Government Business

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Legal Professional Privilege and Practising Certificates

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The ACT Court of Appeal recently delivered the latest instalment in the *Vance*[1] case, which addresses the availability of legal professional privilege for in-house government lawyers.

This decision, although perhaps not the final word in the case, softens the strict approach taken by the Judge at first instance that government lawyers must hold practising certificates if their advice is to attract privilege.

The original decision

The case concerned documents prepared by a Defence Legal Officer (DLO) for the RAAF in the course of his duties. The DLO did not hold a current practising certificate, although he had held one previously.

The original judgment[2], delivered by the Supreme Court in September 2004, found that privilege can only exist where a legal adviser has a 'right to practise'. This requirement was found to exist only where a lawyer had either a current practising certificate, or (for government lawyers in Queensland or Western Australia) a statutory right to practise by virtue of the *Judiciary Act 1903 (Cth)*.

The Court relied on selected case law to find that for a salaried lawyer to be placed on the same footing as other practitioners for the purpose of establishing privilege, they must hold a practising certificate. The existence of a practising certificate was not considered conclusive evidence that privilege should apply, but without one, privilege could not be found.

Is there a need for a practising certificate?

The Court of Appeal found that the Judge erred in finding that privilege can never apply in the absence of a practising certificate. It ruled that the appropriate test for privilege was found not in the case law, but in the Commonwealth *Evidence Act 1995*, which has been embodied in the ACT Supreme Court Rules. Section 118 of that Act contains the following requirements for legal professional privilege to attach to a document:

» The document must be a communication between lawyer and client, or between two lawyers;

» It must be prepared with the dominant purpose of providing legal advice to the client; and

» It must be a 'confidential communication', prepared in such circumstances that either the writer, the intended recipient or both was under an express or implied obligation not to disclose its contents.

By finding that the lack of a practising certificate necessarily defeated a privilege claim, the Court of Appeal ruled that the Judge at first instance had gone beyond the requirements of the *Evidence Act*, and that this amounted to an appellable error.

Importantly, the *Evidence Act* also defines 'client' to include an employer of a lawyer, where that employer is either the Commonwealth or a body established by statute. This provision was viewed by the Court of Appeal as encompassing a broader class of legal advice and a greater variety of in-house situations than the case law relied upon by the Judge at first instance.

The Court of Appeal moved away from the concept of a 'right to practise' to focus on the actual requirements of the Evidence Act. Those requirements will be more readily met where a lawyer does hold a practising certificate, but it is the circumstances surrounding the advice, and not the professional qualifications of the lawyer, which is the central consideration in determining a privilege claim.

The need for independence

The need for independence, while not specifically mentioned in the *Evidence Act*, is a relevant consideration that can be imported from the case law in giving effect to the provisions of the Act.

There was considerable argument in the first hearing about whether a DLO, as a military officer in a chain of command, could possess the requisite degree of independence from their employer/client for their advice to attract privilege. The Appeal Court did not make a finding on this issue of fact, but rather remitted the matter to the Supreme Court for determination in accordance with the Appeal Court's findings.

Parliamentary privilege

A secondary issue on appeal was whether it was proper for the Judge to have relied upon material from a Senate Committee in determining the privilege claim.

The Judge at first instance had relied on evidence given by a Member of Parliament and former RAAF legal officer to the Committee about the procedures and culture of the military.

Despite the fact that neither party had objected to this evidence being introduced, the Court of Appeal found that it was inadmissible under the terms of the *Parliamentary Privileges Act 1987 (Cth)*, which preserves the independence of parliamentary processes. The Court emphasised that this privilege exists for public policy reasons, and cannot be waived.

Summary

This decision, although perhaps not the final word in the case, softens the strict approach taken by the Judge at first instance that government lawyers must hold practising certificates if their advice is to attract privilege.

It confirms that in determining a claim for privilege, the primary concerns are still the purpose and confidentiality of the document, and the circumstances of the relationship between lawyer and client. Privilege may be found more readily where a lawyer has a current practising certificate, but the lack of a certificate will not automatically defeat a claim for privilege.

[1] Commonwealth of Australia and Air Marshall Errol John McCormack in his capacity as Chief of Air Force v Russell Vance [2005] ACTCA 35 (23 August 2005).
[2] Vance v Air Marshall McCormack in his capacity as Chief of Air Force & Anor [2004] ACTSC 78 (2 September 2004)

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