CHECK YOUR [LEGAL PROFESSIONAL] PRIVILEGE - A TIMELY REMINDER FROM THE FEDERAL COURT OF AUSTRALIA

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Australia Complex Commercial Litigation and Disputes Alert

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In *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278, the Federal Court of Australia has found that the majority of 116 sample documents considered by it were not subject to legal professional privilege and therefore not shielded from production to the Commissioner of Taxation (the Commissioner).

PricewaterhouseCoopers (PwC) previously objected to producing some 15,500 documents to the Commissioner on the basis that they were privileged. In response, the Commissioner commenced a proceeding in the Federal Court of Australia seeking declaratory relief to the effect that those documents were not privileged.

PwC's previous privilege claims will undoubtedly need to be revisited in light of Moshinsky J's judgment, subject of course to any appeal from it.

BACK TO BASICS - LEGAL PROFESSIONAL PRIVILEGE PRINCIPLES

Whilst legal professional privilege judgments concerning large professional services firms and/or their clients often attract significant attention, they typically comprise a "refresher" of what are long-standing principles governing this issue as follows.

- First, was the communication in question **confidential**? In other words, was the communication made in confidence, with its contents not generally known or widely disseminated?
- Second, was the communication made in the context of a **lawyer-client relationship**?

  Applying this element to the in-house context, was the in-house counsel (ie the lawyer) advising their employer company (ie the client) in their legal capacity?
- Third, was the communication made for the **dominant purpose** of:
  - giving or receiving legal advice to the client; or
  - the client being provided with legal services relating to current or anticipated litigation to which they are or may be a party?

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COMMISSIONER V PWC - HIGH-PROFILE CHALLENGES TO PRIVILEGE CLAIMS

What makes *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 particularly interesting? PwC Australia provided both legal and non-legal services to its clients, meaning the extent of the lawyer-client relationship was in issue.

The Commissioner disputed PwC's privilege claims on the basis that:

- the "Statements of Work" detailing the terms of PwC Australia's engagements by its clients did not establish a lawyer-client relationship between them;
- PwC Australia, "as a matter of substance", did not provide services to its clients pursuant to a lawyer-client relationship; and
- the 15,500 documents over which a claim of legal professional privilege was made did not satisfy the "dominant purpose" test outlined above.

Moshinsky J was not satisfied that there was no lawyer-client relationship between PwC Australia and its clients whatsoever pursuant to the terms of engagement between them. One PwC Australia partner was an Australian legal practitioner and providing legal services to the clients, such that Moshinsky J held that a lawyer-client relationship existed in at least some circumstances between them.

As Moshinsky J declined to make a generalised finding that there was no lawyer-client relationship between PwC Australia and its clients, all that was left for the Federal Court of Australia to do was to assess whether each of the sample documents was made for the dominant purpose of giving or receiving legal advice.

Whilst a significant portion of Moshinsky J's findings on this issue have not been published to the public as they disclose the contents of documents over which privilege is claimed, his Honour noted that the provision of both legal and non-legal services by PwC was a "*critical part of the context*" in assessing the "dominant purpose" of each of the sample documents.

We infer from Moshinsky J's judgment that the role of the PwC person (eg lawyer, auditor, accountant) behind each communication with their clients was critical in assessing whether that communication was indeed made for the dominant purpose of giving or receiving legal advice.

TAKEAWAYS

As always, legal professional privilege must be at the forefront of the minds of lawyers (be they in private practice or in-house counsel) and their clients.

Key considerations include:

- The audience receiving the communication - will the communication remain sufficiently confidential if made to that audience?
- The person sending and/or receiving the communication - is it in the context of a lawyer-client relationship? If an in-house lawyer is sending or receiving the communication, are they doing so in their legal capacity?

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If, for example, the in-house lawyer is also the company secretary, then there may be questions as to whether the communication was made in the context of a lawyer-client relationship.

- The dominant purpose of the communication - was the ruling, prevailing or most influential purpose of the communication to provide or receive legal advice, or otherwise to receive legal services in relation to current or anticipated litigation?
- The risk of privilege being waived over the communication - is there any prospect that the content of, and/or audience receiving, the communication is such that it is inconsistent with the maintenance of privilege?

Here, the Commissioner challenged the basis of PwC's lawyer-client relationship with its clients on grounds that it provided both legal and non-legal services to them and draw clear lines of division between legal and non-legal services to ensure the dominant purpose of each communication is in keeping with that division so as to avoid any unintended waiver of privilege.

Finally, this decision is also another example of a regulator challenging privilege claims made over documents otherwise responsive to a notice to produce issued by it. Parties must be readily able to "back up" their privilege claims with evidence.

The Federal Court of Australia's judgment can be accessed here.

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