

LEVEL **22** CHAMBERS

Ethics & privilege

Wen H. Wu

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Outline

- Basic rules
- Integrity & independence
- Legal professional privilege
- Robodebt
- Star Casino
- AI

Basic rules

- **Uniform solicitors' conduct rules** in NSW, VIC and WA.
- A solicitor has a **paramount duty to the court and the administration of justice, which prevails to the extent of any inconsistency** with any other duty: r 3.1.
- Among other ethical duties, a solicitor must **deliver legal services competently, diligently** and as **promptly** as reasonably possible: r 4.1.3.
- They must **avoid any compromise to their integrity and professional independence**: r 4.1.4.

Integrity & independence (I)

- **Integrity and independence are important considerations for in-house lawyers** because:
 - They are directly employed by the organisation.
 - They work closely with the business on a day-to-day.
- These lead to **risks of compromise to integrity and loss of independence**.
- **Positive obligation to avoid** compromise and loss of independence (r 4.1.4).

Integrity & independence (II)

- **What is independence?**
- “**An independent legal adviser brings a disinterested mind** to bear on the subject matter of the legal advice. If the **personal loyalties, duties or interests** of the inhouse lawyer **do not influence the professional legal advice** given, the requirement for independence will be satisfied.”
 - *Aquila* [2013] QSC 82 at [10]
- Indicia of independence include a **practising certificate** or a **separate legal team** within the organisational structure:
 - *Racing NSW* [2024] NSWSC 312 at [13]

Integrity & independence (III)

- There is a debate **whether there is a requirement to prove independence in a claim of legal professional privilege (LPP)**.
- The view preferred by more recent authorities is that there is **no separate requirement to prove independence in a LPP claim**.
- An in-house lawyer’s **degree of independence** is relevant to whether the **lawyer was acting in their capacity as a lawyer** or acting in some other capacity, which goes to the **dominant purpose test** for a LPP claim.
 - *Archer* [2013] FCA 1098 at [72]-[73]; *Martin* [2019] FCA 96 at [187]; *NSW Ports* [2020] FCA 1232 at [48]; *Andrianakis* [2022] VSC 196 at [139].

Legal professional privilege (I)

- Everyone knows that in Australia, we have the dominant purpose test for LPP.
- That is, whether the **dominant purpose** for creating the document or making the communication was:
 - the provision of legal advice (**advice privilege**); or
 - the provision of legal services in relation to an anticipated or pending proceeding (**litigation privilege**).
- Principles summarised here: *IOOF v Maurice Blackburn* [2016] VSC 311 at [47](1)-(13).
- Dominant purpose test applies to **IP advice privilege** too: *Patents Act*, s 200.

Legal professional privilege (II)

- **What is legal advice?**
- “[A]ppropriately broad and practical approach to the scope or meaning of ‘legal advice’ ... There are elements of the requested advice that might perhaps be said to involve commercial or administrative matters, however the advice could also be said to involve **what the Port of Newcastle parties should or should not do in a particular legal context**. Elements of the advice also involve the Port of Newcastle parties’ legal obligations. The **commercial or administrative aspects of the advice are essentially part of the overall legal advice and cannot be separated from it.**”
 - *NSW Ports* [2020] FCA 1232 at [194].

Legal professional privilege (III)

- “The fact that some in-house lawyers may have a **mixed role in their organisation does not preclude their documents/communications from attracting privilege**.”
- It is important to ascertain whether the in-house lawyer has **functions other than those involving legal advice or litigation** as that may affect the purpose of the communication.
- For legal advice/litigation to be the **dominant purpose, the in-house lawyer must have been acting in a legal context or role** in respect of the document or communication in question.
- **Where the document/communication involves commercial or administrative matters**, that does not preclude the dominant purpose being a privileged one, **provided that they are essentially part of the legal advice and not separable**. In appropriate circumstances, documents or communications concerning commercial or administrative matters may form part of a ‘**continuum of documents or communications** in which legal advice is sought and given.”
 - *Andrianakis v Uber* [2022] VSC 196 at [138].

Robodebt (I)

- “It is apparent that **the professional independence of both agencies in-house lawyers was compromised in relation to the Scheme**. ... The in-house lawyers involved in the provision of advice in relation to the Scheme **did not uniformly display a professional ethos**.” (Report, 519)
- “DHS lawyers gave evidence of their perception that, even where they sought to act independently, they were **constrained by the culture of the department which discouraged this behaviour**.” (Report, 521)
- “The position that income averaging was a **long-standing lawful practice was so entrenched within DHS that lawyers at all levels were unable to question it in accordance with their professional obligations**.” Describe examples in which external criticism of the practice were drawn to DHS lawyers’ attention. (Report, 521-522)

Robodebt (II)

- “Chief counsel of DHS, Ms Musolino, ... demonstrated **a tendency to accommodate DHS’s policy position in the face of conflicting advice and to advocate for the department’s position** rather than independently considering it.
- **Ms Musolino’s own description of her role** [‘a manager of the legal team, managing the resources and the training and the systems and the processes, rather than the day-to-day supervision’] **downplays her professional obligation to be independent and the need to independently form her own view** about matters where she was providing advice.” (Report, 522)
- **Pro-activeness:** “[T]he role of chief counsel includes the **capacity to recommend the department obtain legal advice, particularly if a significant legal issue has been identified**. There is no need for instruction to make that recommendation.” (Report, 522)

Robodebt (III)

- **Favouritism:** “Melanie Metz (former principal government lawyer, DSS) said she found the culture at DSS to be a very difficult one where **some senior officers were favoured by the leadership over others, which affected who was appointed to the role of chief counsel.**” (Report, 523)
- **Lack of independence:** “The [2017 DSS] advice **positively asserted the legality of using income averaging ‘as a last resort’ without citing any legislative provisions or case law** to support that position and was obviously inconsistent with a previous advice given in 2014 on the same question. ... [T]he principal legal officer who provided that advice was influenced by **pressure to meet ‘the departmental business need’** for a legal justification for what it was doing...” (Report, 523)
- **Recommendations 19.2-19.3:** Regular training; Legal practice standards

Star Casino (I)

- Under the heading “Effectiveness of the GLT [Group Leadership Team] throughout the relevant Period”:
- “During the course of the public hearings of the Inquiry, a picture emerged of the GLT as a **dysfunctional and divided group**. ... In the course of the public hearings before the Inquiry, a number of particular incidents were raised which are illustrative of the problems affecting the GLT’s operations.” (Report, [55], [65])
- **Ms Ivanoff**: “I did **not feel like I was being engaged to the fullest extent** as the Chief Legal Officer of the organisation. So I did feel that **I would be brought in and out of topics at whim by the CEO**, which I found quite – quite awkward, to say the least. I also found that **some of the frameworks and the accountabilities were very unclear** ... And I just felt that from a transparency perspective or, if you like, a visibility perspective, **I wasn’t really getting the fullest picture.**” (Report, [79])

Star Casino (II)

- “Ms Ivanoff said that **Mr Cooke [Group CEO] would negotiate legal agreements on his own and would not consistently involve Ms Ivanoff**, such that he would come back to her ‘with a version and [skip] maybe two or three versions in between’. She described that as ‘haphazard’. **She also said she felt ‘undermined or excluded’, as sometimes Mr Cooke or the Chief of Staff would go directly to external law firms without involving Ms Ivanoff**, and she would only hear about it ‘more often than not by the external legal provider?’” (Report, [80])
- Ms Ivanoff ultimately resigned after four months and left after 10 months (contractual notice period): Report, [138]-[168].

AI (I)

- **Safety issues with AI**, including:
 - It's intelligent, but that doesn't mean it won't make mistakes.
 - Humans may trust AI too much, even when it makes mistakes.
 - AI's potential for mistakes can distract from human decision-makers .
 - AI's users and monitors might make mistakes.
 - **AI's successes may deteriorate human experts' skills.**
 - Undetected AI bias.
 - AI supports novel ways to cause harm.
 - AI-AI reacts too quickly for us to control.
- (Schaich Borg et al, *Moral AI and How We Get There* (2024), 48-52)

AI (II)

- **Joint Statement on the Use of Artificial Intelligence in Australian Legal Practice** (NSW, VIC & WA)
- “When using AI and other legal technology, **lawyers must continue to maintain high ethical standards and comply with their professional obligations** under [the *Uniform Law* and the *Uniform Conduct Rules*], including:
 - **Maintaining client confidentiality** ... If lawyers use commercial AI tools with any client information, they need to carefully review contractual terms to ensure the information will be kept secure.
 - **Providing independent advice** ... Lawyers are responsible for exercising their own forensic judgement when advising clients ...
 - **Being honest and delivering legal services competently and diligently** ... lawyers using AI to prepare documents must be able and qualified to personally verify the information they contain, and must actually ensure that their contents are accurate, and not likely to mislead...”

AI (III)

- **NSW Supreme Court Practice Note on the Use of Gen AI (SC GEN 23):**
- [9A]: Practitioners must **not** enter any information subject to the implied/*Harman* undertaking **unless** they are satisfied the information:
 - will **remain within the controlled environment, subject to confidentiality restrictions** on the supplier of the technology that the information is not made publicly available and not used to train any LLM;
 - is **used only in connection with the proceeding** (i.e. not become part of the organisation's general knowledge-bank), unless required or permitted by law to be disclosed; and
 - is **not used to train the Gen AI or any LLM.**
- [16]-[18]: Human verification of references in **submissions** etc.
- [10]-[15], [19]-[25]: No use of Gen AI for **affidavits, witness statements, expert reports** etc, except with the Court's leave.

Questions?

