

Australian Corporate Lawyers Association

Suite 2, Level 1, 620 Bourke Street Melbourne VIC 3000

Telephone: 1300 558 550 / +61 38616 0197

Facsimile: +61 3 8616 0201

Email: membership@acla.com.au

ABN 97 003 186 767



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Professor Rosalind Croucher
Commissioner
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2000

Dear Professor Croucher

Client legal privilege and federal investigatory bodies

I refer to the meeting David Patience (President of the Victorian Division of ACLA) and I had on 24 May 2007 with you, Kate Connors and Isabella Cozenza. We appreciated the opportunity to discuss issues raised in ALRC Issues Paper 33.

As foreshadowed at that meeting, I am attaching a brief indicative statement of our approach to the issues being addressed by the ALRC. I expect that, following the publication of ALRC's proposed Discussion Paper, ACLA will submit a more formal and comprehensive submission.

In the meantime, we remain ready to participate in any further consultative processes.

Yours sincerely

Richard St John
Chairman
Professional Issues Committee

**Client legal privilege and federal investigatory bodies:
ALRC issues paper 33, April 2007**

Approach of the Australian Corporate Lawyers Association (ACLA)

Introduction

ACLA is the peak national association representing the interests of lawyers working in the employment of corporations, governments and public sector agencies in Australia ('in-house lawyers'). In-house lawyers constitute around 25% of the total Australian legal profession.

ACLA operates through six Divisions based in all States, other than Tasmania, and in the ACT. ACLA's current membership exceeds 2,800 of whom approximately 75% are practising in-house lawyers.

In-house lawyers, by dint of their role as providers of legal services to their own organisations on a dedicated basis, carry out a particular and important role in promoting corporate compliance with legal and regulatory requirements. They are in a position, as integrated members of management teams, to keep themselves informed of, and to influence corporate behaviour on a continuing basis.

General approach

The doctrine of legal professional privilege (or client legal privilege as referred to in the Issues Paper) is founded on a policy basis that is enduring and should continue to be supported. While there may be scope for useful clarification – and there should be greater harmonisation of the relationship between the privilege and the coercive information-gathering powers of various government agencies – the value of full and frank disclosure between client and legal adviser should be recognised and protected as a matter of public and not just private interest. The privilege of course is the privilege of the client and not the lawyer.

Corporations and natural persons

The value embodied in the privilege is not dependent on the legal capacity of the client. The reasons that underlie the privilege in the case of individuals extend to corporations and other bodies.

Any abrogation of privilege in the case of corporations would jeopardise full and frank communication between corporate officers and legal advisers – whether external or in-house – and undermine legal input into corporate decision-making and compliance efforts. With increasingly complex laws and regulations applying to corporate and business activities, this issue is one of real impact.

Moreover, there has been a marked trend in recent years to impose liability under the Corporations Act, the Trade Practices Act 1974 and various environmental, occupational health and safety and other laws, on corporate officers and employees as well as on a corporation itself¹. In many cases directors and other officers are treated as personally liable for the conduct of their company unless they can make out a relevant defence. The provision of legal advice not only to companies but to their officers and employees supports internal compliance efforts. Given the intertwined liability of companies and individuals, any move to

¹ Report on personal liability for corporate fault, Corporations and Market Advisory Committee, September 2006

deprive corporations of the privilege would, as a practical matter, give rise to considerable risks and tensions in managing the respective positions of those involved in corporate activity.

Finally, it is submitted that, in the spirit of a level playing field, any move to abrogate the privilege for corporations would have to extend to governments and public sector agencies as well.

Position of in-house counsel

The rules relating to client legal privilege should not distinguish between external lawyers and in-house lawyers as such. While there may be questions in a particular case as to the capacity in which a lawyer – whether external or in-house - was acting in particular circumstances, the availability of privilege should not be determined by whether the lawyer was engaged under a contract of employment or a contract for services. It should be borne in mind too that in-house lawyers, by virtue of their closeness to the business and their day-to-day participation in its affairs, are well placed to identify areas of potential legal risk and advise accordingly.

Privilege and coercive information-gathering powers

There would be value in a greater harmonisation of the information-gathering powers of Commonwealth agencies, particularly in relation to their bearing on client legal privilege. This should be done on a basis that recognises and protects legal privilege as far as possible and the values underlying it. Variations among the information-gathering provisions give rise to undue complexity and lack of clarity for the individuals and businesses that are from time to time subject to them. This complexity and lack of clarity can of itself complicate and delay good faith compliance efforts.

It is hard to see for example why there should be material differences between the coercive information-gathering powers of the ACCC and ASIC, and why there should be doubts about the recognition of legal privilege under one but not the other.

Should it be judged in any circumstances that the public interest requires some abrogation of legal privilege in the interests of an investigative agency or public inquiry, provision should be made for safeguards, including to preserve privilege as far as possible against third parties.

Apart from any steps to achieve legislative harmonisation, there is also potential value in introducing some administrative guidelines or protocols to clarify the approach taken by agencies in exercising their compulsory powers to obtain information.

Scope of privilege

ACLA believes that there may be scope for greater clarity in regard to the application of the legal privilege doctrine in certain respects. Questions can arise for example about the boundary (if any) between documents prepared for the purposes of obtaining legal advice and pre-existing documents that may have been gathered and communicated to a legal adviser as part of that request for advice.

Consideration also needs to be given to the appropriate treatment of internal inquiries by a corporation or other party into things that have gone wrong in its business or other affairs. Care should be taken for example to avoid discouraging a party from undertaking its own investigation into the causes of an accident or other mishap and the identification of remedial steps that should be taken.

Processes and accountability

ACLA also believes that there would be value in putting greater focus on the processes by which legal privilege claims are made and on the accountabilities of those – clients and legal advisers – by whom they are made. Some of the problems - and perceived abuses - that arise from time to time in relation to major investigations and large-scale discovery exercises may simply be attributable to the volume of information in question and the time pressures involved in responding to notices to produce. Clearer and more expeditious processes for resolving such issues on the run would assist. Beyond that, the clarification of the responsibilities of those involved, and of the consequences of shortcomings on their part, may help to counter the risks of any broad-brush approaches, laxity or lack of rigour.

Continuing legal education

Regardless of any changes that may be recommended in the law, there is a need for the ongoing education of lawyers and others in regard to law and practice and relevant ethical requirements in this area. ACLA has been – and will continue to be -active in promoting programs of this kind for all in-house counsel and expects to do so in the future.