

update

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Friday Facts: Preventing disclosure of legal advice

Preventing a waiver of legal professional privilege can be quite tricky as is demonstrated by the case of AWB Limited v Honourable Terence Rhoderic Hudson Cole (No 5) [2006] FCA 1234 (the "AWB Case").

In the AWB Case, AWB sought an order to prevent them from producing documents subject to legal professional privilege which Commissioner Cole had directed to be produced pursuant to a notice to produce (the "Notice") which had been served under the provisions of the Royal Commissions Act 1902. The AWB initially claimed privilege over 1,400 documents the subject of the Notice but later reduced that claim to 900 documents.

The documents required to be produced were documents relating to the conduct of two internal AWB investigations known as Project Rose and Project Water (the "Internal Investigations") both concerning the AWB's sales of wheat to Iraq under the United Nations' Oil-For-Food Programme.

Commissioner Cole argued that documents relating to the AWB's Internal Investigations were not subject to legal professional privilege because of statements which had been made by the AWB to third parties concerning the gist or substance of the legal advices which it had obtained. The statements related to the Internal Investigations which the AWB had conducted and, in particular, the legal advice which AWB had received that it had not breached any law or UN resolutions in relation to its sales of wheat to Iraq.

The Court examined in detail AWB's conduct in making statements to the Australian Government Solicitor, in interviews and to the Commission, concerning the legal advice that it had received.

The statements consistently made by the AWB that it had received legal advice that the AWB was not in breach of any law or UN resolution was enough to result in a finding by the Federal Court that AWB had impliedly waived the legal professional privilege which had existed in 300 of the 900 documents over which privilege had been claimed.

The Court was satisfied that AWB made a conscious and voluntary decision to deploy the gist or substance of the legal advice it had received because it was in its commercial interests to do so, and that its actions were inconsistent with the maintenance of confidentiality in the legal advice.

The Court then went on to say that the scope of the waiver which had occurred was not confined to the legal advice only, but also to any documents which were relied upon in preparing the legal advice which included witness statements which had been obtained, chronologies and notes of interviews, as well as documents concerning the sale of wheat to Iraq.

The AWB Case makes it clear that when making statements concerning legal advice which has been received in relation to a potential or actual claim, it is important to ensure that the statement that is made is not one which will result in an argument that waiver of the legal advice has occurred.

Such a statement can be constructed with the assistance of legal advisers which will assist in preserving a party's commercial interests without resulting in the waiver of the legal advice received.

For more information

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