

The logo for Buchanan Rees, featuring the name in a serif font. The 'B' is significantly larger than the other letters, and the 'Rees' is in a smaller, regular weight of the same font.

Buchanan Rees

DISPUTE LAWYERS

**LEGALWISE 13TH ANNUAL IN-HOUSE
COUNSEL CONFERENCE
WEDNESDAY, 4 MARCH 2020**

**LEGAL PROFESSIONAL PRIVILEGE:
CHALLENGES AND STRATEGIES FOR
IN-HOUSE COUNSEL**

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THE LEGAL NOTION OF PRIVILEGE AND THE ELEMENTS FOR COMMUNICATIONS TO ATTRACT PRIVILEGE

- **What is legal professional privilege and why does it exist?**
 - Protects the disclosure of confidential communications made for the dominant purpose of a client obtaining legal advice or use in existing or anticipated legal proceedings.
 - Rationale is to enhance the administration of justice and the proper conduct of litigation by promoting free disclosure between clients and lawyers, to enable lawyers to give proper advice and representation to their clients.
 - Two types of legal professional privilege, commonly known as :
 - legal advice privilege
 - litigation privilege.

- **The elements of legal professional privilege**

- Recognised both under the common law and in the uniform *Evidence Acts* in force across various Australian jurisdictions (including New South Wales and the Commonwealth).
- 3 elements required:
 - a communication;
 - which is confidential;
 - made for the dominant purpose of the client obtaining legal advice or use in existing or anticipated legal proceedings.

- **The elements of legal professional privilege (cont'd)**

- The dominant purpose is the ruling, prevailing, paramount or most influential purpose.
- It follows that a communication is not privileged if one purpose for its creation is to obtain legal advice but there are other equally (or more) important purposes: *Federal Commission of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 at 416; *Grant v Downs* (1976) 135 CLR 674 at 678)

- **The elements of legal professional privilege (cont'd)**

- Example:

Sydney Airports Corporation Limited v Singapore Airlines Ltd: [2005] NSWCA 47:

“The evidence that the report was always to be deployed for non-privileged purposes, which purposes were of significance to the Claimant – particularly to have the aerobridge back in service – was such that although the privileged purpose may have been the most important single factor, it was not shown to be dominant”.

- **Legal advice privilege**

- Evidence Act 1995 (NSW): section 118
- Applies to pre-trial procedures (such as discovery, subpoenas and notices to produce) – different from Commonwealth jurisdictions, where the common law applies pre-trial
- The concept of legal advice is quite wide and is not limited to advice about legal rights and obligations

- **Litigation privilege**

- Evidence Act 1995 (NSW): section 119
- Applies to pre-trial procedures (such as discovery, subpoenas and notices to produce) – different from Commonwealth jurisdictions, where the common law applies pre-trial
- Meaning of “anticipated” - there must be a real prospect of litigation and not just a speculative possibility or vague apprehension that it may ensue.
- Examples:
 - *Perazzoli v BankSA, a division of Westpac Banking Corporation Limited* [2017] FCAFC 204
 - *Ensham Resources v AIOI Insurance* [2012] FCA 710

- **Waiver of legal professional privilege**

- Occurs where the party entitled to the privilege (i.e., the client) performs an act inconsistent with the confidence preserved by it.
- Under the common law, the leading decision in Australia is *Mann v Carnell* (1999) 201 CLR 1.
- In the *Evidence Act 1995* (NSW), section 122 deals with waiver of privilege.
- Waiver may be express or implied.

- **Waiver of legal professional privilege (cont'd)**

- Where it is express, it usually consists of an intentional act.
- Where it is implied, the waiver may be unintentional or inadvertent.
- Once it is waived, legal professional privilege is lost (with the result that the party which had been entitled to the privilege can no longer validly claim it in any context).

THE DIFFICULTIES AND COMPLEXITIES IN IDENTIFYING THESE ELEMENTS FOR IN-HOUSE LAWYERS (AND CHALLENGES IN RESPECT OF PRIVILEGE FOR IN-HOUSE LAWYERS)

- **Close relationships with the executive and management**
 - Differences for in-house lawyers when compared with external legal advisers:
 - employed by the client;
 - in substance, has only one client and it is the same client for all matters (even though in-house lawyers may work with numerous different people involved in the commercial side of their organisation); and
 - in many instances, reporting to a non-lawyer employed by the same organisation.

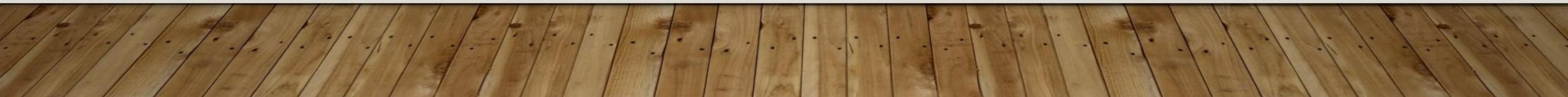
- **Close relationships with the executive and management (cont'd)**

- In combination, these factors have the result that an in-house lawyer will often develop close relationships with the executive and management in his or her organisation.
- Yet, privilege applies only to communications that are made in the course of a professional relationship between the client and the lawyer. As such, a critical aspect of legal professional privilege is the *independence* of the lawyer, in performing his or her legal function.

- **Close relationships with the executive and management (cont'd)**

- *Waterford v Commonwealth* (1987) 163 CLR 54, per Brennan J (re the importance of independence):

“ ... 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.”

- Example: *Seven Network Ltd v News Ltd* [2005] FCA 142
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- **Separating what is a commercial or a privileged communication**

- Sydney Airports case, per Spigelman CJ:

“An in-house solicitor 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. An in-house solicitor may very well have other functions. Accordingly, in determining whether or not a document was brought into existence for a purpose which was both privileged and dominant, the status of the legal practitioner is not irrelevant.”

STRATEGIES TO ATTRACT PRIVILEGE TO COMMUNICATIONS FOR IN-HOUSE LAWYERS

- **Careful structuring of employment arrangements**
 - contract of employment - description of the role and responsibilities (emphasise legal nature of the role; primary responsibility being the provision of legal advice to the organization)
 - performance indicators and remuneration/reward structure – should not include criteria that are relevant in assessing whether the business has been financially successful (e.g., profit level)
 - maintain a current practising certificate

- **Independence policies**

- Written policies can assist in demonstrating that legal advice given by an in-house lawyer is independent.
- For example - a policy which states clearly that the function of the in-house lawyer is to provide independent legal advice (and that commercial people within the organisation must not apply pressure which might undermine that independence).

- **Reporting lines**

- Where an in-house lawyer reports to a non-lawyer, it can be difficult to persuade a Court that the advice of the more junior person:
 - is independent; and
 - satisfies the dominant purpose test.
- Better if an in-house lawyer reports to another in-house lawyer.
- Where the in-house lawyer is the most senior lawyer employed by the organisation (e.g., the General Counsel), employment arrangements and independence policies can become even more significant.

- **Identifying the capacity in which any particular communication is made**

- Keep legal function and non-legal functions entirely separate.
- In-house lawyer should be very clear in their own mind as to which “hat” they are wearing. Also, be clear to others (e.g., in email sign-off).

- **Identifying the capacity in which any particular communication is made (cont'd)**

- No harm in stating in a document that its purpose is to provide legal advice (or for use in litigation) and labelling the document with something like “subject to legal professional privilege”, where that is actually the case.
- But should not be applied on a “blanket” basis or they become meaningless.

QUESTIONS?

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