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Search warrants, phone PIN codes and legal professional privilege

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The District Court of Queensland has delivered a decision in relation to search warrants and a person's ability to refuse **PIN code** access to a phone where the phone's contents include communications between a person and his/her lawyer.

The facts

In *Barbaro v Queensland Police Service* [2020] QDC 39, a search was conducted pursuant to a warrant obtained under the *Police Powers and Responsibilities Act 2000* ("**PPRA**"). The warrant required the defendant ("**Barbaro"**) to provide the police with access to his phone.

- Barbaro's phone required a PIN code to access the phone's contents.
- Barbaro declined to provide the PIN code to the police on the basis that to do so would enable the police to access legally privileged and confidential information.
- In particular, Barbaro was concerned that all conversations including text messages, emails and Facebook messages between himself and his lawyer would be accessible by police.

As a result of refusing to provide police the PIN code, Barbaro was charged with contravening an order of the warrant (pursuant to s205 of the Criminal Code).

Following a contested hearing, the Magistrate ruled that Barbaro did not have a reasonable excuse to withhold the PIN from the police (on the basis of legal professional privilege), and he found him guilty of the charge.

The appeal

Barbaro appealed the Magistrate's decision and submitted that the Magistrate erred in concluding that the legal professional privilege attached to the PIN itself, rather than to the information contained on the phone.

It was contended that the real question was whether Barbaro:

'…had a reasonable excuse… to refuse to provide access information, as such information would allow police access to legal professional privilege protected information, which was stored on his phone.'

Barbaro submitted that the distinction between disclosing 'access information' (being the PIN code) and disclosing the information itself was an artificial one. The claim of legal professional privilege, when focusing on the information contained in the phone itself, should have been deemed a 'reasonable excuse'.

Reliance was placed on *Luppino v Fisher No. 2* [2019] FCA 1100 ("**Luppino**") (delivered after the contested Magistrate's Court hearing) in which it was said:

[33] '… It would be artificial for a distinction to be drawn in the effect on the privilege between the compulsory disclosure of information, on the one hand, and the compulsory disclosure of the means by which information which is otherwise unascertainable or indecipherable may be read, on the other.'

The respondent (in Barbaro) argued that the definition of what constitutes a 'reasonable excuse' is for objective determination. Further, legal professional privilege could not attach to the PIN itself, only to the contents of the phone. Given a phone could contain much more than privileged information, a failure to provide the PIN code could not attract a reasonable excuse.

Conclusion

The Court allowed Barbaro's appeal and set aside his conviction. In doing so, the Court accepted Barbaro's arguments and agreed with the remarks in Luppino; specifically, that the distinction made between access to the information and the information itself is an artificial one.

This decision will undoubtedly see a rise in people refusing to provide police with the PIN code to their phone in circumstances where the phone contains content which could attract legal professional privilege; such as emails and text messages between the person and his/her lawyer.

Whilst it may not deter police from charging people in those situations (for failing to provide the access information), the decision may encourage more people to contest their charges.

If your property is ever the subject of a search warrant, you should contact our office immediately so that we can provide you with advice and guide you through the process.

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