

## Guidance Statement No. 15 – In-house counsel - practising certificates (Published 4 October 2018)

### 1. Introduction

#### 1.1. Who should read this Guidance Statement?

This Guidance Statement is aimed at in-house counsel who are employed by a corporation other than an incorporated legal practice in Queensland. It will also be of assistance to other solicitors and law practices.

#### 1.2. What is the issue?

The Guidance Statement considers the requirements for in-house counsel in relation to practising certificates.

#### 1.3. Status of this Guidance Statement

This Guidance Statement is issued by the Queensland Law Society ('QLS') for the use and benefit of solicitors.

This Guidance Statement does not have any legislative or statutory effect. By having regard to the content of this Guidance Statement it may be easier for you to account for your actions if a complaint is later made to the Legal Services Commission.

This Guidance Statement is not legal advice, nor will it necessarily provide a defence to complaints of unsatisfactory professional conduct or professional misconduct.

This Guidance Statement represents a standard of good practice and is endorsed by the QLS Ethics Committee.

### 2. Ethical principles

#### ASCR

Rule 4.1.5 provides:

#### 4. Other fundamental duties

4.1 A solicitor must also:

4.1.1 .....

4.1.5 comply with these Rules and the law.

Rule 37 provides:

### 37. Supervision of legal services

37.1 A solicitor with designated responsibility for a matter must exercise reasonable supervision over solicitors and all other employees engaged in the provision of the legal services for that matter.

## 3. Do in-house counsel require a practising certificate?

*In-house counsel should proceed on the basis that they are engaged in legal practice and, as such, must hold an appropriate practising certificate.*

Subject to certain limited exceptions<sup>1</sup> a person must not “engage in legal practice” in Queensland unless they are an “Australian legal practitioner”.<sup>2</sup> In addition, a person must not represent or advertise they are entitled to engage in legal practice either, unless they are an “Australian legal practitioner”.<sup>3</sup>

An “Australian legal practitioner” is a person who is admitted to the legal profession under the *Legal Profession Act 2007* (Qld) (‘LPA’) or a corresponding law in another Australian jurisdiction and holds a current Queensland practising certificate or a current interstate practising certificate.<sup>4</sup>

The purpose of the above requirements is to ensure that those engaged in legal practice are properly qualified and entitled to do so.<sup>5</sup> Failure to comply with those requirements may constitute unsatisfactory professional conduct or professional misconduct.<sup>6</sup>

There is no “general definition” of the phrase “engage in legal practice” in the LPA.<sup>7</sup> It is defined as “includes practise law”,<sup>8</sup> a concept which is not further defined in the LPA.<sup>9</sup>

However, “engage in legal practice” has been the subject of judicial consideration both in Queensland and other Australian jurisdictions. The courts have interpreted the phrase broadly to mean “carrying on or exercising the profession of law” or “to engage in legal practice as a legal practitioner”.<sup>10</sup> It is clear from the cases that giving legal advice, preparing legal documents and performing other services that affect important rights under the law, and which require skill and knowledge greater than the average person, constitute engaging in legal practice.<sup>11</sup> This is regardless of whether the person could be properly characterised as carrying on the business of providing legal services or whether the services are paid for or not.<sup>12</sup>

The role of an in-house counsel, as a matter of course, involves the giving of legal advice. It would usually also involve preparing legal documents and performing other services that affect important rights under the law and which require skill and knowledge greater than the average person. This is consistent with the definition of “in-house legal services” under the LPA (which is

<sup>1</sup> *Legal Profession Act 2007* (Qld) s 24 (‘LPA’).

<sup>2</sup> *Ibid* s 24(1).

<sup>3</sup> *Ibid* s 25.

<sup>4</sup> *Ibid* s 6.

<sup>5</sup> *Ibid* ss 3, 22.

<sup>6</sup> *Ibid* ss 24(1), 25(1), 27.

<sup>7</sup> *Reichman v Legal Services Commissioner; Legal Services Commissioner v Reichman* [2017] QDC 158, [12] (Shanahan DCJ) (‘*Reichman*’).

<sup>8</sup> LPA sch 2 (definition of ‘engage in legal practice’).

<sup>9</sup> There is a definition of ‘legal practice’ in Part 2.5 LPA, but it is irrelevant for current purposes.

<sup>10</sup> *Felman v Law Institute of Victoria* [1998] 4 VR 324, 352 (Kenny JA) (‘*Felman*’); *Legal Services Commissioner v Walter* [2011] QSC 132, [19]-[21] (Daubney J) (‘*Walter*’).

<sup>11</sup> *Felman* [1998] 4 VR 324; *Walter* [2011] QSC 132; *Legal Services Commissioner v Beames* [2012] QSC 327; *Dean v Legal Practice Board* [2016] WASCA 63; *Reichman* [2017] QDC 158.

<sup>12</sup> *Felman* [1998] 4 VR 324; *Walter* [2011] QSC 132; *Reichman* [2017] QDC 158.

discussed in more detail below) and the position adopted for in-house legal counsel in other Australian jurisdictions.

Accordingly, in-house counsel should proceed on the basis that they are persons who engage in legal practice within the meaning of the LPA. This position will not change simply because an in-house legal counsel may also perform other roles in their position which do not involve engaging in legal practice (e.g. managing the administrative aspects of a corporate service, procurement or compliance function).

In contrast to the position with respect to government legal officers<sup>13</sup> there is no exception to the requirement for in-house counsel to hold a current practising certificate when engaging in legal practice.<sup>14</sup>

The importance of the requirement for in-house counsel to hold a practising certificate is illustrated clearly by the decision in *Legal Services Commissioner v Nguyen (Legal Practice)* [2013] VCAT 345.

In that case, the respondent continued to perform his role as in-house counsel for a corporation for over two years after his last practising certificate expired. The respondent alleged this was simply an inadvertent omission. However, the Tribunal found that for at least the last six months of that period he was aware he did not have a practising certificate but decided to “*chance his hand*”.<sup>15</sup>

Amongst other things, the respondent was found guilty of professional misconduct relating to engaging in legal practice and representing that he was entitled to do so, when he did not hold a practising certificate. In light of those and other offences of professional misconduct the Tribunal made orders that the respondent not be granted a practising certificate for six years and recommended to the Supreme Court that his name be removed from the roll of practitioners.

#### **4. Who can in-house counsel act for under their practising certificate?**

*In-house counsel holding employee practising certificates must not, other than in the case of certain pro bono activities (see below), provide legal services to anyone other than their listed employer or its ‘related body corporate’ (within the meaning of that term in the Corporations Act 2001 (Cth) (‘Corporations Act’)).*

The QLS is prohibited under the LPA from granting or renewing a practising certificate in response to an application from an Australian lawyer where they:

- (a) are employed by a corporation that is not an incorporated legal practice; and
- (b) provide only in-house legal services to the corporation or a related body corporate,

unless the QLS imposes a condition on the certificate that he or she is not to engage in legal practice other than for providing in-house legal services.<sup>16</sup>

A corporation is not an incorporated legal practice if the only legal services that the corporation provides are in-house legal services. In-house legal services mean those legal services provided to a corporation or its related bodies corporate by an employee of the corporation concerning a proceeding or transaction to which the corporation or the related body corporate is a party.<sup>17</sup> If an

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<sup>13</sup> LPA s 12(1).

<sup>14</sup> Ibid ss 12(1), 44(2)-(3).

<sup>15</sup> *Legal Services Commissioner v Nguyen (Legal Practice)* [2013] VCAT 345, [41], [45].

<sup>16</sup> LPA s 353(2)(b).

<sup>17</sup> Ibid sch 2 (definition of ‘in-house legal services’).

in-house counsel has a practising certificate as an employee of such a corporation, they are exempt from the requirement under the LPA to have professional indemnity insurance.<sup>18</sup>

Importantly, and not surprisingly given the insurance implications, the obligation to comply with the practising certificate's conditions is a continuing obligation.<sup>19</sup> Failure to comply with those conditions gives rise to offences under the LPA capable of constituting unsatisfactory professional conduct or professional misconduct.<sup>20</sup> There is also a positive statutory obligation on the holder of a practising certificate to notify the QLS where the holder becomes aware they are no longer covered by the necessary professional indemnity insurance.<sup>21</sup>

In-house counsel must take care to identify their employer by reference to their employment contract and also any of its related bodies corporate.

The LPA adopts the meaning of “*related body corporate*” in the *Corporations Act*.<sup>22</sup> Under the *Corporations Act* two bodies corporate will be related bodies corporate where:

- (a) one is a holding company of the other; or
- (b) one is a subsidiary of the other; or
- (c) one is a subsidiary of a holding company of another body corporate.<sup>23</sup>

The above definition requires consideration of the definitions of subsidiary and holding company under the *Corporations Act*.

A body corporate (“the first body”) will be a subsidiary of another body corporate if:

- (a) the other body controls the composition of the first body’s board;
- (b) the other body is in a position to cast, or control the casting of, more than ½ of the maximum number of votes that might be cast at a general meeting of the first body; or
- (c) the other body holds more than ½ of the issued share capital of the first body (excluding any part of that issued share capital that carries no right to participate beyond a specified amount in distribution of either profit or capital).<sup>24</sup>

A holding company in relation to a body corporate means a body corporate of which the first body corporate is a subsidiary.<sup>25</sup>

The above definitions in turn require consideration of the meaning of ‘control’ under the *Corporations Act*,<sup>26</sup> the circumstances in which the composition of a company’s board is taken to be controlled by another company under the *Corporations Act*<sup>27</sup> and the relevant corporate governance documents (constitution, shareholders’ agreement etc.).

As is evident from the above, the issue of what is a related body corporate may not be straightforward and it is possible that an in-house counsel will not be permitted under their practising certificate to act for all companies within what might be generally understood within a given business to be its ‘company group’.

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<sup>18</sup> Ibid s 353(2)(b).

<sup>19</sup> Ibid s 354(1).

<sup>20</sup> Ibid s 354(3).

<sup>21</sup> Ibid s 354(2).

<sup>22</sup> Ibid s 110, sch 2 (definition of ‘*related body corporate*’).

<sup>23</sup> *Corporations Act 2001* (Cth) s 50.

<sup>24</sup> Ibid ss 46(a); See also ibid ss 46(b), 48 & 49.

<sup>25</sup> Ibid s 9 (definition of ‘*holding company*’).

<sup>26</sup> Ibid s 50AA.

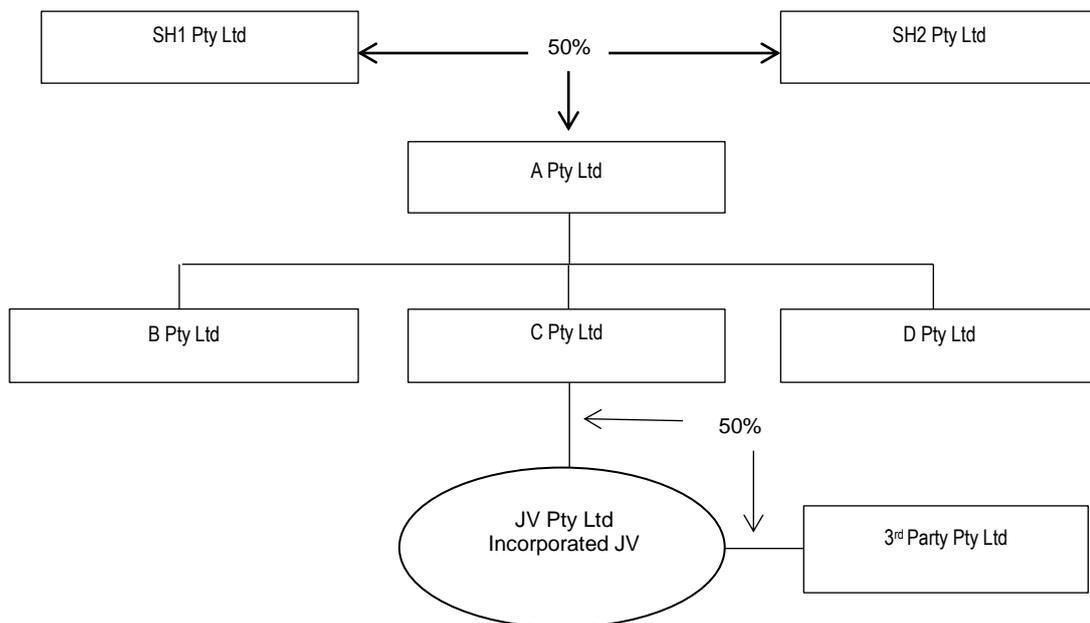
<sup>27</sup> Ibid s 47.

## Example

In the hypothetical company structure, below, SH1 Pty Ltd and SH2 Pty Ltd are shareholders of A Pty Ltd, each having an equal interest in that company, but with neither therefore meeting the 'control' requirements of a holding company. B Pty Ltd, C Pty Ltd and D Pty Ltd are all subsidiaries of A Pty Ltd and, as can be seen from the diagram (Figure 1), they are wholly-owned subsidiaries. C Pty Ltd and 3<sup>rd</sup> Party Pty Ltd are not related bodies corporate, but are the shareholders of an incorporated joint venture each holding an equal interest in it, with neither therefore meeting the 'control' requirements of a holding company.

**Figure 1**

### Hypothetical Company Structure



If a practising certificate was issued to an in-house counsel where A Pty Ltd was the named 'employer', then the only companies the holder could provide in-house legal services to would be A Pty Ltd, B Pty Ltd, C Pty Ltd and D Pty Ltd. This is because they are the only related bodies corporate of A Pty Ltd.

The above structure is only one example of issues that could arise and it is not hard to think of other corporate structures in which similar issues would arise for in-house counsel such as those involving trustee companies or legal service companies.

### Engaging in legal practice for others

It is not unusual for in-house counsel to be approached by persons they work with seeking assistance with personal legal matters. One such situation arose in *Legal Service Commissioner v Kellahan* [2012] QCAT 263. In that case the respondent held a Queensland practising certificate that only allowed him to provide in-house legal services to his employer. The respondent's employer provided business services to a particular individual. The respondent had a "friendly relationship" with the individual and sought to assist him with a family law matter. This involved the respondent writing to the solicitors representing the individual's wife, indicating he was acting for him, filing a document in the Family Court representing he was the individual's solicitor and receiving funds on behalf of the individual. The Tribunal found the respondent had

engaged in legal practice outside the limitations in his practising certificate in the absence of the necessary professional indemnity insurance. While this was done under a mistaken but genuinely held belief, the conduct was still found to be professional misconduct.

In light of those and other offences, the Tribunal made orders that the respondent: be publicly reprimanded; not issued with a practising certificate for 3 years; return to practice only under the supervision, for a 2 year period, of a solicitor holding a principal level practising certificate; upon return to practice arrange a suitable program of retraining in legal ethics in consultation with his supervising solicitor, the Legal Services Commissioner and the QLS; and certain costs orders.

The case highlights that where an in-house counsel is “*engaging in legal practice*” outside the limitations in their practising certificate, they will be doing so in the absence of the necessary professional indemnity insurance. This could be in circumstances where their conduct gives rise to potential personal liability to an aggrieved person.

Similar issues arise for consideration where an in-house counsel is approached either by someone they work with or someone outside of work, to witness or certify a document in a personal matter. Guidance as to whether witnessing or certifying a document is “engaging in legal practice” is found in [‘What’s in a name?’](#) QLS, Ethics Centre, June 2017 and [‘Admitted but not holding a current practising certificate - what can I sign and call myself?’](#) QLS, Ethics Centre, September 2015.

## 5. Can in-house counsel undertake pro bono legal work under their practising certificate?

*In-house counsel may carry out pro bono legal work according to the following endorsements.*

The current form of endorsement for restricted and unrestricted practising certificates issued to in-house counsel are as follows:

Unrestricted employee - corporate	The holder of this unrestricted employee practising certificate must not engage in legal practice except to provide in-house legal services as defined in the Act or as a volunteer at a community legal service or a pro bono project approved by the Australian Pro Bono Centre (ACN 102 444 557).
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Restricted employee - corporate	The holder of this restricted employee practising certificate must not engage in legal practice except to provide in-house legal services as defined in the Act or as a volunteer at a community legal service or a pro bono project approved by the Australian Pro Bono Centre (ACN 102 444 557).
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The above endorsements permit an in-house counsel to volunteer at a community legal service or a pro bono project approved by the Australian Pro Bono Centre. The above-named pro-bono services have been allowed as they provide access to the necessary professional indemnity insurance required under the LPA<sup>28</sup> which would not otherwise be in place for an in-house lawyer.<sup>29</sup> The Australian Pro-Bono Centre established the National Pro Bono Professional Indemnity Insurance Scheme in 2009, which provides free professional indemnity insurance to in-house counsel working on pro bono projects approved by the Australian Pro-Bono Centre.<sup>30</sup>

For the reasons set out above, it is important that before commencing any pro bono legal work that in-house counsel are clear that the pro bono work is of a type permitted under their practising

<sup>28</sup> LPA s 353(3); *Legal Profession Regulation 2017* (Qld) s 73.

<sup>29</sup> LPA s 353(2)(b).

<sup>30</sup> Australian Pro Bono Centre, *Pro Bono Legal Work: A Guide for In-House Corporate Lawyers* (2017) <<https://www.probonocentre.org.au/in-house-guide/>>.

certificates, that they have access to the necessary insurance and what, if any, notification is required under that insurance.

## 6. In-house supervised legal practice

At the time QLS grants a practising certificate it can impose any reasonable and relevant condition on the practising certificate.<sup>31</sup> This includes a condition that may limit the certificate holder to supervised legal practice for a certain period of time.<sup>32</sup>

In that regard, in Queensland an Australian legal practitioner is subject to supervised legal practice for a prescribed period after their first practising certificate is granted. The period of supervised legal practice is either 18 months or 2 years of full-time supervised legal practice depending on how they qualified for admission (i.e. supervised trainee cf. practical legal training course).

It is not unusual for in-house legal functions to include practitioners who have only been recently issued with their first practising certificate. The requirements in relation to supervised legal practice apply equally in an in-house context. Accordingly, it is important that in-house counsel are clear as to what is considered to be “reasonable supervision” for the purpose of the LPA and the Rules and what is required in the role of a supervisor where a practitioner holds a restricted practising certificate.

While the corporate employer of an in-house counsel may have internal policies with respect to training and supervision, it is important to remember that they may not be sufficient or relevant for the purpose of discharging statutory obligations under the LPA and the Rules.

## 7. In-house practice management

As is evident from the above, it is important when recruiting for a position of an in-house legal counsel to include a mandatory requirement that the successful applicant hold a current practising certificate or be eligible to do so. Obviously, in the latter case, it would need to be granted before the successful applicant provided any in-house legal services. It is recommended that in-house legal functions should maintain a register of practising certificates of each of its team members. It is also recommended that practising certificates are produced and reviewed not just prior to employment but also upon renewal each year. It is important that practitioners that are responsible for managing an in-house legal function are aware of any conditions that the QLS may have imposed on those certificates.

## 8. More Information

For further assistance please contact an Ethics Solicitor in the QLS Ethics and Practice Centre on 07 3842 5843 or [ethics@qls.com.au](mailto:ethics@qls.com.au).

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<sup>31</sup> LPA s 53.

<sup>32</sup> Ibid s 55.