

Client Legal Privilege and the Impact on In-House Counsel

As the prevalence of in-house lawyers has increased in Australia, so too has the courts' caution in recognising legal privilege in relation to their advice. In the recent Federal Court case of *Rich v Harrington* [2007] FCA 1987 a litigant's right to claim legal privilege for communications from an in-house lawyer, has again been questioned.

In Australia, client legal privilege protects against compulsory disclosure of a communication or document where its dominant purpose is obtaining or giving legal advice, or the preparation for actual or anticipated litigation.

However, there is an emerging judicial concern with establishing the independence of in-house lawyers. Of particular concern is the blending of legal and commercial advice, where it becomes impossible to discern between the two. Increasingly, litigants who claim privilege in respect of communications or documents from their in-house lawyers, are being required to demonstrate that personal loyalties, duties and interests arising from the employment relationship do not influence the legal advice being provided.

In *Telstra Corporation Ltd v Minister for Communications, Information Technology & the Arts* [No.2] [2007] FCA 1445 the presumption against independence of in-house counsel was further advanced with Graham J stating (at 35) "Different considerations may apply if, say, the documents in question were opinions expressed by identified senior counsel where one might start off with the premise that by its nature the document would have privilege attached to it".

The Australian Law Reform Commission (ALRC) released a 2007 discussion paper *Client Legal Privilege and Federal Investigative Bodies*, indicating the possibility of client legal privilege being abrogated for Federal investigations. A final report entitled *Privilege In Perspective – Client Legal Privilege in Federal Investigations* was delivered in early 2008, which indicates that while there is no presumption against in-house counsel, the issue of independence is one which can be put under inquiry.

Some recent cases:

Rich v Harrington [2007] FCA 1987 - Ms Rich brought an action against the partners of PricewaterhouseCoopers (PwC) for sexual harassment, discrimination and victimisation. Brennan J held that the relationship between the in-house legal counsel and the partners he was advising was not one of "professional detachment" and therefore did not attract privilege.

"An in-house lawyer is, by reason of his or her position, more likely to act for purposes unrelated to legal proceedings than an external solicitor who, in the normal course, has no relevant function other than that involving legal proceedings and/or legal advice."



Telstra Corporation Limited v Minister for Communications, Information Technology and the Arts (No. 2) [2007] FCA 1445 - The Court pointed out “the risk that an in-house lawyer will lack the requisite measure of independence if his or her advice is at risk of being compromised” by the nature of the employment relationship. Furthermore the court emphasised the need for a claim of privilege to be justified with evidence.

Seven Network v. News Ltd [2005] FCA 142 - A claim of privilege was rejected due to the involvement of the Chief General Counsel in other commercial activities of the company. It was held that he was not acting in a legal capacity when making the communication over which privilege was sought.

Sydney Airports Corporation Limited v Singapore Airlines Limited [2005] NSWCA 47 - Highlighted the dominant legal purpose test. In this case, a malfunction incident report was rejected as being subject to privilege as there were four purposes to the report, none of which were inherently dominant.

Vance v McCormack [2004] 154 ACTR 12 held that there must be a practical means for displaying independence which take into account the culture of a business. In this case, Defence Legal Officers were subject to a hierarchical chain of command where advice could be overruled. Consequently they were found not to be independent and that privilege therefore could not be claimed.

“ Consult external legal advice when unsure of your independence ”

What can you do to ensure Client Legal Privilege?

- ◆ Ensure your in-house legal counsel is independent by protecting and preserving their autonomy.
- ◆ Consider the possibility of litigation and ensure your involvement as an employer preserves your in-house lawyer’s independence.
- ◆ Develop an internal protocol that separates documents dealing with commercial matters and legal advice. This will enable the dominant purpose to be identified where a document could be perceived as being both legal advice and commercial guidance.
- ◆ Seek external legal advice when independence is uncertain.
- ◆ Implement an employment structure which reflects legal independence such as ensuring lawyers as supervised by other lawyers and that documents and communications indicate the expectation that privilege will apply
- ◆ Avoid instances which may be derogatory to independence such requiring in-house lawyers to take on the dual roles of giving commercial advice/guidance or commissioning documents for multiple purposes.