

## Legal Professional Privilege

Mark Easton  
Partner – Litigation & Dispute  
Resolution

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### PRESENTATION OUTLINE

- **LPP – What is it?**
- LPP – How does it arise?
- LPP – In-house counsel
- LPP – How do you lose it?
- LPP – Case study

## LPP – WHAT IS IT?

- Protection of confidentiality to encourage full and frank disclosure between clients and lawyers
- Grounded in public policy – effective administration of justice
- Substantive common law right
- Also enshrined in statute in the *Uniform Evidence Laws*

## LPP – WHAT IS IT?

- The privilege is against **compulsory** disclosure of confidential information and documents
- LPP may be relied on in judicial, quasi-judicial and investigatory proceedings
- Covers oral communications and documents
- LPP is a right of the client (not the lawyer)
- Once lost, privilege cannot be regained

## LPP – WHAT IS ITS EFFECT?

- **Litigation** – prevents disclosure to other parties and the court:
  - Evidence of privileged information cannot be adduced in court (oral evidence or documents)
  - Discovery, Subpoenas, Interrogatories
- **Regulators** – prevents disclosure e.g.:
  - **ACCC, ASIC, WorkCover/Worksafe, EPA, ATO etc -**

## LPP – WHAT IS IT?

### Common Law right

- A person's right to resist the **compulsory disclosure** of **confidential** information contained in a communication made (orally or in writing) or a document prepared for the **dominant purpose** of:
  - obtaining, or giving, **legal advice (advice limb)**; or
  - for use in actual or anticipated **legal proceedings (litigation limb)**
- *Evidence Acts* apply to proceedings in court – otherwise common law test applies

## LPP – WHAT IS IT?

*Evidence Acts* (Cth, NSW, VIC & Tas) govern LPP in Court proceedings

- Section 118 – confidential communication between client and lawyer for, or confidential document prepared for, the dominant purpose of giving or obtaining legal advice (**advice limb**)
- Section 119 – confidential communication between client or lawyer and another person for, or confidential document prepared for, the dominant purpose of providing legal services relating to an actual or anticipated proceeding (**litigation limb**)

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## HOW DOES IT ARISE?

- 3 key elements of LPP:
  - Confidentiality
  - Dominant purpose of legal advice or litigation
  - Professional relationship of legal adviser and client

## ELEMENTS – CONFIDENTIALITY

- Communications made privately between lawyer and client are assumed to be confidential
- The presence of a third party may negate the confidentiality
- Internal communication of legal advice within a corporation still generally confidential
- Indiscriminate dissemination of legal advice in corporations threatens confidentiality
- Disclosure between officers of companies in corporate group did not constitute waiver (*Seven Network Limited v News Ltd* [2005] FCA 864)

## CONFIDENTIALITY - BEST PRACTICE

- Best practice to protect confidentiality:
  - Avoid wide distribution – “need to know” only
  - Report legal advice directly to management
  - Avoid referring to privileged communications in other documents
  - Restrict access to legal department files
  - Mark legal advice "Privileged & Confidential"
  - Pick up the phone

## ELEMENTS – DOMINANT PURPOSE

- Communication must be for the dominant purpose of legal advice/litigation
- Must be "the ruling, prevailing or most influential purpose" (*Waterford v Cth* (1987) 163 CLR 54)
- If legal advice only one of a number purposes LPP will be difficult to prove
- Objectively determined
- Communications with third parties can be privileged if made for the dominant purpose

## ELEMENTS – DOMINANT PURPOSE

Incident Investigation Reports:

- Prepared by lawyer as basis for advice
- Prepared by client for submission to lawyer for advice
- Prepared by third party for use in, or in relation to, litigation
- Multiple business purposes fatal to LPP - *Sydney Airports Corporation v Singapore Airlines*
- Advice for multiple entities with different interests in same corporate group may not be covered: *Wingecarribee Shire Council v Lehman Brothers Australia*

## DOMINANT PURPOSE - BEST PRACTICE

- Best practice to show dominant purpose:
  - Record purpose for requesting and delivering legal/expert advice in writing and include in retainers of external lawyers/experts
  - Obtain written instructions from management recording the purpose
  - Create more than one report if necessary
  - Consider using external lawyers to commission third party reports

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## LPP – IN-HOUSE COUNSEL

### Key Element – Professional relationship

- Privilege attaches if lawyer:
  - acting in their capacity as a professional legal adviser
  - is competent and *independent*
- In-house lawyers are more closely scrutinised for equivalent work
- Serious risk if "player in the transaction" with blurred roles and responsibilities



## LPP – IN-HOUSE COUNSEL

- Capacity
  - In-house lawyer must be acting as a lawyer and not in other capacity
  - Factual inquiry based on evidence
  - Dual roles including company secretary or director are risky and will be carefully examined (*Southern Equities Co (in liq) v Arthur Andersen & Co (No 6)*)

## LPP – IN-HOUSE COUNSEL

- Independence
  - A professional relationship between lawyer and client requires the lawyer to be independent
  - Independence assumed for external lawyers
  - The personal loyalties, duties or interest of the adviser should not influence the legal advice which he gives or the fairness of his conduct in litigation on behalf of the client – *Waterford v Commonwealth* (1987) 163 CLR 54

## LPP – IN-HOUSE COUNSEL

- *Rich v Harrington* [2007] FCA 1987  
 "the relationship ... was not such as to secure ...  
**the objectively independent character necessary**  
 to support the respondent's claim of client legal  
 privilege. OGC was not in a position to give  
**professionally detached advice** to the  
 respondents concerning the allegations..."
- Existence of some non-legal functions not fatal to  
 LPP - *Dye v Commonwealth Securities Ltd* –

## LPP – IN-HOUSE COUNSEL

- **Practising Certificate**
  - Requirement not clear
  - A practising certificate makes it easier to meet the independence test.
  - The absence of a Practising Certificate may raise serious doubts as to independence (*Southern Equities*) but not conclusive
  - From 1 July 2015, the Legal Profession Uniform Law provides that in-house counsel are now required to have practising certificates (with limited exceptions)

## IN-HOUSE COUNSEL – BEST PRACTICE

- **Best practice** to show professional relationship:
  - Establish legal function as separate unit
  - Report to senior management only
  - Acknowledge duty to court in employment contracts
  - Avoid non-legal roles (best) **or** clearly demarcate
  - Maintain practising certificates
  - Avoid linking remuneration to financial performance of organisation
  - Separate and prevent access to electronic and physical files (*Archer Capital v Sage Group 2014*)

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## LPP – HOW DO YOU LOSE IT? - WAIVER

- Waiver of LPP can be intentional or inadvertent and express or implied from conduct.
- Express waiver - e.g. tender of privileged document into evidence
- Implied waiver:
  - *Evidence Act* - Section 122(2) requires **knowing** and **voluntary** disclosure to another person of the **substance** of the evidence
  - Common Law “inconsistency test” is informed by consideration of fairness – see *Mann v Carnell*

## LPP – HOW DO YOU LOSE IT?

- *Mann v Carnell* (1999) 201 CLR 1:
  - LPP is impliedly waived if the client’s conduct is **inconsistent** with the maintenance of **confidentiality** which LPP exists to protect.
  - Implied waiver occurs where a privileged communication is voluntarily disclosed to a 3rd party on a non-confidential basis.

## LPP – HOW DO YOU LOSE IT?

- Waiver of privilege over advice also waives privilege over associated documents considered in, or influencing, the advice e.g. investigation report.
- Waiver/disclosure does not have to be to the opposing party, once privilege is lost, it is lost for all purposes and against all parties – not just the party to whom the legal communication was disclosed historical disclosure is fatal.
- Disclosure of substance, gist or conclusion of advice will waive privilege.

## LPP – HOW DO YOU LOSE IT?

*Ampolex Limited v Perpetual Trustee Company (Canberra) Limited* (1996) 40 NSWCR 12:

- Part B statement lodged with ASIC, Ampolex set out its views on the litigation: having “*regard to the pleadings, the evidence available to Ampolex and the advice of the barristers and the solicitors engaged by Ampolex . . . Ampolex considers that ... it is likely that Ampolex will be successful . . .*”
- No waiver. Statement of opinion. Substance of advice not revealed.

## LPP – HOW DO YOU LOSE IT?

*Switchcorp Pty Ltd v Multiimedia Limited [2005] VSC 425*

- ASX announcement by Multiimedia:
 

*“The Board’s lawyers have been instructed to vigorously defend the claim and have advised that the plaintiff’s claim will not succeed.”*
- Privilege waived: *“Clear and deliberate disclosure of the gist or the conclusion of legal advice received by Multiimedia”.*

## LPP – HOW DO YOU LOSE IT?

*Seven Network v News Ltd (No 12) [2006] FCA 348:*

- Discovered board papers contained the statement:
 

*“Our legal advice is that the risk of damages being awarded against Optus is low”*
- Disclosure of “gist” or “conclusion” of advice waived privilege in the legal advice.
- Optus ordered to produce all documents relating to the advice.

## LPP – HOW DO YOU LOSE IT?

- *Nine Films & Television v Linux Television* [2005] FCA 356
  - “We’ve engaged Stuart Littlemore QC and he has reviewed everything in great detail and we are moving forward based on his recommendations”
  - No waiver as the substance and content of the advice was not disclosed with specificity or clarity

## LPP – HOW DO YOU LOSE IT?

- *Krok v Commissioner of Taxation* [2015] FCA
  - The partial disclosure of the “gist” of legal advice in sworn affidavits had “necessarily put in issue and laid open to scrutiny the confidential communications”.
  - The Court held that the privilege that would otherwise attach to the communications had accordingly been waived.

## JOINT PRIVILEGE

- Parties have joint interest in subject matter
- Usually where single lawyer acting for multiple parties under joint retainer
- Example - law firm acting for a company and its directors or partners of a partnership
- Best practice to formally record legal relationship
- Waiver only with the consent of all

## COMMON INTEREST PRIVILEGE

- Sufficient identifiable commonality of interest
- Allows disclosure between parties without waiver as against all other persons
- Examples:
  - insurer and insured
  - parent and subsidiary
  - defendants with the same interest in litigation
- **Waiver by one effects waiver by all**
- Best practice to document relationship with obligations of non-disclosure
- *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Limited (No 2)* [2014] FCA 481



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## QUESTIONS?



**Mark Easton**

Partner - Litigation & Dispute Resolution

T: (02) 9513 2482

E: mark.easton@klgates.com

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