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Paul McNab, DLA Piper Sydney, discusses the March 22 Federal Court of Australia judgment in a long-running dispute against Pricewaterhouse Coopers determining that some tax documents are privileged, others are not.

Complex tax disputes (and tax risk issues in transactions) often arise in relation to cross border dealings. A critical part of understanding the risk is the ability to quickly and thoroughly gather the relevant evidence. It is common for the case theory to evolve as this is done, and the initial understanding of the evidence may prove to ultimately be quite incorrect. Managing this process though a well integrated global legal team enables taxpayers to ensure that their final representations to tax authorities are complete, accurate and well argued. And that initially gathered incomplete or inaccurate information, gathered by the legal team under privilege, cannot be forcibly obtained.

A final, first instance, judgement of the Federal Court has now been released in the legal professional privilege dispute between the Australian Taxation Office and PricewaterhouseCoopers in relation to its work for the JBS global food processing group (Commissioner of Taxation v PricewaterhouseCoopers [2022] FCA 278.

The decision is an Australian landmark in the examination of the application of legal professional privilege to the work of firms in Australia that operate as "mixed law and other services" firms (Multi-Disciplinary Partnerships, or MDPs). This is most relevant for the "Big 4" accounting firms where lawyers often form a minority of client service teams, particularly in areas such as tax.

The Court initially released a very limited part of its conclusions and asked PwC and its client to suggest redactions to the judgement that would protect legal professional privilege in documents where the court found it existed. The final redacted version has now been released and can be found at:
https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2022/2022fca0278

The final published judgement is 932 paragraphs long, over 228 pages. There are 703 redactions, but the result is still extremely useful.

The best starting point is actually para 931 (the summary of principles the Court applied).

The judgement represents a detailed analysis of only 116 of the 15,500 documents in dispute (out of a total of 44,000 documents originally sought by the Commissioner and over which PwC and its client claimed privilege). The parties must now agree how the judgement should be used

to guide the resolution of their privilege dispute. It is possible the substantive tax issue remains to then be resolved.

There are a number of other disputes that are current in Australia in relation to similar situations.

It seems clear that the parties intended, or at least hoped, that all 116 documents would be privileged. The fact that less than 50% were found to be privileged would seem to be principally a product of a lack of clarity around the manner in which lawyers and non-lawyers operated together. And possibly even the extent to which the particular lawyer might be able to actually give advice on some of the topics. For some of the documents it is difficult to see that privilege could ever have arisen in the context of the dealings between the parties in this particular engagement structure.

It is also clear that in a team giving legal advice, where lawyers are in the minority, the risk of privilege not being available is significantly greater. This is especially the case where some of the non-lawyers are as, or perhaps even more, skilled than the lawyer in their subject matter. Meaning they are competent to engage directly with other team members (and directly with the client) without the lawyers supervision. And may have a usual practice of doing so, when not engaged in legal engagements. Or where they are subject matter experts in fields that are not the core competence of the lawyer.

It is also clear that in multi-jurisdictional transactions, best practice is that legal engagements should be in place in all jurisdictions with the local office of the law firm.

The process by which the judgement explores these conclusions is interesting in many respects. Importantly it contains a detailed discussion of the law of privilege in Australia and explores its operation in the quite complex context of a combined team of lawyers and non-lawyers. Working on projects that involve legal, and non-legal advice. It also gives a quite interesting overview of the factual conduct of a complex assignment by a large firm. Including the roles of the team members.

Some interesting paragraphs along the way include:

The Court clearly accepts that some "commercial" advice can be legal advice (see for example para 239).

Mixed purposes, where non lawyers are involved, can be fatal to claims of privilege (see for example para 248 and 257)

The actual behaviour of non-lawyers must be consistent with the assertion that they are facilitating the giving of legal advice by the relevant lawyer (see for example para 262-267, and para 281 and especially regarding foreign affiliate firms, para 304)).

Paragraphs 171-172 discuss the need for a lawyer to be sufficiently skilled in a subject to actually sign off advice.

From paragraph 175 the Court describes how to approach the analysis of email chains.