



Précis Paper

Professional Indemnity Insurance for In-House Lawyers

Sonia Tame and Ian Benson discuss claims against in-house counsel, the types of risk that in-house counsel face and how those risks can be insured by professional indemnity insurance.

Discussion Includes

- Who sues in-house counsel?
- Risks faced by in-house counsel
- Examples of claims made against in-house counsel
- Options for professional indemnity insurance
- Legal professional privilege in claims against in-house counsel
- Establishing protocols for how advice is given by in-house counsel

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Professional Indemnity Insurance for In-House Lawyers

1. In this edition of BenchTV, Sonia Tame (Barrister, New Chambers – Sydney) and Ian Benson (Solicitor, AR Conolly and Company – Sydney) discuss the circumstances in which in-house lawyers may require professional indemnity insurance, the risks that they face in their roles as general counsel and company secretary, and what in-house lawyers should consider when examining options for professional indemnity insurance.

Claims against In-House Lawyers

2. Claims against in-house lawyers are relatively rare, however cases arise where claims are made. Claims against in-house lawyers are not usually made by the lawyer's employer, but are mostly made by third parties, including clients of the employer, suppliers, and regulators.
3. In Australia, many statutory causes of action, such as misleading and deceptive conduct, can be used as a hook to bring claims against company executives generally and also, more specifically, against in-house counsel. Claims may also arise in negligence where a third party has suffered loss as a result of advice provided by an in-house lawyer. Other examples of claims brought against in-house lawyers include claims of defamation and allegations of presenting false evidence in court.
4. A claim for misleading and deceptive conduct could arise against a lawyer where, for example, he or she is present at a meeting in which an executive makes a misleading or false statement and the lawyer remains silent without correcting the statement. The lawyer's silence could be interpreted as knowing involvement in the misleading or deceptive conduct, or even direct engagement in misleading or deceptive conduct. In the USA, claims have also arisen in the context of audit committee meetings where a Chief Financial Officer has made an untrue statement and in-house counsel does not correct the statement.
5. In-house counsel may also be considered officers within the meaning of the *Corporations Act 2001* (Cth) and therefore subject to directors' and officers' duties. In *Shafron v ASIC* [2012] HCA 18; 247 CLR, Shafron, who held the dual role of company secretary and general counsel, was found to be an officer of the company. The High Court was not persuaded that he was acting in his general counsel capacity, as opposed to his company secretary capacity, and therefore determined that he was sufficiently involved in a decision regarding an ASX announcement to be considered an officer of the company.

6. There is thus a risk for general counsel who serve the dual role of company secretary, and also for general counsel who sit on the Board or who are intimately involved in the decisions of the company, that they will be considered officers and subject to directors' and officers' duties under the *Corporations Act*. Ms Tame indicated that it is a matter for each company as to whether it would be worthwhile splitting these roles between two individuals, however for many companies it may not make commercial sense to do so. Moreover, even in situations where the roles are split between two people, the general counsel may still be considered to be an officer where they are very involved in a particular decision of the company.
7. In the past 10 to 15 years, there has been an increase in the incidence of litigants including company executives, including in-house lawyers, as defendants in addition to the company. The rationale behind this is that some litigants consider that the tactic will increase the pressure on the company to settle the claim. In addition, directors and officers insurance might be viewed as an additional source of settlement funds. There is also a view that by having multiple defendants, including the in-house lawyer, a plaintiff may be more able to break down a company's defence by having different perspectives and interests involved.
8. Finally, regulators have in-house counsel in their sights. ASIC and other regulators have regularly discussed gatekeepers, and their role in acting properly and assisting a company to achieve good corporate governance. While gatekeepers clearly include directors, the term also encompasses in-house counsel, who some regard as the moral guardians of an organisation. If in-house counsel have been particularly involved in an impropriety or a breach of the law, ASIC and other regulators will not hesitate to bring an action against the in-house counsel.
9. In NSW, the *Employees Liability Act 1991* (NSW) applies where an employee commits a tort and the employer is also liable. In that situation, the employer cannot cross-claim or seek indemnity from the employee, and the employer is liable to indemnify the employee for any liability, providing there is no serious or willful misconduct and the negligence arose in the course of the employment. However, in-house counsel should note that the Act does not prevent the employee from being held liable to a third party, so where the employer no longer exists or is bankrupt, the Act will be of little utility. Moreover, the Act does not apply to statutory causes of action, including misleading or deceptive conduct, claims under the *Australian Consumer Law* or the *Australian Securities and Investment Commission Act 2001* (Cth), which will often arise in claims against in-house counsel.

Case Studies

10. In *Commonwealth Bank of Australia v ZYX Learning Centres Ltd* [2014] NSWSC 1676, the NSW Supreme Court considered an issue that arose in the aftermath of the collapse of ABC Learning Centres. Prior to its collapse, ABC had issued convertible notes for \$600 million, and the Commonwealth Bank acted as underwriter. Prior to the issue, the Commonwealth Bank required the CEO, the CFO and the company secretary (who was also the general counsel) to complete a management questionnaire.
11. After the collapse of ABC, the Commonwealth Bank initiated proceedings against the general counsel as a result of the loss said to have been suffered as a result of the convertible notes issue. The claim was based on misleading and deceptive conduct, and alleged that answers given by the general counsel in the management questionnaire were false and misleading.
12. The legal counsel applied to have the claim summarily dismissed, however the Court was not prepared to rule out the claim as untenable or hopeless without a full trial on the merits. The in-house counsel was therefore obliged to defend the claim at a trial, and incur substantial legal costs in doing so.
13. A second case study involved an employee of Star City Casino who had injured himself in a fall on an escalator. The employee was unsuccessful in a claim against the Casino, and tried to challenge the result by bringing a claim against the Casino's in-house counsel and the lawyers who had run the defence for the Casino's insurers at trial. The employee claimed that the in-house counsel had forged video evidence and withheld vital evidence: *McLean v Power* [2013] NSWSC 193.
14. The Court found that the claim was completely baseless and dismissed the claim summarily. Nonetheless, the case demonstrates that unmeritorious claims can be brought against in-house counsel, who will then have to defend the claims.

Professional Indemnity Insurance

15. As a consequence of the capacity for claims to be brought against in-house counsel, Ms Tame recommends strongly that in-house counsel consider professional indemnity insurance. As a first step, lawyers should find out what insurance their company already has that might cover their role, including directors and officers insurance. If the existing insurance does not cover an in-house lawyer for claims brought by third parties based on their advice or other professional activities, look wider to see if the organisation will take on another policy, or speak to an insurance broker. The Association of Corporate Counsel now has a group professional indemnity policy that can be considered.

16. It is also important to ensure that the relevant insurance policy covers the in-house lawyer for regulatory proceedings, and specifically provides for separate representation in examinations before regulatory bodies, where the lawyer's interests may conflict with those of the company. Some professional indemnity policies are narrowly drafted and do not cover regulatory or disciplinary proceedings.
17. Professional indemnity policies are generally "claims-made" policies. Claims-made policies respond to when the claim is made, not when the act giving rise to the claim occurs. In-house counsel should be aware that if the policy is not in place at the time when the claim is made (even some years down the track), they will not be covered, even if the act the subject of the claim occurred at a time when the policy was in place.
18. Ms Tame advises in-house lawyers to ensure that the insurance policy has a run-off period. In addition, a lawyer may consider including a term in their employment contract that the employer will maintain professional indemnity insurance for them, and would cover former employees, so that the lawyer is covered after leaving their position.
19. In most cases, employers will indemnify their in-house counsel where claims are brought. However in some cases, this will not be possible or in the company's interests. For example, in the ABC Learning Centre case, by the time an action was brought against the in-house counsel, the company had collapsed and was therefore no longer able to indemnify their employee. In addition, in some circumstances it may suit the company to claim that they acted in a certain way because they were relying on legal advice given by in-house counsel, and the company may therefore choose not to stand behind its in-house counsel in a claim brought by a third party.
20. In-house counsel may also not be indemnified by an employer where he or she gives advice outside of their employment ("moonlighting" services), such as in a situation where the lawyer gives advice to a friend or in a more casual setting. Similarly, where in-house counsel provides pro bono services, the advice is not given to the employer or a related entity so the company may choose not to indemnify the lawyer.

Legal Professional Privilege

21. To establish legal professional privilege in relation to advice given by an in-house lawyer, the same issues arise as when seeking to establish legal professional privilege in the context of private practice. Specifically, a court will consider the following questions:
 - Is it legal advice?
 - Is it for the dominant purpose of giving or receiving legal advice?
 - Is it a communication for the dominant purpose of the proceedings?

22. Legal professional privilege belongs to the client, i.e. the employer. If the employer is bringing suit against the in-house counsel, there is an implied waiver of the privilege.
23. Where the claim is brought by a third party, the employer may choose not to waive the privilege. In *Commisso v United Telecasters Sydney Pty Ltd* [1999] NSWSC 51, for example, a case brought against in-house counsel was summarily dismissed on the basis that the Court was satisfied that the privilege was not going to be waived. In that situation, all that could be inferred was that the in-house counsel had given legal advice, but there was no way of knowing what the advice was.
24. In litigation where the other party seeks access to an in-house lawyer's documents, a challenge to legal professional privilege may be brought. In those claims, which may be more difficult for the organisation to defend, the court will need to be satisfied of the role that the in-house counsel was performing at the time, particularly where one individual holds the dual role of in-house counsel and company secretary. In that situation, the court will consider whether the individual was providing legal advice or whether in fact management or commercial advice was being provided. Companies should be aware that merely copying an in-house lawyer into email communications will *not* render that communication privileged.
25. In order to make clear when an in-house counsel is acting in their legal capacity, consider having separate email sign-offs for the general counsel and company secretary roles. Ms Tame also suggests hedging legal advice as "Privileged" or "Legally Privileged and Confidential". In-house counsel may also wish to establish client files, so that each piece of advice or litigation has a separate file to make clear that the work is privileged. Protocols should also be established as to how instructions should come to the in-house lawyer.

BIOGRAPHY

Sonia Tame

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Sonia was admitted as a solicitor in 1996 and was called to the NSW Bar in 2015. Her practice includes banking and finance, class actions, general commercial and equity, insurance, professional indemnity, and professional negligence. She has been listed in the Litigation category of Best Lawyers Australia from 2010-2017 and was recommended in Doyle's Guide to Leading Commercial Litigation & Dispute Resolution in 2016.

Ian Benson

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Ian Benson is a solicitor at AR Conolly and Company and holds a First Class Honours degree in law.

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Legislation

Corporations Act 2001 (Cth)

Employees Liability Act 1991 (NSW)