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On the Outside: The Place of In-House Counsel Within Australia's Modern Legal Landscape

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Abstract

Australia's legal profession today has a particularly different look to it than it did a decade or so ago. By and large this is as a result of businesses looking to develop and/or strengthen in-house capabilities. The growth of Australia's in-house lawyers comes hand-in-hand with an increased scrutiny of, and expectations centred around, their ethical behaviour. While the fabric has changed many of the frameworks have not which means Australia is largely out of step with other global jurisdictions. This paper examines some of the Australian deficiencies concerning professional rules and standards of practice, representation on governing bodies and education and how such shortcomings have the potential to leave Australia's in-house lawyers fending for themselves.

INTRODUCTION

The fabric of Australia's legal profession today is different on a number of levels than it was a decade or so ago. One notable difference is the continued development and/or strengthening of business communities' in-house legal capabilities that has brought about the growth of Australia's in-house lawyers. However, whilst the fabric may have changed (and continues to change) many of the frameworks that underpin the profession – such as professional rules and standards of practice, representation on governing bodies and education – have not. This has meant that when it comes to in-house lawyers Australia remains, to some extent, out of step with other jurisdictions around the globe.

GENERAL OBSERVATIONS

It is fair to say the in-house lawyer today has a legitimate (and more respected) place in Australia's wider legal community with around 25% of the Australian legal profession moving their practice in-house.[1]

Not only has the last decade seen numbers increase (and continue to rise) the in-house role, and more importantly, what is expected of it, has also developed. Traditionally the role of the in-house lawyer was perceived to be an overseeing one to instruct external counsel.[2] However, in-house legal practices have evolved with in-house legal teams playing more significant roles by undertaking work that was historically the domain of private practice. This evolution also correlates with Australia's membership in the global community. Not surprisingly, recent years have witnessed an uptake in regional counsel roles requiring some of Australia's in-house lawyers to feed into global in-house legal departments based in Europe, the US or Asia. This too is an important issue given the

[1] P Turner, "Setting the Scene: Challenges for In-house Counsel", in BS Tabalujan (ed), *Leadership and Management Challenges of In-house Counsel* (LexisNexis Butterworths, 2008) at 3
[2] CL Ming, "Transitioning from External Counsel to In-house Counsel", in BS Tabalujan (ed) *Leadership and Management Challenges of In-house Legal Counsel* (LexisNexis Butterworths, 2008) at 23

matters raised in this paper potentially impact on multi-national businesses operating regional in-house legal capabilities in Australia.

With an increase in numbers, an expansion of the role's remit and the burden of higher expectations, the so-called "poor cousin" tag that has stigmitised the in-house lawyer is slowly diminishing as the gap between private and in-house practice closes.[3]

Be that as it may, it would appear a disconnect still exists between in-house lawyers and the broader profession, the latter still finding it somewhat difficult to completely understand the in-house lawyer's role and function. While parts of the Australian judiciary have had to consider an in-house lawyer's unique client relationship, as well as the ethical demands and tensions associated with that[4] – in much the same way as other courts worldwide[5] – fundamental areas of the profession arguably remain disengaged. Three key areas exemplify this – professional and ethical rules of practice, representation on Australia's mainstream governing bodies and legal education of law students, lawyers as well as the business community generally. Each area deficient in its own way and all found wanting when it comes to the in-house community.

PROFESSIONAL RULES & STANDARDS

Importantly, Australia – with all its nuances and complexities associated with being a Federal jurisdiction – has professional and ethical rules and standards specific to each State (of which there are six)[6] and Territory (of which there are two).[7] While there may be commonality as to the themes and approach adopted when it comes to these rules and standards there remains a lack of uniformity around the specifics.

The lack of uniformity creates its own difficulties. The Law Council of Australia (**Law Council**)[8] has attempted to correct this anomaly with the publication of the Australian Solicitors' Conduct Rules (**Conduct Rules**),[9] supported by a draft commentary currently in circulation for comment,[10] with the view that each State and Territorial jurisdiction would adopt, and be bound by, a common set of professional and ethical guidelines. To date the position remains that each State and Territorial jurisdiction continue to address professional ethical issues by applying their own specific professional rules with only some jurisdictions whole-heartedly embracing the changes. In any event, no matter the jurisdiction, the gaps associated with in-house legal practice, and which are discussed in this paper, are for all intents and purposes the same.

Largely the legal profession has an expectation – as it should – that in-house lawyers should be governed, regulated and behave in the same way as private practitioners. That expectation should be embraced and steadfastly protected by the in-house legal community as it signifies that in-house and external lawyers are on an equal footing. As Lord Denning observed in his Lord's often cited judgment:[11]

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[3] T de Govrik, "Closing the Gap on the Private Profession" (2012) 22(1) *The Australian Corporate Lawyer* 10

[4] E.g. *Waterford v the Commonwealth* (1987) 163 CLR 54 at 72

[5] E.g. *Alfred Crompton Amusement Machines Ltd v Custom & Excise Commissioners* [1972] 2 QB 102 at 129 and *Akzo Nobel Chemicals Ltd & Akcros Chemicals v European Commission* [2010] EUECJ C-550/07 at [45]

[6] The six Australian States are: New South Wales, Victoria, South Australia, Queensland, Western Australia and Tasmania

[7] The two Australian Territories are: Northern Territory and Australian Capital Territory

[8] The Law Council of Australia's remit is to speak on legal issues of national and international importance advising governments, courts and federal agencies on the way the law can be improved for the benefit of the community

[9] *Australian Solicitors' Conduct Rules*, Law Council of Australia, June 2011

[10] *Australian Solicitors' Conduct Rules 2011 and Consultation Draft Commentary*, Law Council of Australia, 19 October 2012

[11] *Alfred Crompton Amusement Machines Ltd v Custom & Excise Commissioners* (supra) at 129

"[In-house lawyers] are regarded by the law as in every respect in the same position as those who practise 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 etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privileges."

But if that is so, surely the Conduct Rules should also speak to the unique issues faced by the in-house community. This is especially so when one considers that one of the purposes of the Conduct Rules is to assist lawyers to act ethically.[12] The importance of all legal practitioners being viewed and judged equally should be tempered and balanced, to a certain extent, by taking into account the type of practice one operates. On review of both the Conduct Rules and the supporting draft commentary it appears that balance is somewhat inadequate by failing to assist the in-house section of the profession with their ethical responsibilities.

Australia's shortcomings in this area are amplified when measured against other significant jurisdictions. In particular, professional standards and rules in such jurisdictions as the UK, US and Canada have captured and reflected today's modern in-house profession. The UK, for example, clearly contemplates lawyers practising in-house and the particular issues which may or may not impact on such a practice.[13] Further – as evidenced by the recent comments by Singapore's Attorney General at the 13th In-House Congress in Singapore – other regional Asian Pacific jurisdictions are turning to the leadership provided by the UK, US and Canada in this area.[14] There is no apparent reason why Australia cannot follow suit.

BRIDGING GAPS

A failure to recognise and address the complexity and uniqueness of in-house legal practice is all too prevalent. The absence of dealing with issues such as "up the line" reporting, resignation, wearing multiple hats as well as looking at "clients" as only private citizens and not corporate organisations are some of the obvious practical deficiencies in Australia.

Take, for example, the meaning of "client" – a concept important to the in-house lawyer both from a legal[15] and ethical point of view. As for the ethical aspect of that proposition the observation has been made:[16]

"The simple answer to an inquiry into the identity of the client is that the client is the entity, and it is the entity that the lawyer owes her or his professional duties. Yet the matter is more complex than this simple statement may suggest. As an entity operates through its officers, the principal issue is to identify which individuals (or body) should be treated as representing the entity for the purposes of the retainer."

Notwithstanding the importance, the definition of "client" under the Conduct Rules is lacking in that it does not cater for the corporate client – instead dealing with "client" as a "person" who engages a solicitor to provide legal services. There is no definition of

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[12] Conduct Rule 2.1

[13] Refer generally to the Solicitors Regulation Authority's *Code of Conduct* 2011 and *Practice Framework Rules* 2011

[14] "Singapore's Attorney General calls for serious discussion of greater regulation of in-house counsel at the 13th In-House Congress Singapore" (2012) 10(7) *Asian MENA Counsel* 19

[15] E.g. *Three Rivers District Council v Bank of England (No.5)* [2003] QB 1556; *CITIC Pacific Ltd v Secretary of Justice* [2011] HKEC 1657; and *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* [2011] FCA 29

[16] GE Dal Pont, *Lawyers Professional Responsibility*, (4th Edition, Lawbook Co, 2010) at 300. Also refer to the discussion by GC Hazard Jr, "Ethical Dilemmas of Corporate Counsel" (1997) 46 *Emory Law Journal* 1011 at 1013-1016

"person" whatsoever nor is there reference to a corporation, partnership, association or other type of entity as client or guidance as to how a solicitor should deal with a client of that nature.

A lawyer is required to act in the best interests of a "client".[17] There is nothing illuminating in such a statement. However, when considering that duty in the context of the Conduct Rules' definition of "client" it is difficult to reconcile an in-house lawyer's obligations with the organisational setting. In that regard, there is nothing contained within the Conduct Rules to help navigate whether an in-house lawyer's responsibility is to the client organisation rather than to its internal and external stakeholders, despite the unwritten expectation that this is the case. On these points there would appear to be a clear deficiency when compared to the US[18] and Canada.[19] Without doubt, those jurisdictions provide a more robust, practical and commercially relevant definition of "client" by embracing the concept of a client as an organisation and assist an in-house lawyer to have certainty as to where his/her duties lie.

Australia's Conduct Rules also are silent on an in-house lawyer's obligations regarding when to report to the CEO or Board and in what circumstances an in-house lawyer is expected to resign – again issues addressed in the US, UK and Canada.[20] This absence should not be read that those obligations do not exist – as they do – but it creates a vacuum of ambiguity that requires Australia's in-house lawyers to navigate a situation without their own profession providing an effective barometer.

This issue has the potential to pose a real practical difficulty for the in-house lawyer that should not be under-estimated. The nuances of this issue also cannot be lost. An unsafe work environment for an in-house lawyer can take many forms – from an extreme situation where the employer is committing illegal acts to the more subtle forms where a lawyer is asked to alter legal advice because it does not suit certain personal stakeholder objectives or agendas. Then there are circumstances when the in-house lawyer may be asked to behave in a way that may not be illegal but sails so close to the wind that it brings into play a lawyer's professional and ethical obligations. In that scenario, how can the lawyer satisfy his/her legal obligations? How is legal independence maintained? Who is a lawyer to turn to in those circumstances? What steps need to be taken by the in-house lawyer to maintain their continuing obligations under the Conduct Rules? In-house lawyers cannot allow themselves to become a stakeholder's political pawn but these are all especially difficult questions for which the Conduct Rules fail to provide the necessary guidance.

When these situations present themselves it may be the case that the in-house lawyer will ultimately be faced with an unenviable position of having to resign. As the point has been made, in-house lawyers may be faced with a circumstance where they have to:[21]

"… ask for reconsideration of the matter, seek a separate legal opinion or refer the matter to the board. Ultimately, if all else fails, the in-house counsel may have no option but to resign."

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[17] Conduct Rule 4.1.1

[18] Rule 1.13 *Model Rules of Professional Conduct*

[19] Rule 2.02 (1.1), (5.1) and (5.2) *Rules of Professional Conduct* 2000, Law Society of Upper Canada

[20] Refer n18 and n19. Also, in the UK refer to [viii] in the Guidance Notes under Rule 4 of the Solicitors Regulation Authority's *Practice Framework Rules* 2011 and A Philpott, "The Independence of the In-House Lawyer – A Warning from History" (2009) 2(6) *International In-house Counsel Journal* 901 at 903

[21] K Mander, "Professional Ethics: In-house Counsel as In-house Conscience", in BS Tabalujan (ed), *Leadership and Management Challenges of In-house Legal Counsel*, (LexisNexis Butterworths, 2008) at 146

Again, while it is an issue addressed in other jurisdictions around the globe Australia remains silent. The Conduct Rules speak of a "law practice" terminating the engagement "for just cause".[22] More specifically, the definition of "law practice" does not include an in-house legal practice. As to what is meant by "just cause" the in-house lawyer needs to turn to the common law for guidance.[23] This shows a model that has either given no consideration to the in-house legal community at all or has adopted a mindset that such circumstances do not exist in-house. Sadly, it would seem that the former is the more likely reality. Without clear guidelines in Conduct Rules the decision to resign is an extremely courageous, difficult and isolating one. At the moment, it is a lonely place for the in-house lawyer in that predicament and is an unsatisfactory state of play.

Client confidentiality, especially in the context of when an in-house lawyer leaves his/her employment for another organisation, is another issue. At the moment it would appear that in Australia the Conduct Rules relating to client confidentiality and conflicts with former clients are drafted, once again, with private practitioners in mind.[24] Further still the Conduct Rule's draft commentary provides no helpful assistance to in-house lawyers, citing examples that are private practice specific.

But it is an issue that is as equally important to in-house lawyers. Take the situation where an in-house lawyer's current employer sues that lawyer's former employer. What are the in-house lawyer's obligations? What is the right thing to do? Should he/she be restrained from acting? Is it unethical to continue to act for a new employer against the former one? A recent UK Court of Appeal decision, with its wildly divergent reasoning, shows that is also not a straightforward proposition with a simple answer.[25] The Court's segmented approach can be traced back to the way its members viewed the in-house lawyer's relationship with his/her client – Sir Robin Jacob seeing it as a lawyer/client relationship compared with Lord Justices Etherton and Ward who perceived it as one of employee/employer.[26] But again, where does this leave an in-house lawyer? Unfortunately, the answer remains in a state of flux.

And it runs even deeper. The Conduct Rules also fail to address an in-house lawyer's obligations when wearing multiple hats, albeit Australia's High Court has given some limited guidance on this issue.[27] For example, how does an in-house lawyer use information obtained in a non-legal capacity? Can he/she take their legal hat off? Again, it is assumed that the lawyer's hat never comes off and any information obtained must be used for the benefit of the client. As the point has been made: [28]

"Certainly, an attempt to compartmentalise the employed lawyer's dual (or multiple) roles as a means of avoiding an ethical responsibility are unlikely to succeed … any information an employed lawyer secures in the course of allegedly acting in a non-legal

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[22] Conduct Rule 13.1.3

[23] *Richard Buxton (a firm) v Mills-Owen* [2010] 4 All ER 405 at 417 per Dyson LJ: "… whether there is a good reason to terminate is a fact-sensitive question. I accept … that it is wrong to restrict the circumstances in which a solicitor can lawfully terminate his retainer to those in which he is instructed to do something improper. I accept that solicitors should not lightly be able to lawfully terminate their retainers … But the desirability of protecting a client from an arbitrary and unreasonable termination is not a sufficient justification for giving such a narrow interpretation of the phrase 'good reason' …"

[24] Conduct Rules 9 and 10

[25] *Generics (UK) Ltd v Yeda Research & Development Co. Ltd* [2012] EWCA Civ 726

[26] *Generics (UK) Ltd v Yeda Research & Development Co. Ltd* (supra) at [23] per Sir Robin Jacob cf. [43] per Etherton LJ, [100] per Ward LJ. Also refer to *PCCW-HKT Telephone Ltd v Aitken* [2009] 2 HKLRD 274 at [61] per Lord Hoffmann's interpretation of the in-house lawyer's relationship with his/her client/employer

[27] *Shafron v ASIC* [2012] HCA 18 at [20]

[28] Dal Pont, n16, at 296

capacity … he or she is obliged to use for the benefit of the client in the lawyer's legal capacity."

However, the silence only creates ambiguity and confusion for in-house lawyers forced to look to their own ethical barometers to assist in answering these complex and not necessarily straightforward questions.

It should be acknowledged that the Australian Corporate Lawyers Association (**ACLA**), in conjunction with Corporate Lawyers Association of New Zealand and the St James Ethics Centre, have developed a set of "best practice" guidelines that identify issues specific to the in-house environment. These include matters such as whistle blowing, receipt of gifts/entertainment, advising corporate groups, opinion shopping and sourcing external legal service providers. Despite this, none of these issues are directly addressed by the Conduct Rules and that inevitably leads to the question: do some of these guidelines need to be incorporated into the Conduct Rules?

While in-house "best practice" guidelines are important, it is the Conduct Rules that remain fundamental to legal practice – whether in-house or external. It is the Conduct Rules that need to adequately reflect the requirements of both the modern private and in-house practitioner. This is especially so when the ethical behaviour demonstrated by an Australian lawyer – in-house or otherwise – will be judged by reference to his/her particular jurisdiction's professional rules and the common law[29] and not a "best practice" guide.

The Conduct Rules need to be relevant to the profession in the 21st century taking into account the in-house legal community's requirement. In that regard, there would appear to be no reason why the Conduct Rules cannot have a "carve-out" which addresses the practice of law in-house in a similar way to that which has been designed as rules for advocacy and prosecutor's duties.[30]

CONVENTIONAL VOICE

Such issues also bring into question whether professional bodies have a bigger role to play as the in-house role continues to grow and evolve. Glance at the *Canadian Lawyer* and it shows this is an issue also being currently debated in North America.[31]

ACLA plays a role but equally the various Law Societies and Law Council should likewise have obligations and wish to have active participation in moulding the future of the in-house legal profession. On that, the Law Council addresses national legal issues on behalf of its constituent bodies – the constituent bodies being each State and Territory's Law Society and Bar Association, together with the Large Law Firm Group Ltd. However, and importantly, ACLA is not one of those constituent bodies and that leaves the in-house lawyer without an effective vehicle on the "mainstream" national stage.

Scratch the surface to reveal that the Law Societies throughout Australia are leaving in-house lawyers virtually mute. Positively, the Law Society of New South Wales being a notable exception with its Corporate Lawyers Committee and a remit to:[32]

- identify and service the needs of corporate lawyers; and

[29] Conduct Rule 2.2
[30] Conduct Rules 17-29
[31] C Foy, "Associations in Canada provide basics but fall short" *Canadian Lawyer In-House*, 14 January 2013 at http://www.canadianlawyermag.com/4476/associations-in-canada-provide-the-basics-but-fall-short.html
[32] Refer to Law Society of New South Wales website at http://www/lawsociety.com.au/resources/areasoflaw/corporatelawyers/index.htm

- provide corporate lawyers a higher profile, increased professional development and a strengthened role in the Law Society.

But this is the exception. Law Societies in Victoria, South Australia, Queensland, Western Australia, Tasmania, Northern Territory and the Australian Capital Territory cannot lay claim to such progress.

Without an adequate in-house influence within the conventional stream the wider profession will not understand or represent the in-house community. ACLA performs a vital function in serving the in-house community but a need exists for appropriate interface between that body and all Law Societies and the Law Council. Otherwise the in-house voice will continue to go unheard. Given the number of in-house lawyers together with increasing regional features associated with the role, Australia's professional bodies should be actively engaging with the in-house community to ensure they understand and meet its needs. This in turn, would have a positive effect on the business community that employs in-house lawyers – with all concerned knowing precisely the role, function, duties and obligation of an in-house lawyer.

WIDER EDUCATION

Taking on a lawyer is different to hiring any other employee quite simply because the role involves holding fundamental ethical obligations[33] – whether lawyers like it or not, they have a unique position in society from which they cannot shy away.[34] That being so, education, on a range of levels, becomes significant.

On one level, this brings into play the governing body's broader obligations in educating the business community. Much is expected of the individual in-house lawyer to educate the business about their legal and ethical responsibilities. Good in-house lawyers will always do that, however, what seems clear is that a lawyer's own professional body should play a role in teaching businesses about what is required of the lawyers they employ. Again in Australia, it would appear the New South Wales Law Society is alone in taking active, positive and necessary steps on that front by publishing:

- an easy to follow road map of an in-house lawyer's role and obligation for non-legal colleagues; [35] and

- a "handy hints" document reminding in-house lawyer's of what is required of them.[36]

It cannot be assumed that commercial enterprises understand a lawyer's obligations – in fact, there should be a presumption that they do not. A survey of the current Australian job market demonstrates a growing tendency for medium sized business to attempt to fulfil its in-house capability with relatively junior lawyers and quite often in the absence of senior legal guidance to deal with sophisticated legal and ethical issues. That situation seems to derive from a naivety on the part of both businesses (around how to address legal needs) and junior lawyers (not fully cognisant of what is required of in-house lawyers). In any event, this has the potential to expose in-house lawyers and is something that should rest uncomfortably with the profession and its governing bodies. Looking at the situation from that perspective, there is a strong and resounding argument for the

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[33] *Generics (UK) Ltd v Yeda Research & Development Co Ltd* (supra) at [23] per Sir Robin Jacob

[34] S Mark, "Walking the Ethical Tightrope: Balancing the Responsibilities of In-house Counsel to Key Stakeholders" Legalwise Seminar, Sydney, 12 November 2009. Also refer to M Landis, "The Honest Lawyer" *The New Lawyer*, 11 July 2011 at http://www.thenewlayer.com.au/article/The-honest-lawyer/530631.aspx.

[35] *Guide to Ethical Obligations of In-house Lawyers – for Non-Lawyer Colleagues*, Law Society of New South Wales, 2012

[36] *Handy Hints … For In-House Counsel*, Law Society of New South Wales, 2012

place of professional bodies to take the education baton and not only educate their own members but also the wider business community.

The in-house community should be striving to attract the best legal talent. The better the lawyer, the better the service. In-house legal education impacts at undergraduate and practical training stages as well as for lawyers before they embark on an in-house career. Education needs to reflect the realities associated with a modern legal profession. New South Wales's College of Law offers a Masters in Applied In-house Practice and that has to be viewed as a good first step. But it needs to go further. If 25% of Australia's students (and no doubt, increasing) will one day end up in-house there is also a legitimate place for mainstream Universities to become more involved in educating students and young lawyers about in-house practice – covering bespoke in-house issues such as general practice management, ethics, wearing multiple hats and privilege. Technical excellence will only take an in-house career so far. Lawyers need a wider and deeper understanding of what it actually means to operate a practice within a business working on the "inside" for their client. Presently, an education void appears to exist throughout Australia that would benefit from redress so that the wider profession could be armed with sufficient and appropriate knowledge concerning in-house legal practice issues. Again, greater knowledge equals better service.

CONCLUSION

In many ways, the shortcomings outlined evidences a broader lack of understanding as to the nature of the role in-house and its unique demands and pressure points. Further, and importantly, when an individual lawyer does not approach the in-house role appropriately it can lead to in-house lawyers becoming high profile figures as clearly evidenced in the fall out associated with modern corporate scandals and collapses. AWB and James Hardie in Australia, Enron in the US and, most recently, News International in the UK are all telling examples that have brought uncomfortable attention to the role of in-house lawyers. Perhaps lessons have been learnt. However, when you drill down and consider the Australian framework it would appear that the wider spectrum of the legal profession is still learning from these lessons and may still not truly appreciate these.

In-house practice (and practice management) continues to evolve and with that comes a changing, modern and global legal landscape that needs to be adequately accommodated. It serves no one's interests for Australia's in-house lawyers to become isolated from the mainstream particularly in a globalised commercial environment where international business requires appropriate, clear and competent in-house and external legal capabilities. The legal profession and its governing bodies need to be in tune with the exact nature of the in-house role, its demands, bespoke issues and needs, with ongoing development and to that end, should be championing its cause. Not doing so fails a significant part of today's Australian legal profession, is out of step with global trends of a modern profession and ultimately does not adequately service the Australian and international business communities who rely on in-house services to play an integral part in a globalised commercial society.

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