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# Corporate Update

## Legal professional privilege for in-house lawyers

### Introduction

In a recent edition of NZLawyer (issue 74, 28 September 2007), the front page carried the headline "Legal professional privilege does not apply to in-house lawyers, declares EC Court of First Instance". The substance of the article summarises the test stated in *AM & S Europe Ltd v Commission* [1982] ECR 1575 which has now been confirmed in the Court of First Instance on 17 September 2007 in the case *Akzo Nobel Chemicals Ltd v Commission of the European Communities*. The test is that privilege only applies to those lawyers who provide advice "in full independence". In the *Akzo* case, the fact that the lawyer concerned had a clause in his employment contract stating that the obligation of independence and compliance with the relevant Bar rules would prevail over his loyalty to the company was not sufficient to protect his advice.

In the same edition of NZLawyer there was an article regarding the recent Australian decision in *Telstra Corporation Limited v Minister for Communications Information Technology and the Arts (No.2)* [2007] FCA 1445. Justice Graham refused a claim for privilege over advice provided by the in-house lawyers of Telstra, holding "an in-house lawyer will lack the requisite measure of independence if his or her 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." Justice Graham

did not go on to set out any criteria for determining when an in-house lawyer is sufficiently independent of his or her employer.

Independence is also an issue in New Zealand (which does mean that it is more difficult to establish privilege for in-house lawyers than those in private practice). However, provided that independence can be established and certain other conditions are met, there is no bar on privilege applying to advice by in-house lawyers here.

### New Zealand in-house lawyers and privilege

Privilege in New Zealand is now governed by the Evidence Act 2006, which came into force on 1 August 2007 and was intended to codify the existing law on privilege.

Section 54 of the Act provides for privilege for communications with 'legal advisers'. In-house lawyers will fall within the definition of 'legal adviser' in section 51 provided they hold a current practising certificate.

To be privileged under section 54 the communication must be:

- intended to be confidential; and
- made in the course of and for the purpose of the person obtaining professional legal services from the legal adviser or the legal adviser giving such services.

A key issue will be whether the in-house lawyer is providing "professional legal services". The Act does not give specific guidance on this, but it does expressly provide at section 10 that it may be interpreted having regard to the common law (to the extent that it is consistent with the Act, its purpose and principles).

The common law in the area of privilege has been well established prior to the enactment of the Act, with the following conditions set out by Fisher J in *Commerce Commission v Caltex New Zealand Ltd* (HC Auckland, CL33/97, 10 December 1998), having been adopted in several subsequent cases as those that must be met for privilege to apply.

- a In-house lawyers must be acting in a legal capacity and not in some other capacity such as company director.
  - b Consideration should be taken as to whether it is really "legal advice" that is being provided or whether it is advice of a different nature (such as general commercial advice). This is often the central question.
- In the Court of Appeal in *Millar v Commissioner of Inland Revenue* [1999] 1 NZLR 275, Justice Blanchard on behalf of the Court confirmed that the test is: "if the dominant purpose of the document prepared by the in-house lawyer and in respect of which privilege is claimed was to give or seek legal advice in relation to a matter it would be privileged notwithstanding that it contained other matter".
- c In-house lawyers must be acting independently of their employer (ie the relationship should be the same as a solicitor/client relationship where the solicitor is external).
  - d In-house lawyers should be subject to the rules of professional conduct and professional standards of discipline, and it is advisable for in-house lawyers to retain practising certificates.

These tests will remain relevant in determining whether it is "professional legal services" that have been provided, or something else.

## What can you do to protect your position?

In order to increase the likelihood that privilege will apply, in-house lawyers should take the following precautions:

- a Always maintain a current practising certificate.
- b Be clear when advising in a legal capacity and when advising in some other capacity such as a commercial one (and make it clear to those they are advising – see (d) below).
- c When acting in a legal capacity, in-house lawyers should use their legal title.
- d Mark all documents that contain, or that are related to the provision of, legal advice "privileged and confidential", although this will not protect documents that are not actually privileged (in accordance with the tests set out above).
- e Do not disseminate privileged documents widely through the organisation; rather, give them only to those who would be considered to be the "client" for privilege purposes.
- f If the advice is likely to be sensitive, external legal advice would be preferable to increase the chance of a successful privilege claim.

## Key contacts



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