



Express law fast track information for clients

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Legal professional privilege: recent judgment affects in-house lawyers

A recent judgment of Branson J in the Federal Court shows the importance of in-house lawyers having the right amount of independence when giving legal advice on internal disputes—otherwise, legal professional privilege will not exist in relation to that advice. Also, legal professional privilege that does exist in legal advice (whether given by an in-house lawyer or an external lawyer) may be lost by making a statement disclosing the conclusions or substance of the advice.

In the judgment in [Rich v Harrington \[2007\] FCA 1987](#) on 13 December 2007, Branson J refined the principles of legal professional privilege that apply to in-house lawyers in internal disputes. Her Honour also dealt with waiver of legal professional privilege as a result of making reference to legal advice that has been obtained, and addressed an issue regarding common interest privilege.

Background

Independence of in-house lawyers

It is established that, subject to conditions, legal professional privilege can apply to legal services provided by in-house lawyers, including government in-house lawyers. One condition is that the in-house lawyer must have the necessary degree of independence when providing the legal services.

The lawyer lacks that independence if the lawyer's advice is at risk of being compromised by the nature of his/her employment relationship. If the personal loyalties, duties and interests of the in-house lawyer do not influence the legal advice given, the requirement for independence will generally be satisfied.

The Office of Legal Services Coordination in the Attorney-General's Department issued [Guidance Note 1 of 2004: Legal Professional Privilege and In-house Legal Advice](#) recommending steps that departments and agencies might take to achieve the necessary independence of an in-house lawyer.

Rich v Harrington

Facts

Usually, the question of independence of an in-house lawyer arises when the lawyer is providing legal services that relate to the normal functions of the lawyer's employer. In those circumstances, the lawyer is providing advice corporately to the organisation on some matter between the organisation and third parties.

However, in *Rich v Harrington* the question of an in-house lawyer's independence arose in the context of an internal dispute between partners of the firm in which the legal unit was established. In this case the plaintiff partner claimed unlawful discrimination, harassment and victimisation by the firm against her.

All lawyers in the legal unit of the firm held practising certificates. The lawyer in charge of the unit, in addition to holding a practising certificate, was a partner of the firm. There was evidence that the lawyers 'ordinarily' had the necessary independence to attract legal professional privilege.

Decision

Branson J did not decide whether the lawyers in fact 'ordinarily' had the necessary independence. Rather, her Honour considered the relevant question to be whether the lawyers could give independent advice to the firm 'concerning the allegations and claims advanced by one partner ... against other partners in the firm' (at [57]).

Her Honour held that, in considering that question, she was not required to 'speculate' about the legal unit's actual approach to giving that advice. The critical question was whether the relationship between the legal unit and the partners it was advising 'was one of professional detachment'. Branson J found that it was not.

Specifically, her Honour found that the plaintiff partner's allegations 'cast aspersions of a personal, rather than a purely professional kind' and were 'likely to engage the personal loyalties and the duties and interests of all partners of [the firm]—and probably many employees of the firm as well' (at [59]).

As a result, communications relating to the in-house lawyers' advice did not attract legal professional privilege.

Implications of the decision for government in-house legal units

Branson J's approach has implications for government in-house lawyers providing advice on disputes within their department or agency (for example, on discrimination, promotion, remuneration or discipline matters). Specifically, even if the in-house lawyer was sufficiently independent to attract legal professional privilege in advising the department or agency on matters involving third parties, the lawyer might not be sufficiently independent to attract legal professional privilege for advice on the internal dispute.

A risk of this lack of independence could arise where the head of an in-house legal unit was part of the department's management team and the legal advice was about the internal management of the department and/or the conduct of the management team in an internal matter. In this regard, Branson J accepted that the independence of legal advice provided by the in-house legal unit 'could not rise above' the independence of the head of the unit because that person 'supervises, and carries responsibility for, the work' of the unit.

A relevant difference between a firm and a department is that employees of a firm are employed by all partners and thus owe duties to all partners (and in *Rich v Harrington* the dispute was between partners). However, there is only one executive head of a department. As a general rule, the necessary independence of an in-house government lawyer advising on a dispute within the lawyer's department could be achieved by ensuring that the lawyer is advising (and receiving instructions from) a person who is senior to, or otherwise organisationally independent of, all parties to the internal dispute. In some cases that person might need to be the head of the department. These principles would also apply to an agency with a structure relevantly similar to a department.

Ultimately, each case will need to be considered in the light of its circumstances—especially the nature of, and parties to, the dispute. A relevant factor will be whether one or more of the parties involved is in a position of authority or influence over the in-house legal team or, at least, the in-house lawyer giving the advice. In cases of doubt, the prudent course might be to obtain the desired advice from an external lawyer.

Waiver of legal professional privilege

Branson J's judgment provides another warning about the risk of losing legal professional privilege by making a statement referring to having received legal advice.

Branson J considered a letter from the firm's external lawyers to the plaintiff's lawyers stating that 'our client has acted at all times with the benefit of external legal advice and does not believe there has been any victimisation or other conduct for which compensation could properly be sought'. Her Honour held that legal professional privilege in the relevant legal advices given to the firm was waived as a result of that statement.

Branson J held that 'implicit in the calling-in-aid of the external legal advice ... was the claim that the external legal advice supported the conduct of' the firm (at [32]), and that the letter disclosed the substance or conclusion of that advice.

Also, Branson J held that, even if legal professional privilege had applied to advice given by the firm's in-house legal unit, legal professional privilege in some of that advice would have been waived by a letter from a partner of the firm to the plaintiff partner stating that 'Based on the work done by [the in-house legal unit] my preliminary view is that the allegations ... appear to me to be without foundation'.

On the other hand, Branson J held that legal professional privilege in related legal advice was not lost merely by a statement by the firm in the legal proceedings that the firm's conduct 'was in good faith ... and was reasonable and in the best interests of the firm', because that statement did not refer to reliance on legal advice.

There have been conflicting court decisions on the circumstances in which voluntary disclosure of the gist of legal advice can waive legal professional privilege in the whole of the advice. The High Court has recently granted special leave to appeal to it on this issue (see *Osland v Secretary to the Department of Justice* [2007] HCA Trans 811 (14 December 2007)).

Common interest privilege

Branson J noted the general principle that, if parties with a common interest exchange information and advice relating to that interest, a document or copy document containing that information or advice will be privileged from production in the hands of each party. Her Honour accepted that, after the plaintiff partner of the firm had commenced legal proceedings against all other partners, those other partners had a common interest in defending the legal proceedings. Accordingly, copies of related legal advice obtained separately by one respondent partner and passed to other respondent partners would attract common interest privilege, thus precluding the plaintiff from having access to the advice.

However, Branson J held that legal advice obtained by one respondent partner, and disclosed to the other respondent partners, before legal proceedings were instituted did not attract common interest privilege because that partner disclosed the advice to the other partners for the purpose of promoting that partner's own 'selfish' interest in protecting his position within the firm. Nevertheless, because the disclosure to the other partners was made subject to an implied obligation of confidentiality, that partner had not waived his own legal

professional privilege in the advice. Thus, the end result was that the plaintiff was not entitled to have access to the advice.

Implications for clients

The Federal Court's judgment indicates the need for departments and agencies to exercise care to avoid unintentional loss of legal professional privilege in legal advice, especially legal advice provided by in-house lawyers on internal disputes. Some basic steps to maintain legal professional privilege include:

- ensuring that an in-house lawyer is sufficiently independent in relation to each matter on which the lawyer is advising
- being careful about (and where desirable seeking guidance on) disclosing to a third party the conclusions or substance of legal advice received
- ensuring that legal advice circulated within the government is circulated on a clear understanding that the advice is confidential.

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