

15th January, 2020

Ms. Libby Fulham
Executive Director
Legal Practice Board of Western Australia
(LPBWA)
Level 6, 111 St Georges Terrace
PERTH WA 6000

Attention: Professional Affairs Committee
(PAC)

general@lpbwa.com

lfulham@lpbwa.com

Dear Ms. Fulham

USE OF THE TITLE “SENIOR LEGAL COUNSEL” BY IN-HOUSE LEGAL COUNSEL

1. We refer to your letter dated 31 October 2019 (“the Letter”) to WA in-house legal counsel using the title “Senior Legal Counsel” or variants thereof which include the words “senior” and “counsel” (the “affected legal counsel” (ALCs)). The Letter requested that ALCs amend their title by ceasing to use the words “senior” and “counsel” in their position title, on the basis that this is misleading and potentially in contravention of the LP Regs and LPA (as these terms are defined in the Letter). We also refer to the ACC interim submission dated 11th November, 2019 (“ACC submission”) and to the LPBWA response to that submission dated 20th November, 2019 (“LPBWA response”) in relation to this matter.
2. ACC Australia (“ACC”) is the peak body representing the in-house legal profession in Australia. It is part of a global network of more than 45,000 in-house legal counsel employed by over 10,000 organisations in more than 85 countries. ACC is proud to represent the interests of lawyers working for corporations and government in Australia. In-house lawyers constitute approximately 25% of the total Australian legal profession, or about 14,000 practitioners, making ACC’s role as the ‘voice of in-house lawyers’ a vital one for the furthering and advancement of the profession.

3. ACC is writing to confirm its objection to the LPBWA's requirement as advised in the Letter and in the LPBWA response, on the grounds set out below.
4. However, ACC requests that it be given the opportunity to meet with the LPBWA Executive Director and representatives of LPBWA Professional Affairs Committee ("PAC"), to resolve this issue. Recently ACC met in a face to face/teleconference meeting with representatives including the LPBWA, the Victorian LSB and the Legal Services Council ("LSC") to work together to resolve a separate issue concerning the Legal Profession Uniform Law (which we understand is due to be implemented in WA from 1 July 2020). This face to face consultation (post a formal submission process) was found by all parties, we understand, to be a most satisfactory way for parties to better articulate their different issues and come to an agreed solution. ACC also believes that it may have a specific solution to our current impasse, which we would like discuss at this proposed meeting with the LPBWA PAC.
5. If such a meeting cannot be held beforehand, then ACC wishes to have this submission considered at the next meeting of the PAC, which we understand is to be held on 13th February 2020.
6. ACC notes reference in the LPBWA response to certain behaviours of an in-house legal counsel. ACC wishes to advise that, whether or not this person is a member of the ACC, ACC does not condone such behaviour.
7. ACC also wishes to confirm it has an excellent relationship with the Bar Associations in each Australian jurisdiction:
 - ACC and the Victorian Bar Association held a 'Meet the Justices' event in November, 2019 in Melbourne where members of the Victorian Bar (including its new President), 12 Judges of the Federal Court and Circuit Court and ACC's most senior in-house counsel representing some of the largest ASX100 listed organisations in Australia met. One objective was for all attending parties to better understand how ACC's in-house legal counsel can direct brief barristers.
 - ACC recently co-hosted an In-House Insight event in Perth on 10th October 2019, together with WA's Francis Burt Chambers and The Piddington Society, to discuss law tech, diversity and collegiality. A number of Senior Counsels were present at this event, and we hope to continue strengthening this relationship with WA's Bar Association in 2020.

ACC's General Objections

8. As stated above, ACC wishes to reassert its concerns with the Letter and the LPBWA response:
 - A. The use of the term “Senior Legal Counsel”, as any Google or Linked-In search will reveal is widespread, indicating over 40,000 hits and over 1,100 job search results. Such is the widespread use of the offending titles, that across Australia alone they likely exceed 1,000.
 - B. In-house counsel are employed by some of the largest national and international organisations working across a number of Australian and international jurisdictions. These in-house counsel often practise across State and Territory borders and to expect them to use different titles only while practising in WA will lead to confusion and administrative burden.
 - C. The job title ascribed to in-house counsel is normally given to them by their employer as part of their job description and is therefore entrenched in their contract of employment. The title “Senior Legal Counsel” predates the September 2001 introduction of the office of “Senior Counsel” and has been used for decades in Australia by in-house counsel without issue. We are not aware of any cases where people have suggested they were somehow misled and thought they were dealing with “Senior Counsel” or “SCs” from the Bar.

Purported Misleading Titles

9. A key concern of the LPBWA in both the Letter and LPBWA response is that certain titles used by in-house counsel are purported to be misleading. We note that the LPBWA also had concerns with the title “Special Counsel” and that ultimately a “no action” communication of 11th October 2019 warned law firms as follows:

‘However, the Board cautions firms to be mindful of their legal obligation not to mislead the court, members of the public, other practitioners and their clients regarding the skill or expertise purportedly held by solicitors employed by the firm and reserves the right to deal with matters where that obligation is shown to have been breached.’

10. Referring to each of the stakeholders listed in the ‘no action’ communication, ACC submits that in whatever domain used by the in-house counsel, the title ‘Senior Legal Counsel’ (or similar) is not misleading to the relevant stakeholder:

- ***Members of the public***

In-house counsel provide advice to their employer and related entities and not to the public. Thus the public cannot engage an in-house counsel and thus cannot be misled.

- ***SCs and their juniors***

Senior Counsel themselves are unlikely to be misled, nor are their juniors at the bar.

- ***Other in-house counsel***

Other in-house counsel are unlikely to be misled. They understand precisely the variety of titles, which are applied to the job descriptions of their peers.

- ***The client (employing company)***

In-house legal counsel provide advice to their employing company (or related entity). Their titles are usually stated in their employment contract. Their employer would not be misled by the title it has agreed to with the employee.

- ***Lawyers in private law firms***

Private practitioners are unlikely to be misled. Lawyers in private firms instruct ‘Senior Counsel’ and are well aware of the role and titles of in-house counsel.

- ***Judicial officers and the court***

Judicial officers of the court are unlikely to be misled. They are familiar with counsel who appear before them, for the most part, and in particular with those who hold the Senior Counsel title. Further, our understanding is that while on occasion an in-house lawyer, holding the position description “Senior Legal Counsel” might swear an affidavit using that title it will be followed by

the words “*employed by [the relevant corporate entity]*” which immediately discloses their status. Any in-house counsel who appears as an advocate would disclose that they are acting on behalf of their employer.

We look forward to further discussions.

Please contact Chris Drummer, Director, Policy, Projects and Advocacy, ACC Australia and Asia Pacific c.drummer@acc.com or 0411264734 at first instance should you have any questions.

Yours faithfully



Tanya Khan
Vice President and Managing Director

Association of Corporate Counsel
Australia and Asia Pacific