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High Court considers waiver of privilege in audit letter response

An application by Westpac Banking Corporation (the "Bank") for special leave to appeal to the High Court against a decision allowing management consultancy firm 789 Ten access to letters from the Bank's lawyers to its auditors PriceWaterhouseCoopers, has been rejected by the High Court.

The Bank sought special leave to protect the privilege which it argued existed in letters from its lawyers to its auditors on the basis that the letters were prepared for the dominant purpose of providing legal advice to the Bank's auditors to enable it to perform its auditing obligations under the *Corporations Act*.

The New South Wales Court of Appeal rejected the Bank's claim that the audit letters were subject to legal professional privilege within the meaning of the *Evidence Act* (NSW) (the "Act"). Rather, the Court of Appeal decided that the lawyers representation letters were a service provided by the Bank's lawyers to the auditors, not to the Bank, and therefore did not attract the protection of legal professional privilege.

The Bank sought to argue on appeal that the drafting and sending of the audit letters by their lawyers fell squarely within the concept of providing a professional legal service to the Bank. It further argued that the information included the provision of a legal opinion on the likely exposure the Bank had in litigation which was currently on foot against it which constituted legal advice within the meaning of the Act.

In rejecting the application for special leave, the High Court stated that the dominant purpose of obtaining the letters for which legal professional privilege was claimed in this matter was essentially a question of fact. Whilst the High Court did not expressly state what that question of fact was, it alluded to the fact being that the letters were obtained not for the purpose of receiving legal advice but rather for the purpose of the Bank's auditors meeting reporting requirements under the *Corporations Act*.

High Court considers waiver of privilege in audit letter response *cont*

The decision leaves open the possibility that the content of audit letters may now be subject to production in litigation. One possible solution may be for companies to seek direct responses from their lawyers to audit issues rather than their auditors seeking them. However, the argument that the request is not one which has the dominant purpose of seeking legal advice will still be an argument that can be raised.

The other possible solution is for companies to argue that their audit responses are not relevant to the issues in the litigation at hand. Either way, these alternatives will not provide clear cut solutions until there is further consideration of the issue by the Courts.

For more information about this decision and waiver of legal professional privilege please contact Mary Nemeth, Partner, on 03 9321 7810 or by email, mnemeth@rigbycooke.com.au



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