The Role of In-House Counsel
Address given to Cooper Grace Ward Breakfast Forum
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This morning's address is something of a challenge to me because I expect that you all know more about the topic than I do. My understanding of it is entirely theoretical but I understand that it is hoped that we should soon engage in general discussion rather than you listen to a lecture, so I will tell you what I think and we can discuss whether you think it is right.

I should acknowledge at the outset that I have drawn heavily on an article by Associate Professor Webb in Corporations and Security Law Journal (2005 Volume 23 p 438).

The obvious starting point of any discussion is the potential for conflict between the commercial objectives of a corporation which employs in-house counsel, the desire to maximise profits, and the lawyers' professional obligations to uphold the law, a breach of which can result in professional discipline or striking off in extreme cases.

In-house counsel occupy a professional position which is not entirely consistent with the traditional legal framework. The most obvious difference is that in-house counsel have only one client. This has a number of consequences. The first is that there is a shift in power from the lawyer to the client employer. The loss of that client will have a substantial negative impact on the lawyer who not only loses his or her job but may suffer loss of reputation and difficulty in obtaining another employer.

The background to any conflict is that the in-house lawyer will not seek employment with an organisation whose corporate aims he dislikes. Even if one is not passionate about the employer's commercial activity, he or she is unlikely to be critical of it. In cases where the in-house lawyer shares the employer's viewpoint the scope for critical or detached assessment and advice can be compromised.

If you add to this the factor already mentioned, that the in-house lawyer may be vulnerable to his employer's disenchantment there is added pressure on the lawyer to give advice which pleases rather than displeases his employer. Advice which from a detached point of view might be an impediment to an employer's preferred course of action may not be given because of a lack of detachment and/or an eagerness to please. An interpretation of the law which is, or is close to being, untenable, may be offered to assist the employer.

Such an approach is possible because much of the work undertaken by in-house lawyers is not subject to the scrutiny of others who have an interest in challenging it and are capable of doing so. Much of the work done by lawyers in conventional employment is exposed to the scrutiny of lawyers on the other side of a transaction, or a judge. Propositions of law or assertions as to the meaning of a contract or a statute which unduly favour the proponent will certainly be challenged and foolishness exposed. However where there is no opponent to act as a counterpoint, lawyers may take a view of the law which is overly favourable to their clients' objectives.

An in-house lawyer may be asked to provide advice on or certify with respect to a structure or transaction that achieves a desired end. The only pressure on the lawyer comes from the client/employer to achieve the desired result. Professor Webb suggests that it is this kind of work which has proven the most hazardous for corporate counsel.

Increasingly lawyers are expected to act as certifiers for particular transactions for regulatory purposes. In the Enron scandal in-house lawyers certified that transactions were what the company represented them to be when in fact they were quite different and the certification concealed self-dealing. Sometimes there is a legal requirement for lawyer's certification as to shareholdings or sales of shares but certification that something has been done or as to a state of affairs occurs quite frequently without legal compulsion. The certification will often give rise to a sense of legitimacy in the subject matter of the certification and may give a misplaced sense of confidence to managers that the transaction is a proper one. There can be an obvious danger in this role if the lawyer giving the certificate is the one who had designed the structure or transaction being certified. The problem becomes acute if the lawyer had devised this transaction or given advice which stretches the law because there is no opponent to scrutinize what was said or done.

Professional framework

The Law Council Australia's model rules of professional conduct provide that a lawyer employed by a corporation must not, despite any contrary direction from the employer, act in breach of the legislation applicable to practitioners, or the rules themselves.

Lord Denning made the same point with his usual clarity in a case, *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1972] 2 QB 102 at 129:

> 'Many barristers and solicitors are employed as legal advisers, whole time, by a single employer. Sometimes the employer is a great commercial concern. Other times it is a government department ... . In every case these legal advisers do legal work for their employer and ... no-one else. ... They are, no doubt, servants or agents of the employer. For that reason Forbes J thought they were in a different position from other legal advisers who are in private practice. I do not think this is correct. They are regarded by the law as in every respect in the same position as those who practice on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the Court.'

It is said to be a fundamental principle that the in-house lawyers owes duties to the organisation and not any particular officer or group of officers in it. This is to state the obvious but in practice an in-house lawyer's instructions are likely to come from a particular manager or section of the company. An in-house lawyer will no doubt have a particular reporting structure and will be answerable to a particular person or committee or director. The reporting lines may tend to obscure who the client is. These people will usually, for all practical purposes, represent the company and its interests but on occasion it or they may not. A director or manager may be acting beyond his authority, and will be doing so if he is, for example, defrauding the company. In such a case the relationship of agency breaks down. Such obvious cases aside the in-house lawyer may have to manage what may be a complex triangular relationship between company, its agents and the lawyer himself.

The duty a lawyer owes of loyalty and confidence are not owed to any individual or sub-set of the company but to the corporation as a whole. Lawyers are, of course, bound by duties of confidentiality. A practitioner must never disclose information which is confidential to a client and which is acquired by the practitioner during the client's engagement. The obligation appears in the Law Council's model rules of professional conduct. The duty is wide and extends beyond legal advice to mere information. The duty is not, of course, absolute. Disclosure is permitted where some public interest outweighs the public interest in maintaining confidence. As always a duty to maintain confidentiality does not exist where it is used as a cloak for fraud or criminal wrongdoing.

These exceptions are permissive not mandatory. There is no obligation on the lawyer who holds a confidence to divulge it to detect or prevent fraud or crime. It is simply the case that should he break the confidence and inform the appropriate authorities he will not have broken any professional obligation.

These observations are unexceptional and apply equally to all lawyers, whatever their employment. What is perhaps different for in-house lawyers is that it is not a breach of confidence for such counsel to inform some other part of the company or organisation of a proposed transaction or course of action. Because the organisation is the client rather than any particular individual in it, no internal communication to another officer can be a breach of confidentiality. There may be something that falls short of fraud or crime that the lawyer thinks should be drawn to the attention of an officer more senior than the one to whom he or she normally reports. To do so will not, for the reasons such explained, amount to a breach of confidence.

Professor Webb suggests that a problem which in-house lawyers may face is that they be seen as confidants by other employees who may seek them out to obtain informal advice about their own relationship with the company. In many cases no harm will come from the seeking and giving of advice to employees. However the lawyer must be astute to avoid conflicts of interest and problems of confidence which would interfere with his ability to act effectively for the company. There may be a real risk in acting as counsellor or confidante to other employees. If the advice sought relates to a problem the other has with the company or someone in the company the existence of the problem and its nature and those involved in it may well be facts the company would want to know. But to inform 'the company' may be a breach of confidence that the other employee thought he had with the lawyer. However, once the lawyer is in possession of the information it is his obligation to pass it on to the employer. If the lawyer has in some way expressly or impliedly accepted the other employee as a client he will owe him a professional duty of confidence. He will have as well a professional duty to disclose to the company what he has learnt and there is an insoluble conflict of interest.

Conflicts of interest

In theory there should be no conflicts of interest for in-house lawyers who have only one client. It may be, however, that in a very complex organisation the in-house lawyer will tend to identify with the real people with whom he deals rather than the abstract legal corporation for whom he works. There may be a natural human tendency to identify with individuals and not an impersonal abstract. If a company is large and the lawyer is assigned to work for some part of it, he may perhaps subconsciously align himself with that part. If that part is in competition

with some other parts the problem may be exacerbated. In fact and in theory the obligation of the lawyer is to put the interests of the whole organisation first, even if that means coming into conflict with superiors in the part of the organisation to which the lawyer is assigned.

Problems may also arise when the employer company is one in a group. The lawyer may be asked to give advice with respect to a subsidiary, parent or related company, or with respect to the group of companies. Economically there is much to be said for the view that a group of companies is a single entity and that what is important is the interests of the group as a whole. Orthodox legal opinion in this country is that the interests of companies have to be considered from the point of view of the particular company and not be subsumed within a wider context. There may be exceptions where one is dealing with wholly owned subsidiaries but as a general rule the law is as I have described it, so that if an in-house lawyer is asked to give advice to a related company whose interests may be adverse to the company employing the lawyer, a conflict of interest may arise which should be addressed at the outset.

Uncontroversially, any corporate wrongdoing of which an in-house lawyer becomes aware of should be reported because the company/employer has an interest in knowing that one of its officers is engaged in wrongdoing. There may be a human reluctance to expose an employee with whom the lawyer works closely or to whom the lawyer reports but the obligation is clear. The lawyer's loyalties are owed to the company, not any employee, however senior or influential in the lawyer's career.

Client wrongdoing

I mentioned before the conflict between the profit motive and the obligation of the professional lawyer. There is an economic theory of efficient breach of contract and the law in general. According to this theory legal obligations have no moral content and the question whether or not to breach a contract of the law is an exercise in economics: one weighs and compares the costs and benefits of breach or adherence to it of a legal obligation. A decision is made on the basis of lowest cost or highest return. It would be a breach of professional conduct to advocate a breach of the law, and probably of a contract, despite the economic benefit to be gained from that course. Nor can a lawyer properly advise on a means of breaking the law in a manner which is likely to escape detection. These cases are plain enough but more difficult are cases such as how a lawyer should answer a question about the likelihood of detection or enforcement remedies if detection should occur. To answer such a question may well be to encourage the breach. The question by itself may, however, be innocuous. But the information may go beyond and the lawyer may know it will be taken beyond the provision of information and be used as a basis for deciding upon illegal activity. It may well amount to an encouragement to break the law.

Objective advice

The role of in-house counsel as for all lawyers is to give frank and objective advice. Not to do so would be to fail the duty owed by lawyer to client. Lord Cooke when a judge of the High Court in New Zealand made the point in Henderson Borough Council v Auckland Regional Authority 1984 1 NZLR 16 at 23:

> 'Although an employed barrister may properly represent his employer, it is as well to stress the importance of the independent consideration of a case that will more often be given by a barrister ... whose experience and responsibilities are not confined to representing one client. This kind of professional detachment can be of value to the client ... in the more effective presentation of the client's case. ...'

The point of that part of the judgment was to stress the importance of briefing out in cases of litigation which is no doubt something you all understand but underlying the comment is the need for independent advice and the fear it may not always be as easily provided by in-house counsel as by a lawyer in private practice. Professor Webb makes the point that 'while a lawyer is unlikely to be disciplined for failing to give objective advice arguably it has been a significant factor in a number of corporate wrongs.' He suggests that 'at the heart of the problem' is the manner in which the lawyer approaches the legal issue upon which advice is sought. There has been at times what he calls 'a convenient myopia', a blindness to the wider context in which certain transactions have been located.

According to the professor, lawyers may not approach their task as bureaucrats whose functions are limited to narrow confines of a legal question put before them. Lawyers are required to discharge their duties of good faith and competence in all cases and may not agree to limit their duties in a way which is meant to grant impunity for breach of those duties. So corporate counsel may not accept instructions which are clearly incomplete. If advice is sought upon whether a transaction complies with the relevant statutory requirements all aspects of the scheme and its wider context must be given to the lawyer.

Apparently in the Enron case legal tasks were ‘sliced so thinly that the overall significance of the transaction was invisible.’ This was a deliberate tactic which took advantage of its organisational complexity and briefed outside counsel to give advice on small specific topics without ever informing those lawyers of how the pieces fitted together but used the affirmative advices they did get on the parts to mislead investors and the SEC.

Professor Webb is equally critical of the practice of shopping for opinions until a favourable one is obtained or approaching in the first place someone who is known to have a view of the law or a class of transactions which would suit the employer’s ends. Corporate counsel are, it is said, expected to exercise their own independent professional judgment on the proper interpretation of the law and to discharge that professional judgment requires acting independently of pressures from the client as to how they would like the opinion expressed.

The primary obligation of a lawyer is to uphold the law. There is a temptation to see the law, or those parts of it which are concerned with corporation regulation, as constraints or obstacles in the path of profit-making. The temptation is likely to be greater for in-house counsel than for others. It may lead to an approach which seeks to lessen the constraint and reduce the effectiveness of the regulation. In-house lawyers should resist the temptation to see their task as one of minimising legal constraint and thereby enhancing the profit-making capacity of their employers. Not resisting that temptation may lead to a manipulation of the law at best, and a disregard for it at worst.

A corollary of this admonition is that in-house counsel ought to express their opinions frankly and not resort to ambiguity or qualification meant to encourage the belief that a course of conduct which is in fact unlawful may be arguably lawful.

I have so far in this address worked closely from Professor Webb's article. I suspect he has no more practical knowledge of the pressures and problems which confront in-house lawyers than I do so I will be interested to hear your views. You will have noted that Professor Webb expounds some particular viewpoints of how things ought to be rather than how they are. I think I agree with him on his strictures about how in-house counsel should behave and would like to hear, if you are prepared to tell me, what you actually do.

Privilege

The topic which occurs most frequently in writing about the role of in-house counsel is legal professional privilege. As you all know privilege may be claimed with respect to confidential communications passing between a legal adviser and a client when the dominant purpose of the communication was to give legal advice to the client and with respect to documents brought into existence for use in litigation, present or prospective.

There is usually no difficulty in deciding whether communications with solicitors in private practice are privileged but whether communications with in-house lawyers are privileged has generated controversy but I think by now the rules are fairly well-established.

The party claiming privilege must establish the basis for its claim, it must prove that the dominant purpose of the communication was to receive or give legal advice.

There are several reasons why claims for legal professional privilege by those who dealt with in-house counsel have proved problematic. The first concerns the requirement that the dominant purpose of the communication be to obtain legal advice. There are many reasons why the opinion of in-house counsel might be sought, only one of which is to obtain legal advice. The point is illustrated by a case involving Sydney Airports Corporations and Singapore Airlines, one of whose aircraft was damaged by an air bridge owned by the Airports Corporation which malfunctioned. An in-house solicitor at the Airports Corporation commissioned a report into the incident. In subsequent litigation (which was anticipated) Singapore Airlines sought disclosure of the report. The judge ordered it because he found that the report was commissioned for several purposes:

1. For use in the contemplated litigation.
2. So that the Airport Corporation could understand what had caused the accident;
3. To avoid such mishaps in the future;
4. To persuade the safety authority to allow the air bridge back into operation.

The Corporation did not prove that the first was the dominant purpose.

That case and others have stressed the importance of particular evidence to establish what was the dominant purpose for a document or

communication. It is not enough to make a ..... about the purpose. Detail must be given of the genesis of the communication. The thought processes of the person who created the document must be exposed in an affidavit to show why the dominant purpose was to obtain legal advice and why any other purpose for the document is subsidiary.

An affidavit claiming privilege must disclose why particular documents came into existence and if there were several reasons it must identify each. A resort to verbal formula and bare conclusions are insufficient to establish a claim for privilege.

Evidence of this kind needs to be given with respect to each document for which privilege is claimed.

The second requirement is that the communication is for the purpose of giving or receiving legal advice. This is easy enough to do in the case of a lawyer in private practice but in-house lawyers are often asked to advise on topics other than the law, and to give advice other than legal advice. Tamberlin J made the point in one of the C7 judgments. He said:

> ‘The dominant purpose test had particular importance ... to ... in-house counsel because they may be in a closer relationship to the management than outside counsel and therefore be exposed to participation in commercial aspects of an enterprise. ... Commercial reality requires recognition by the courts of the fact that employed legal advisers not practicing on their own account may often be involved to some extent in giving advice of a commercial nature related to the giving of legal advice. Such involvement does not

> necessarily disqualify the documents relating to that role from privilege. The matter is necessarily one of fact and degree and requires a weighing of the relative importance of the identified purposes.'

In that case the judge found that the Chief General Counsel for News Limited:

> '... was actively engaged in the commercial decisions to such an extent that significant weight must be given to this participation. ... (He was) not persuaded that ... Mr Phillip was acting in a legal context in relation to a number of the documents ...'

The courts are very protective of privilege but equally concerned to ensure that the protection given is not wider than is necessary to satisfy the rationale for the existence of the privilege. Privilege exists to protect legal advice, not business advice.

There may be some circumstances where legal advice and commercial advice in the same document may be separated so that the legal advice can be identified and privileged. If separation is impossible privilege will be lost with respect to the legal advice.

Before a claim for privilege can be made the in-house lawyer who gave the advice must be a practicing lawyer. He or she must have been admitted to practice although it is not necessary that the lawyer has maintained a current practicing certificate, though I gather that you all do. It is not enough that the in-house lawyer has a law degree. There must be

as well the successful completion of a recognised course of practical legal training and, as I say, admission to practice.

A point often stressed in the authorities which have considered whether in-house legal advice is privileged is whether the in-house lawyer was 'independent'. What this means was explained by Brennan J in Waterford v The Commonwealth 1987 163 CLR 54 at 70. He said:

> 'If the purpose of the privilege is to be fulfilled the legal adviser must be ... independent ... in order that the personal loyalties, duties or interests of the adviser should not influence the legal advice which he gives or the fairness of his conduct of litigation on behalf of his client. ... If he is unable to be professionally detached in giving advice or in conducting litigation there is an unacceptable risk that the purpose for which privilege is granted will be subverted.'

Mason and Wilson JJ said more concisely of the relationship between employer and employed lawyer:

> 'Whether in any particular case the relationship is such as to give rise to the privilege would be a question of fact. It must be a professional relationship which secures to the advice and independent character notwithstanding the employment.'

This topic was usefully discussed by Branson J in Rich v Harrington 2007 FCA 1987. Her Honour remarked:

> ‘An independent legal adviser is one who can bring a disinterested mind to bear on the subject matter of the legal advice. ... What is required is a legal adviser who is able to be “professionally detached” in giving the advice.’

In another of the C7 cases Graham J had said:

> ‘... An in-house lawyer will lack the requisite measure of independence if his advice is at risk of being compromised by virtue of the nature of his employment relationship with his employer. On the other hand, if the personal loyalties, duties and interests of the in-house lawyer do not influence the professional legal advice which he gives, the requirement for independence will be satisfied.’

So if a claim for privilege is to be made for advice given by in-house counsel the independence of that counsel from the employer will have to be established. Evidence will need to be given of the role of the particular in-house counsel in the organisation and the structure of his office and employment: who he answers to, the type of advice he is required to give – is it purely legal or does it extend to other areas; to what extent is the lawyer involved in guiding the commercial activities of the enterprise. The courts are not devoid of common sense and understand that there is no bright line separating the role of in-house counsel as lawyer from his participation in commercial decisions. As I mentioned the two will often be inter-mixed and privilege will not be withheld simply because there is some commercial element to the advice given. It is, as I said earlier, a question of fact and degree.

The question of independent has arisen acutely in the case of lawyers employed in the defence forces. The lawyers are officers subject to military discipline and obliged to obey lawful commands of superior officers who may not be lawyers. This was a cause of concern to Crispin J who decided *Commonwealth and Air Marshal McCormack as Chief of the Air Force v Vance* (2003) ACT CA 35. The decision was reversed on appeal on points which did not consider that aspect of the lack of independence. You can read the case yourself if you want to. It is not particularly relevant for this morning's discussion but I mention it as an aspect of the need to prove independence.

Legal professional privilege with respect to in-house counsel is not universally recognised. It has been refused by the European Court at First Instance, the second-highest court in Europe in a case involving anti-competitive conduct by a Dutch chemical manufacturer. Its offices were raided by European competition investigators and a number of documents were seized. These included memoranda setting out information gathered from employees and prepared for the purpose of obtaining outside legal advice in connection with the company's competition law compliance program, notes on the memorandum made by an external lawyer, and communications between the general manager and an in-house lawyer. None of these was granted privilege. The court held that the company had not shown that the documents were prepared exclusively for the purpose of obtaining legal advice in relation to the defence of a prosecution and, as well, the court concluded that legal professional privilege only applied in connection with advice provided by a lawyer who 'structurally, hierarchically and functionally is a third party ...' privilege would not apply to advice, even legal advice given by an employed lawyer.