culture' within which DLOs clearly lacked the requisite independence.[29]

Having reached these conclusions along the way, Crispin J decided that legal professional privilege:

- did not apply to military DLOs, due to a combination of factors[30];
- did not apply to civilian DLOs, due to the lack of practising certificates;[31] but
- did apply to the reserve DLOs, partly because they had a right to practise and partly because they were only involved in the Defence culture on 'a part-time basis'.[32]

Ramifications of *Vance*

Not surprisingly, the *Vance* decision has caused a flurry of activity in the ACT. The ACT Law Society has written to government agencies, urging them to arrange for their lawyers to have practising certificates. The potential impact to agencies is no doubt lessened by the fact that the Law Society is currently offering such certificates at discounted rates.

A further issue, of course, is the limitation on government lawyers holding unrestricted practising certificates. Again, however, the Law Society has advised that, pending possible amendment of the *Legal Practitioners Act 1970* (ACT), it is prepared to allow government lawyers to have unrestricted certificates if they, in return, undertake not to perform work of a legal nature other than for their employer.

The Secretary of the Attorney-General's Department has also written to agencies, seeking their views on the implications of *Vance* for their agencies. It is evident that some agencies have already taken steps in relation to practising certificates.[33]

But what about the independence issue? My own view is that the independence requirement is the more problematic issue arising out of *Vance*. Is it the case that lawyers in government agencies are immune from the 'chain of command' type arguments accepted by Crispin J in *Vance*? If not, how might agencies be re-structured in order to give them the necessary independence?

These issues may be addressed, in part, by arguing that it is possible to limit *Vance* to its facts, that is, to limit its application to situations where there is the sort of formal command structure that is involved in Defence. This is, however, presumably an argument that is yet to be won or lost.

ADDENDUM

The *Vance* decision has been considered by the Administrative Appeals Tribunal ('AAT') in *Re McKinnon and Secretary, Department of Foreign Affairs and Trade*,[34] in the context of the application of legal professional privilege as a ground of exemption under the (Commonwealth) FOI Act. In that decision, the President of the AAT, Justice Downes, stated:

> 50. The authorities establish that legal professional privilege is attracted by legal advice otherwise qualifying even though the advice is given by an employed lawyer to his employer, including a Government department or agency, provided that the employee is acting independently in giving the advice (see *Australian Hospital Care Pty Ltd v Duggan (No 2)* [1999] VSC 131; *Waterford v The Commonwealth* (1987) 163 CLR 54).
>
> 51. In *Australian Hospital Care v Duggan*, Gillard J concluded that provided the advice given was independent advice, it did not matter that the lawyer did not have a practising certificate for a claim of legal professional privilege to arise (at [111]). In *Vance v McCormack and The Commonwealth* [2004] ACTSC 78, Crispin J in the Supreme Court of the Australian Capital Territory concluded that a practising certificate was necessary (at [48]). **I prefer the conclusion and reasoning of Gillard J. The real test is whether the advice had the necessary quality of being independent advice. Whether or not legal professional privilege is attracted should be determined by the substance not the form.** The rise of requirements for practising certificates is relatively recent and is associated primarily with regulatory considerations and matters associated with lawyers holding themselves out to the public as qualified. Many of these considerations are irrelevant to the role of the employed lawyer. [emphasis added]

This might be seen as alleviating the need for in-house lawyers to rush out and obtain practising certificates, with Justice Downes being more concerned by the substance of a lawyer's independence than whether or not he or she holds the relevant 'ticket' to practise. It does not address the independence issue, however, meaning that in-house lawyers still need to consider whether they can meet the requirement that their advice have 'an independent character notwithstanding the employment'.[35]

Endnotes

1 See Part 3.10 of the *Evidence Act 1995* (Cth).
2 (2002) 192 ALR 561, per Gleeson CJ, Gaudron, Gummow, Hayne JJ, at para 9.
3 (1999) 210 CLR 1, at para 29 (per Gleeson CJ, Gaudron, Gummow and Hayne JJ).
4 [2003] WASC 213, 5 November 2003, per Johnson J.
5 [2004] VCAT 930 (20 May 2004).
6 See para 40.
7 (2004) 210 ALR 220.
8 At para 3 (the *Mann v Carnell* passage being from para 34 of that judgment).
9 (1986) 161 CLR 475, at 493.
10 Ibid.
11 (1996) 137 ALR 28 (see Kirby J at 34).
12 *Bennett*, above n 7 at para 13.
13 Ibid, para 14.
14 [2004] ACTSC 78 (2 September 2004).
15 (1987) 135 CLR 674.
16 Ibid, at 96 (and at para 35 of Crispin J's judgment).
17 [2004] ACTSC 78, at para 42.
18 Ibid.
19 Ibid, at para 43.
20 Ibid, at para 45.
21 Ibid.
22 Ibid, at para 47.
23 Ibid, at para 49.

24 Ibid, at para 57.
25 Ibid, at para 60.
26 Ibid.
27 Ibid, at para 61.
28 Ibid, at para 62.
29 Ibid, at para 64.
30 Ibid, at para 88.
31 Ibid, at para 89.
32 Ibid, at para 93.
33 In an advertisement in *The Canberra Times* on 23 October 2004, for example, the Department of Education, Science and Training indicated that practising certificates would be a condition of employment for Government Lawyers in that Department.
34 [2004] AATA 1365 (21 December 2004).
35 In this context, we note that the Attorney-General's Department has issued a "Guidance Note" to Commonwealth agencies, recommending that certain steps be taken to demonstrate the necessary independence of legal areas.