

15 February 2018

Mr Andrew Hastie MP
Chair
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
Canberra ACT 2600

By email: pjcis@aph.gov.au

Dear Mr Hastie

Response to question on notice: legal professional privilege

On 30 January 2018, the Law Council appeared before the Parliamentary Joint Committee on Intelligence and Security (**the Committee**) in relation to proposals contained in the Foreign Influence Transparency Scheme Bill 2017 (**FITS Bill**) and National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (**NSLA Bill**).

In the course of providing evidence, I was asked to take on notice a question regarding the operation of legal professional privilege and the potential interaction with proposed disclosure obligations contained within the FITS Bill.¹

The Hansard transcript of this exchange reads as follows:

Mr Bailes: Yes, I heard that, and it did stimulate some thought. The other participants, Mr Moses and Ms Macdougall, weren't here for that. The question was whether or not the class should be with or, if you like, the subject of what they were dealing with dealt with, so that some type of disclosure is made on a document that might be presented to a member of parliament. That has an elegance to it, Senator. I think the one aspect that we would need to think about is the question of whether this a client privilege and what to do about that if you are instructed not to make that disclosure. It may be that that would need to be accommodated within the advice that is given to that client. But there is certainly a certain elegance about going after what is the subject matter, what you're trying to get to, rather than just picking up an entire profession and requiring registration in certain circumstances, which—as you've heard from our constituent body, Law Firms Australia—may not ultimately be proportionate insofar as the regulatory burden is concerned and then the advantage that you might derive from it.

¹ Parliamentary Joint Committee on Intelligence and Security (30 January 2018) Committee Hansard, at 42.

Senator Fawcett: Can I ask you to take on notice the issues around legal professional privilege?

Mr Bailes: Yes, Senator. It's an ethical question for us, and it's not a particularly easy one to answer, in that clients will ask for the cloak of privilege, but we'll give it some thought.

This document provides further input to the Committee on the Law Council's view as to whether the disclosure obligations arising from the proposals in the FITS Bill are consistent with established principles of legal professional privilege.

The current proposed exemption for legal professionals

Proposed section 25 of the FITS Bill provides an exemption for otherwise registerable activity that is 'solely, or solely for the purposes of, the provision of legal advice or legal representation in judicial, criminal or civil law enforcement inquiries, investigations or proceedings'.

The Explanatory Memorandum to the FITS Bill notes that the exemption is 'intended to recognise the proper role of the legal profession in providing legal advice to foreign principals'.² It further explains that the limitation to activity 'solely by way of' and 'solely for the purposes of' are intended to convey that activities covered by the exemption must be able to be 'completely and wholly considered as legal advice or legal representation in judicial, criminal or civil law enforcement inquiries, investigations or proceedings'.³

In its submission, the Law Council suggested that this exemption was overly narrow in its application and should be expanded to cover activities that are incidental to the provision of legal advice or representation. It was further submitted that the exemption should be extended to cover other professions (such as medical practitioners) that may have clients that fall within the proposed definition of foreign principal.⁴

Disclosure of privileged information

The FITS Bill contains a range of reporting and disclosure obligations on registrants and the foreign principals they represent. This includes the ability for the Secretary to compel disclosure of information where they reasonably suspect that a person might be liable to register under the scheme.⁵ Once registered, there are further obligations to disclose information about a foreign principal, some of which are delegated to rules to be determined under proposed section 71.

Noting these disclosure obligations and ability for the Secretary to compel certain information where it is reasonably suspected that a person might be liable to register under the scheme, there are concerns as to whether there is the potential for legal professional privilege to be eroded. In this regard, the Law Council considers it critical that any registration requirement or disclosure obligation under the FITS Bill is not in conflict with existing legal professional privilege obligations, noting that existing Commonwealth laws that have the effect of abrogating legal professional privilege are rare.⁶

² Foreign Influence Transparency Scheme Bill 2017 (Explanatory Memorandum), at page 61

³ Ibid, at page 62.

⁴ Law Council of Australia, submission on the Foreign Influence Transparency Scheme Bill 2017 (22 January 2018), at [46] - [49].

⁵ Foreign Influence Transparency Scheme Bill 2017, at proposed section 45.

⁶ See Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Report 129), at [12.54].

The Law Council notes that the current position in Australia with regards to privileged communications is the 'dominant purpose' test.⁷ That is, professional privilege attaches to information or the production of documents which would reveal communications between a client and their lawyer made 'for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings'.⁸

Proposed section 25 of the FITS Bill appears to vary from this position by removing the dominant purpose test and reverting to the previous sole purpose test by only exempting activity that is 'solely, or solely for the purposes of, the provision of legal advice or legal representation in judicial, criminal or civil law enforcement inquiries, investigations or proceedings'. It is submitted that if the exemption is to remain for legal advice or representation, it should maintain consistency with the dominant purpose test.

When applying the dominant purpose approach, it is clear that for something to constitute legal advice it is not necessary that the only subject matter in the communication be legal advice. Commercial advice may be included as long as the dominant purpose was for legal advice. This was explained in *Seven Network Ltd v News Ltd*, where Tamberlin J noted:

Commercial reality requires recognition by the courts of the fact that employed legal advisers not practising on their own account may often be involved to some extent in giving advice of a commercial nature related to the giving of legal advice.

*Such involvement does not necessarily disqualify the documents relating to that role from privilege. The matter is necessarily one of fact and degree and involves a weighing of the relevant importance of the identified purposes.*⁹

As noted by Barrett J in *Apple Computer Australia Pty Ltd v Wily*, 'privilege exists so that a person may consult his legal adviser in the knowledge that confidentiality will prevail'.¹⁰ While it is correct to say that a communication from a lawyer will not be privileged if they are acting in a non-legal capacity and are providing something other than legal advice, that proposition does not address whether work was in fact undertaken by a lawyer, acting as a lawyer, doing things that lawyers can and do with their legal skill set, and whether the work product can fall within the broad definition of what the courts recognise can be legal advice or assistance.

The concept of legal advice and legal professional privilege is not limited to communications about the clients' legal rights and obligations. It is a necessarily broad concept and 'extends to professional advice as to what a party should prudently or sensibly do in the relevant legal context'.¹¹ It also includes, for example, advising a client on how to present material persuasively¹², assisting promoters of private bills¹³, and assistance to an objector at a planning inquiry for the purpose of enhancing the prospects of a successful outcome¹⁴. The privilege protects communications that are sufficiently connected with the giving or obtaining of legal advice or assistance.¹⁵

⁷ *Esso Australia Resources Limited v Federal Commissioner of Taxation* (1999) 201 CLR 49.

⁸ *Daniels Corp v ACCC* (2002) 213 CLR 543, at [9].

⁹ *Seven Network Ltd v News Ltd* [2005] FCA 142, at [5].

¹⁰ *Apple Computer Australia Pty Ltd v Wily* [2002] NSWSC 855, at [11].

¹¹ *AWB v Honourable Terrance Rhoderic Hudson Cole (No. 5)* [2006] SCA 1234, 155 FCR 30, at [7].

¹² *Three Rivers District Council and others (Respondents) v. Governor and Company of the Bank of England (Appellants)* (2004) [2004] UKHL 48.

¹³ *Ibid* per Lord Scott of Foscote at [40]-[41].

¹⁴ *Ibid*, per Lord Scott at [39] and Lord Brown of Eaton-Under-Heywood at [121].

¹⁵ *Australian Mud Company Pty Ltd v Coretell Pty Ltd* [2014] FCA 200; 106 IPR 49 per Nicholas J at [15].

In light of this, the Law Council is concerned that the existing exemption from registration contain at proposed section 25 does not reflect the current law as it relates to legal professional privilege, and may in some instances lead to an abrogation of this principle. It is submitted that a broader exemption, as proposed by both the Law Council and Law Firms Australia in their written submissions would address these concerns.

Thank you for the opportunity to provide a supplementary submission on the issue of legal professional privilege.

Please contact Natasha Molt, Deputy Director of Policy, Policy Division [REDACTED] [REDACTED] in the first instance, if you require further information or clarification.

Yours sincerely

Morry Bailes
President