

# INSURANCE



## LEGAL UPDATE

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## Utmost good faith: The missing authority in the making?

*In September 2005, the Full Bench of the Federal Court handed down its decision in **AMP Financial Planning Pty Ltd v CGU Insurance Ltd** [2005] FCAFC 185 in which it held against an insurer, dismissing a narrow interpretation of the duty of utmost good faith. The decision sets the stage (if special leave is granted) for the High Court to provide its long-awaited views on the meaning of utmost good faith.*

### Key message

*A decision by the Federal Court dismissing an interpretation of the 'duty of utmost good faith' has many implications for insurance companies and sets the stage for the High Court to provide its views on the meaning of utmost good faith.*

In this case, AMP received a number of claims from investors in relation to the conduct of financial planners for whom it was alleged AMP was vicariously liable. Having received advice from senior counsel that it was liable for those claims, AMP sought indemnity from its professional indemnity insurer in respect of that liability. It also sought the insurer's consent to settle some of the claims prior to the commencement of litigation.

The policy responded only to claims, as defined, which meant claims made by way of originating (or similar) process. The insurer neither denied indemnity, nor refused consent to the proposed settlements. Although it reserved its position generally and told AMP to act as a 'prudent uninsured', it also agreed in principle to a protocol proposed by AMP for dealing with the claims.

Under pressure from the regulatory authority, AMP proceeded to settle claims, often paying what the investors demanded with interest. It sent detailed information to the insurer for comment before doing so.

After the settlements had occurred, the insurer declined indemnity on the basis of advice from its senior counsel that AMP was not legally liable to the investors. AMP argued that as the legal issues were not straightforward, the settlements were reasonable. AMP contended that the insurer had not acted in good faith.

In the leading judgment, Justice Emmett said that the insurer's attitude was "tantamount to saying that AMP should await [the institution of proceedings] and then call upon [the insurer] to indemnify it".

His Honour considered that "taking that course, in circumstances where [the insurer] did not formally deny that AMP had a liability and had all of the information that it had asked for would expose AMP to further costs and to difficulties with [the regulator]".

The trial judge had held that a breach of the duty of utmost good faith involved 'some want of honesty'. The majority disagreed, with Justice Emmett saying: "to ignore AMP's requests without any explanation or justification, whether or not a want of

honesty, was capable of constituting a failure to act with the utmost good faith.”

The matter has been remitted to the trial judge to determine whether the insurer’s conduct was a breach of the duty of good faith.

We await with interest whether the High Court will grant special leave to appeal and, if so, what it will say constitutes a breach of the duty of utmost good faith. For the time being, the Full Federal Court has hinted at two examples:

- » AMP argued the insurer’s behaviour during the litigation constituted a breach

of the duty. The majority hinted that this may be arguable. If accepted, this could have profound consequences for insurance litigation and could impose something akin to ‘model litigant’ obligations on insurers

- » the majority agreed that an insurer’s failure to state within a reasonable time its position on indemnity ‘by reason of negligence or unjustified and unwarrantable suspicion as to the *bona fides* of the claim’ may constitute a breach of the duty.

For further information, please contact **Shayne Thompson**

## In-house lawyers: Is a practising certificate necessary to attract privilege?

*In Commonwealth of Australia v Vance [2005] ACTCA 35, the ACT Court of Appeal held that the possession of a current practising certificate, while not conclusive, is relevant to determining whether or not an in-house lawyer is “employed in circumstances where they are acting with appropriate professional standards and providing the independent professional legal advice such that would attract a claim for client legal privilege”.*

### Key message

*A recent ACT Court of Appeal judgment highlights the importance of a practising certificate for in-house lawyers in establishing legal professional privilege.*

### Establishing legal professional privilege

Section 118 of the Evidence Act (Cth & NSW) relates to ‘legal advice’ privilege and provides, *inter alia*, that:

*“Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of a confidential communication*

*made between the client and a lawyer... for the dominant purpose of the lawyer... providing legal advice to the client.”*

For the purposes of section 118, section 117 defines ‘client’ to include ‘an employer (not being a lawyer) of a lawyer’. ‘Lawyer’ is defined in the Act to mean a barrister or solicitor. According to the Court of Appeal in *Vance*:

*“the occasion of the privilege described by the Evidence Act does not specifically require anything more than admission to the status of lawyer for its operation.”*

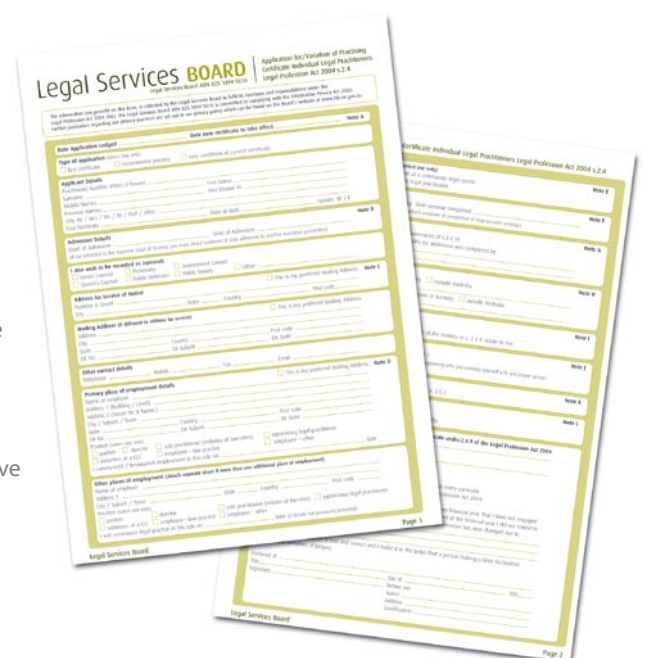
In *Vance*, the Court considered two important aspects of a claim for privilege under section 118:

1. the document over which privilege is claimed must be a ‘confidential communication’. Here the court considered the question: is the in-house lawyer who prepared it ‘under an express or implied obligation not to disclose its contents?’
2. the dominant purpose of the communication must be to provide ‘legal advice’. Here the court emphasised the requirement that the in-house lawyer be subject to appropriate professional independence. The lawyer should not be integrally involved with the employer’s commercial activities (but see also *Seven Network Ltd v News Ltd* [2005] FCA 142).

The Court’s view was that the possession of a practising certificate is an important factor that goes to establishing both aspects. The holding of a practising certificate reinforces the requirement to observe duties assumed on admission to the roll of legal practitioners, including the duty of confidentiality.

Whether or not an in-house lawyer holds a practising certificate is a relevant factor in determining whether a document is privileged, and there is little doubt that it will assist in the process. To label a document as ‘privileged’ or ‘without prejudice’ is insufficient to justify the privilege. The test is one of independence. If the personal loyalties, duties and interests of the in-house lawyer do not influence the professional legal advice given, it is more likely the requirement for independence will be satisfied.

**April O’Keefe** | Solicitor



## Show me the money!

Courts and insurers have long grappled with the issue of financial assistance provided by strangers to litigation. In NSW, the crimes and torts of maintenance and champerty were abolished in 1993 by the **Maintenance Champerty and Barratry Abolition Act (the Act)**. However, the Act does not affect conduct connected with litigation funding or support which may be contrary to public policy or otherwise illegal.

### Key message

*In order to challenge a litigation funding arrangement, the non-party must demonstrate an abuse of process, independent of any complaint that the plaintiff is receiving the unlawful assistance of a third party.*

In *Fostif Pty Limited v Campbells Cash & Carry Pty Limited* [2005] NSWCA 83, the NSW Court of Appeal discussed champerty (sharing profits of litigation), maintenance (intermeddling in litigation) and trafficking in litigation in the context of the Act. The court dealt with a number of issues including whether an outsider to a funding agreement (for example, a defendant) can challenge the agreement on any basis.

The NSW Court of Appeal held that champerty (or other third party assistance) *per se* does not constitute an abuse of process. The fact that the funder had authority to instruct the solicitor did not constitute an abuse of process.

The court also held that public policy and abuse issues will not necessarily constitute a basis for a defendant to challenge the legitimacy of proceedings, but might go to whether the litigation funding contract should be enforced. In order to challenge a litigation funding arrangement, the non-party must demonstrate an abuse of process, independent of any complaint that the plaintiff is receiving the unlawful assistance of a third party.

The High Court has granted special leave to appeal. We suspect that the High Court will use the opportunity to declare the Australian common law on maintenance and champerty. It is possible that the High Court will rule that the common law does not now consider litigation funding to be against public policy (as long as the mechanisms are subject to judicial oversight).

This result would be consistent with modern case law, the development of class actions for individually small claims, and the court's stated aims of enabling access to justice. It would also align the rights of individuals with the rights of liquidators (who currently have statutory rights to sell or assign causes of action against third parties in exchange for a portion of the proceeds of the claim).

**Toby Blyth** | Senior Associate

### Further information

#### Editor

**Baron Alder**  
Senior Associate  
T: +61 2 9513 2434  
F: +61 2 9513 2399  
baron.alder@middletons.com.au

#### Sydney

**Shayne Thompson**  
Partner  
T: +61 2 9513 2470  
F: +61 2 9513 2399  
shayne.thompson@middletons.com.au

#### Melbourne

**George Stogdale**  
Partner  
T: +61 3 9205 2093  
F: +61 3 9205 2055  
george.stogdale@middletons.com.au