Legal Profession Uniform Law

Draft Uniform General Rules

Supplementary Submission by

Australian Corporate Lawyers Association

Legal Services Council
Level 11, 170 Phillip Street
Sydney NSW 2000

Dear Legal Services Council,

Thank you for the opportunity to make a supplementary submission on the Legal Profession Uniform Law (**"Uniform Law"**) and draft Uniform General Rules (**"Uniform Rules"**). In addition to the Australian Corporate Lawyers Association's ("ACLA's") previous submission to the Legal Services Council and Admissions Committee on 16 January 2015, we seek to address two additional matters; refining the definition of "related entity" in s.6 of the Uniform Law (or alternatively extending the meaning under the Uniform Rules to reflect business practice); and recommending a clarifying statement on legal professional privilege under s.38 of the Uniform Law.

ACLA is the peak national association representing the interests of lawyers working for corporations and government in Australia (**"in-house lawyers"**). As a membership association ACLA provides support, tools and resources for in-house lawyers, catering for all members including those new to in-house through to general counsel working in ASX 200 companies and government departments. ACLA plays an important role advocating on matters of interest to the in-house profession to shape our nation's corporate legal environment and promote the understanding of the law within the business and legal communities.

Should you have any questions about either of our submissions please contact Tanya Khan, Chief Legal Officer, on 03 9248 5500 or tanyakhan@acla.com.au.

Kind regards

Trish Hyde
Chief Executive Officer
13 February 2015

SECTION 6 – DEFINITION OF "RELATED ENTITY'

ACLA seeks to have the definition of "Related Entity" broadened to better reflect the nature of commerce in Australia by allowing in-house counsel to provide advice to their client, or entities closely associated with their client, in the context of the client's ordinary business operations.

The issue

Under s.6 of the *Legal Profession Uniform Law* (**"Uniform Law"**), a "corporate legal practitioner" is defined as follows:

> "**corporate legal practitioner** means an Australian legal practitioner who engages in legal practice only in the capacity of an in-house lawyer for his or her employer or a related entity, but does not include a government legal practitioner;" [emphasis added]

Also under s.6 a "related entity" is defined as follows:

> "**related entity**, in relation to a person, means –
>
> (a) if the person is a company within the meaning of the Corporations Act – a related body corporate within the meaning of section 50 of that Act; or
>
> (b) if the person is not a company within the meaning of that Act – a person specified or described in the Uniform Rules for the purposes of this definition;" [emphasis added]

Under s.50 of the Corporations Act (**"the Act"**), a related body corporate, in effect, is limited to a subsidiary company or a holding (parent) company in a corporate group. "Corporate legal practitioners" however are often expected, for quite sound reasons, to advise other entities which may not fit neatly within the strict definition of what constitutes a related body corporate in the Act. This might, for instance, involve advising an associated company (i.e. one in which the parent company holds 50% or less of the voting rights or issued share capital but still effectively controls that other company), joint venture partners, trusts (including the trustee of a trust), unincorporated bodies and other forms of legal entity associated with an in-house counsel's employer. Section 50 of the Act deals only with related bodies corporate and because of this limitation in-house counsel would normally be precluded from advising any of these associated entities even if they are effectively controlled by their employer company.

By moving away from the term "related entity" as defined in s.6 of the Uniform Law (which is limited to related bodies corporate by virtue of s.50 of the Act) and instead adopting the term "associated entity" (as defined in s.50AAA of the Act and which includes related bodies corporate) most of these unnecessary, and often impractical, limitations would be removed. ACLA believes that by adopting this change in terminology, there will be significant benefit to "corporate legal practitioners" in terms of efficiency of advice to the various types of entities commonly found within a corporate group. This would effectively legitimise a broader scope of work that they will lawfully be entitled to advise on under the Uniform Law.

Proposed solution

There are two ways in which the Uniform Law or Uniform Rules could be amended to achieve this outcome:

1. **Amending the Uniform Law**
   ACLA appreciates that amending the Legislation at this time may not be possible, however, we submit to the Council that this would be the neatest way in which to address the issue. Specifically, we propose the definition of "corporate legal practitioner" in s.6 of the Uniform Law be amended by deleting the reference to "related entity" and replacing those words with the words "associated entity". The definition would then read:

"**corporate legal practitioner** means an Australian legal practitioner who engages in legal practice only in the capacity of an in-house lawyer for his or her employer or an associated entity, but does not include a government legal practitioner;"

A consequential amendment would also be required. The definition of "related entity" in s.6 of the Uniform Law would need to be deleted and the following definition inserted in its place:

"**associated entity**, in relation to a person, means –

(a) an associated entity within the meaning of section 50AAA of the Corporations Act; or
(b) if the person is not an associated entity within the meaning of that Act – a person specified or described in the Uniform Rules for the purposes of this definition;"

2. Amending the Uniform Rules

Should amendments to the Uniform Law not be an option at this point in time, the issue could be resolved through prescription in the Uniform Rules.

Under the second limb of the definition of "related entity" in s.6 of the Uniform Law (i.e. paragraph (b)), a person who is not a company may be "specified or described in the Uniform Rules" for the purposes of the definition of what constitutes a "related entity". Accordingly, ACLA submits that, if the Uniform Law cannot be amended, that the Uniform Rules prescribe that an "associated entity", as defined in s.50AAA of the Corporations Act, be a "related entity" for the purposes of the definition of that term in s.6 of the Uniform Law.

Recommendation:

- *That the term "associated entity", as defined in s.50AAA of the Corporations Act, be substituted for the term "related entity" where used in s.6 of the Uniform Law and that this be effected by the two amendments to the legislation as proposed above.*

- *That alternatively, if the proposed legislative amendments are not possible at this point in time, the term "associated entity" be specified or described in the Uniform Rules for the purposes of the definition of "related entity" in s.6 of the Uniform Law.*

SECTION 38 – LEGAL PROFESSIONAL PRIVILEGE

ACLA recognises that the Uniform Law has significantly clarified the equal footing of Australian legal practitioners regarding Legal Professional Privilege (LPP). However, we believe that the terminology could be strengthened to provide even greater certainty. Accordingly, ACLA seeks an amendment to achieve this outcome.

The issue

ACLA has advocated for many years that in-house counsel should be treated the same as private practitioners in terms of independence and legal professional privilege. We recognise that exercising independent judgement is a threshold requirement for a communication to be advice provided by a lawyer in their capacity as a lawyer, and therefore its ability to attract LPP. However, through a number of differing decisions in the courts in recent years, the profession is unclear exactly how a court would assess the applicability of LPP in various circumstances, and in particular if in-house counsel will be asked to prove their independence, purely based on the fact that they practice law within an organisation.

Naturally, this is not a satisfactory position for a client to be placed in, nor should a client have to consult outside counsel when they have in-house counsel who abide by the same professional standards as their external counterparts. All in-house counsel have the same training and requirement to maintain compulsory legal education as their private practice counterparts. They are admitted to practice and are bound by the same professional conduct rules in providing advice and dealing with the client as those which apply to private practitioners. The new requirement under the Uniform Law for every Australian legal practitioner to hold a practising certificate provides further support for ACLA's position that there should be no differentiation between how in-house counsel and private practitioners are treated in terms of independence and LPP.

While In-house lawyers are employees and therefore owe a duty to their employer, this duty should not be mistaken for loss of independence. Like their private practice counterparts, in-house lawyers are critically aware of the broader (and paramount) duties they owe to the administration of justice. By way of comparison, in the relationship between a private practitioner and client there is a benefit exchanged that can create interdependence. For the private practitioner, it may be a major or powerful client paying a fee and for the in-house counsel it is an employer paying remuneration. In ACLA's view, accepting a monetary or other consideration does not equal a loss of independence. Furthermore, it is much easier to change law firms than to dismiss an in-house lawyer for giving frank and fearless independent advice.

While the independence test has been introduced by case law as a mechanism to distinguish whether it is legal advice or some other advice that has been given by the legal practitioner, over time its application has resulted in in-house counsel often being treated differently to their external peers, by having to prove their independence. To the extent that private practitioners are considered independent despite their commercial relationship with the client, in-house counsel should be considered the same.

ACLA has strongly advocated this position in a number of formal submissions. In June 2007 ACLA made a submission to the Australian Law Reform Commission (**"ALRC"**) in response to its Issues Paper on "*Client Legal Privilege and Federal Investigatory Bodies*" released in April 2007. ACLA's submission clearly found favour with the ALRC. In its Report "*Privilege in Perspective*" released in December 2007, the ALRC provided some guidelines on the types of particulars to be provided when making a claim for privilege (see paragraph 8.146). In doing so, the ALRC stated (at paragraph 8.147):

> "8.147 The above approach places external lawyers and in-house counsel on the same footing. Communications prepared by in-house counsel will need to be indicated – as will communications prepared by solicitors and barristers." [emphasis added]

The ALRC, **in further support of ACLA's submission**, went on to say (at paragraph 8.149):

> "8.149 However, taking into account the views expressed in submissions and consultations, the ALRC is persuaded that details of the independence of in-house counsel should not be required, as a matter of course, whenever a federal body requests particulars of a claim." [emphasis added]

This position is reinforced in a decision handed down in the Federal Court in November 2013 (*Archer Capital 4A Pty Ltd v Sage Group PLC*) where Justice Michael Wigney said that:

> "Were it necessary for me to decide, I would err on the side of concluding that **there is no separate requirement of independence in the case of privilege claims where the relevant lawyer is an employed or in-house lawyer.** [emphasis added] 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."

Proposed solution

Section 38 of the Uniform Law presently provides as follows:

> "38 **Privileges of practitioners**
>
> (1) An Australian legal practitioner who provides legal services in the capacity of an officer, director, partner or employee of a law practice, or in the capacity of a corporate legal practitioner or government legal practitioner, does not lose the professional privileges of an Australian legal practitioner.
>
> (2) The law relating to client legal privilege (or other legal professional privilege) is not excluded or otherwise affected because an Australian legal practitioner is acting in the capacity of an officer, director, partner or employee of a law practice or in the capacity of a corporate legal practitioner or government legal practitioner."

As previously stated, ACLA's view is that the question of an in-house lawyer's independence should be put beyond all doubt by placing it on the same footing as that enjoyed by a private practitioner. ACLA considers that s.38 of the Uniform Law is a significant and positive step forward in this regard, in that it acknowledges that privilege is neither lost nor excluded by a practitioner being in either private practice or in-house. We believe however that the terminology could be strengthened by a relatively simple amendment to the Uniform Law that would deliver the desired equality in the eyes of the law and certainty for clients, and put the content and purpose of communications at the centre of LPP claims instead of the issue of independence.

Accordingly, if an amendment to the Uniform Law is possible at this time, we recommend that this situation be clarified through an amendment to subsection (1) of s.38 as follows:

> **38 Privileges of practitioners**
>
> (1) An Australian legal practitioner who provides legal services in the capacity of an officer, director, partner or employee of a law practice, or in the capacity of a corporate legal practitioner or government legal practitioner:
>
> (a) does not lose the professional privileges of an Australian legal practitioner; and
>
> (b) does not need to show that they are independent of their employer or client when providing legal advice, in order for their communications to be the subject of client legal privilege (or other legal professional privilege).

Recommendation:

- *That if an amendment to the Uniform Law is possible at this time, subsection (1) of s.38 be amended as follows:*

> ***38 Privileges of practitioners***
>
> *(1) An Australian legal practitioner who provides legal services in the capacity of an officer, director, partner or employee of a law practice, or in the capacity of a corporate legal practitioner or government legal practitioner:*
>
> *(a) does not lose the professional privileges of an Australian legal practitioner; and*
>
> *(b) does not need to show that they are independent of their employer or client when providing legal services, in order for their communications to be the subject of client legal privilege (or other legal professional privilege).*