Protection of Corporate Communications from Enforcers and Litigants
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Abstract

The increased exposure of corporations and their officers to liability is – within the 2016 CLTA Conference theme - one of the enduring issues in, and reflections on, corporate law and policy over the past 25 years. This enduring issue in turn inherently has raised how to protect corporations and their officers in an enhanced regulatory and litigious environment. For example, evidence is vital in assisting a corporation and its officers in successfully resisting actions that are threatened or have been brought against them by regulators and litigants. Maintenance of privilege can protect sensitive communications from becoming admissible in these processes and proceedings. Increasingly, from the late 1980s, there has been a tendency to respond to pressures brought about through their increasing regulatory and litigious exposures by corporations appointing general counsel and expanding their in-house legal teams. This trend itself can create exposures unless there is careful monitoring by the corporation of its in-house operations to ensure privilege continues to be attracted and is protected against loss through inattention to detail. The ascendency of economics, commerce and technology has created a situation where non-lawyers have tended to encroach on legal work (e.g. taxation); there accordingly has been a blurring of the distinctive nature of legal from non-legal work; and globalisation has accentuated the tendency towards transnational transactions whereby particularly in-house lawyers can be called upon to become involved in the legal features of transactions carried out in countries with very different laws and legal systems from those of their jurisdiction of admission. There are High Court of Australia authorities which indicate that, unless very careful precautions are taken, the ambit within which general counsel and in-house lawyers are able to attract privilege for their corporate clients can be substantially less when compared with the position outside Australia, including our major trading and investment partners. The application of legal professional privilege to corporations in respect of the work of their in-house lawyers has been contentious in important jurisdictions outside Australia. Nevertheless, given the precautions that now seem essential to ensure corporations operating here do not jeopardise this important cover, Australia might not have been as advanced as some other countries in capturing this legal and policy challenge that corporate law has confronted in regard to legal professional privilege for in-house

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corporate legal work over the past 25 years, at a domestic and international level. In an increasingly globalised environment, these matters require immediate attention by Australian in-house lawyers and their educators, such as members of the Corporate Law Teachers Association in Australia, to facilitate Australian corporations competing on a level playing field internationally.

Introduction

From late 1998, Mr Peter Shafron was employed as the general counsel and company secretary of James Hardie Industries Ltd. In mid-November 1999, Donald Cameron was appointed joint company secretary with him. The Australian Securities and Investments Commission commenced proceedings in the Supreme Court of New South Wales alleging that he had breached section 180 of the Corporations Law of that State\(^2\) and section 180 of the Corporations Act 2001 (Cth).\(^3\)

Until October 2001 James Hardie Industries Limited (“JHIL”) was the ultimate holding company of the James Hardie group of companies. JHIL was a listed public company; its shares were listed on the ASX. Two wholly owned subsidiaries of JHIL, James Hardie & Coy Pty Ltd (“Coy”) and Jsekarb Pty Ltd (“Jsekarb”), had manufactured and sold products containing asbestos. Each of Coy and Jsekarb was subject to claims for damages for personal injury suffered by those who had come in contact with its asbestos products. In 2001 the board of JHIL expected that there would be further claims made against Coy and Jsekarb. The board of JHIL decided to restructure the James Hardie group by "separating" Coy and Jsekarb from the rest of the group. This was to be done by JHIL establishing a foundation (the Medical Research and Compensation Foundation – "the MRCF" or “foundation”) to manage and pay out asbestos claims made against Coy and Jsekarb and to conduct medical research into the causes of, and treatments for, asbestos-related diseases. Jsekarb and Coy would make a Deed of Covenant and Indemnity with JHIL under which Jsekarb and Coy would make no claim against and indemnify JHIL in respect of all asbestos-related liabilities and, in return, JHIL would, over time, pay Jsekarb and Coy an amount of money. New shares would be issued by Coy and Jsekarb to be held by or for the ultimate benefit of the MRCF; JHIL's shares in both Coy and Jsekarb would be cancelled. A new company, James Hardie Industries NV (“JHINV”), would be incorporated in the Netherlands and that company would become the immediate holding company of JHIL and ultimate holding company of the James Hardie group. On 15 February 2001, the board of JHIL

\(^2\) Set out in section 82 of the Corporations Act 2001 (Cth) operating in each State as a law of that State from 1 January 1991 to 15 July 2001 pursuant to an Application Act of the State
\(^3\) Commenced 15 July 2001 pursuant to referral of power over corporations by each State to the Commonwealth
met to consider the separation proposal. What happened at that board meeting became the focus of a range of proceedings.

These proceedings evolved around a key feature of the separation which was the establishment of a foundation to manage and pay out asbestos claims made against the two hitherto wholly-owned subsidiaries - Coy and Jsekarb - which were to be separated from the rest of the group. The day after the board meeting, on 16 February 2001, JHIL sent an announcement outlining the proposal to the Australian Stock Exchange. The announcement contained misleading statements about the sufficiency of the funds available to the foundation to meet present and future claims. It stated that the foundation was “fully funded” and that it gave “certainty” to people with legitimate asbestos claims. In fact, the funds provided to the foundation by JHIL would not have been adequate to meet all legitimate compensation claims.

In so far as the proceedings against Mr Shafron were concerned, the Australian Securities and Investments Commission (“ASIC”) sought civil penalties and related orders against Mr Shafron alleging that he had failed to exercise his powers and to discharge his duties as an officer of JHIL with the degree of care and diligence that a reasonable person would exercise if that person were an officer of a corporation in JHIL’s circumstances and occupied the office held by, and had the same responsibilities within the corporation as, Mr Shafron, thereby contravening subsection 180(1) of the then Corporations Law of New South Wales.

Judgments in Shafron and their ramifications re corporate privilege

The advice which the Court of Appeal found that Mr Shafron should have given either to Mr Macdonald the chief executive officer of JHIL or to the board of JHIL was advice to the effect that certain information about the Deed of Covenant and Indemnity (the "DOCI information") which was to be given by Coy and Jsekarb to JHIL should be disclosed to the Australian Stock Exchange ("the ASX"). The other contravention found was Mr Shafron’s failing to advise the board of JHIL that material (referred to as the "February 2001 Trowbridge Report" and the "Trowbridge 50 Year Estimate") provided by actuarial consultants retained by Mr Shafron on behalf of JHIL – Trowbridge Deloitte Ltd – mentioned to the board and used as the basis for a cash flow model considered by the board at its 15 February 2001 meeting in relation to the proposal for separation of Coy and Jsekarb from JHIL - did not take into account "superimposed inflation" and that

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5 Australian Securities and Investments Commission v Hellicar & Ors (2012) 247 CLR 345
6 Morely & Ors v Australian Securities and Investments Commission (2010) 274 ALR 205, 395 and 404; [2010] NSWCA 331 [979] and [1035] per Spigelman CJ; Beazley and Giles JJA
7 Ibid 408 and 410; [1055] and[1072]
a prudent estimate would have done so. The Court of Appeal had observed that "superimposed inflation" is "an actuarial concept referring to the potential for the cost of claims to increase at a level above the general rate of inflation"; and it was a concept with which the Court of Appeal said Mr Shafron was "acquainted").

At first instance, the trial judge, Gzell J, had found that Mr Shafron had failed to exercise reasonable care and diligence and thereby contravened section 180, and an appeal by Mr Shafron to the Court of Appeal of the Supreme Court of New South Wales did not affect – and indeed reinforced - the underlying principles enunciated by Gzell J in respect of his Honour's findings of liability against Mr Shafron for these contraventions which it upheld. Mr Shafron was given special leave to appeal to the High Court of Australia which affirmed the decisions in the courts below against Mr Shafron.

The High Court’s decision (and the decision in the courts below) unquestionably is correct on the facts. Mr Shafron was either the second or third most senior executive in the company. He was one of this group of three senior executives; himself, the chief executive officer Mr Macdonald, and the chief financial officer Mr Morely. These three senior executives were responsible for formulating the pertinent proposals whose implementation by the company’s Board of Directors resulted in the directors and the three senior executives becoming personally liable for civil penalties under legislation in force in Australia. Mr Shafron had joined the other two senior executives in presenting those proposals to the Board. The principles which have been enunciated by the Australian courts in handing down this decision highlight how special precautions have to be taken in Australia in order to protect legal professional privilege for the work of in-house lawyers within corporations. Those precautions might be thought to be excessive in those overseas jurisdictions which recognise that the work of in-house lawyers can attract legal professional privilege, particularly were those precautions to be looked at from outside in the abstract in the light of the principles enunciated by the Australian courts and without considering the factual context in which the courts have enunciated the principles. Nevertheless, as a result of the courts’ enunciation of those general principles, precautions now seem essential if corporate bodies within Australia are to attract the very substantial protections that legal professional privilege can confer in respect of their in-house legal work. In essence, the necessary precautions evolve around in-house lawyers not becoming exposed as “officers” of the corporations which

8 Ibid 409; [1060]
9 Ibid [1068]
employ them. Once such an exposure arises, it would seem that in-house lawyers then
could be regarded as functioning without the professional detachment essential to
attract legal professional privilege in Australia in respect of their in-house work. They
could be held in court to be performing a different role to that of a lawyer.

The importance of attracting legal professional privilege for in-house legal work is
highlighted by the increasingly significant role in-house lawyers play in corporations:

In a sense, we have gone back to the future. In the early part of the twentieth
century, in-house lawyers were well respected and highly compensated. As
private law firms grew in size and stature, however, they in effect took work from
their clients. In-house counsel came to be viewed as inferior, handling limited,
routine tasks. With increasing costs, economic downturns, and new business
regulations, however, inhouse lawyers benefited by gaining significantly more
legal work in both business transactional and compliance areas.

In-house lawyers today are again well respected in their field for their internal
expertise and management, and they maintain a large degree of control over
corporations’ legal work.13

This has ramifications for legal education:

The above examination of in-house counsel raises an important question
concerning the appropriate role of legal education. Namely, does (or can) legal
education provide appropriate training for inhouse lawyers? The traditional legal
education model has been criticized for its narrow focus. Indeed, changes are
needed and being made to provide students with a broader view of the legal
profession and practice by encouraging students to think like lawyers and
function as lawyers.14

The strategic in-house counsel role adds value precisely because it is
fundamentally different from the largely tactical role of outside law firms. Legal
education must recognize this reality and provide foundational academic
instruction as well as training for the in-house counsel role. These steps have the
potential to significantly enhance the competence and reputation of in-house
counsel.15

content/uploads/2012/04/1-Lipson.pdf accessed 8 January 2016
14 Omari Scott Simmons∗ & James D. Dinnage “Innkeepers: A Unifying Theory of the In-House Counsel Role” (2011)
41 Seton Hall Law Review 77, 148 at http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1372&context=shlr
accessed 8 January 2016
15 Ibid 149
As the judgments in *Shafron* pertain to statutory liability, to more fully consider those judgments and their ramifications, it is necessary to commence with the Australian legislation under which they have been handed down.

**The legislation**

Section 180 provided at all material times in so far as it was relevant at subsection (1) as follows:

A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:

(a) were a director or other officer of a corporation in the corporation's circumstances;
(b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

Note: This subsection is a civil penalty provision (see subsection 1317E).

it is necessary to advert to the definition of “officer” of a corporation in section 9 of the *Corporations Act 2001* (Cth):\(^{16}\)

"officer" of a corporation means:

(a) a director or secretary of the corporation; or
(b) a person:

(i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
(ii) who has the capacity to affect significantly the corporation's financial standing; or
(iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation); or
(c) a receiver, or receiver and manager, of the property of the corporation; or

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\(^{16}\) Which replaced the *Corporations Law* of NSW on its commencement on d 15 July 2001 pursuant to referral of power over corporations by each State, including NSW, to the Commonwealth of Australia, but did not affect the application to Mr Shafron of the pre-existing definition in the *Corporations Law*, which was in the same terms
(d) an administrator of the corporation; or
(e) an administrator of a deed of company arrangement executed by the corporation; or
(f) a liquidator of the corporation; or
(g) a trustee of other person administering a compromise or arrangement made between the corporation and someone else.

Officer

It will be observed that the term “officer” was defined in section 9 to include a secretary of a corporation or a person who makes, or who participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation. The High Court commented that at no stage of the litigation had it been disputed that, as company secretary of JHIL, Mr Shafron was an officer of JHIL within paragraph (a) of the definition. It noted that the Court of Appeal also concluded that Mr Shafron was a person who, at the relevant times, participated in making decisions that affected the whole, or a substantial part, of the business of JHIL and thus was an officer within subparagraph (b)(i) of the definition.

Mr Shafron submitted, in effect, that his obligation of care and diligence was limited to performance of those responsibilities that attached to the office held or the circumstances that made him an "officer". That is, if he was an officer only because he was company secretary, his obligations under subsection 180(1) were limited to the exercise of powers and discharge of duties as secretary, without regard to any powers or duties as general counsel. Thus, Mr Shafron further submitted, only if he fell within subparagraph (b)(i) of the definition of "officer" might it be said that a reasonable person, being an officer of a corporation in JHIL's circumstances and occupying the office held by and having the same responsibilities within the corporation as Mr Shafron, would have tendered the advice which the Court of Appeal found that he should have tendered but did not. Mr Shafron submitted that his responsibilities as company secretary did not extend to tendering that advice. Rather, Mr Shafron argued, "his conduct at issue in these proceedings was not done in his capacity as company secretary, but rather was done in his capacity as general counsel".

The High Court analysed Mr Shafron’s arguments as that they could be seen to have proceeded by three steps: first, there should be a division of his duties and responsibilities between those undertaken "in the capacity of" general counsel and those undertaken "in the capacity of" company secretary; second, he denied that his

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19 Ibid 473-4; [8]
duties and responsibilities as company secretary extended to tendering advice of the relevant kind; and third, he denied that he was an "officer" of the company on another and wider basis that would have carried duties and responsibilities that did extend to tendering such advice.20

The High Court considered that the first of these steps assumed that it was possible to divide the duties and responsibilities of a person engaged by a company as "general counsel and company secretary" between the two elements of the single, composite description given to the job. According to the High Court, the first step in Mr Shafron's argument further assumed that the making of such a division was relevant to the application of subsection 180(1). It concluded that neither assumption could be made. The first step in Mr Shafron's argument was not made good.21

The High Court observed that the proposition that some distinction could be drawn between the "capacities" in which certain tasks were undertaken by Mr Shafron assumed, wrongly, that the work he did "as company secretary" could not, and did not, overlap with the work that he did "as general counsel". The High Court considered that it was greatly to be doubted that the tasks that Mr Shafron undertook could be divided in this way. It concluded that that may be reason enough to reject this aspect of Mr Shafron's argument (although there were other, more fundamental, reasons to do so).22

A crucial issue was found to evolve around Mr Shafron's submission that the scope of the office of a company secretary in any particular corporation was a question of fact and that "[i]n this case, the best evidence of the scope of Mr Shafron's role as company secretary is the scope of the role of JHIL's other company secretary, Mr Donald Cameron". It was submitted that Mr Cameron's responsibilities "never rose above purely administrative functions (such as transmitting material to the ASX, maintaining the records of the board, and such like)". So, Mr Shafron submitted, any work that he did in advising the board or others about such matters as duties of disclosure was work that was done as, or "in the capacity of", general counsel, not as, or "in the capacity of", company secretary. Similarly, Mr Shafron submitted, any work that he did in connection with actuarial advice "related principally to actuarial and financial matters" and was work done as, or "in the capacity of", general counsel.23

The High Court considered that it by no means followed from the proposition that what responsibilities a company secretary had in a particular company was a question of fact that the tasks Mr Cameron performed at JHIL were properly to be understood as a complete identification of the work that could be or was undertaken by Mr Shafron

20 Ibid 474; [9]
21 Ibid [10]
23 Ibid [12]
because he too held the office of company secretary. That was, it could not be assumed that Mr Cameron's responsibilities were identical (in whole or in part) to Mr Shafron's responsibilities. It followed that, contrary to Mr Shafron's submissions, the "scope" of his role as company secretary could not be identified as limited to the responsibilities Mr Cameron had.24

The High Court found25 that a fundamental difficulty with Mr Shafron's submission was that there was no evidence demonstrating or suggesting that Mr Shafron performed certain tasks in one "capacity" and other tasks in another. Mr Shafron did not give evidence at trial. What evidence there was about the role of a "company secretary and general counsel" of a listed public company did not support the distinction Mr Shafron's submissions sought to draw:

Peter Athanas Bobeff was senior vice president commercial affairs at Foster's Group Limited for 13 years until retirement. The title involved the positions of company secretary and general counsel as well as other responsibilities. His opinion was that a listed company would expect its general counsel to provide advice about the operation and application of the continuous disclosure rules and that a company secretary and general counsel would ensure that directors were aware of issues that arose in relation to continuous disclosure.26

The evidence of Mr Bobeff, referred to at LJ [557], went further than as stated by the judge, and included that it was the role of company secretaries to support directors in complying with continuous disclosure rules and that it had been the practice of the ASX "to look to the company secretary whenever issues arise in respect of a listed disclosing entity, particularly in relation to continuous disclosure matters". Indeed, the thrust of his evidence was that all senior executives had a responsibility in that regard. We do not think that, as was submitted by Mr Shafron, Mr Bobeff’s evidence was diminished by disregard of Mr Shafron’s position as general counsel or his secondment to the United States.27

Yet, as had been stated, what responsibilities Mr Shafron had was a question of fact.28

24 Ibid 475; [13]
25 Ibid [14]
27 Morely & Ors v Australian Securities and Investments Commission (2010) 274 ALR 205, 396; [2010] NSWCA 331 [983] per Spigelman CJ; Beazley and Giles JJA
The title "general counsel and company secretary" given to Mr Shafron indicated he was qualified as a lawyer – he was admitted to practise law both in Australia and in California. An important element in Mr Shafron's responsibilities was his giving advice about and, where appropriate, taking steps necessary to ensure compliance with all relevant legal requirements, including those that applied to JHIL as a listed public company. The High Court observed\textsuperscript{29} that the primary judge and the Court of Appeal had described this aspect of Mr Shafron's responsibilities as a duty to protect the company "from legal risk":

It was said in Mr Shafron’s behalf that he owed no duty to warn the board because any reasonable director who considered the Draft ASX Announcement would have appreciated that it was expressed in too emphatic terms and that it was false and misleading.

But Mr Shafron had a duty to protect JHIL from legal risk and if the directors were minded to approve the release of the Draft ASX Announcement in its false and misleading form, there was the danger that JHIL would be in breach of Section 995(2) and Section 999. Against that harm it was his duty to warn the directors that the Draft ASX Announcement should not be released in its too emphatic form. The factors of the Cashflow Model that should have alerted the non-executive directors and Mr Macdonald that the excessive statements in the Draft ASX Announcement should not be made should have alerted Mr Shafron also.\textsuperscript{30}

Mr Shafron knew, or ought to have known, that the unqualified statements that PwC and Access Economics had advised JHIL and that advice supplemented the company’s long experience in the area of asbestos and formed the basis of determining the level of funding required to meet all future claims was false or misleading and potentially damaging to JHIL.

In the absence of explanation by Mr Morley, it was Mr Shafron’s duty in protecting JHIL from legal risk to have advised the board of the limitations.

A reasonable person, if an officer of a corporation in JHIL’s circumstances who occupied the office of secretary and general counsel and had the same responsibilities within the corporation, would have advised the board that the reviews of the Cashflow Model by PwC and Access Economics were limited to reporting on the logical soundness and technical correctness of it and they had not verified, and had been specifically instructed not to consider, the key

\textsuperscript{29} Ibid 475; [15]
assumptions adopted by the Cashflow Model, being fixed investment earnings rates, litigation and management costs and future claim costs.31

It was submitted, although we were not referred to evidence in this regard, that Mr Shafron’s responsibilities as company secretary were, like Mr Donald Cameron’s, purely administrative, and did not extend to protecting JHIL from legal risk. We do not think that restriction can be accepted. A company secretary with legal background would be expected to raise issues such as potential misleading statements (in relation to the Draft ASX Announcement) and disclosure obligations (in relation to the DOCI) with the board. Ordinarily it might not be the same with respect to a matter such as the JHIL cash flow modelling, which required particular expertise. But Mr Shafron had a quite close involvement with the cash flow modelling, and raising the limitations of the cash flow model is by no means a legal matter for the attention of general counsel; the involvement, and raising the limitations, in our view fell within Mr Shafron’s responsibilities as company secretary.32

We go then to advice from Allens. Mr Shafron’s principal submission was to the effect that Allens was retained to provide advice on JHIL’s obligation to disclose the DOCI Information, either expressly or generally as part of that firm’s general retainer. We will discuss each of these alternatives.

In this, Mr Shafron challenged the judge’s rejection of a like submission recorded at LJ [563]. He did not challenge the existence of a duty to protect JHIL from legal risks, or challenge the threefold particularisation of breach of that duty in the pleadings and accepted by his Honour. His submissions were to the effect that there was no breach of the duty because he ensured that skilled legal advisers were retained to advise.33

It is sufficient to conclude that Mr Shafron did not ensure that external solicitors would give relevant advice. We would, in the alternative to that factual basis for rejecting his appeal in relation to the DOCI, accept ASIC’s submission that the breach of duty identified in the threefold manner set out above would not be ameliorated by the fact, contrary to our conclusion, that Allens was required or could reasonably be expected to advise on disclosure of the DOCI Information.

… there would have been no finding of breach if Mr Shafron had raised the issue of disclosure for consideration. There is no evidence that he did. We do not

31 Ibid 271; [410]-[412]
33 Ibid 395-6; [995]-[996]
suggest that, using language from another legal context, the duty of a person in Mr Shafron’s position to protect the company from legal risk is a non-delegable duty. However, there had to be some evidence that consideration was given to the need for advice, and there was none.\(^{34}\)

The High Court considered that no doubt the obligations of a general counsel and company secretary such as Mr Shafron to protect the company from legal risk included ensuring that purely administrative functions were performed like transmitting necessary material to the ASX and maintaining appropriate records of the board. But the High Court stated that Mr Shafron’s responsibilities did not end at that point. His responsibilities were wider than administrative, and extended to the provision of necessary advice.\(^{35}\)

In relation to Mr Shafron’s contention that the application to him of subsection 180(1) should be restricted to those functions he performed in the capacity of company secretary and that the contraventions alleged against him concerned his functions as general counsel, the High Court raised “even if some division could be made between the capacities in which Mr Shafron acted, what would be its relevance?”\(^{36}\) It held that section 180 applied to Mr Shafron because he was a company secretary of JHIL (consistent with the Court of Appeal’s findings in respect of a company secretary with Mr Shafron’s legal background). In addition, the High Court noted that Mr Shafron was one of the three executives responsible for formulating the separation proposal put to the board for approval. The High Court considered that it was not possible to divide the duties and responsibilities Mr Shafron performed as company secretary from those he performed as general counsel. These were two elements of a single, composite description given to the job. Nor was the making of such a division relevant to the application of sub-section 180(1).\(^{37}\)

The proposition that some distinction could be drawn between the "capacities" in which certain tasks were undertaken by Mr Shafron assumed, wrongly, that the work he did "as company secretary" could not, and did not, overlap with the work that he did "as general counsel". It is greatly to be doubted that the tasks that Mr Shafron undertook could be divided in this way. That may be reason enough to reject this aspect of Mr Shafron’s argument (although there are other, more fundamental, reasons to do so).\(^{38}\)

\(^{34}\) Ibid 403-4; [1034]-[1035]
\(^{35}\) Ibid 475; [15]
\(^{36}\) Ibid 476; [17]
\(^{37}\) Ibid 474; [10] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ
\(^{38}\) Ibid [11]
All of the tasks Mr Shafron performed were undertaken in fulfilment of his responsibilities as general counsel and company secretary. More particularly, because of his qualifications and the position in which he was employed, his responsibilities as general counsel and company secretary extended to proffering advice about how duties of disclosure should be met. And when he procured advice of others and put that advice before the board for its use, his responsibilities could, and in this case did, extend to identifying the limits of the advice that the third party gave.\(^{39}\) The responsibilities referred to in subsection 180(1) were not confined to statutory responsibilities; they included \textit{whatever} responsibilities the officer concerned had within the corporation, regardless of how or why those responsibilities came to be imposed on that officer.\(^{40}\)

The High Court found that Mr Shafron’s responsibilities were found by both the primary judge (Gzell J)\(^{41}\) and the Court of Appeal\(^{42}\) to have included the tendering of relevant advice (including legal advice) about disclosure requirements. It cited the Court of Appeal as having rightly said:\(^{43}\)

"A company secretary with legal background \textit{would be expected to raise} issues such as potential misleading statements (in relation to the draft ASX announcement) and disclosure obligations (in relation to the DOCI) with the board. Ordinarily it might not be the same with respect to a matter such as the JHIL cash flow modelling, which required particular expertise. But Mr Shafron had a quite close involvement with the cash flow modelling, and raising the limitations of the cash flow model [based on the material Mr Shafron had obtained from Trowbridge] is by no means a legal matter for the attention of general counsel; the involvement, and raising the limitations, in our view fell within Mr Shafron’s \textit{responsibilities} as company secretary." (emphasis added by the High Court)\(^{44}\)

The High Court found that the Court of Appeal had rightly concluded that Mr Shafron's "responsibilities within the corporation" extended to the several subjects identified.\(^{45}\)

\(^{39}\) Ibid 475; [16]
\(^{40}\) Ibid 476; [18]
\(^{41}\) \\textit{Australian Securities and Investments Commission v Macdonald & Ors (No 11)} (2009) 256 ALR 199; 270-271, 290-29; [2009] NSWSC 287 [402]-[406], [559-560] per Gzell J
\(^{42}\) Morely & Ors v \textit{Australian Securities and Investments Commission} (2010) 274 ALR 205, 383; [2010] NSWCA 331 [926] per Spigelman CJ; Beazley and Giles JJA
\(^{43}\) Ibid
\(^{45}\) Ibid
Consequences of finding re responsibilities as general counsel/ secretary

Once it was found that Mr Shafron’s responsibilities extended to those subjects, the question became whether Mr Shafron undertook those responsibilities with the requisite degree of care and diligence.

Participation in making decisions

It therefore was not necessary for the High Court to decide whether Mr Shafron was a person who participated in making decisions that affected the whole or a substantial part of the business of JHIL. The High Court, however, did say something shortly about this question.46

On this matter, the High Court made several points. First, the inquiry had to be directed to what role the person in question played in the corporation. It was not confined only in relation to the particular issue in respect of which it was alleged that there was a breach of duty.47 Second, where the breaches of duty alleged were the failure to provide advice it was evident that determining how a reasonable person occupying the same office and having the same responsibilities would exercise the powers and discharge the duties of that office may be assisted by consideration of how the officer in question acted on occasions other than the one which was alleged to give rise to a breach of the duties imposed by subsection 180(1). It therefore was relevant for the Court of Appeal to notice48 what Mr Shafron had done at JHIL in connection with matters other than the separation proposal. The Court of Appeal had found that apart from Mr Shafron’s role in connection with actuarial information provided to the board, perusal of the minutes of board meetings from mid-1998 onwards had shown frequent reporting on asbestos litigation and risk management and occasions such as authority to finalise the terms of an agreement with James Hardie Investments NV (and together with others) authority to negotiate and execute an underwriting agreement in connection with Project Chelsea:

In our opinion, what Mr Shafron did went well beyond administrative arrangement, and well beyond providing advice or information as required, and is correctly described as participation in decisions affecting the whole or a substantial part of JHIL’s business.49

46 Ibid [21]
47 Ibid 478; [23]
49 Ibid [895]
The High Court decided that, contrary to Mr Shafron's submission, there was no denial of natural justice in the Court of Appeal taking notice of what he had done in connection with matters other than the separation proposal.50

Third, the High Court noted that each of the three classes of persons described in paragraph (b) of the definition of "officer" was evidently different from (and a wider class than) the persons identified in the other paragraphs of the definition. Persons identified in the other paragraphs of the definition all held a named office in or in relation to the company; those identified in paragraph (b) did not. Persons identified in the other paragraphs all held offices for which the legislation prescribed certain duties and functions; those identified in paragraph (b) did not. Persons identified in the other paragraphs of the definition were bound by the legislation to make certain decisions and do certain acts for or on behalf of the corporation; those identified in paragraph (b) did not. Persons identified in the other paragraphs of the definition were usually in accordance with section 198A of the Corporations Act 2001 (Cth), and in relation to JHIL was, given.51

Fourth, the High Court noted that sub-paragraph (i) of paragraph (b) of the definition of “officer” distinguished between making decisions of a particular character and participating in making those decisions. Contrary to Mr Shafron’s submissions, the High Court considered that participating in making decisions should not be understood as intended primarily, let alone exclusively, to deal with cases where there were joint decision makers. According to the High Court, the case of joint decision making would be more accurately described as "making decisions (either alone or with others)" than as one person "participating in making decisions". Rather, as the High Court believed the Court of Appeal had rightly held,52 the idea of "participation" directs attention to the role that a person has in the ultimate act of making a decision, even if that final act is undertaken by some other person or persons. The notion of participation in making


51 Ibid 478-9; [[25]

52 Morely & Ors v Australian Securities and Investments Commission (2010) 274 ALR 205, 377-78; [2010] NSWCA 331 [892-[893] per Spigelman CJ; Beazley and Giles JJA
decisions presents a question of fact and degree in which the significance to be given to
the role played by the person in question must be assessed.53

Mr Shafron was a senior executive of JHIL (either the second or third most senior
executive in the company). He was one of a group of three executives (Messrs
Macdonald, Morley and Shafron) responsible for formulating proposals for the
separation of Coy and Jsekarb from the James Hardie group and presenting those
proposals to the board.54

The High Court referred55 to findings by the New South Wales Court of Appeal56 and
the trial judge57 that between December 1999 and February 2001, Messrs Macdonald,
Morley and Shafron, at times with the assistance of others, formulated several "variants"
of the separation proposal. At the January 2001 board meeting, Messrs Macdonald,
Morley and Shafron (and others) presented the net assets model, which the board
rejected.58 Messrs Macdonald, Morley and Shafron (again with the assistance of others)
then formulated the revised proposal that was put to and approved by the board in
February 2001.59

The High Court found that the fact that Mr Shafron was an employee of the company,
and not an external adviser, was important. What Mr Shafron did was not confined to
proffering advice and information in response to particular requirements made by the
company. And what Mr Shafron did went well beyond his proffering advice and
information to the board of the company. Mr Shafron played a large and active part in
formulating the proposal that he and others chose to put to the board as one that should
be approved. It was the board that ultimately had to decide whether to adopt the
proposal but what Mr Shafron did, as a senior executive employee of the company, was
properly described as his participating in the decision to adopt the separation proposal
that he had helped to devise.60

French CJ, Gummow, Hayne, Crennan, Keifel and Bell JJ
54 Ibid 480; [28]
55 Ibid [29]
56 Morely & Ors v Australian Securities and Investments Commission (2010) 274 ALR 205, 218, 221-6,387; [2010]
NSWCA 331, [56], [68], [71]-[90], [941]per Spigelman CJ; Beazley and Giles JJA
57 Australian Securities and Investments Commission v Macdonald & Ors (No 11) (2009) 256 ALR 199; 268; [2009]
NSWSC 287, [285] per Gzell J
58 Australian Securities and Investments Commission v Macdonald & Ors (No 11) (2009) 256 ALR 199; 221; [2009]
NSWSC 287, [89] per Gzell J; Morely & Ors v Australian Securities and Investments Commission (2010) 274 ALR 205,
268; [2010] NSWCA 331, [385] per Spigelman CJ; Beazley and Giles JJA
59 Morely & Ors v Australian Securities and Investments Commission (2010) 274 ALR 205, 228, 234-40; [2010]
NSWCA 331, [100], [133]-[166] per Spigelman CJ; Beazley and Giles JJA
French CJ, Gummow, Hayne, Crennan, Keifel and Bell JJ
According to the High Court, the conclusion that Mr Shafron participated in making that decision was not a conclusion based only on what Mr Shafron did. That what Mr Shafron did could be described as proffering advice or providing information for the board's consideration was not an end to the relevant inquiry. The conclusion that Mr Shafron participated in making the decision depended not only upon what he did but also upon identifying the relationship between his actions and the decision to adopt the proposal as "participation" in making the decision. In this case, Mr Shafron was one of three executives who shaped and developed the proposal through its successive variants; he was one of the executives who presented successive proposals to the board; he was, as the Court of Appeal found, part of the "promotion of the separation proposal to the board", a board that did not itself decide what elements would go to make up any of the several proposals it considered and was, as ASIC submitted, "reactive" rather than "proactive" in the formulation of the proposals. And he did all this as a senior executive employee of the company who, with Messrs Macdonald and Morley, decided what would be put to the board.

Breaches of duty?

There remained for the High Court's consideration so much of Mr Shafron's appeal as alleged that he had not been shown to have acted without due care and diligence in respect of either the Deed of Covenant and Indemnity (DOCI) information or the question of superimposed inflation.

More particularly Mr Shafron had alleged, first, that the Court of Appeal was wrong to have found, as had the primary judge, that he breached subsection 180(1) by not advising Mr Macdonald or the board that they needed to consider whether disclosure of the DOCI information to the ASX was required, by not obtaining advice for Mr Macdonald or the board or giving his own advice to the board about that matter, or by not advising Mr Macdonald or the board to decide to disclose the information. Second, Mr Shafron had alleged that the Court of Appeal was wrong to find, as it did, that in making a presentation to the board about the material provided by Trowbridge which formed the basis of the cash flow model considered at the February 2001 board meeting he did not advise the board that the Trowbridge material did not allow for superimposed inflation and prudence warranted making that allowance.

DOCI

The Court of Appeal had found, amongst other things, that Mr Saffron “was not a mere conduit for the advice of external solicitors”.63 There was no doubt that Allens advised extensively, but there was no direct evidence that Allens had a “general retainer” to advise on all legal matters arising with respect to the project. No defendant gave any such evidence. Nor was there any document establishing a “general retainer”.64

Allens’ bill was impressive, but we derive no assistance from its size. It does not suggest a general retainer of the kind alleged.

There is no evidence of a “general retainer” to advise, relevantly, on continuous disclosure obligations. Allens’ attendance at meetings and what occurred in relation to the Draft ASX Announcement takes matters no further towards such a retainer. Senior solicitors from Allens drafted all the relevant documents and were present at board meetings, notably the meeting at which DOCI was agreed. They were also involved in settling the Draft ASX Announcement. Whether or not they should have raised the issue of disclosure of the DOCI Information is not before the Court. The issue before us is not Allens’ duty, but what the exercise of due care and diligence required of Mr Shafron. Insofar as he relied on an express or inferred retainer to Allens to advise on disclosure of the DOCI Information, in our opinion he failed to establish the factual basis for his contention.65

The High Court found that it was enough to say that there was no reason to doubt the correctness of the factual findings made in relation to this aspect of the matter by both the primary judge and the Court of Appeal. It followed that Mr Shafron’s argument in the High Court, that he "was entitled to assume that Allens [JHIL’s solicitors] would have advised him if disclosure of the DOCI Information to the ASX was required", foundered on the rock of the finding at trial, not disturbed on appeal, that Allens' retainer neither expressly nor impliedly extended to considering that question.66

Superimposed inflation

The Court of Appeal had found that Mr Shafron had breached his duty under subsection 180(1) by failing to advise the board that the best estimate contained in a report and an estimate supporting the trust had not taken into account superimposed inflation and that a prudent estimate would have:

63 Morely & Ors v Australian Securities and Investments Commission (2010) 274 ALR 205, 403; [2010] NSWCA 331, [1032] per Spigelman CJ; Beazley and Giles JJA
64 Ibid 401; [1022]
65 Ibid 403; [1029]-[1030]
In our view, it is clear that Mr Shafron was acquainted with the concept of superimposed inflation, and aware of its importance in estimating asbestos liabilities. It should be found that he knew that the cash flow projections in the February 2001 Trowbridge Report did not allow for superimposed inflation. That report was an updating, on alternative scenarios of claim numbers, in the light of the Watson and Hurst study. The assumptions otherwise made for the June 2000 draft report remained. If this is not something properly to be inferred, then we consider that a reasonable person in Mr Shafron’s position would have inquired in order to ascertain whether or not the cash flow projections allowed for superimposed inflation.

As we have earlier accepted, Mr Shafron was not actuarially trained. But in this instance he had familiarity with the concept such that he had suggested a different figure for superimposed inflation for the sensitivity analysis at the time of the June 2000 draft report. The potential impact of superimposed inflation was obvious, and must have been known to Mr Shafron from that draft report if not otherwise. At the least, inquiry was called for.

Mr Shafron submitted that the fact that the February 2001 Trowbridge Report was an updating did not mean that Trowbridge had failed to take superimposed inflation into account. He submitted that in any event he was not an actuary, and was not on notice of a flaw in Trowbridge’s methodology in failing to allow for superimposed inflation. He submitted that he was entitled to rely on the competence of the actuaries on such a matter, and that there was no occasion for him to raise the matter. He said also that the evidence did not establish that superimposed inflation should have been taken into account, and that Dr Taylor accepted that the appropriate rate of superimposed inflation “could conceivably have been zero”.

The reasons we have given dispose of all but the last of these submissions. The reliance on Dr Taylor was misplaced. An actuary called by Mr Morley, Mr Wilkinson, gave evidence to the effect that an allowance should have been made. Dr Taylor said that, while the appropriate rate of superimposed inflation could conceivably have been zero, he agreed with Mr Wilkinson’s comment “that that would have represented the lower bound of what was reasonable”. The point is not what rate of superimposed inflation should have been taken into account, or that there was a lowest limit. It is whether Mr Shafron should have advised the board that, in the “best estimate” used as a basis for the cash flow model, it had not been taken into account and a prudent best estimate would have taken it into account. The evidence made it clear, in our view, that prudence dictated that it be taken into account.
... Mr Shafron submitted that he did not fail in the exercise of due care and
diligence, because in the circumstances of JHIL at the time any advice to the
board from management on that topic was a financial matter within the area of
expertise and responsibility of Mr Morley. He submitted that it was not within his
area. He submitted that ASIC’s case was really that he had been negligent in
failing to pick up Trowbridge’s negligence in not allowing for superimposed
inflation, and that such a case should be rejected.

We do not agree.67

The High Court stated68 that again there was no reason to doubt the correctness of the
conclusion reached by the Court of Appeal, quoting its judgment:69

Without undue repetition, Mr Shafron had a primary involvement with
Trowbridge’s estimates, including knowledge of the significance of superimposed
inflation. He made the slide presentation concerning Trowbridge’s estimates at
the February meeting. In the June 2001 draft report Trowbridge had pointed out
that their estimates of asbestos liabilities did not allow for superimposed inflation,
and the significant difference which such an allowance could make. It was not a
matter of Mr Shafron second-guessing Trowbridge. He knew that JHIL’s
experience was that the cost of claims was increasing at a much higher rate than
the general inflation rate. A reasonable person with his responsibilities would
have made sure that the board knew of those matters, and in our opinion, would
have drawn to the board’s attention, as a matter highly significant to the reliance
to be placed on the cash flow modelling, that no allowance had been made for
superimposed inflation and that prudence warranted that an allowance should be
made.

The High Court concluded that the findings of fact should not be disturbed70 and that Mr
Shafron’s appeal should be dismissed with costs:71

Contrary to Mr Shafron’s submissions in this Court, the conclusion reached by
the Court of Appeal did not depend upon Mr Shafron bringing to bear any expert
actuarial knowledge about what was an appropriate rate for superimposed
inflation. What the Court of Appeal decided was that a reasonable person with

331 [1068]-[1073] per Spigelman CJ; Beazley and Giles JJA
68 Shafron v Australian Securities and Investments Commission (2012) 247 CLR 465, 482; [2012] HCA 18, [34] per
French CJ, Gummow, Hayne, Crennan, Keifel and Bell JJ
331, [1073] per Spigelman CJ; Beazley and Giles JJA
French CJ, Gummow, Hayne, Crennan, Keifel and Bell JJ
71 Ibid [37]
his responsibilities (which included commissioning the Trowbridge material) would have drawn to the attention of the board a matter of which he knew (that the cost of claims was increasing at a much higher rate than the general inflation rate) and that, as Trowbridge had shown in its June 2000 draft report on JHIL's potential exposure to asbestos-related claims, an allowance for superimposed inflation could make a significant difference to the estimates that Trowbridge made and upon which the board relied.72

Justice Heydon’s concurring judgment

Heydon J handed down a concurring judgment. His Honour held that the Court of Appeal was right to dismiss Mr Shafron's appeal against the trial judge's orders.73 Mr Shafron was "General Counsel and Company Secretary" of James Hardie Industries Ltd.74 He therefore fell within paragraph (a) of the definition of "officer" in section 9 of the Corporations Act 2001 (Cth).75 Even if Mr David Cameron's duties as joint company secretary were of an administrative character only, it did not follow that Mr Shafron's duties as company secretary were also of an administrative character only. It was not possible to sever Mr Shafron's responsibilities into watertight compartments, one marked "company secretary" and the other marked "general counsel". The expression "company secretary" was not a term of art. The responsibilities of company secretaries could vary from company to company, within companies, and over time. They had tended gradually to wax over many decades. From Mr Shafron's behaviour in practice, it could be inferred that his responsibilities were much more than mere administrative duties. He advised the board on substantive matters, particularly in respect of James Hardie Industries Ltd's exposure to asbestos litigation. He was one of its three most senior executives. He had assisted in devising proposals for separating its subsidiaries exposed to asbestos claims from the rest of the group.76

For the purposes of this appeal, it was sufficient to say that the obligation of care and diligence that subsection 180(1) imposed on Mr Shafron was measured by what a reasonable person would do if that person occupied the office of company secretary and had the same responsibilities as those Mr Shafron had in that office. The responsibilities which he had were those which he ordinarily carried out.77

James Hardie Industries Ltd had legal obligations to make disclosures to the Australian Stock Exchange ("the ASX"). Mr Shafron had a duty to take care and employ diligence

72 Ibid [35]
73 Ibid 483 [38]
74 Ibid [40]
75 Ibid
76 Ibid [41]
77 Ibid [42]
to protect the company from legal risk in relation to those obligations. The company
would be exposed to legal risk both from non-disclosure of information in the Deed of
Covenant and Indemnity and from any failure of actuarial consultants to take into
account "superimposed inflation". For Mr Cameron the position might well have been
different, because his responsibilities, on Mr Shafron's submission, were much
narrower. 78

Mr Shafron's sole argument was that he was entitled to assume that James Hardie
Industries Ltd's solicitors would have advised him if disclosure of the information to the
ASX was required. The argument had to be rejected. The solicitors' retainer did not
extend to advising on that question. 79

At the board meeting of 15 February 2001, a cash flow model was tabled. It was based
in part on two documents provided by actuarial consultants that Mr Shafron had
retained. The courts below had found that Mr Shafron breached his duty in failing to
advise that the actuarial documents did not take into account "superimposed inflation" –
the potential for the cost of asbestos claims to increase over time at a rate above the
general rate of inflation. 80

The Court of Appeal had found that Mr Shafron was "acquainted" with that concept and
"aware of its importance in estimating asbestos liabilities." It also found that he knew
that the cash flow projections in the actuarial material did not allow for superimposed
inflation. Although Mr Shafron was not a trained actuary, he was familiar enough with
superimposed inflation to suggest in June 2000 that a different figure for it be used than
the one which appeared in an earlier actuarial report. He had had primary involvement
with the actuaries' estimates in the past. He had conducted the slide presentation of the
estimates at the 15 February 2001 meeting. And he knew about the superimposed
inflation which James Hardie Industries Ltd had experienced during his time as
company secretary. Heydon J concluded that these facts were enough to support the
conclusions of the trial judge and of the Court of Appeal, 81 and that the appeal had to be
dismissed with costs. 82

**Issue of proactivity in Shafron relevant to legal professional privilege**

In the Court of Appeal, Mr Shafron submitted that the proper discharge of his duties in
the circumstances did not require him to tell directors “what they already knew”,

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78 Ibid 483-4; [43]
79 Ibid [44]
80 Ibid [45]
81 Ibid 484-5; [46]
82 Ibid [47]
particularly where he had already provided information and advice sufficient to enable a reasonable director to understand the relevant issues.83

The response of the New South Wales Supreme Court of Appeal was:

Mr Shafron’s submissions, in our view, are off the point. If the directors should have appreciated, because it was obvious, that the Draft ASX Announcement was expressed in too emphatic terms, by approving it they either failed nonetheless to appreciate that position or proceeded regardless of their appreciation. In either case, the circumstances of JHIL included, in brief, that making such an obviously misleading announcement was likely to be highly detrimental to it. The reasonable person with Mr Shafron’s responsibilities, in our view, would have raised with the board that which on Mr Shafron’s submissions was so obvious, but was either not appreciated or was being ignored by the board. He or she would have done so because it appeared that such an important matter was not appreciated, or was being ignored.84

According to Austin and Ramsay:

Mr Shafron argued that he did not breach his duty because he was entitled to assume that JHIL’s law firm would have advised him if disclosure of particular information to the ASX was required. The court rejected this argument because the law firm’s retainer did not extend to considering this matter. This indicates that the scope of responsibilities where it has been agreed that some responsibilities, which would otherwise be undertaken by the officer, have been assigned to an external adviser. In turn, this can influence whether there has been a breach by the officer where it has been alleged that the officer did not undertake the responsibilities with sufficient care.85

As intimated above, the High Court did note expressly that “there is no reason to doubt the correctness of the factual findings made in relation to this aspect of the matter by both the primary judge and the Court of Appeal” so that it followed that “Mr Shafron’s argument in this Court, that he "was entitled to assume that Allens [JHIL’s solicitors] would have advised him if disclosure of the DOCI [i]nformation to the ASX was required", founders on the rock of the finding at trial, not disturbed on appeal that Allens'

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83 Morely & Ors v Australian Securities and Investments Commission (2010) 274 ALR 205, 386; [2010] NSWCA 331 [936] per Spigelman CJ; Beazley and Giles JJA
84 Ibid [947]
retainer neither expressly nor impliedly extended to considering that question". The High Court also did not disturb the Court of Appeal’s finding that:

Mr Shafron also submitted that Allens was retained to advise “on all aspects of establishment of the Foundation”, and that representatives of Allens and UBS were at the meeting and “had the opportunity to advise and respond to any questions the directors had in relation to the establishment of the Foundation and any public announcements”. Similar submissions were made in relation to disclosure of the DOCI. We there observe that there is no basis on which we can properly infer that he relied on the silence of Allens, and the same goes for the silence of UBS. In any event, the silence of Allens or UBS did not relieve the reasonable person with Mr Shafron’s responsibilities from himself or herself raising the over-emphasis in the announcement.

While in the case of outside solicitors, it seems “fair to say” that “only in the rarest of cases will a lawyer who has fulfilled her or his retainer nonetheless be liable” for breaching the duty of care in respect of the common law action of tort, with respect to the statutory liabilities of a corporate “officer”, it seems clear from the Court of Appeal’s reference to the silence of the outside solicitors “not relieving a person with Mr Shafron’s responsibilities from himself or herself raising the over-emphasis in the announcement”, that a corporate officer is unlikely to be able to contract out of his or her statutory liabilities by their having “been assigned to an external adviser”. In essence, the nature of the two sets of responsibilities is fundamentally different. A corporate officer with Mr Shafron’s responsibilities cannot contract out of them by a purported assignment to an external adviser. In accordance with what was stated by the Court of Appeal, prudently it should be assumed that a corporate officer with Mr Shafron’s responsibilities is unable to hide behind the actions, omissions and silence of an outside adviser.

Mr Shafron relied on what was said to be evidence of two directors, Mr Brown and Mr Gillfillan, that it would have been “impudent and inappropriate” for Mr Shafron him to have “stated the obvious” during the February Board meeting. The Court of Appeal noted that this was not their evidence. The two directors agreed in cross-examination

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88 G E Dal Pont, Lawyers’ Professional Responsibility (5th ed 2013) 148 [5.30] Thomson Reuters, Pyrmont NSW; cf Hawkins v Clayton (1988) 164 CLR 539, 574 per Deane J (tortious duty of care may require lawyer to take positive steps “beyond the specifically agreed professional task or function” where necessary to “avoid a real and foreseeable risk of economic loss being sustained by the client”.)
that it would have been unusual, and not required of a reasonable person in Mr Shafron’s position, to quiz whether they were “sufficiently sure of the material before them to make the decision in favour of the Foundation and the top-up” (Mr Brown); and that they would not expect and would regard it as inappropriate for Mr Shafron to ask if they were sure they had “read all the papers” and did not expect Mr Shafron as part of his job to ask whether they had had “formed the opinion of the adequacy of the Foundation”, and it would have been “socially inappropriate” for him to have done so (Mr Gillfillan). The Court of Appeal noted that Mr Shafron’s submission omitted reference to the immediately following evidence of Mr Gillfillan -

“Q. You didn’t need Mr Shafron to advise you during that meeting to be careful about announcements being in too emphatic terms, did you?

A. I would have relied on Mr Shafron to make sure that any press releases that went out had the proper checking either by management or by outside advisers.”

In essence, what we have is a requirement on Mr Shafron in his capacity as general counsel and company secretary to protect the company and its governing board of directors from legal liability and associated legal risks, with the directors relying on him to do so irrespective of whether specific instructions on any particular matter that might have created the risk exposure actually had been given to Mr Shafron. Mr Shafron was required to have been proactive in minimising the risk exposures of the company and its governing board of directors. This requirement of proactivity on the part of Mr Shafron is consistent with his liability arising from him being a senior officer who participated in the corporate decision-making and who held the position of company secretary, with the liability arising in Mr Shafron’s capacity as an “officer” rather than as a “legal practitioner”.

What this requirement on Mr Shafron illustrates is the potential incompatibility between:

- such a requirement on a general counsel and company secretary, in his or her capacity as an “officer”, to be “impudent and inappropriate” in intervening at Board meetings, either to state the “obvious” or to say to the Board that cash flow projections in an actuary’s report or an outside expert economic forecast commissioned by the Chief Executive Officer and the Chief Financial Officer are unsafe for the Board to rely on, because these actuary reports and economic forecasts have not been factored to allow for such a non-legal technical concept as “superimposed inflation”, that is an increase in costs within a particular market or financial segment requiring greater monetary reserves than ordinarily would suffice to meet those cost increases; and

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90 Ibid 386, [938]
• the caution that to protect legal professional privilege “in-house lawyers should [emphasis as in original] … seek written instructions in relation to legal advice requested [emphases added]”.91

The courts clearly have required Mr Shafron to have given governance advice which, while informed by his legal qualifications, the courts have mandated that his governance advice should have extended into specialist areas well outside the law and his own legal training, such as to encompass actuarial and economic matters, so that it could not reasonably be considered to be “legal” advice; and then to have provided governance “advice” not only when the Board had not requested any such “advice”, but also when the provision of this “advice” to the Board by Mr Shafron would have been “impudent and inappropriate”; e.g. in these respects, it was not only an issue of the courts requiring Mr Shafron to have stated “the obvious” in relation to the continuous disclosure matters, but also on another aspect the courts requiring Mr Shafron to be upstaging his own boss the Chief Executive Officer and Managing Director, and to be contradicting at the Board meeting the company’s Chief Financial Officer, and outside expert actuaries and economic forecasters brought in to advise the Board on matters within their expertise, professional qualifications, experience and training (not Mr Shafron’s).

One might well understand conservative outside directors regarding such conduct as a recipe for anarchy at the Board. There remains for consideration dicta by the Full Federal Court that:

The scope of a retainer may not be confined to the client’s express instructions. Matters which would reasonably arise in the course of carrying out express instructions should be regarded as coming within the scope of the retainer.

For instance, in the case of drafting wills, a solicitor would be obliged to give advice to ensure that the client understands and agrees to the provisions of the will: see Morrell v Morrell (1882) 7 P.D. 68 at 72-4 per Hannen P. In some circumstances, the solicitor will need to give advice on matters not requested to advise upon. Thus, if a solicitor knows that his client is about to marry, he may need to advise the client of the law where the law provides that the will is revoked on marriage unless expressly made in contemplation of marriage: see eg Hall v Meyrick [1957] 2 QB 455, 2 All ER 722. Therefore, a retainer simply to draw a will involves necessarily the providing of advice, at least as to its validity and effect. In providing the finally drafted will to the client, the solicitor is effectively saying the will complies with the law and gives effect to the client’s instructions.

A contrary position has been adopted. In *Tickell v Trifleska* (1990) 24 NSWLR 548[, Rogers CJ in an ex tempore ruling, without the citation of authority, concluded that a letter giving instructions for the preparation of a will was not privileged.

His Honour said (at 549):

Mr Emmett submits that the letter from the second defendant to Mr Wagland constitutes communication to a solicitor with a view to obtaining legal assistance. This is by reason of the fact that, on his argument, when instructions are given to a solicitor for the preparation of a will, there is implicit in those instructions a request, ‘for advice on what is the proper form of the will’. For myself, I am not prepared to draw that implication. While there may be circumstances in which there is a request for advice of that nature, further factual material, which is not available in the present case, would be required before a court would be prepared to draw the implication sought by Mr Emmett.

In our view, Rogers CJ did not approach the matter correctly. One would normally draw the implication that the solicitor will provide legal advice as to the effectiveness of the will, either expressly, or implicitly by the mere production of the will to the client.92

The difference between this Full Federal Court’s case and Mr Shafron’s case is that the proactivity required by the Full Federal Court of the solicitor is in the course of the solicitor providing legal advice to the client who engaged the solicitor to draw up the will and otherwise functioning as a solicitor in servicing the client in respect of the will. Whereas, in Mr Shafron’s case, the proactivity that the High Court and the courts below have mandated of Mr Shafron is in another capacity than as a legal practitioner. Namely, it is in Mr Shafron’s capacity as a corporate “officer” on matters which are not just ascertaining issues of fact, but require Mr Shafron to have intruded into matters within the professional expertise of outside experts on financial affairs. This intervention on the part of Mr Shafron could only be appropriate in Mr Shafron’s role as a corporate “officer”, not as a legal practitioner.

The key issue is that based on the evidence found by the courts to be proven in this litigation:

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• Mr Shafron either himself had commissioned the outside advice or as one of the company's three most senior executives making the recommendation to the Board, was actively involved with the outside advisers;
• any liabilities which the outside advisers might have had were not themselves before the Court;
• the Court had to consider the civil penalties under statutory law that ASIC was seeking against the directors and the three senior executives in their capacities as corporate “officers”, not the liability at common law for negligence or other breach of duty of care at tort on the part of external advisers;
• by being privy to the way their retainers were formulated so as not explicitly to require the outside advisers to bring the pertinent matters to the attention of the Board, Mr Shafron might have assisted the outside advisers in escaping liability at common law;
• Mr Shafron was personally aware of the defective nature of, or omissions in, the outside advisers’ output that was presented to the Board;
• Mr Shafron was found to have made a slide presentation to the Board at the pertinent meeting on 15 February 2001 with respect to these actuarial and economic matters;
• Mr Shafron had demonstrated he should have known – and indeed knew - how these defects and omissions impacted upon the recommendation which he, Mr Macdonald and Mr Morely were putting before the Board, so as to have made it unsafe for the Board to have proceeded with implementation of the proposals as then formulated, including it being unsafe for the Board to approve an announcement to the ASX that was misleading to investors; and
• Mr Shafron never made any attempt to bring such matters to the attention of the Board (including to the Board through his direct “supervisor” Mr Macdonald, which would have been an alternative course to interrupting the Board meeting or through referring to them in his slide presentation to the Board at the meeting).

In essence, Mr Shafron was not functioning as general counsel even on the more expansive definition of that role:

Generally, in-house counsel function in a strategic capacity whereas outside counsel primarily play a tactical role. In-house counsel (and particularly general counsel) often sit at the intersection of most corporate activity. Moreover, in-house counsel usually have or should have the opportunity to be part of the management team, whether at the pinnacle of an organization or somewhere in the middle ranks of the organization. This integrated strategic function (or seat at the table) affords in-house counsel (i) access to information and institutional
knowledge, (ii) the power to promote internal action, (iii) responsibility for outside
counsel, and (iv) the capacity to engage in preventive law.93

Such an expansive approach to the general counsel function still is consistent with Mr
Shafron having taken a different, far more cautious, approach to what he actually was
found to have done.

Accordingly, while the principles enunciated in reaching this decision might have
unfortunate effects upon a company’s capacity to claim legal professional privilege in
respect of in-house legal work unless special precautions are taken, on its specific facts
the decision itself has to be correct.

Legal professional privilege or client legal privilege

Origin and background at common law

In Berd v Lovelace,94 a solicitor served with a process to testify was ordered not to be
examined. The solicitor was served with a subpoena to testify his knowledge touching
upon the cause in variance. The solicitor made oath that he had been, and yet was a
solicitor in this matter. He had received several fees of the defendant. Upon these
factual matters being informed to the Master of the Rolls, it was ordered that the solicitor
should not be compelled to be deposed touching the same, and that he should be in no
danger of any contempt, touching the not executing this process. “Legal professional
privilege” originally was the privilege of the lawyer and not of the client. In a trial,
counsel at the Bar was examined upon his oath to prove a death. Whereupon a
Sergeant Maynard urged to have him examined on the other part, as a witness in some
matters whereupon he had been made privy as counsel in the cause. The Roll Chief
Justice answered that he was not bound to make answer for things which may disclose
the secrets of his client’s cause, and thereupon he was forbored, to be examined.95 It
has since long been settled at law that the privilege is that of the client and not of the
lawyer.96 It therefore seems more appropriately termed “client legal privilege” as indeed
is the term used in modern Australian statutes.97

93 Omari Scott Simmons∗ & James D. Dinnage “Innkeepers: A Unifying Theory of the In-House Counsel Role” (2011)
41 Seton Hall Law Review 77, 113 at http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1372&context=shlr
accessed 8 January 2016
94 (1577) Carey 62; 21 ER 33
95 Waldron v Ward (1654) Style 450; 82 ER 853
96 Minet v Morgan (1873) 8 Ch 361
97 E.g. Part 3.10 Division 1 (client legal privilege) of the Evidence Act 1995 (Cth), Evidence Act 1995 (NSW), Evidence
Act 2001 (Tas), Evidence Act 2008 (Vic), Evidence Act 2011 (ACT) and Evidence Act 2011 (NT)
**Uniform evidence legislation operates together with common law re privilege**

In federal courts, the Australian Capital Territory, New South Wales, Tasmania, Victoria and the Northern Territory, parliament has enacted a “client legal privilege”.  

So in this respect there is uniform evidence legislation in operation in the Australian jurisdictions of the Commonwealth (the federal courts) (enacted 1995), New South Wales (enacted 1995), Tasmania (enacted 2001), Victoria (enacted 2008), the Australian Capital Territory (enacted 2011, but whose evidence legislation before 2011 anyway was as applied by the *Evidence Act 1995* (Cth)) and the Northern Territory (enacted 2011). This uniform legislation has its origins in an Australian Law Reform Commission inquiry that commenced in 1979, which produced a number of research and discussion papers, an Interim Report (ALRC 26) in 1985 and a Final Report (ALRC 38) in 1987. The reports included draft legislation. In 1995, the Commonwealth and New South Wales enacted legislation which corresponded to the ALRC recommendations, with the Commonwealth Act being applied in the Australian Capital Territory. Other Australian jurisdictions have followed accordingly as set out above, with the exceptions of three of the six States (Queensland, South Australia and Western Australia).

As intimated above, this uniform legislation contains detailed provisions with respect to client legal privilege, which supplement and have to be read together with the common law rules of legal professional privilege as handed down by the courts in the applicable Australian jurisdictions:

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in the breach of –

(a) a confidential communication made between the client and a lawyer; or
(b) a confidential communication made between 2 or more lawyers acting for the client; or
(c) the contents of a confidential document (whether delivered or not) prepared by the client, lawyer or another person –

for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.  

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:

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99 *Evidence Act 1995* (Cth), s 118; *Evidence Act 1995*(NSW), s 118; *Evidence Act 2001* (Tas), s 118; *Evidence Act 2008* (Vic), s 118; *Evidence Act 2011* (ACT), s 118; and *Evidence Act 2011* (NT), s 118
(a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made; or
(b) the contents of a confidential document (whether delivered or not) that was prepared;

for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.\(^\text{100}\)

Evidence is not to be adduced if, on objection by a party who is not represented in the proceeding by a lawyer, the court finds that adducing the evidence would result in disclosure of:

(a) a confidential communication between the party and another person; or
(b) the contents of a confidential document (whether delivered or not) that was prepared, either by or at the direction or request of, the party;

for the dominant purpose of preparing for or conducting the proceeding.\(^\text{101}\)

**Ramifications for corporations**

From the viewpoint of a corporation, it is important that “client” includes a person who employs a lawyer including under a contract of service.\(^\text{102}\) There is an increasing prevalence of employed (sometimes termed “in-house”) lawyers in the Australian legal environment:

This trend appears to be driven by entities, usually companies, wishing to have ready access to legal advice - to which strict duties of confidentiality apply, and the mantle of legal professional privilege may attach – from a person who is committed to the employer’s cause and whose fees (via a salary) are determined. The role and expectations of in-house counsel have evolved, and indeed expanded, through time, beyond simply providing legal advice. An in-house lawyer may be a member of the senior executive team of the client employer, and a legal intermediary between the employer and its employees, as well as an agent of the employer in dealings with third parties (including with outside lawyers). He or she may also assume the role of certifier for regulatory purposes.\(^\text{103}\)

\(^{100}\) Ibid s 119
\(^{101}\) Ibid s 120
\(^{102}\) Ibid s 117(1)(a)((definition of “client”))
\(^{103}\) G E Dal Pont, *Lawyers’ Professional Responsibility* (5\(^\text{th}\) ed 2013) 427 [13.05] Thomson Reuters, Pyrmont NSW
independence can be compromised, so it is advisable for the employer to adopt a reporting structure as “independent” as possible – such as requiring the lawyer to report directly either to the board of directors or the managing director – as the fewer “pressure points” that are placed on the lawyer the better he or she is placed to demonstrate independence.104

**Lawyer means:**

(a) an Australian lawyer; and  
(b) an Australian-registered foreign lawyer;  
(c) an overseas-registered foreign or a natural person who, under the law of a foreign country, is permitted to engage in legal practice in that country; and  
(d) an employee or agent of a lawyer referred to in paragraph (a), (b) or (c).105

**Uniform legislation not cover all circumstances in which privilege may be claimed**

The High Court of Australia has considered that this statutory language is clear. According to the High Court, it deals with the adducing of evidence. It would cover adducing evidence in interlocutory proceedings as well as at a final hearing, or on an appeal. It does not cover all the circumstances in which a claim for privilege might arise.106

**Not just rule of evidence, but fundamental principle to protect citizens**

For example, the High Court initially considered that it would not cover such cases as whether an officer with a warrant issued pursuant to section 10 of the *Crimes Act 1914* (Cth) was entitled to seize documents kept by a solicitor at his office, notwithstanding that the documents would be privileged from disclosure or production in the course of legal proceedings.107 The application of the common law position was described in the High Court:

> At common law there existed no power to compel a solicitor (or anyone else) to divulge information or produce documents, whether privileged or otherwise, except in legal proceedings, and no power to obtain a search warrant except to search for stolen goods, which would in any case not have been the subject of

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104 Ibid 437, [13.50]  
105 Subsection 117(1) (definition of “lawyer”) of the *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic); the *Evidence Act 2011* (ACT); and *Evidence Act 2011* (NT)  
privilege. For many years after statutory powers were first conferred to grant search warrants, no question of privilege seems to have arisen, possibly because the nature of the things for which the warrant authorized a search to be made (such as things with which a crime was committed, or which were the fruits of a crime or evidence of the commission of a crime) made it unlikely that they would be found in a solicitor's office.\footnote{Baker v Campbell [1983] HCA 39; (1983) 153 CLR 52 (26 October 1983), 60-1 per Gibbs CJ}

On 14 April 1983, the High Court of Australia had held by a majority (Gibbs CJ, Mason and Wilson JJ, Murphy J (dissenting)) that legal professional privilege was a rule of evidence which applied in judicial and quasi-judicial proceedings, but was not available more broadly so as to apply to a notice to produce issued under section 264 of the \textit{Income Tax Assessment Act 1936} (Cth).\footnote{O'Reilly v State Bank of Victoria Commissioners [1983] HCA 47; (1983) 153 CLR 1 (14 April 1983)} On 26 October 1983, the High Court of Australia held by a 4 to 3 majority (Murphy, Wilson, Dean and Dawson JJ, Gibbs CJ, Mason and Brennan JJ (dissenting)) that the protection of legal professional privilege was not confined to judicial and quasi-judicial proceedings and went well beyond being just a rule of evidence, but extended to permit refusal to produce documents in response to any warrant or statutory notice where the authorising legislation did not expressly or by necessary implication oust legal professional privilege: \footnote{Baker v Campbell [1983] HCA 39; (1983) 153 CLR 52 (26 October 1983)}

I am persuaded that the general and substantive principle underlying legal professional privilege is of fundamental importance to the protection and preservation of the rights, dignity and equality of the ordinary citizen under the law in that it is a precondition of full and unreserved communication with his lawyer.\footnote{Ibid 118 per Deane J}

\ldots

That general principle represents some protection of the citizen - particularly the weak, the unintelligent and the ill-informed citizen - against the leviathan of the modern state. Without it, there can be no assurance that those in need of independent legal advice to cope with the demands and intricacies of modern law will be able to obtain it without the risk of prejudice and damage by subsequent compulsory disclosure on the demand of any administrative officer with some general statutory authority to obtain information or seize documents.\footnote{Ibid 120}
There is a common law exception that legal professional privilege cannot be used to facilitate the commission of crimes.\footnote{113}{O’Reilly v State Bank of Victoria Commissioners [1983] HCA 47; (1983) 153 CLR 1 (14 April 1983), 27 per Murphy J}

The common law would apply to the pre-trial disclosure or inspection of documents, not the statutory provisions:\footnote{114}{Archer Capital 4A Pty Ltd as trustee for the Archer Capital Trust 4A v Sage Group plc (No 2) [2013] FCA 1098 (24 October 2013) at [9] per Wigney J}

It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings.\footnote{115}{Daniel’s Corporation v Australian Competition and Consumer Commission (2002) 213 CLR 543, 552; [2002] HCA 49, [9]}

The rationale for legal professional privilege:

according to traditional doctrine is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor.\footnote{116}{Grant v Downs (1976) 135 CLR 587, 685 per Stephen, Mason and Murphy JJ}

**Dominant purpose test**

The dominant purpose test for legal professional privilege which now represents the position at common law\footnote{117}{Esso Australia Resources v Commissioner of Taxation [1999] HCA 67; 201 CLR 49; 168 ALR 123; 74 ALJR 339 (21 December 1999) e.g. at 73, [61] per Gleeson, Gaudron and Gummow JJ (dominant purpose test preferred by Barwick CJ in Grant v Downs should be preferred over sole purpose test enunciated by Stephen, Mason and Murphy JJ in that case as striking a just balance and bringing the common law of Australia into conformity with other common law jurisdictions)} so as to accord in that respect with the statutory provisions of the *Evidence Act 1995* (Cth) and (NSW), and the jurisdictions which had enacted analogous Acts, was enunciated by Barwick CJ in *Grant v Downs*\footnote{118}{(1976) 135 CLR 674 (by contrast to the sole purpose test adopted by the majority in that case, but now overruled by *Esso*)) in the following terms:

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\footnote{113}{O’Reilly v State Bank of Victoria Commissioners [1983] HCA 47; (1983) 153 CLR 1 (14 April 1983), 27 per Murphy J}
\footnote{114}{Archer Capital 4A Pty Ltd as trustee for the Archer Capital Trust 4A v Sage Group plc (No 2) [2013] FCA 1098 (24 October 2013) at [9] per Wigney J}
\footnote{116}{Grant v Downs (1976) 135 CLR 587, 685 per Stephen, Mason and Murphy JJ}
\footnote{117}{Esso Australia Resources v Commissioner of Taxation [1999] HCA 67; 201 CLR 49; 168 ALR 123; 74 ALJR 339 (21 December 1999) e.g. at 73, [61] per Gleeson, Gaudron and Gummow JJ (dominant purpose test preferred by Barwick CJ in Grant v Downs should be preferred over sole purpose test enunciated by Stephen, Mason and Murphy JJ in that case as striking a just balance and bringing the common law of Australia into conformity with other common law jurisdictions)}
\footnote{118}{(1976) 135 CLR 674 (by contrast to the sole purpose test adopted by the majority in that case, but now overruled by *Esso*)}
Having considered the decisions, the writings and the various aspects of the public interest which claim attention, I have come to the conclusion that the Court should state the relevant principle as follows:

A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production and reasonable prospect, should be privileged and excluded from production.\textsuperscript{119}

A dominant purpose is a reference to “the ruling, prevailing, or most influential purpose”.\textsuperscript{120} Whether a purpose is a dominant purpose is “a matter to be objectively determined but the subjective purpose will always be relevant and often decisive”.\textsuperscript{121} Whether communications were made confidentially for the purposes of legal advice or legal services has to be construed broadly.\textsuperscript{122} Legal advice “is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context”.\textsuperscript{123} However, it does not extend to advice that is purely factual or commercial.\textsuperscript{124} The onus is on the party claiming privilege to show that the communication was made, or the document created, for the dominant purpose of giving or obtaining legal advice or aiding in the conduct of litigation or prospective litigation.\textsuperscript{125} The court has power to examine the documents for itself; and should not be sparing in exercising this power through any misplaced reluctance to go behind any formal claim of privilege.\textsuperscript{126} It has been said judicially that:

The dominant purpose test will often be much harder to apply than the sole purpose test previously applied. This is because in order to determine the dominant purpose, it may be necessary to consider, among other things, the state of mind of the person creating the document and to examine a number of diverse purposes and to balance them to resolve the question.\textsuperscript{127}

When “sole” purpose or “a” purpose is the criterion for existence of the privilege, seldom can it be necessary to go beyond the contents of the document and the

\textsuperscript{119} Ibid 677
\textsuperscript{120} \textit{Federal Commissioner of Taxation v Spotless Services Ltd} (1996) 186 CLR 404, 416; [1996] HCA 34 per Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ
\textsuperscript{121} \textit{Esso Australia Resources v Commissioner of Taxation} [1999] HCA 67, [172]; 201 CLR 49, 107 per Callinan J
\textsuperscript{122} \textit{Balabel v Air India} [1983] 1 Ch 210, 330 per Taylor LJ
\textsuperscript{123} Ibid
\textsuperscript{124} Ibid 331
\textsuperscript{125} \textit{Grant v Downs} (1976) 135 CLR 587, 689 per Stephen, Mason and Murphy JJ
\textsuperscript{126} Ibid
\textsuperscript{127} \textit{Seven Network Limited v News Limited} [2005] FCA 142 (28 February 2005), [2] per Tamberlin J
identity of its recipient to determine whether privilege protects the document. But if "dominant" purpose becomes the test, it will often be necessary to examine the state of mind of the person creating the document.\textsuperscript{128}

The fundamental danger of any erosion of the sole purpose test is that, to the extent that it occurs, communications, contemporaneous with the matter in dispute, will potentially be excluded from the materials upon which the parties to litigation will be advised on their cases, plead their claims, pursue their evidentiary inquiries, negotiate settlement or seek to establish their assertions at a hearing. To the extent that a dominant purpose test is substituted for the present sole purpose test, variables of other debatable objectives will inevitably be introduced. As a matter of practicality these are bound to increase the scope for cross-examination of a deponent answering to an order for discovery or to a subpoena on behalf of the person receiving them. The explosion of pre-trial hearings of this kind is a blight on civil litigation in the United States. It is one that would be undesirable for courts in Australia to follow, more than they already have. Such developments tend to enhance the power of corporate and administrative litigants which already have the means to outlast most ordinary individuals. It would need very strong reasons indeed to convince me that this Court should change the established law from a simpler principle, easier to apply, to one susceptible to more protracted pre-trial disputation and contentious evaluation with interlocutory applications and the appeals to which they may give rise. If there is any doubt about this, consider how long it would take to sort out, in the case of almost 600 documents, the disputed question whether the dominant purpose of each communication was to seek or receive legal advice. The sole purpose test narrows the room for such disputes.\textsuperscript{129}

**Concern: replacement of sole by dominant purpose test advantages corporations**

In respect of corporations:

the dominant purpose test is, of its nature, more likely to advantage corporations and administration at the cost of ordinary individuals. The latter, when engaged or potentially engaged in a legal dispute will either speak personally with a lawyer or engage in correspondence seeking and receiving legal advice, the sole character and purpose of which is easily ascertained. On the other hand, corporations and administration, already subject to many legal requirements can, with minimal imagination, readily present documents as being for a dual purpose - to receive legal advice (perhaps in house) and also to effect a corporate or administrative purpose. Any slippage from the sole purpose test potentially

\textsuperscript{128}\textit{Esso Australia Resources v Commissioner of Taxation} [1999] HCA 67; 201 CLR 49, 77; [73] per McHugh J

\textsuperscript{129}\textit{Ibid} 90-1; [108] per Kirby J
allows a very large amount of such material to be the subject of a claim for the
privilege so as to exclude it from the purview of the opposite party and the
ultimate decision-maker. In this way, as a matter of practicality, a larger privilege
will typically be accorded to the corporation or administration than would
ordinarily be accorded to the individual. This is a further reason for adhering to
the sole purpose test. It lays emphasis upon the fact that the privilege attaches to
communications and not, as such, to documents.130

It has been recognised that to the extent that the corporation or administration
specifically were to seek and receive legal advice, classified as being solely addressed
to and received from a legal practitioner, it would seem appropriate, as a matter of
principle, that it should be in the same position as the individual. By contrast, to the
extent that people within the corporation or administration were to communicate with
others within or outside that organisation, and direct those communications for other or
additional or alternative corporate and administrative purposes, what they would be
doing is merely engaging in the ordinary operations of the organisation. They would not,
as such, only be seeking and receiving legal advice. It is said that corporations and
administrations are governed, for the most part, by documentary communications. As
that is how they ordinarily operate, diminishing access to such documentation would, to
that extent, diminish the capacity of courts to enter the mind of the corporation or
administration viewed through the contemporaneous means by which its actions,
omissions and motives may ordinarily be understood.131

**Breadth in corporate environment: 3rd parties who assist in obtaining legal advice**

The scope of advice privilege has been extended by the Australian courts at common
law so as to cover certain third party communications bringing it into line with the
position in relation to litigation privilege. An accountant’s report prepared by
PricewaterhouseCoopers has been held to be subject to legal professional privilege
where it has been prepared and made for the dominant purpose of the client corporation
obtaining legal advice:

> To deny that a third party is an agent in such circumstances does not, though,
provide a sufficient or principled reason for denying privilege to the documentary
communication (or contents) it has authored. The important consideration in my
view is not the nature of the third party’s legal relationship with the party that
engaged it but, rather, the nature of the function it performed for that party. If that
function was to enable the principal to make the communication necessary to
obtain legal advice it required, I can see no reason for withholding the privilege
from the documentary communication authored by the third party. That party has

130 ibid 91; [109]
131 ibid 919-2; [110]
been so implicated in the communication made by the client to its legal adviser as to bring its work product within the rationale of legal advice privilege.

There are, in my view, clear reasons of policy that support extending the privilege to such third party authored documentary communications. Whether a natural person or a corporation, a party seeking to obtain legal advice may not have the aptitude, knowledge, skill and expertise, or resources to make adequately, appropriately or at all such communication to its legal adviser as is necessary to obtain the advice required. Such is commonplace today where advice is sought on complex and technical matters. To deny that person the ability to utilise the services of a third party to remedy his or her own inability or inadequacy unless he or she is prepared to forego privilege in the documents prepared by the third party, is to disadvantage that person relative to another who is able adequately to make the desired communication to a legal adviser by relying upon his or her own knowledge, resources, etc.

For the law to provide such an incentive not to utilise the services of third parties in such circumstances is to undercut the privilege itself. It would not facilitate access to effective legal advice nor would it facilitate effective communication with legal advisers for the purpose of obtaining legal advice.132

…

In my view the present issue must be decided by the application of principle, eschewing formalistic approaches and concentrating on substance.

The history of legal professional privilege shows that the courts have been willing and able to adapt the doctrine to ensure that the policy supporting the doctrine is not sabotaged by rigid adherence to form that does not reflect the practical realities surrounding the application of privilege. The complexity of present day commerce means that it is increasingly necessary for a client to have the assistance of experts, including financial experts such as accountants, in formulating a request for legal advice and in providing legal advisers with sufficient understanding of the facts to enable that advice to be given. … .

The complexity of commercial arrangements is matched by increasing volume, complexity and technicality in the law: taxation legislation now runs to many volumes, encompassing nearly two thousand provisions; corporations and securities legislation is similarly mammoth. A company that wishes to obtain legal advice as to its obligations under such legislation may well need to rely on

132 Pratt Holdings Pty Ltd v Commissioner of Taxation [2004] FCAFC 122 (12 May 2004), [42]-[44] per Finn J
experts to assist it in instructing its legal advisers. This is not only true of commercial arrangements but may also extend to scientific and technological complexities. To take a purely hypothetical example, suppose the manufacturer of lip salve requests its lawyer to advise as to the health and manufacturing standards with which it must comply. The lawyer is aware that among the legal requirements that may be relevant are regulations applicable to skin care products. In such a case scientific advice may be required as to whether lips are skin. These are issues that did not arise in simpler times.

The coherent rationale for legal professional privilege developed by the High Court does not lend itself to artificial distinction between situations where that expert assistance is provided by an agent or alter ego of the client and where it is provided by a third party. Nor, in my view, should the availability of privilege depend on whether the expert opinion is delivered to the lawyer directly by the expert or by the client. Provided that the dominant purpose requirement is met I see no reason why privilege should not extend to the communication by the expert to the client. 133

Communications between a client and a third party in either direction can be covered by legal professional privilege where made for the dominant purpose of the client seeking or obtaining legal advice. 134 Communications by a client to a third party can attract legal professional privilege: “it can reasonably be expected that the difficulty of drafting such instructions in many situations is likely to be greatly increased without the assistance of informed third parties.” 135

Provided a communication is made with the dominant purpose of the client seeking or obtaining legal advice, we see no reason why privilege should not protect communications between the client and third parties whose knowledge is desirable or necessary for the client to obtain the legal advice the client desires, as in this case. 136

While “in deciding whether the function of the third party was the relevant function of enabling the client to obtain legal advice, a court will consider not only the client’s stated purpose in having the communication created, but also the client’s conduct”, 137 provided the parties are working together consensually, under a regime of confidentiality, to formulate and finalise instructions or other communications to outside solicitors or the company’s in-house lawyers (where those in-house lawyers themselves attract legal

133 Ibid [103]-[106] per Stone J
134 State of New South Wales v Bettair Pty Ltd & Ors [2009] FCA 1293 (12 November 2009)
135 Ibid [32] per Kenny, Stone and Middleton JJ
136 Ibid [40]
137 Ibid [33]
professional privilege), communications between different departments and personnel within a company or between company personnel and outside experts or potential witnesses should attract legal professional privilege.\(^\text{138}\) As illustrated by *Daniels Corporation International Limited v Australian Competition and Consumer Commission*,\(^\text{139}\) this can be an important protection for companies and their personnel in the face of an investigation by a regulator or in respect of existing or anticipated litigation.

So the extension of legal professional privilege in Australia to communications between non-lawyers where the dominant purpose of those communications is to assist in obtaining legal advice can become of the utmost significance given the changing and more flexible environment in which corporations undertake their activities:

The emergence of the in-house counsel role, or “innkeepers” in the terminology of this Article, is one of the most significant shifts in the legal profession over the past half century, and this development inevitably has implications for legal scholars, policymakers, and practitioners. Historically, in-house counsel were stereotyped as inferior legal service providers. They were unfairly viewed as lawyers “who had not quite made the grade as partner” at their corporation’s principal outside law firm. Today, however, in-house counsel, when compared to other legal providers, have a greater potential impact on corporate affairs, particularly by curbing corporate opportunism and creating value. A broader conception of the in-house counsel role now prevails, and the in-house legal department function has transformed the delivery of legal services. Moreover, significant improvements of in-house lawyer skill and reputation signal a defining moment for the legal profession. A growing number of corporations, facing increasing costs due to business and legal complexities, are deciding to internalize a greater proportion of their legal needs in lieu of procuring legal services from the wide array of outside law firms available in the marketplace. Just as greater divisionalization in the modern corporation can be explained, to a large extent, through transaction-cost economizing, the growth of in-house legal departments can be viewed through a similar lens.\(^\text{140}\)

So in the modern Australian corporate environment, provided the proper precautions are taken, a communication between two non-lawyers within the corporation, or by a

\(^{138}\) Ibid [37]
\(^{139}\) (2002) 213 CLR 543
non-lawyer within the corporation to a non-lawyer outside the corporation, can attract legal professional privilege and thus be protected from compellable disclosure to regulators and litigators, where it can be shown that the dominant purpose of the communication is to obtain legal advice from an in-house lawyer whose work is able to attract this coverage.

**England: whether in-house lawyers could attract legal professional privilege: yes**

In relation to companies and other corporations, including statutory corporations, in England it has been held that salaried legal advisers, whether barristers or solicitors, employed by a government department or commercial concern had precisely the same duties and privileges as lawyers in independent practice; professional privilege attached to all the communications between the officials and their legal department both in the ordinary course of work and when litigation (which included arbitration) was anticipated. Accordingly, professional privilege attached to all the communications between the commissioners and their internal legal advisers from the earliest date at which arbitration was anticipated. The professional privilege also attached to the internal memoranda used in the valuation or obtained in the exercise of the commissioners' powers since those documents had come into existence after “litigation” was anticipated.\(^{141}\)

Lord Denning MR noted that the law relating to discovery was developed by the Chancery Courts in the first half of the nineteenth century. Then nearly all legal advisers were in independent practice on their own account. Since then, many barristers and solicitors had become employed as legal advisers whole time by a single employer. Sometimes the employer was a great commercial concern. At other times it was a government department or a local authority. It could even be the government itself like the Treasury Solicitor and the staff there. In every case these legal advisers did work for their employer and for no one else. They were paid, not by fees for each piece of work, but by a fixed annual salary. They were no doubt servants or agents of their employer. They were regarded by the law as in every respect in the same position as those who practised on their own account. The only difference was that they acted for one client only, and not for several clients. They had to uphold the same standards of honour and of etiquette. They were subject to the same duties to the client and to the court. They had to respect the same confidences. They and their client had the same privileges. Lord Denning MR said that he himself in his early days settled scores of affidavits of documents for the employers of such legal advisers. He had always proceeded on the footing that the communications between the legal advisers and their

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\(^{141}\) Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2) [1974] 2 QB 102
employer (who was their client) were the subject of legal professional privilege; and he had never known it questioned.\textsuperscript{142}

Lord Denning MR went on to say:

I speak, of course, of their communications in the capacity of legal advisers. It does sometimes happen that such a legal adviser does work for his employer in another capacity, perhaps of an executive nature. Their communications in that capacity would not be the subject of legal professional privilege. So the legal adviser must be scrupulous to make the distinction. Being a servant or agent too, he may be under more pressure from his client. So he must be careful to resist it. He must be as independent in the doing of right as any other legal adviser.\textsuperscript{143}

Lord Denning MR identified the capacity of a master or a judge to inspect the documents so as to see if the claim of legal professional privilege was well-founded.\textsuperscript{144} In this case, the documents were obtained primarily in order to enable the commissioners to form their own opinion of the justice of the company’s claims to deductions:

But, at the same time, they were obtained as material to place before the solicitor if it came to a fight, as the commissioners anticipated that it might. That is, I think, sufficient …\textsuperscript{145}

The safeguard of inspection identified by Lord Denning MR seems to be applicable to identifying the subject matter of communications between employer and employed legal advisers, but not necessarily addressing the separate matter of the independence of employed legal advisers.

**Europe: whether in-house lawyers could attract legal professional privilege: No**

The decision of the European Court of Justice in *A M & S Europe Ltd v Commission of the European Communities*\textsuperscript{146} involved the applicant which was an English company which was a subsidiary of an Australian company, Australian Mining & Smelting Ltd. Both companies belonged to the Rio Tinto Zinc Group. The question at issue related to the extent to which, and the manner in which, communications between a lawyer and the client may be protected from disclosure to an investigation into allegedly jointly fixed prices and conditions of sale, controlled production and shared out markets. The

\textsuperscript{142} Ibid 129  
\textsuperscript{143} Ibid  
\textsuperscript{144} Ibid  
\textsuperscript{145} Ibid 131  
\textsuperscript{146} [1983] 1 QB 878
European Court of Justice held that a written communication between a lawyer and client arising in the course of the business of an undertaking was not protected from disclosure as it was within the category of business records for the purposes of article 14(1) of Council Regulation (European Economic Community) No 17/62 and it was for the Commission alone to determine whether it was necessary for such a document to be disclosed in proceedings brought by the Commission for infringement of articles 85 and 86 of the European Economic Community Treaty; but that the Commission’s power to order disclosure under the Regulation was subject to the protection given by the laws of all the member states of the confidentiality of written communications between an independent lawyer and the client made for the purposes and in the interests of the client’s rights of defence; and that, therefore, privilege could be claimed for written communications between an independent lawyer and an undertaking, whether made prior to or after the initiation of the administrative procedure by the Commission under the Regulation, provided that it was related to that procedure. An undertaking claiming that the principle of confidentiality applied to documents had to provide the relevant material to the Commission to demonstrate that the documents were protected from disclosure. Where the Commission remained unsatisfied that the documents were protected, it should demand production and, if the undertaking were still unwilling to produce the documents, the undertaking should bring proceedings before the European Court of Justice for the matter to be determined; and that, in the present case, the documents from an independent lawyer entitled to practise his profession in the member state that concerned the applicant’s position with regard to Community provisions on competition were protected but the remainder of the documents were to be produced.

To emanate from “independent lawyers”, the communications had to emanate from “lawyers who are not bound to the client by a relationship of employment”.

It should be stated that the requirement as to the position and status of an independent lawyer, which must be fulfilled by the legal adviser from whom the written communications which may be protected emanate, is based on a conception of the lawyer’s role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of that cause, such legal assistance as the client needs. The counterpart of that protection lies in the rules of professional ethics and discipline which are laid down and enforced in the general interest by institutions endowed with the requisite powers for that purpose.

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147 Ibid 950
148 Ibid
There remains an issue of lawyers who are employed in-house but remain or become members of a professional bar. It seems that, at least in some European countries, legal privilege for in-house lawyers will be established where they have been admitted to the Bar and comply with requirements guaranteeing their independence.

European jurisdictions do not necessarily allow in-house lawyers to be admitted to the bar.

**USA: in-house privilege: generally “yes” – vary inter–State - not always generous**

The position has been summarised as follows:

America has no unified common law and no unified national regulation of lawyers. Thus, the law of privilege differs subtly across the fifty states and various federal jurisdictions. As a general rule, privilege is recognised on much the same terms as in Australia, and generally applies to in-house counsel whether by virtue of common law or statute. Perhaps the most significant difference across the states is their approach to whether a corporate client can claim privilege over employees’ communications with lawyers, whether in-house or not. For example, in Illinois, Michigan and New Jersey, only members of the ‘control group’ who actually direct the litigation can claim privilege. By contrast, in the federal courts, Arizona Colorado and New York privilege is generally available whenever the communication is for the purpose of seeking legal advice, whatever the role or seniority of the person making the communication. Some courts, though, subject claims of privilege in the corporate context to a ‘heightened level of scrutiny’.

**Australian position re in-house legal professional privilege: Yes, but**

There seems to be no definitive High Court precedent that establishes conclusively that employed legal advisers in Australia working in companies and other corporations automatically attract legal professional privilege. So it is necessary for companies and other corporations to take precautions in this regard; legal professional privilege for the work of in-house corporate lawyers should not be taken for granted; and the High Court decision in *Shafron* demonstrates what should be a core precaution in the in-house

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149 E.g. see *Professional privilege litigation remains a live issue in Europe’s courts* at [http://www.ibanet.org/Article/Detail.aspx?ArticleUid=0391bbba-1b9e-4b0d-a676-740e9c5240c1](http://www.ibanet.org/Article/Detail.aspx?ArticleUid=0391bbba-1b9e-4b0d-a676-740e9c5240c1) accessed 6 January 2016


lawyers not exposing themselves to statutory liabilities as corporate “officers” so as not thereby to prejudice the corporation’s legal professional privilege in respect of their work.

It is clear that in Australia the High Court has found that legal professional privilege attracts to the work of employed legal officers in the employment of the Crown in a government solicitor’s office or analogous employment, where the terms of that employment protect professional independence:

To our minds it is clearly in the public interest that those in government who bear the responsibility of making decisions should have free and ready confidential access to their legal advisers. Whether in any particular case a relationship is such as to give rise to the privilege will be a question of fact. It must be a professional relationship which secures to the advice an independent character notwithstanding the employment.\(^\text{152}\)

The Commonwealth, State and Territorial statutes under which officers are employed in the offices of Crown Solicitors, the Australian Government Solicitor and in the Departments of the respective Attorneys-General give them a certain security of tenure and those statutes would be construed, in the absence of contrary express provisions, as leaving these officers completely professionally independent. The protection of the respective Attorneys-General, as the first Law Officers of the Crown, should extend to all of these officers, so that none of them will be affected in the performance of their professional duty by any sense of loyalty or duty to, or hope of reward from, the government of the day.\(^\text{153}\)

The independence of State Crown Solicitors and the Australian Government Solicitor in the giving of legal advice is – or ought to be – protected by the respective Attorneys-General as the first law officers of the Crown, and is buttressed by the laws relating to the public service and sometimes by specific legislation.\(^\text{154}\)

There has been acknowledgment by the High Court that:

It has long been recognized that claims of privilege based upon the fact that the relevant materials were procured for the purposes of anticipated litigation (in which independent counsel would in any event be expected to be briefed) are

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\(^{152}\) Waterford v The Commonwealth (1987) 163 CLR 54, 62 per Mason and Wilson JJ

\(^{153}\) Ibid 72 per Brennan J

\(^{154}\) Attorney-General (NT) v Kearney (1985) 158 CLR 500, 517 per Mason and Brennan JJ
plainly distinguishable from a claim to privilege based upon the mere fact that a document contains or concerns confidential professional legal advice.\textsuperscript{155}

However, it has been recognised in the High Court that the proposition that legal professional privilege extends to protect the confidentiality of advice given by salaried employees has difficulties.\textsuperscript{156} For example, in the High Court it has been recognised that this could be “an unwarrantable extension of the privilege rules”.\textsuperscript{157} Another and more significant criticism of the extension of legal professional privilege to the work of salaried employees has been identified in the High Court as to unduly discount the importance of the “full independence” of the lawyer.\textsuperscript{158} So that the “conclusion” is:

that legal professional privilege can extend to protect the advice given within an organization by a salaried legal adviser … . Subject to an important reservation, it appears to me that it should be accepted as correct for this country. The reservation is that it is unnecessary to investigate here what, if any, qualification should be placed upon that conclusion to avoid potential abuse. … In particular, it is unnecessary for present purposes to seek to identify the minimum academic or practical qualification which must be held by a "salaried legal adviser" before the confidentiality of his or her professional legal advice will enjoy the protection of the privilege since it has not been suggested that any officer of the Attorney-General's Department whose advice is involved in the present case would fail to satisfy any such minimum academic or practical qualification. It would, however, seem that Lord Denning's statement that salaried legal advisers are regarded by the law "as in every respect in the same position as those who practise on their own account" with the "only difference … that they act for one client only, and not for several clients" would not be true of this country unless one restricted the category to persons who, in addition to any academic or other practical qualifications, were listed on a roll of current practitioners, held a current practising certificate, or worked under the supervision of such a person. I would add that the conclusion that legal professional privilege extends to protect the confidentiality of advice given by appropriately qualified salaried legal advisers makes it unnecessary to consider whether, in any event, the whole Attorney-General's Department and its officers should, when providing professional legal advice to other branches of the Executive Government, be seen as acting in a role that is more akin to that of the independent professional firm than to that of the ordinary employed salaried lawyer … .\textsuperscript{159}

\textsuperscript{155} Waterford v The Commonwealth (1987) 163 CLR 54, 80 per Deane J
\textsuperscript{156} Ibid 79
\textsuperscript{157} Ibid 80
\textsuperscript{158} Ibid 80
\textsuperscript{159} Ibid 81-2
Brennan J in the High Court has highlighted the importance of independence:

The purpose of legal professional privilege is to facilitate the seeking and giving of legal advice. … If the purpose of the privilege is to be fulfilled, the legal adviser must be competent and independent. Competent, in order that the legal advice be sound and the conduct of litigation be efficient; independent in order that the personal loyalties, duties or interests of the adviser should not influence the legal advice which he gives nor the fairness of his conduct of litigation on behalf of his client. If a legal adviser is incompetent to advise or to conduct litigation or if he is unable to be professionally detached in giving advice or in conducting litigation, there is an unacceptable risk that the purpose for which privilege is granted will be subverted.\textsuperscript{160}

The reference to professionally detached is consistent with the ordinary meaning of “independent”.\textsuperscript{161} There has to be an absence of fear or favour. An independent legal adviser brings an independent mind to bear on the subject-matter of the legal advice.\textsuperscript{162}

However, overall In the High Court, it has been said that while there is something to be said for the distinction drawn between independent and employed lawyers, employed lawyers are not disqualified from attracting legal professional privilege by reason only of their status as employed lawyers, but the issue of independence is pertinent in deciding whether legal professional privilege applies in a specific case:

it is not a statement of the position at common law and there is authority in this Court and elsewhere for the proposition that legal professional privilege may attach to communications passing between salaried legal adviser and his employer, provided that the legal adviser is consulted in a professional capacity in relation to a professional matter and the communications are made in confidence and arise from the relationship of lawyer and client.\textsuperscript{163}

Australia – employment relationship must not compromise professional capacity

It therefore seems that the law in Australia is that communications to and from an in-house or employed legal officer, however he or she is designated, may attract legal professional privilege.\textsuperscript{164} If the personal loyalties, duties and responsibilities of the in-house lawyer do not influence the professional legal advice which she or he gives, the

\begin{thebibliography}
\bibitem{160}bid 70 per Brennan J
\bibitem{162}ibid 115; [40]
\bibitem{163}Waterford v The Commonwealth (1987) 163 CLR 54, 95 per Dawson J
\bibitem{164}Cf Southern Equities Corporation Ltd (In Liquidation) v Arthur Andersen & Co (No 6) [2001] SASC 398 (23 November 2001, [8] per Debelle J (“I have some misgivings as to whether privately employed in-house legal advisers will have the required degree of independence to justify communications between them and their employers being subject to legal professional privilege.”)}
\end{thebibliography}
requirement for independence will be satisfied. An in-house lawyer will lack the requisite measure of independence if her or his advice is at risk of being compromised by virtue of the nature of the employment relationship with the employer:  

As courts are more inclined to find that in-house lawyers lack independence due to their employee status, it is important to avoid situations which give the appearance of lack of independence.

Similarly, the ATO [Australian Taxation Office] will often raise questions if claims for LPP [legal professional privilege] are made in respect of legal advice given by in-house counsel, to test whether the in-house counsel:

- has appropriate legal qualifications; and
- is sufficiently independent.  

**Australia – admission as a lawyer in some relevant jurisdiction essential**

To attract legal professional privilege, the in-house legal officer should have been admitted as a lawyer (however expressed) or as a barrister, solicitor, barrister and solicitor, or a legal practitioner by the Supreme Court of a State or internal Territory of Australia or where international law or the law of a foreign jurisdiction is concerned, be admitted as a legal practitioner howsoever styled in a relevant foreign jurisdiction.

**Australia – communication must meet dominant purpose test**

The communications must have been confidential and satisfied the dominant purpose test. The requirement to satisfy the dominant purpose test has ramifications where the High Court of Australia, the Court of Appeal of the Supreme Court of New South Wales and the trial judge (Gzell J) have all held that Mr Peter Shafron’s liability arose from his capacity as an "officer" rather than as a legal practitioner. Consequently, to protect legal professional privilege, it now seems advisable in Australia that in-house lawyers should not be company secretaries; and in–house lawyers in Australia should have careful regard to the guidance provided by the High Court decision in Shafron so as not to participate in making decisions that affect the whole, or a substantial part, of

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167 E.g. Legal Profession Uniform Law Application Act 2014 (Vic), Schedule 1 – Legal Profession Uniform Law, s 6(1) – meaning of admission to the Australian legal profession
168 E.g. Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd [2013] QSC 82 (28 March 2013), [19]-[20] and [24]-[26] per Boddice J (28 March 2013); and Ritz Hotel Ltd v Charles of the Ritz Ltd (No 4) (1987) 14 NSWLR 100, 102 per McClelland J
169 Archer Capital 4A Pty Ltd as trustee for the Archer Capital Trust 4A v Sage Group plc (No 2) [2013] FCA 1098 (24 October 2013) at [56] per Wigney J
the business of their employer corporation (which thereby would expose them to statutory liability as corporate “officers”). At best, any non-legal work or role that an in-house lawyer undertakes should strictly be ancillary to the performance of his or her professional legal work which always must constitute his or her primary responsibilities within the corporation. It will be recalled that the High Court had held that raising the limitations of a cash flow model fell within Mr Shafron’s responsibilities as company secretary; and had highlighted the distinction in other parts of the statutory definition of “officer” between making the decisions and participating in making those decisions where a proponent of a recommendation leading to a decision made by someone else is a participant in respect of that decision and thus an “officer” notwithstanding that the participant is not the actual or ultimate decision-maker. The holding of an “officer” position or role such as that of company secretary or director, or an active involvement as a senior executive in corporate decision-making, are likely to be found not compatible with the dominant purpose test, notwithstanding Kirby J’s concerns when the dominant purpose test replaced the sole purpose test at common law in 1999 that this new test was too advantageous to corporations.

Australia - “independence” where General Counsel/Company Secretary

Where the author of documents was employed as General Counsel and Company Secretary, Gillard J acknowledged that the aspect of independence was relevant, and proceeded to state:

The learned judges of the High Court have not spoken with one voice. Mr Jopling QC made reference to the various statements made by the High Court judges and submitted that it was an essential element of the privilege that the legal adviser is acting independently when he gave the advice.

It is not possible to say with any degree of confidence that independence is an essential element of legal professional privilege with respect to communications between the private sector employer and employee legal adviser but in my opinion there is sufficient dicta to support the proposition that the employee legal adviser when performing his role in a communication concerning a legal matter must act independently of any pressure from his employer and if it is established that he was not acting independently at the particular time then the privilege

171 Ibid 479; [26]
173 Australian Hospital Care Pty Ltd v Duggan (No. 2) [1999] VSC 131 (28 April 1999), [37]
would not apply or if there was any doubt the court should in those circumstances look at the documents.  

Gillard J concluded that:

A legally qualified legal practitioner knows his ethical obligations and his duty to the court and is duty bound to approach the task of providing advice in a professional, ethical, honest and independent way. The affidavit is that of the client, not the solicitor and the client is entitled to assume that the legal adviser has fully and properly performed his function.

In my opinion once the client swears the affidavit of documents claiming legal professional privilege in a way which leads the court to the conclusion that the claim is properly made, then the prima facie position is that the legal adviser was acting independently at the relevant time.

It follows that if any other party to the litigation disputes the claim for legal professional privilege then it has the evidentiary burden of establishing facts which prima facie rebut the presumption.

…

If the party opposing the claim for privilege does establish facts which rebut the prima facie presumption then in the end result the party claiming privilege must establish the propriety and validity of the claim.

The Court may, after considering the issues, reach the conclusion that the lawyer was acting independently and accordingly the privilege is upheld, or that the lawyer was not acting independently and accordingly there is no privilege, or the Court may reach a position where it is in doubt. If the latter stage is reached then the Court should inspect the documents to determine the propriety and validity of the claim.

…

… the mere fact that the legal adviser is an employee of the client or that his duties may involve performing non-legal work do not establish that at the relevant time he was not acting independently. It is recognised that employees will perform non-legal work and it is an essential element of the establishment of the privilege that at the relevant time the employee was performing legal work.

174 Ibid [53] and [54]
The fact of employment is relevant but the weight to be attached to that fact in considering independence will depend on all the circumstances.  

**Current practising certificate very relevant, but not mandatory, to attract privilege**

The employee solicitor or in-house legal officer howsoever designated should hold a current practising certificate adviser solicitor, particularly where the employer is a private company. The lack of a current practising certificate is a very relevant factor in determining whether legal professional privilege exists in respect of advice given by in-house lawyers, but it is not determinative of the existence of the privilege:

It seems to us that the possession of a current practising certificate can be a very relevant fact to take into account in determining whether or not an employed lawyer, whether or not in government service, is employed in circumstances where they are acting in accordance with appropriate professional standards and providing the independent professional legal advice such that would attract a claim for client legal privilege under the Evidence Act. To make the holding of a practising certificate a pre-condition for such a claim, however, seems to us to go beyond the requirements of the Evidence Act, and to amount to appealable error.

Holding a current practising certificate is not essential, but prudently, it can become important “in demonstrating independence, as it indicates that the lawyer is bound by the current ethical and professional standards of the legal profession and is subject to the disciplinary regime of the jurisdiction in which they are admitted to practice”.

**Supervision by non-lawyers must not impact upon in-house lawyers’ legal work**

An in-house lawyer might have to give sworn evidence that she or he has not been and is not the subject of any direction from elsewhere in the company. It could be considered an inherent feature of in-house lawyers that somewhere along the chain of authority there will be a person who is not a lawyer who will, directly or indirectly, hold authority over them, so that they will be accountable to non-lawyers. Once it is accepted that legal professional privilege can extend to in-house lawyers, the mere fact

175 Ibid [66]-[68], [70], [71], [81], [82]
177 Ibid [30] per Gray, Connolly and Tamberlin JJ
179 E.g. Telstra v Minister for Communications, Information Technology and the Arts (No 2) [2007 FCA 1445 (12 September 2007)
that their employment is subject to the authority of non-lawyers should not be determinative. Rather, the question of fact for resolution by a court or tribunal should be whether such supervision or other authority on the part of a non-lawyer over in-house lawyers impacts upon the independence of the advice given or other work undertaken by the in-house lawyers.  

Prudently:

It is important to establish independence objectively. In this regard, in-house counsel should not be in a position where they are subject to the influence and control of a non-lawyer. They should not, for example, report to or be subject to the direct control of the CFO [chief financial officer] or the business line. Rather, they should maintain objective independence from those they are advising by reporting to General Counsel, who in return reports directly to the CEO [chief executive officer] or to the Board.

What the High Court – and the courts below - have required of a general counsel and company secretary in Mr Shafron’s position is not “legal advice” as a “legal practitioner”, but proactive “governance” interventions into board and corporate deliberations as an “officer”. In respect of this governance advice, it seems that Mr Shafron could not have been mandated to hold a practising certificate. Conversely, it seems Mr Shafron could not have escaped liability if he had ceased to hold a current practising certificate and used his lack of a practising certificate as an excuse for not intervening at the Board meeting on 15 February 2001 (either directly or through his “supervisor” Mr Macdonald as chief executive officer). Mr Shafron’s liability for not so intervening arose in his capacity as a corporate “officer” not as a currently practising lawyer or legal practitioner who may be required to have a practising certificate.

**Admission to practice somewhere, but Australian admission not essential**

Legal professional privilege cannot attach to advice given by a person who is not admitted to practice anywhere as a legal practitioner. Legal professional privilege may attach to communications involving an in-house lawyer who is a qualified lawyer admitted to practice elsewhere than in Australia. Legal advice by a lawyer qualified in, say, New South Wales on matters involving the law of, for example, Victoria of the United Kingdom, would, in appropriate circumstances, attract legal professional

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180 *Re Alex Proudfoot and Human Rights and Equal Opportunity Commission No: A92/4 Aat [1992] AATA 317; (1992) 16 AAR 411 (1992) 28 ALD 734 (22 October 1992), [27] per O’Connor J (President), Dr Travers and Mr Attwood (Members)*


182 *E.g. Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd [2013] QSC 82 (28 March 2013), [19] per Boddice J (28 March 2013)*

183 *E.g. Ibid [20]*
privilege. In a field with international ramifications such as for example trade mark law, legal advice from a lawyer qualified, say, in New York, concerning trademarks and trade mark litigation in another country than the United States or Australia, could, in appropriate circumstances, attract legal professional privilege.\textsuperscript{184}

Legal professional privilege could be attracted to work by an in-house corporate legal department notwithstanding that the corporation’s legal department were to be headed by a general counsel who was not admitted in an Australian jurisdiction, but instead only in an overseas jurisdiction, such as New York in the USA:

A conclusion that legal professional privilege can attach to the documents in question, notwithstanding that the defendant’s general counsel is not admitted as a legal practitioner in Australia, is consistent with the purpose of, and rationale behind, the doctrine of legal professional privilege.

Legal professional privilege is the privilege of the client, not the lawyer. It exists even where the client erroneously believed the legal adviser was entitled to give the advice. It would be contrary to the notion of the privilege being that of the client that the client should lose the privilege merely by reason that the legal adviser, who is admitted elsewhere, is not admitted in Australia.

Legal professional privilege is afforded as it is in the public interest for clients to seek legal advice, and make frank disclosure in doing so, without fear of disclosure. There is a corresponding public interest in legal advisers being able to give full and frank advice, without fear of disclosure. It would be contrary to that public interest if the privilege were to be lost merely by reason that the legal adviser, who is admitted to practice, is not admitted in Australia.\textsuperscript{185}

\textbf{Commercial context may inform work, but contrast participation in commerce}

In \textit{Seven Network Limited v News Limited}\textsuperscript{186} Mr Philip, Chief General Counsel for News, was the nineteenth respondent in the proceedings. He held a number of other positions and offices in the News Group of companies. These included directorships and alternate directorships of six associated companies. He was also a member of the NRL Partnership Executive Committee. The evidence demonstrated that Mr Philip has been actively involved in a commercial role in a number of business activities. These activities included negotiations of numerous important commercial arrangements, including the grant of options, the making available of television channels to other parties and the conduct of negotiations concerning a content sharing agreement and the broadcast of

\textsuperscript{184} \textit{Ritz Hotel Ltd v Charles of the Ritz Ltd (No 4)} (1987) 14 NSWLR 100, 102 per McClelland J

\textsuperscript{185} \textit{Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd} [2013] QSC 82 (28 March 2013), [24]-[26] per Boddice J (28 March 2013)

\textsuperscript{186} [2005] FCA 142 (28 February 2005)
football matches. This evidence as to his extensive involvement in commercial matters was not contradicted or qualified by any evidence on behalf of News or Mr Philip.187

It was recognised that the dominant purpose test has particular importance in relation to the position of in-house counsel:

because they may be in a closer relationship to the management than outside counsel and therefore more exposed to participation in commercial aspects of an enterprise. The courts recognise that being a lawyer employed by an enterprise does not of itself entail a level of independence. Each employment will depend on the way in which the position is structured and executed. For example, some enterprises may treat the in-house adviser as concerned solely in advising and dealing with legal problems. As a matter of commercial reality, however, both internal and external legal advisers will often be involved in expressing views and acting on commercial issues.

The authorities recognise that in order to attract privilege the legal adviser should have an appropriate degree of independence so as to ensure that the protection of legal professional privilege is not conferred too widely. Commercial reality requires recognition by the courts of the fact that employed legal advisers not practising on their own account may often be involved to some extent in giving advice of a commercial nature related to the giving of legal advice. Such involvement does not necessarily disqualify the documents relating to that role from privilege. The matter is necessarily one of fact and degree and involves a weighing of the relative importance of the identified purposes. 188

...

I am cognisant of the fact that there is no bright line separating the role of an employed legal counsel as a lawyer advising in-house and his participation in commercial decisions. In other words, it is often practically impossible to segregate commercial activities from purely "legal" functions. The two will often be intertwined and privilege should not be denied simply on the basis of some commercial involvement. In the present case, however, I am persuaded that Mr Philip was actively engaged in the commercial decisions to such an extent that significant weight must be given to this participation. In many circumstances where in-house counsel are employed there will be considerable overlap between commercial participation and legal functions and opinions. As can be seen from the specific rulings below, I am not persuaded that in this proceeding Mr Philip was acting in a legal context or role in relation to a number of the

187 Ibid [14] per Tamberlin J
documents in respect of which privilege was claimed. Nor am I persuaded that the privilege claims were based on an independent and impartial legal appraisal.189

Partnership means can’t meet test of essential professional detachment

Where a former partner of PricewaterhouseCoopers had commenced discrimination and victimisation proceedings in the Federal Court of Australia against the partners of the firm, the issue arose as to whether the respondent partners could maintain a claim for legal professional privilege (or client legal privilege) in respect of legal advice provided by persons comprising the Office of General Counsel of PwC. It seemed uncontroversial that the allegations made by one partner against the other partners were of a kind capable of tarnishing the reputation of the firm of which the Office of General Counsel was part. The allegations cast aspersions of a personal, rather than of a professional, kind on the general counsel's partners including those partners who comprised the leadership of her firm. The general counsel and the deputy general counsel were themselves likely respondents to the litigation then in prospect. Because of its likely subject matter, that litigation, should it have eventuated, could reasonably have been expected to attract a high level of media interest of a relatively sensational kind. The allegations were by reason of their content inherently likely to engage the personal loyalties and the duties and interests of all partners of PwC – and probably many employees of the firm as well. Having regard to the nature and significance of the allegations, the relationship between the Office of General Counsel and the respondents was not such as to secure the advice of the Office of General Counsel concerning those allegations the objectively independent character necessary to support the respondents' claim of client legal privilege. The Office of General Counsel was not in a position to give professionally detached advice to the respondents concerning allegations of the character of those made.190

On appeal to the Full Federal Court, Sackville, Emmett and Jacobson JJ denied leave to appeal. The orders of the trial judge (Branson J) were interlocutory. Sackville, Emmett and Jacobson JJ denied leave on such grounds as that the proceedings which were subject to the orders had subsequently been terminated by consent and the substantive proceedings between the parties had been completely resolved, there remaining no issue even as to the costs of the proceedings, and because:

the Partners say that the primary judgment creates significant uncertainty as to whether solicitors within OGC [the Office of General Counsel] will be able to give advice that attracts privilege, in the event of an allegation being made regarding

189 Ibid [38]
the conduct of a partner of PwC. Branson J’s judgment, insofar as it addresses the role of OGC, is (as might be expected) fact specific. Her Honour emphasises (at [59]) the fact that allegations were made by one partner (Ms Rich) against the others; that the allegations cast aspersions of a personal rather than of a purely professional kind against certain of the Partners; and that General Counsel and her deputy were likely to be respondents in any litigation instituted by Ms Rich. Whatever the merits of her Honour’s conclusions, they do not purport to lay down broad general principles governing the subsistence of legal professional privilege in relation to advice given by legally qualified members of a firm to other members of the firm.191

There is a view that any requirement for “independence” on the part of an in-house lawyer does no more than stipulate that the salaried legal officer be consulted in a professional capacity in relation to a professional matter; and the communications be made in confidence and arise from the relationship of lawyer and client, whereupon legal professional privilege will attach to communications between a salaried legal officer and his or her employer.192

Where in-house lawyers are not partners: for example, they are employees of a company; which corporate employer is their client; and nor are they actual or potential parties to existing or anticipated litigation; and they are able to give unchallenged evidence that they have not met any of the individuals whose conduct could be impugned in the course of litigation to which those individuals were parties or potential parties, it could not be said that the objectively independent character was missing or that the in-house legal team was not in a position to give professionally detached advice. A court could be satisfied on this kind of evidence that the general counsel and the in-house lawyers under the general counsel’s supervision were in such a position.193

It has been said that while it was unnecessary to decide the issue:194

The better view is that any requirement of independence on the part of an in-house lawyer is an aspect of the relationship between the lawyer and the employer (client) and the capacity in which the lawyer is consulted. Legal professional privilege will attach to a confidential communication between an employer and its employed solicitor if it is established that the communication

192 AWB Limited v Cole (No 5) [2006] FCA 1234 per Young J (18 September 2006) (corrigendum 26 October 2006), [44] per Young J
193 Dye v Commonwealth Securities Ltd (No 5) [2010] FCA 950 (1 September 2010), 27-[]29] per Katzmann J
194 Archer Capital 4A Pty Ltd as trustee for the Archer Capital Trust 4A v Sage Group plc (No 2) [2013] FCA 1098 (24 October 2013, [74] ) per Wigney J
arises as a result of the employer consulting the employed solicitor in a professional capacity in relation to a professional matter that arises from the relationship of lawyer and client. In my opinion it is preferable to approach the issue in this way, rather than relying on presumptions and evidentiary onuses …

Senior executive roles such as Secretary highly relevant, but not decisive

So where there is a Group Legal Director who is the senior management team member responsible for all legal and regulatory matters in the Group with oversight over all ethical issues and overseeing approximately 30 employed practising solicitors across various offices who ultimately report to the Group Legal Director, who also is the Company Secretary with the role to support the Board in all areas of corporate governance, where the financial and commercial teams did not have access to his electronic files and emails, and his physical files were stored separately from them, it has been decided that:

To the extent that there is a separate requirement, in the case of privilege claims involving in-house lawyers, to demonstrate that the lawyer or his or her advice are independent, the evidence adduced by Sage makes out the requisite independence on the part of Mr Robinson. Relevant in this regard is the evidence that demonstrates Mr Robinson’s lengthy legal career as a solicitor, the fact that he remains admitted as a solicitor with a current practising certificate in the United Kingdom, the professional nature of Mr Robinson’s duties and responsibilities as head of Sage’s legal team, the fact that as Group Legal Director Mr Robinson reports directly to the Chief Executive Officer of Sage and the fact that Mr Robinson’s files, both electronic and physical, are stored separately to and are not accessible by the financial and commercial teams at Sage.

It was acknowledged that the evidence showed that in relation to a proposed transaction at issue in the proceedings:

Mr Robinson’s role extended in some respects beyond that of in-house legal adviser. However, the mere fact that Mr Robinson also had responsibilities as Company Secretary, and that some aspects of his position as Group Legal Director may have involved administrative and managerial functions, does not mean that, when he was consulted in his capacity as legal adviser, Mr Robinson relevantly lacked independence. Nor does it mean that legal professional

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195 Ibid [73]
196 Ibid [82]
privilege cannot be claimed in relation to any communication involving Mr Robinson. Nor does the mere fact that Mr Robinson may have engaged in communications in relation to the Proposed Transaction in respect of which privilege is not claimed mean that Mr Robinson lacked independence, or that privilege cannot be claimed in relation to any other communications involving Mr Robinson. All that the existence of these other communications shows is that not all communications relating to the Proposed Transaction that Mr Robinson was involved in were for the dominant purpose of Sage seeking or obtaining legal advice.197

However, the finding that Mr Robinson did not relevantly lack independence did not entirely resolve the privilege claim of the company Sage in relation to what were designated as the Relevant Robinson Documents. The fact that Mr Robinson’s role and responsibilities extended beyond acting in the capacity of legal adviser, and the fact that he engaged in communications relating to the Proposed Transaction that did not involve seeking or giving legal advice, meant that it was necessary to analyse precisely in what capacity Mr Robinson sent or received the relevant communications in respect of which privilege was claimed, particularly where the claim was that Mr Robinson was providing legal advice to Sage. In respect of those communications, it was only where the communication was sent or received in Mr Robinson’s capacity as Sage’s legal adviser that the communication could be privileged.198

The evidence was that Mr Robinson’s involvement in the Proposed Transaction was “almost exclusively” in his capacity as Group Legal Director and that the tasks he undertook in his capacity as Company Secretary were limited to organising and minuting Sage’s audit meetings. It did not necessarily follow, however, that every communication sent to or sent by Mr Robinson in relation to the Proposed Transaction was in Mr Robinson’s capacity as legal adviser. Nor did it follow that every such communication was for the dominant purpose of obtaining or providing legal advice. That appeared to be confirmed by the existence of the non-privileged communications between Mr Robinson and the Deutsche Bank AG, an investment bank, which was engaged as Sage’s exclusive financial adviser in connection with the Proposed Transaction.199

There had to be a broad, practical and common sense approach that should be taken to the concept of legal advice in this context. In complex commercial transactions involving legal advisers, there was often no sharp division between what was advisory and what was merely administrative. This latter point was particularly apposite where

197 Ibid [83]
198 Ibid [84]
199 Ibid [4] and [85]
documents or communications involving an in-house lawyer in the context of a complex transaction were examined for the purpose of ascertaining whether a particular communication attracted advice privilege. Where an in-house lawyer was involved in providing advice and seeking advice from external lawyers in a complex commercial transaction, it might be difficult to disentangle the in-house lawyer’s purely legal function from other functions performed by the lawyer in relation to the transaction. Accordingly, with the exception of one email from a solicitor in the legal department which did not (and was not said to) contain legal advice, after inspection of the documents the trial judge was satisfied that the dominant purpose test had been satisfied in relation to each of the documents.

As it is prudent that:

In-house lawyers should not [emphasis as in original]:

- advise on a matter if they have a material personal interest in the matter …;
- advise the company (or a subsidiary) if they are a director of that company;
- advise on a transaction if they are a sponsor or champion of the transaction or a major player in that transaction; or
- allow a non-lawyer who is not the internal client to “vet”, “settle”, “approve” or “endorse” their advice or be a joint author.

it would also seem prudent that, to protect legal professional privilege, an in-house lawyer should not have a mixed role, such as being Company Secretary and General Counsel, or otherwise occupy a position or perform a role at senior management level which involves a function that is not strictly incidental to his or her primary function as a legal practitioner. In that regard, if a director on the Board is there as a director not a legal practitioner (irrespective of whether he or she has a current practising certificate), given the decision in Shafron becoming a company secretary or other officer seems incompatible with the professional detachment required of a lawyer to attract legal professional privilege. Once a General Counsel or another in-house lawyer becomes an “officer” of the corporation with the exposures to statutory liabilities of the kind which apply to directors, the General Counsel or other in-house lawyer seems to be in a position analogous to that of a partner in an accounting firm exposing them to allegations of a non-professional character of the kind considered by the Full Federal

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200 Ibid 88
201 Ibid 90
Court in *Harrington v Rich*\(^{203}\) as substantiating the non-application of legal professional privilege.

**Capacity in which advice given or relevant work undertaken is critical**

**Patent attorneys, trade mark attorneys and licensed conveyancers**

The courts in England and Wales have refused to extend legal advice privilege to legal advice given by a trade mark agent, a patent agent, or a personnel consultant.\(^{204}\) For example, it has been held that patent agents were not lawyers and that privilege did not attach to their advice.\(^{205}\) There has been a statutory extension of privilege in the United Kingdom to extend the privilege to patent attorneys,\(^{206}\) to trade mark agents,\(^{207}\) and to licensed conveyancers.\(^{208}\)

**Accountants giving expert tax advice**

The Supreme Court of the United Kingdom has held that, in so far as the law of England and Wales is concerned, legal advice privilege should not attach to communications passing between chartered accountants and their client in connection with expert tax advice given by the accountants to their client, in circumstances where there was no doubt that legal advice privilege would attach to those communications if the same advice were given to the same client by a member of the legal profession.\(^{209}\)

The dominant position in the United Kingdom Supreme Court was that the implications for society, for the courts, and for the executive, of legal advice privilege only applying where it was members of the legal profession who were giving the advice, had been generally understood, accepted and allowed for by the rules and practice of the courts and in legislation. The suggestion that legal advice privilege should apply in any case where legal advice was given by a person who was a member of a profession which ordinarily included the giving of legal advice was overall regarded as an an inappropriate formulation. There was concern it would carry with it an unacceptable risk of uncertainty and loss of clarity in a sensitive area of the law. For example, actuaries, auditors, architects and surveyors had considerable specialist legal expertise, on which

\(^{203}\) [2008] FCAFC 61 (18 April 2008), [26] per Sackville, Emmett and Jacobson JJ

\(^{204}\) *Dormeuil Trade Mark*[1983] RPC 131 (Nourse J); *Wilden Pump Engineering Co v Fusfeld*[1985] FSR 159 (CA, Waller and Dillon LJ); and *New Victoria Hospital v Ryan*[1993] ICR 201 (EAT, Tucker J)

\(^{205}\) *Wilden Pump Engineering Co v Fusfeld*[1985] FSR 159

\(^{206}\) *Copyright, Designs and Patents Act 1988 *(UK), s 280

\(^{207}\) *Trade Marks Act 1994 *(UK), s 87 (as amended by the *Legal Services Act 2007 *(UK));

\(^{208}\) *Administration of Justice Act 1985 *(UK), s 33

\(^{209}\) *R (on the application of Prudential plc and another) (Appellants) v Special Commissioner of Income Tax and another (Respondents)* [2013] UKSC 1 (23 January 2013)
clients drew, and expected to be able to draw. There was room for uncertainty, expenditure and inconsistency if the court had to decide such an issue. Lawyers normally only gave legal advice, but would legal advice privilege apply with other professions where the legal advice was only subsidiary; and, if so, how would one determine subsidiarity; and how would documents which contained legal and non-legal advice be dealt with.\textsuperscript{210}

The extension of legal advice privilege to foreign lawyers was based on fairness, comity and convenience. While that extension did rather undermine much of the principled justification for legal advice privilege being confined to cases where the advice was given by professional lawyers, it was consistent with the court restricting legal advice privilege to its currently understood bounds for reasons of practicality and certainty. It should be left to Parliament to decide what, if anything, it wished to do with legal advice privilege, with Parliament’s wide powers of inquiry, consultation and its democratic accountability. Where Parliament had legislated in this field extending legal advice privilege to members of other professions, it had been on the assumption that the privilege only applies to lawyers; its extension to professions other than lawyers may only be appropriate on a conditional or limited basis which could not appropriately be assessed, let alone imposed, by the courts.\textsuperscript{211}

It would be a significant change to declare that legal advice privilege is to be determined not by the profession to which the adviser belongs but by the function the adviser is performing – it would be changing the ambit of the privilege. The position as generally understood has clearly defined limits and, in consequence, the inestimable advantages of clarity and certainty. The functional test would give rise to a significant risk of uncertainty.\textsuperscript{212}

The justification of legal advice privilege advanced in respect of lawyers included candour – that was, it enabled clients to provide their lawyers with all the facts and matters that they may need to advise on the law. It was evident that when the present issue had been considered by law reform committees or legislators in the United Kingdom, New Zealand and Australia, this justification had not been felt to have the same force. Rather, a specific need had been felt to ensure, by appropriate legislative qualification of the scope of legal advice privilege that the Revenue was put into possession of a full understanding of the facts and the nature of the relevant transactions, so as to be able then to advise itself as to the correct legal conclusions to be derived there from as a matter of tax law. While such a distinction can sometimes be relevant to lawyers (e.g. where a lawyer acts as a business person or purely

\textsuperscript{210} Ibid [53] to [59] per Lord Neuberger, President (with whom Lord Walker agreed)
\textsuperscript{211} Ibid [61] to [72], [73] per Lord Neuberger, President (with whom Lord Walker agreed)
\textsuperscript{212} Ibid [80] per Lord Hope
administratively, rather than as a lawyer), it was not normally so. In the case of other professions, the distinction would become highly relevant and would not be easy to draw.\textsuperscript{213}

In the context of legal professional privilege, in each of the decided cases in which the privilege was held to exist, the relationship of the persons between whom the communication passed was that of client (or prospective client) and professional lawyer acting as such; and the privilege had not been held to exist when any of the characteristics of that relationship were absent. One could therefore deduce from the authorities a principle which applied when that relationship existed. That relationship did not, however, exist in the present case.\textsuperscript{214}

Since the case at hand lacked one of the characteristics which had been present in all previous cases in which legal advice privilege had been held to exist, the court had a choice whether or not to extend legal advice privilege to situations where legal advice was sought from a person other than a lawyer. The choice was exercised by making a policy decision. It was open to a court to redefine the characteristics of legal professional privilege in more general terms. A court could hold that legal advice, given in the exercise of a professional activity which involved the giving of such advice, was subject to legal advice privilege. It was also open to a court to adhere to the narrower principle which could be derived from the existing body of case law. A judgment had to be made as to the most appropriate course of action.\textsuperscript{215}

The privilege should, as far as possible, be based upon a principle which was clear, certain and readily understood. The existing common law principle met those requirements.\textsuperscript{216}

The dissenting judgments referred to a range of considerations. For present purposes, what seems most pertinent is that the law was that legal professional privilege attached to any communication between a client and his or her legal adviser which was made, first, for the purpose of enabling the adviser to give or the client to receive legal advice; second, in the course of a professional relationship; and, third, in the exercise by the adviser of a profession which had as an ordinary part of its function the giving of skilled legal advice on the subject in question. The privilege was a substantive right of the client. Its availability depended on the character of the advice which the client was seeking and the circumstances in which it was given. It did not depend on the adviser’s status, provided that the advice was given in a professional context. It followed that

\textsuperscript{213} Ibid [82] to [92] per Lord Mance  
\textsuperscript{214} Ibid [96] per Lord Reid  
\textsuperscript{215} Ibid [98] per Lord Reid  
\textsuperscript{216} Ibid [100] per Lord Reid
advice on tax law from a chartered accountant should attract the privilege in circumstances where it would have done so had it been given by a barrister or a solicitor. They were performing the same function, to which the same legal incidents attached.217

None of the judgments proceeded on such a basis as that members of professions, other than that of the law, do not give legal advice as distinct from, say, a tax accountant giving tax accountancy advice informed by tax law but not itself constituting “legal advice”. If the United Kingdom Supreme Court had proceeded on this basis, it consequently would have had no choice but to reject the appeal to extend the privilege to accountants. However, although there were dissenting judgments, it rejected this appeal.

The Australian Law Reform Commission has recommended the establishment of a ‘tax advice privilege’ in Australia, to protect the confidentiality of tax advice given by independent professional accountants. This would effectively formalise the Australian Taxation Office “accountants’ concession”, and would only apply in relation to information sought by the Commissioner of Taxation.218 At present, it is clear that in Australia, and in England and Wales, only lawyers attract legal professional privilege. Accordingly, to attract legal professional privilege, work has to be undertaken as a lawyer and not in some other capacity, such as a company secretary or director. In some circumstances legal advice may be accompanied by advice of another kind which can be separated from it. In such circumstances, only the legal advice will be privileged. If the legal advice contains extraneous matter which cannot be separated from it, while the legal advice will not lose its privilege for that reason, a question may arise as to why it was brought into existence, which is a matter of fact for determination as final by the hearing tribunal or court.219

Directors, company secretaries and executive officers who are legally qualified

Of central importance is that the communications must have been in the course of the professional’s capacity as a lawyer, and not in such a capacity as a director, company secretary or executive irrespective of whether the director, company secretary or executive also is legally qualified.220 Where minutes of a company board meeting

217 Ibid [114] per Lord Sumpton
219 Waterford v The Commonwealth (1987) 163 CLR 54, 66 per Mason and Wilson JJ, 103 per Dawson J
220 Belle Rosa Holdings Pty Ltd v Hancock Prospecting Pty Ltd Unreported, 1 December 1992, Supreme Court of WA, Master Adams, proceeding 2105 of 1992 cited by Emilios Kyrou, Legal Professional Privilege in the High Court
recorded statements made by a director who was also a partner in the firm of the company’s solicitors, summarising part of the legal advice he had given as a partner, it was held that the statements before the board were made by him primarily as a director with legal knowledge, rather than either by him giving confidential legal advice as a solicitor for the company, or as summarising advice previously given. Consequently, the Court decided that the director’s statements, and the board’s reaction to them as recorded in the minutes, should be regarded as being expressions of knowledge and belief of the company and its directors, rather than a confidential communication of a report of such a communication which would have attracted legal professional privilege.221

While courts in Australia frequently have expressed misgivings to greater or lesser extents, it is accepted that the principles expressed by the High Court in in Kearney and in Waterford in relation to government lawyers could be extended to apply to privately employed in-house legal advisers. The reservations which often have been expressed by courts relate primarily to whether a privately employed in-house legal adviser could ever possess the necessary degree of independence to justify their communications with their employer being subject to legal professional privilege, but it is clear that this reservation alone does not disqualify in-house lawyers from attracting legal professional privilege in the work for their employers. Directors, company secretaries and executive officers who are closely involved with the operations of their company are unlikely to be in a position to proffer independent legal advice. Notwithstanding that they may have been involved in producing legal documents, including legal advice, or commenting on legal issues, and even hold practicing certificates, directors, company secretaries and executive officers are unlikely to be found to have given legal advice or otherwise to have been party to communications on legal matters so as to have acted in an independent legal professional capacity. The fundamental problem is that legal professional privilege would not attach if they did so in their capacity as directors, secretaries, executives, managers or other officers of the company.

A finding that legal professional privilege should not so attach is likely where governance advice or related services are provided by the “officer” irrespective of whether or not the “officer” held a practising certificate. While the absence of a practising certificate is likely to be regarded as indicative of the fact that the work lacked the necessary degree of independence or professional legal detachment to attract legal professional privilege, a practising certificate will not transform work undertaken as a director into legal advice and other legal services. Conversely, communications

221 Standard Chartered Bank of Australia Ltd v Antico (1993) 36 NSWLR 87, 93 per Hodgson J

involving a company’s in-house senior legal counsel attract legal professional privilege where it is unable to be shown that this employee had held any other office in addition to that of the company’s senior legal counsel or has been involved in the business activities of the company.  

Given technological changes and increased globalisation driving a growing need for more flexible use of in-house lawyers by corporations, the outcome might be that the position taken by many European countries becomes adopted in Australia, if only by default, so that in many cases notwithstanding a corporate employee’s formal legal qualifications and formally styled legal position within the company, the employee’s work will face increasing challenges in response to any claim for legal professional privilege:

But just as technology helped in-house counsel take power from outside lawyers, it is promoting corporate lawyers’ evolution. Many compliance and transactional tasks that expanded inside lawyers’ jobs are being replaced by new technologies. By reducing the role of specialized legal expertise, technology could help transform legally trained employees from lawyers to business people.

There are significant policy ramifications in a too restrictive approach to legal professional privilege in the modern corporate environment in respect of in-house “legal” work:

The inability of legal scholars to expand the in-house counsel inquiry beyond independence is shortsighted and could lead to perverse consequences. For example, this dilemma is particularly evident within the European Union competition law context, where the European courts’ negative perception of in-house counsel (i.e., the inability to render independent judgment) has influenced the denial of legal privilege to in-house counsel communications. As a consequence, this narrow perspective forces corporations to undertake less effective and more costly measures through outside counsel, even where the use of in-house counsel would be optimal. Moreover, this perspective may operate to

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222 Southern Equities Corporation Ltd (In Liquidation) v Arthur Andersen & Co (No 6) [2001] SASC 398 (23 November 2001)
suppress vital internal communications or information flow that would otherwise lead to the early identification and resolution of legal issues.\textsuperscript{224}

Conclusion

The judgments in \textit{Shafron} make it unsafe in Australia to continue proceeding on the basis that ‘courts have been reticent to unduly restrict what comes within the lawyer’s professional province, noting the difficulty of disentangling the lawyer’s views of the legal framework from other reasons that together go to make up the “advice as to what prudently and sensibly should be done in the relevant legal framework”’.\textsuperscript{225}

Rather, those judgments reinforce that, quite apart from such additional issues as that of “independence”:

Communications are not protected by legal professional privilege simply because they are made by an in-house solicitor - for the privilege to apply, the solicitor must be acting in a professional, or legal, capacity and the advice must be of a legal nature.\textsuperscript{226}

What the judgments in \textit{Shafron} seem to highlight is that analogous to how agreeing to “serve on a corporate client’s board of directors” can be “an invitation to disaster”, an in-house lawyer becoming involved in a company other than in a legal professional capacity, such as to wear the “two hats” of general counsel and company secretary, “may serve to deny the employer’s claim to legal professional privilege”.\textsuperscript{227}

In Australia, communications between a company and its company secretary or any other person who had participated in its decisions so also being an “officer”, prudently should be anticipated not to attract legal professional privilege. This outcome would be irrespective of whether the “officer” was in addition to being, say, the company secretary (or other senior executive office-holder) also general counsel or was legally qualified as a lawyer. The reason would be that the communications would not be in the capacity of the person as a legal practitioner, but as an “officer”. To avoid this outcome:

- general counsel prudently should not also be company secretaries; and


\textsuperscript{225} G E Dal Pont, \textit{Lawyers’ Professional Responsibility} (5\textsuperscript{th} ed 2013) 378 [11.130] Thomson Reuters, Pyrmont NSW


\textsuperscript{227} Cf G E Dal Pont, \textit{Lawyers’ Professional Responsibility} (5\textsuperscript{th} ed 2013) 431 [13.30] Thomson Reuters, Pyrmont NSW
• in-house lawyers prudently should not be senior executives at or near the level that was Mr Shafron’s; and
• in-house lawyers and the general counsel prudently should confine their involvement in any corporate decision-making to the provision of legal advice and other legal services, quarantining their legal services from any participation in management recommendations or decisions that reflect non-legal considerations, such as financial, commercial or policy matters.

Such a legal advisory and professional role would seem able to take into consideration financial, commercial and policy matters germane to the ongoing operation of the corporate concern. For example:

Observers generally recognize that in-house counsel are particularly well situated to serve an anticipatory and preventive function for their business clients. In contrast to outside counsel, who typically are too costly to involve in the early stages of a transaction or legal issue, in-house counsel are almost always present and can offer legal advice early in the decision-making process. Also, because in-house counsel only serve a single client, they benefit from superior information about that client’s organization, operations, and business culture. This information is also “dynamic” in the sense that, at any given time, in-house lawyers know whom in their company to contact about an issue as well as the status of ongoing projects. Furthermore, their knowledge of the law equips in-house counsel to educate corporate employees about potential legal issues and avoid costly compliance problems.228

In-house counsel are also well-situated to guard the long-term interests of the company against the possibly short-sighted behavior of management. The interests of line personnel are not inherently opposed to the long-term interests of their company; indeed, their interests are obviously linked in many fundamental ways. However, compensation structures that reward accomplishing short-term goals, like the successful negotiation of a deal or the execution of an asset transfer, can create perverse incentives for managers. In-house counsel, however, are not subject to the same incentives as managers because their compensation is typically not linked to transactional volume or quantitative performance measures. To that extent, they serve as a counterweight to managers, guarding against short-term myopia as part of their preventive role.229

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229 Ibid 531-2
Consistent with what is set out above about in-house lawyers being able to have regard to matters beyond only the law such as their company’s overall corporate affairs, to safeguard legal professional privilege their involvement in any financial, commercial or policy matters nevertheless must be incidental to their provision of legal advice. “Extra-legal” matters should not become a separate focus of the advice as independent considerations in their own rights.

It would be dangerous from the vantage point of the protection of legal professional privilege were the general counsel or in-house lawyers to become proponents of any recommendation where financial, commercial or policy considerations had become paramount to the recommendation. By contrast, prudently they should always remain detached advisers and service-providers on the legal ramifications in respect of recommendations. General counsel and in-house lawyers must not stray from their essential role of legal practitioners who provide advice on the law and provide other legal services, albeit legal advice and legal services which ordinarily would be more informed by day-to-day corporate operations and exigencies than with outside solicitors and barristers.

These precautions might seem overly prescriptive to observers outside Australia. For example:

A crucial qualifier must be added to the informational superiority of in-house counsel: the information they receive from corporate management is heavily dependent on the nature of their relationship with such management. Lawyers who question business decisions too often, or who seem overly cautious, risk being perceived as obstacles to deal-making and are liable to be frozen out of information channels within the organization. Thus, the theoretical information advantage of an in-house lawyer can be constrained by the lawyer’s ability to forge relationships within the company and even by the vicissitudes of office politics. To be most effective, in-house counsel need to be—and to be seen by their clients as—members of the corporate “team”: working towards the same goals, even when their role on the “team” seems to be in conflict with a business group’s particular wishes.230

However, while perhaps not easy to implement, the necessary precautions can still be made consistent with general counsel and in-house lawyers being part of the corporate team working towards the same goal, albeit from perhaps radically different perspectives. Based on the evidence, Mr Shafron seems to have gone well beyond a

230 Ibid 531
legal advisory role in relation to the restructure of the James Hardie group, to have become a principal “player” and proponent.

The precautions set out in this paper already may well have been prudent in Australia even prior to the Shafron decision in 2012. The High Court (and the courts below it) did not confine their decision in respect of Mr Shafron simply to the evidence having demonstrated conclusively that Mr Shafron, in the particular circumstances of this case, had specific responsibilities as a corporate “officer” which he manifestly had failed to discharge. If the High Court (and the courts below it) had confined their decision to there being such a conclusive finding of fact on the evidence, it would seem that whether or not Mr Shafron also was employed as general counsel then would have been rendered entirely irrelevant. Such an outcome would seem to have been preferable in that it would have given general counsel and in-house lawyers somewhat more flexibility than now in how they have to go about their duties as employed legal practitioners in order to attract legal professional privilege. Instead, the Australian courts have enunciated a series of general principles which, while informed by, seem to extend well beyond, the specific circumstances of Mr Shafron’s case. Consequently, taking these precautions seems essential if corporations in Australia, in respect of their in-house legal work, are not to jeopardise the very substantial protections legal professional privilege is able to confer. As explained above, such precautions can still be consistent with general counsel and in-house lawyers being able to have a substantially greater involvement in their company’s corporate affairs than outside solicitors and barristers in private practice.