

THE HON T F BATHURST

CHIEF JUSTICE OF NEW SOUTH WALES

INTRODUCTORY REMARKS

GC1000 MEET THE REGULATORS*

WEDNESDAY 25 MAY 2016

1. Thank you Brian for that introduction and for inviting me to give a few remarks tonight. I will keep my speech brief, as I don't want to encroach on the main purpose of tonight's event, which is not only to take advantage of the drinks on offer, but to share knowledge and professional experiences in business and company law. No doubt, the drinks will not impede that purpose.
2. In my earlier days as a barrister, I used to envy solicitors because of the lack of legal supervision or oversight between them and their clients. When I was briefed by solicitors, they were not at all afraid to question or supervise me. As a side note, that might well have been because my legal acumen was not particularly formidable, and not necessarily due to my status as a junior barrister. Nonetheless, my envy was due to the fact that solicitors did not seem to need to worry about blows to the ego when they were speaking to legally naïve clients. Of course, the advent of the role of general counsel has changed all of that.
3. General counsels are a relatively new phenomenon. Much like the terms 'LOL', 'BRB' and 'YOLO', when general counsel's first started popping up, I did not have the slightest clue why they were necessary or what they did. I had horrifying visions of getting two different sets of instructions in a single matter and being trapped in a vortex of conflicting and overlapping orders.
4. However, unlike the term 'YOLO', which I still don't really understand, even I can see that general counsels have settled into the legal landscape with ease. Law firms have taken this development in their stride.

* I express my thanks to my Research Director, Ms Sarah Schwartz, for her assistance in the preparation of this address.

5. A testament to the success of general counsel is reflected in their growing ranks. In 2001 and 2002, the Australian Bureau of Statistics report of legal services did not even have a corporate option for the categories of legal profession practices.¹ However, now, the overwhelming majority of organisations in the ASX 100 have a specified general counsel function.² Moreover, the percentage of corporate solicitors in the profession has increased from 12.5% at the end of 2001 to close to 20% in 2015.³
6. Perceptions of the role and status of general counsel have also changed over the years. While it may once have been viewed with disdain, the role of general counsel is now an enviable position. The position is increasingly being viewed as an invaluable opportunity for lawyers to gain a real insight into the needs of a client. Like an expedition to Mars, to live, breathe and talk in the world of the client is to set oneself apart with knowledge inaccessible to other, external, lawyers. Further, and importantly, the role of general counsel has been recognised as providing the opportunity for lawyers to move into senior management roles. Thus, for example, Geoff Healy, who left Herbert Smith Freehills in 2013 to accept an appointment as a general counsel at BHP Billiton, is now part of the company's executive leadership team. I would hazard a guess that clients are happy with the increasing trend of oscillation between external and in-house lawyers. After all, it allows the poachers to turn game keepers.
7. Given the relatively recent advent of the role of general counsel, interesting questions arise in regard to whether the law has kept up or embraced general counsel. One of these issues which has provoked some controversy within the profession is the way in which the rules of legal professional privilege apply to in-house counsel.
8. There is now a line of authority in the Federal Court and Supreme Court of New South Wales which states that, for an in-house counsel to be granted legal professional privilege, it must be established that she or he is

¹ Maxine Evers and Jason Harris, 'The duties of in-house counsel: The bold, the bright and the blurred?' (2009) 37 *ABLR* 267, 9 ft 9.

² Australian Corporate Lawyers Association, 'ASX100 General Counsel Report: the nature of the role', 30 June 2012, 4.

³ <http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/025942.pdf>.

‘independent’.⁴ According to this line of authority, the condition precedent of ‘independence’ must be satisfied before even turning to determine what the dominant purpose of the communication is.

9. The reasons that have been provided for this additional requirement are that in-house counsel might not be in a position where they are able to give independent legal advice or maintain primary allegiance to the court and that advice from in-house counsel may necessarily involve strategic advice as well as what might be described as pure legal advice.
10. However, these reasons have been criticised for creating an unjustified two tier division within the profession.⁵ External lawyers may well have less so-called ‘independence’ than in-house counsel due to a desire to comply with the interests of an important or valuable client. Further, it would seem that in-house counsel who are not able to provide ‘independent’ legal advice are not particularly valuable to their employer. According to the Australian Law Reform Commission’s report on client legal privilege, there has been “strong opposition” within the profession to such segregate treatment.⁶
11. Based on this particular example, it would seem that the law is yet to fully embrace the arrival of general counsel within the legal profession. Although this will no doubt come back to bite me, I have never seen any logic in the distinction, particularly in the context of what is plainly legal advice.
12. One area in which I do not think sufficient advantage has been taken of the increasing importance of the role of general counsel is in the opportunity for direct consultation between general counsel and the courts in regard to the manner in which courts resolve commercial disputes. For my part, I regard it as important to get as much feedback as possible as to the way courts conduct such work and how this can be improved.

⁴ *Rich v Harrington* [2007] FCA 1987; (2007) 245 ALR 106; *Hannaford v the Royal Society for the Prevention of Cruelty To Animals, NSW* [2013] NSWSC 1708.

⁵ L Bastin, ‘Should “independence” of in-house counsel be a condition precedent to a claim of legal professional privilege in respect of communications between them and their employer clients’ (2011) 30(1) *CJQ* 33, 46, ft 114.

⁶ Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report 107 (2008) at [8.101].

13. Whilst it is relatively easy to get feedback from the Bar and, to a lesser extent, from the independent solicitor branch of the profession, interaction between the courts and general counsel is either non-existent, or limited to occasional, albeit very enjoyable, social occasions. It would be of real assistance if direct feedback was provided, so that the courts could obtain what might be described as a client's perspective of how they are performing their duties. In that regard, let me say that I am happy, at any time, to consider issues which any of you wish to raise or to hear suggestions as to methods by which you would have the opportunity to provide such feedback. I can't promise solutions on each occasion, but I will certainly take account of any suggestions you may have.
14. In that vein, I look forward to having the opportunity to talk to many of you tonight about this and the ways in which the courts and the profession can support in-house counsel in performing their role. I know that, unlike some good judgments, and like the advice general counsel prefer to receive, an entertaining speech is a short speech. Thank you again for inviting me to speak tonight.