

# In-house lawyers need practising certificates

By Jayne French, Ethics & Practice

There is a common misconception amongst in-house and pro-bono lawyers that they do not require practising certificates. This article clarifies the issue.

Section 21 of the *Legal Practitioners Act 1981* (SA) (the Act) states that it is an offence for a person who is not a local legal practitioner to practise the profession of the law or hold themselves out as being qualified to practise the profession of the law. The definition of a local legal practitioner is a legal practitioner who holds a practising certificate.<sup>1</sup>

So what constitutes practising the profession of the law? Section 21 provides a partial definition only. It states that that practising the profession of the law includes preparing, for fee or reward, any instrument creating, transferring, assigning, modifying or extinguishing any right, power, or liability at law or in equity.

The case law provides a much broader definition. In essence, the courts have stated that practising the profession of the law means providing, for or on behalf of another person, advice or representation with respect to that person's legal obligations and entitlements, whether or not it is for fee or reward. Doing the following, whether or not it is for payment, will always constitute practising the profession of the law:

- provision of legal advice and representation;
- interpreting legal documents, legislation and case law;
- drafting any legal document.

While section 21 does provide for some exceptions to the requirement for a practising certificate this does not change the fact that what is being done is practising the profession of the law. Conveyancing involves tasks that constitute practising law, but section 21 permits someone without a practising certificate to perform these tasks under certain limited circumstances.

Just because a person does not define themselves as a lawyer does not mean that they are not practising the profession of the law. Dal Pont observes that whether "*an uncertified person describes himself or herself in other than expressly legal title is no defence to a charge of practising as a lawyer, if he or she in fact performs lawyers' work.*"<sup>2</sup>

Section 21 establishes the requirement for an in-house or pro bono lawyer to hold a practising certificate but there are other issues to bear in mind.

The fact of holding a practising certificate will assist a lawyer when making a claim of legal professional privilege. The ACT Court of Appeal in *Commonwealth v Vance*<sup>3</sup> found that the possession of a certificate will be a relevant factor in determining whether or not an in-house lawyer is providing independent, professional legal advice sufficient to make such a claim. The Court cited the decision of the Victorian Supreme Court in *Australian Hospital Care v Duggan (No 2)*<sup>4</sup> which concerned an in-house lawyer who did not hold a current practising certificate. Gillard J in that decision extensively outlined the case law establishing independence as a crucial element of the features that must be

present for client legal privilege (or other legal professional privilege) to apply in respect of a confidential communication between a private sector employer and its own employee lawyer. Gillard J also noted that "*the facts of qualification and entitlement to practice are safeguards against a legal practitioner failing to act independently*".

In the Supreme Court of Queensland decision of *Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd*<sup>5</sup>, Boddice J briefly addressed the holding by an in-house lawyer of a practising certificate as relevant to whether independence existed. He said<sup>6</sup>:

*Further, the lack of a current practising certificate, whilst a very relevant factor in determining whether legal professional privilege exists in respect of advice given by in-house legal representatives, is not determinative of the existence of privilege.*

This decision confirms the position that in-house lawyers must remain independent and not be under the direct or indirect authority of a person who is not a legal practitioner.

In addition, by holding a current (and unrestricted) practising certificate an in-house lawyer can also be the solicitor on the record in court proceedings and claim costs in court proceedings. **B**

## Endnotes

- 1 Section 5 of the *Legal Practitioners Act 1981* (SA)
- 2 G E Dal Pont, *Lawyers' Professional Responsibility*, 5<sup>th</sup> Edition (2013) at [2.140]
- 3 [2005] ACTCA 35
- 4 [1999] VSC 131
- 5 [2013] QSC 82
- 6 Ibid at para [23]

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