



HANDY HINTS FOR IN-HOUSE LAWYERS

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Aim

In-house lawyers are subject to the same ethical rules as all legal practitioners.

However, in-house lawyers, including government in-house lawyers, face challenges that may not apply to private practice practitioners.

The In-House Corporate Lawyers Committee of the Law Society of New South Wales has therefore prepared this document to assist corporate and government in-house lawyers in dealing with these challenges. A variety of voices and perspectives have informed this guide; do not be surprised if you don't agree with everything or have a different view. The contents of this document are not binding on the practice of in-house lawyers and are provided to be instructive only. If you have any comments, we encourage our readers to get in touch and start a dialogue about their experience.

This document should be read in conjunction with the *Legal Profession Uniform Law (NSW) Legal Profession Uniform Law Application Act 2014* and the Rules and Regulations made under them which are binding on all lawyers in NSW.

The various Rules made under the Legal Profession Uniform Law are collectively referred to as the Uniform Rules. In some parts of this guide, the relevant provision from the Solicitors' Conduct Rules has been included in square brackets for easy cross reference.

Ultimately, our guide is a living document, and we note that from time-to-time hyperlinks may break and laws may change. We kindly invite our readers to let us know if any corrections are required by emailing us at corporatelawyers@lawsociety.com.au

Disclaimer: This document has been produced solely for use by in-house lawyers to provide general assistance in relation to some aspects of in-house practice. It is not exhaustive of issues which in-house lawyers may encounter, nor does it constitute legal advice. It is a general guide only and practitioners must take care to fully consider the circumstances and laws applicable to their circumstances. While every care has been taken in the production of this document, no legal responsibility or liability is accepted, warranted or implied by the authors or The Law Society of New South Wales and any liability is hereby expressly disclaimed.

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Forward

There are distinct challenges to working in-house compared to a traditional law firm environment. We know that in-house roles often involve working as part of a smaller team or, sometimes, as the only lawyer within an organisation. Some larger organisations have legal teams spread across the country or the world working with colleagues in compliance, insurance, internal audit or risk. You're not, therefore, just dealing with laws and regulations; you're also part of a larger team within your organisation which means you need to balance legal expertise with a clear understanding of your company's needs and goals.

This guide is here to make your job a little easier – think of it as a helpful friend who gives you practical advice and useful tips.

Our goal is to provide you with clear, straightforward advice on various aspects of your role – be it dealing with regulators, maintaining your independence or appointing a panel law firm, we want to give you some helpful insights that you can apply straight away to simplify complex tasks and help you navigate your role with greater ease.

Whether you are new to in-house or have years of experience, we hope you will find this guide to be a valuable resource.

Rebekah Hunter

Chair

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1. Professional obligations of in-house lawyers

The same professional obligations apply!

As a lawyer who practises in-house in NSW (often referred to as an in-house lawyer, legal counsel or general counsel), you have the same professional and ethical obligations as any other legal practitioner in NSW.

First and foremost, you are an officer of the court and have a paramount duty to the court [see Solicitors' Conduct Rule 3].

Further, you must comply with the Legal Profession Uniform Law, including the Uniform Rules made under it that govern the conduct and obligations of our profession.

These professional obligations are reflected in the [**Law Society's Statement of Ethics**](#) which recognises the role of our profession in serving our community in the administration of justice and that we are responsible to our community to observe high standards of conduct and behaviour when we perform our duties to the courts, our clients and our fellow practitioners.

This means that as individuals engaged in the profession and as a profession our paramount duty is to the administration of justice and we:

- act competently and diligently in the service of our clients;
- advance our clients' interests above our own;
- act confidentially and in the protection of all client information;
- act together for the mutual benefit of our profession;
- avoid any conflicts of interest and duties;
- observe strictly our duty to the court of which we are officers to ensure the proper and efficient administration of justice; and
- seek to maintain the highest standards of integrity, honesty, and fairness in all our dealings.

2. Identifying your client

Ultimately, in-house lawyers represent their employer entity and not its CEO or management. An in-house lawyer is therefore accountable to the corporation's (or other incorporated body or unincorporated association's) shareholders and other stakeholders, represented by the board of directors (or similar governing body).

Balancing stakeholder interests can be challenging, and in-house lawyers must try and balance independence from management and being a trusted adviser whose advice is actively sought by the business.

Regulators increasingly view and target in-house lawyers as the 'gatekeepers' and conscience of an organisation, who should be held responsible for ensuring the prevention of corporate misconduct or maladministration.

Whether or not you agree with this position, it's timely to consider the role we play as in-house lawyers. First and foremost, you are an officer of the court. A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.

In-house lawyers are regarded by the law as being in the same position as those in private practice within a law firm or practicing as a principal of a law firm on their own account. The only difference is that they primarily act for one client alone. As such, one of the principal ethical challenges faced by an in-house lawyer is identifying the client. In-house lawyers typically represent their employer body corporate. However, a corporate entity typically acts through several authorised individuals, including the company's:

- Officers.
- Directors.
- Employees.
- Shareholders or members.

Furthermore, if the in-house lawyer is working for a group of companies or a conglomerate, the lawyer needs to consider which company they are acting for at a given situation. This can mean that the authorised individual for one company is not the same for the others.

Regardless of who may provide the in-house lawyer with instructions or seek advice with respect to a company legal matter, in-house lawyers must act first and foremost in the interests of the company or other corporate entity which employs them (rule 4.1.1, ASCR).

Moreover, the lawyer-client relationship is a fiduciary relationship and an in-house lawyer has a duty of loyalty to the company which includes a duty to:

- **avoid potential conflict and avoid inhibition of performance.** A lawyer must ensure that they do not act for two or more clients with potentially conflicting interests in the same or a related matter without the fully informed consent of each client. The lawyer must serve the interest of their principal, in this case the company, faithfully and effectively.
- **act in good faith.** A lawyer is required to act in good faith in the interests of the client and not to intentionally further the interests of one client to the prejudice of another. The lawyer must be honest, candid and fully advise the company on all information and issues relevant to a legal matter.
- **avoid actual conflict.** A lawyer must not place themselves in a position where there is an actual conflict between their duties to two clients (for example, when representing the company and a wholly owned subsidiary of the company), and where there is an actual conflict, the usual course is to cease to act for both (see Conflicts of interest).
- **maintain confidentiality.** The duty of confidentiality is owed concurrently to the company and all of the in-house lawyer's former clients, whether in private practice or other in-house legal departments (see Duty of confidentiality). The duty to maintain confidence arises from three sources:
 - contract;
 - equity; and
 - professional rules.

Case Study

Your employer is the listed conglomerate, WhiteAcre Corporation, with two main operating subsidiaries:

- BlackAcre Limited, a life insurer with superannuation and investment management businesses, and
- WholeAcre Pty Ltd, a FCMG business with nationally recognised consumer products in hygiene products and cosmetics.

While you may be employed by WhiteAcre Corporation, you may work on different types of matters for all three of WhiteAcre, BlackAcre, and WholeAcre. You will need to ensure you know which entity you are acting for in a matter as you owe in that matter your professional obligations to act for your client at the time.

3. Corporate Groups - When the interests of clients' conflict

If you are an in-house lawyer within a corporate group (or similar) and you act for more than one entity within that group, there may be occasions when the interests of one of your clients conflicts with the interests of another of your clients.

In such circumstances you should advise both your clients accordingly and seek to have your clients deal with the issue in accordance with the group's conflict management policy. In some circumstances, it may be appropriate for each client to instruct different private practitioners to act on its behalf [see Solicitors' Conduct Rule 11].

4. Your obligations of independence

Like any other lawyer, your first obligation is as an officer of the court.

This is reflected in the Law Council of Australia's *Policy Statement on Rule of Law Principles, including Principle 4, which provides that everyone should have access to a competent and independent lawyer of their choice in order to establish and defend their rights, and:*

- Lawyer-client communications should be regarded as confidential, except where lawyer and client are together engaged in conduct that is calculated to defeat the ends of justice or is otherwise in breach of the law.
- Lawyers should not be subject to sanction or discrimination as a result of the legal advice or representation they have provided, except where that advice fails to comply with agreed standards of professional conduct.

Your next obligation is to act in the interests of your client.

You also have obligations as an employee of your client. Although your obligations as an employee and as an in-house lawyer may at times appear to conflict, your obligation as an in-house lawyer to act in the interest of your client takes priority over your obligations as an employee of your client.

If, for example, an individual in a senior management position is seeking legal advice to support an agenda that is not in the interests of your client, then as an in-house lawyer your obligation is to your client, not to the senior executive.

When establishing the terms of your employment as an in-house lawyer, it is prudent to ensure your employment contract clearly recognises these obligations. In addition, the in-house legal function should agree with the employer on an independence statement which covers the work and employment of in-house lawyers. A pro forma independence statement is attached at Appendix A. This will assist to minimise any possible conflicts or misunderstandings. A separate Guide for Employers, "*Understanding the role of in-house lawyers*" is set out in Appendix B. This document can be used as a resource for in-house lawyers to brief their employers about their role and professional obligations.

If you work for a group of companies, make sure you know who your client is

If you happen to have another role in your organisation in addition to your legal role, for example, you are also working as company secretary or as a risk professional dealing with enterprise management risk, then you will need to manage and clearly delineate when you are an in-house lawyer (and therefore your professional obligations apply) and when you are not. Otherwise, there is a risk that your ability to claim legal professional privilege may be compromised.

5. Your obligation to maintain client confidentiality

The Law Society of New South Wales has a Statement of Ethics which requires that lawyers "act confidentially and in the protection of all client information". These obligations are found in the Solicitors' Conduct Rules [see Solicitors' Conduct Rules 9 and 10].

As with any lawyer, and any employee, you should maintain the confidentiality of information given to you by your client both during and after your employment. This is subject to any overriding legal obligation to disclose such information, or a legal compulsion to do so.

As with other professional obligations, your professional obligation to maintain confidentiality is owed to your client. You do not owe your professional obligation of maintaining confidentiality to the people who manage your client, such as a Chief Executive Officer or Managing Director, individuals in senior management positions, directors of any Board of your client or other fellow employees.

For the purposes of maintaining the confidentiality of "your client", "your client" includes employees of, and contractors, who perform services for, your client. However, note that working for an organisation with multiple bodies corporate may require you consider which client at the time is owed your duty of confidentiality.

Case Study

You are acting for WholeAcre Pty Ltd on an arms-length negotiation with its related party, BlackAcre Limited, on a contract to supply hygiene products to BlackAcre's offices. In this circumstance, you should not provide confidential information of WholeAcre to representatives of BlackAcre unless you have received instructions from your client to do so and you are permitted to do so by the law.

Given the nature of in-house legal practice and your position as a "confidant" of the business, it is also prudent to apply professional judgment when determining what information (if any) should be disclosed by you, and to whom, by taking into consideration:

- the nature and content of the information; and
- the manner in which it was disclosed to you.

In addition, you should consider whether your obligation to maintain confidentiality also extends to the manner in which you conduct your in-house legal practice, such as:

- your work environment;
- document management practices; and
- meetings and conversations.

If you are requested to provide such confidential information to a third party, you would need to obtain your client's permission or be compelled by law to do so.

6. Your client's ability to claim client legal privilege (previously legal professional privilege)

Client legal privilege protects confidential communication and confidential documents between an in-house lawyer and their employer client which have been created for the dominant purpose of the lawyer providing legal advice or professional legal services to the client, or for use in current or anticipated litigation.

In the past the courts have taken the view that a client is able to claim client legal privilege over legal advice provided by an in-house lawyer only if that lawyer is sufficiently 'independent' of their employer/client.

More recently, the courts have moved away from 'independence' being a separate requirement for in-house lawyers. Instead, courts have preferred the view that provided an in-house lawyer is acting in his or her professional capacity in relation to a professional matter and the confidential communications came into existence for the dominant purpose of legal advice, then client legal privilege will attach to the communications without the need to separately prove independence (see *Archer Capital 4A as trustee for the Archer Capital Trust 4A v Sage Group plc (No 2)* [2013] FCA 1098). The focus will be on whether you were acting in your professional capacity as an in-house lawyer.

Section 38 of the *Legal Profession Uniform Law* (NSW) supports this view by providing that privilege is neither lost nor excluded because the lawyer is acting in the capacity of an officer, director, partner or employee of a law practice or in the capacity of a corporate legal practitioner or government legal practitioner.

To ensure that your client retains the option to claim that your advice is privileged, you should clearly mark your advice to show that it is subject to client legal privilege. You should also be careful not to circulate legal advice widely by email or outside your organisation. Bear in mind that disclosing even the most general information about your advice may compromise its privileged status. You should make sure that you advise the recipients of your advice about the importance of keeping the advice confidential.

7. Holding a current practising certificate

An in-house lawyer usually holds a corporate legal practitioner ([supervised](#)) or a corporate legal practitioner (unsupervised) certificate. A corporate legal practitioner certificate holder in NSW is not required to take out professional indemnity insurance cover. The difference between the two corporate certificates is:

SUPERVISED – The holder is entitled to engage in supervised legal practice as a corporate legal practitioner or government legal practitioner until the holder has completed the period of supervised legal practice required.

UNSUPERVISED – The holder is entitled to engage in legal practice as a corporate legal practitioner or government legal practitioner. Such a practising certificate would enable an in-house lawyer to provide supervision to other in-house lawyers in the organisation, who hold a practising certificate, to engage only in supervised legal practice.

To attain an unsupervised practising certificate, a period of supervised legal practice must be completed. The Law Society's website provides additional information about the different kinds of [practising certificates](#) and the requirements for each.

Subject to appropriate supervision (where required) as the holder of a corporate practising certificate, you may engage in legal practice only in the capacity of an in-house lawyer for your employer or a related body corporate of your employer (as defined in section 50 of the Corporations Act 2001).

Holders of a corporate practising certificate are also authorised to volunteer at a community legal service or otherwise on a pro bono basis provided that you are covered by professional indemnity insurance for such work. If you intend to provide legal services to any other person or entity, those services must be provided through a law practice holding the requisite professional indemnity insurance. In those circumstances you must hold a principal or employee of a law practice practising certificate.

Conversely, if you hold a corporate practising certificate, you cannot provide legal advice or legal services outside your employment, other than on a voluntary or pro bono basis (for which you need to be covered under an approved professional indemnity insurance policy, as noted above). As an employed lawyer you can only act for and sign off on documents that constitute a legal service for the organisation who is employing you or the organisation that you are volunteering with. If, however, you are not providing a legal service, such as simply certifying that a document is a true copy of the original, then you can provide such service outside your employment and volunteering arrangements.

8. Dealing with client of another lawyer in the course of legal practice

It is, of course, against the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (ASCR) in most circumstances to communicate with the client of another lawyer directly unless one of the circumstances in r33 of the ASCR applies, such as their lawyer has consented, there has been no response to your notice (and there's a reasonable basis for the communication) or you reasonably believe that it's warranted due to the urgency of the circumstances (Rule 33, ASCR).

The 'no contact' rule applies to all work undertaken as a solicitor (including as in-house counsel) and not just in contentious matters.

9. Reporting lines

It is best practice corporate governance for the senior in-house lawyer or General Counsel in an organisation to report directly to the Board (or other governing body) or to senior management, such as the Chief Executive Officer or Managing Director. This is important because the protection of client legal privilege can be lost by your client if its legal advisors are not considered to be sufficiently independent.

If, however, the senior in-house lawyer does not report to a Board or to senior management your professional obligations as a lawyer do not change, even though your client may not be able to claim client legal privilege over legal advice you provide. In such circumstances the challenge is to ensure that the person to whom the senior in-house lawyer reports appreciates and respects the nature of your professional obligations as a lawyer and supports those obligations.

In either case, it is recommended to include in your contract of employment as a lawyer a clause acknowledging that:

- you are an officer of the court;
- you have an obligation to provide legal advice that is in the best interests of your client; and
- the advice you give may conflict with the immediate business objectives of the organisation (this could be tempered by including words to the effect that wherever possible your advice will be structured to facilitate those business objectives).

Ultimately it is in your client's interest to receive the best legal advice and retain the ability to claim client legal privilege.

We know from historical examples of corporate misconduct and business collapses that Interference in the process of giving legal advice can lead to poorer advice being provided and ultimately bad outcomes. All in-house lawyers should be aware that advice given to satisfy the demands of business managers in the organisation may ultimately not be in the best interests of your client.

10. Outsourcing legal work

There are many different reasons that legal work is outsourced to private practitioners, such as a requirement for a particular area of legal expertise not available in the in-house legal function or excessive current workloads within the in-house legal function. As an in-house lawyer you have an important role to play in selecting, managing and working with private practitioners.

The in-house legal function is better placed than non-lawyers to determine whether, and if so what, legal work should be referred to private practitioners. The in-house legal function is primarily responsible for advising on legal issues that arise in the organisation and, in some instances, the risk and compliance functions of the business and is responsible for ensuring that the relevant advice is sought, obtained and then considered by the business.

Generally, where private practitioners are engaged it is best if the in-house legal function remains responsible for the carriage of the matter, engaging and instructing the private practitioners and managing the costs of the matter. This is because you have an in-depth understanding of the client's business, which will allow you to bring specific legal and business matters to the attention of the private practitioners.

Because of your understanding of your client's business, you are well placed to ensure that the instructions provided to the private practitioners are clear and accurate and that the advice provided by the private practitioners is focused, provides value for the client and that the costs are reasonable.

Clear and detailed instructions to private practitioners are a very important consideration when dealing with business issues.

As an in-house lawyer, you may need to explain relevant business information to the private legal practitioners and to ensure that the legal advice obtained is structured to enable the client to understand and implement it. This makes your role an important one as you know the legal and business history of the organisation and can guide any private practitioners with confidence and expertise.

You also have an important role to play in ensuring that legal advice provided by private practitioners is explained clearly and simply to senior management. With your understanding of your client's business and how it operates, you are well placed to do this.

When briefing private practitioners, some in-house functions may find it helpful to establish a formal policy or set out guidelines for managing the relationship between the organisation and private practitioners. Guidance on preparing such policies and guidelines is widely available on the Internet, for example in Stirling L. Miller's blog [*"Ten Things: Preparing Outside Counsel Guidelines – The Keys"*](#) and the standard set of *Outside Counsel Guidelines* published by the Corporate Legal Operations Consortium (CLOC). These reference materials suggest that when appointing private practitioners, consideration ought to be given to matters such as organisational values, expectations around time recording, billing practices and exclusions, identification and delineation of proper boundaries, conflicts disclosure and management, value add services, and review of performance and success criteria.

Whilst these reference materials are quite US-centric and should be applied with care in the NSW legal environment, they nevertheless provide helpful background information and are a good place to start.



**When communicating
with your internal client,
remember to keep it
simple and practical.
It's best to advise in
plain English.**

11. Selecting private practitioners

As noted above, there are a number of factors that should generally be taken into account in the selection of private practitioners. These include: reputation, industry expertise, cost effectiveness, prior knowledge of the business, flexibility of billing arrangements and personnel.

There are also a number of different ways that the engagement of private lawyers can be structured, including selecting a panel of private law firms, one full-service firm or several firms at the same time with each being instructed in their area(s) of expertise. Both the choice of private practitioner and the structure of the engagement should be determined by what is the “best fit” for your client and the in-house legal function, as well as the kind of legal issues your client is facing. Different legal issues will require different considerations when looking at which private law firm is the most appropriate for the outsourcing of any particular matter.

For some organisations, it may be a good strategy to choose a particular private law firm which can provide the bulk of the advice for general business purposes. This saves time and money as that firm will become familiar with the business and give expedient, cost effective and specific advice. Alternatively, an organisation may have a number of firms on a panel. In today’s legal market many firms look to specialise, which may result in a client wanting to have more than one firm looking after the business interests of the organisation. Another reason why a diversity of external legal providers is desirable is to ensure there are alternative external legal providers where one may be conflicted in a particular matter or situation.

Procurement of legal services is increasingly being undertaken in more sophisticated and innovative ways, including by using bespoke technology solutions, specialist procurement functions and the use of “request for proposal” (or *RFP*) processes. For example, large corporate and government departments may have established and publicly available guidelines for procurement of legal services, which is often undertaken in conjunction with in-house procurement specialists and/or legal operations experts. Typically, this is done to promote value for money, transparency and integrity, and there are a multitude of different methods. Regardless of the approach, in-house lawyers should ensure the way in which they procure legal services is not only fit for purposes but is also robust and appropriate having regard to the size and shape of their organisation.

It is also possible for an in-house lawyer to be recognised as the “Solicitor on the Record” in legal proceedings, thereby enabling them to carry on legal proceedings and brief barristers directly, provided they are acting on behalf of their employer.



12. Dealing with Regulators

Important Australian regulatory bodies include (among others):

- the [Australian Securities and Investments Commission](#) (ASIC) which administers the [Corporations Act 2001](#) (Cth);
- the [Australian Competition and Consumer Commission](#) (ACCC) which administers the [Competition and Consumer Act 2010](#) (Cth) which covers anti-competitive practices, merger clearances, consumer protection and product safety and liability;
- the [Australian Taxation Office](#) (ATO) which administers the Australian federal tax system
- the [Office of the Australian Information Commissioner](#) (OAIC) which is the independent regulator for privacy and freedom of information;
- the [Australian Transaction Reports and Analysis Centre](#) (AUSTRAC) which is Australia's financial intelligence unit and anti-money laundering and counter-terrorism financing regulator;
- [Safe Work Australia](#) and corresponding State-based regulators for workplace health and safety; and
- The [Australian Human Rights Commission](#) (AHRC) an independent third party which investigates complaints about discrimination and human rights breaches. There are also state-based boards under anti-discrimination law.

As in-house counsel you should familiarise yourself with regulators and laws specific for your industry and organisation: e.g. the [Australian Prudential Regulation Authority](#) (APRA) administers laws specifically regulating banks, insurance companies, superannuation funds and other financial institutions, the [Australian Communications and Media Authority](#) (ACMA) which regulates the telecommunications industry and consumer protections in communications (e.g. Do Not Call and spam) generally.

Regulators generally:

- have a range of compliance and enforcement options available to achieve compliance with the laws they administer;
- allocate resources using a risk-based approach to target non-compliant conduct which poses the greatest risk to the public; and
- publish a compliance and enforcement policy that sets out the principles they adopt to achieve compliance with the law. The policy generally outlines their compliance and enforcement functions, strategies and tools.

For example, the ACCC's *Co-operation Policy for Enforcement Matters* (July 2002) provides that leniency, including immunity for civil matters, is more likely to be considered appropriate for individuals and corporations that co-operate during any investigation. The ACCC's 2024/25 Priorities include targeting:

- consumer and fair trading in the digital economy, with a focus on misleading or deceptive advertising within influencer marketing, online reviews, in-app purchases and price comparison websites;
- improving compliance by NDIS providers with their obligations under Australian Consumer Law; and
- unfair contract terms in consumer and small business contracts.

A responsible organisation should adopt a respectful, compliant position when dealing with regulators. Notwithstanding, it is important to know your organisation's legal rights and the principles which might apply to the regulator, including integrity, professionalism, confidentiality, timeliness, proportionality and fairness. As in-house counsel you are well placed to guide your organisation and its people in responding to regulatory action and protect your organisation's interests by:

- ensuring that regulators do not exceed their authority;
- orchestrating document review and disclosure, including dealing with confidential and privileged documents (note Guidelines on Privilege by Law Council of Australia and Australian Federal Police);
- assessing if the organisation has exposure to areas that the regulator is investigating/inspecting and mitigating that risk;
- reviewing any public comments to the media;
- providing a safety buffer between the organisation, its people, and regulators; and
- maintaining legal privilege over internal investigations.

13. Demonstrating value

As an in-house lawyer it is important that you demonstrate to the people to whom you report, such as the Chief Executive Officer, or Managing Director, individuals in senior management positions, or directors of any Board, the benefits of maintaining and engaging with an in-house legal function.

Legal risk management is the focus of any in-house legal function. The key role of an in-house function is to give legal advice, to avoid, manage or resolve legal issues relating to your client's business. This value proposition is readily demonstrated to the relevant business unit where the legal function is able to translate legal advice into a readily usable to help the business achieve its objectives.

In-house lawyers are in a prime position to identify legal risks that may not have been identified by the business and therefore advised on by external counsel. You can demonstrate value by recording circumstances where you have identified risks early or been able to manage legal risks upfront, saving time and cost for the business.

An in-house function is often more cost effective than instructing private practitioners. Where you have been able to bring the work and expertise in-house, this should be quantified and drawn to your client's attention wherever possible. The in-house legal function has the opportunity to minimise loss by managing effectively the relationship between client and relevant regulators. Similarly, the in-house legal function is usually responsible for the establishment, maintenance and enforcement of the legal and governance compliance processes and procedures, thereby providing the opportunity to further minimise loss to the organisation. Additionally, the in-house legal function is very close to the client's business processes and procedures and has the opportunity to add value to the business by highlighting business risks early and, thereafter, managing or resolving them.

If possible, you should maintain records of the type of legal work the in-house legal function undertakes and compare the value of that to a reasonable estimate of the cost if the same work had been done by private practitioners. There are, of course, many other ways to demonstrate value: accessibility, pro-activity, commerciality, user-friendliness, internal feedback.

You may wish to consider what records will assist you to demonstrate the importance of the in-house legal function to your client. Many value propositions can be illustrated through monthly reporting on issues such as: the ability to forecast legal needs of the business, cost effectiveness (the costs of the in-house legal function versus the cost of private practitioners), the value of investigations carried on in-house (e.g. those of the Australian Competition and Consumer Commission and the Australian Taxation Office), and the value of employment law issues being dealt with in-house as well as the benefit of, the retention of specifically trained in-house legal employees.

The Guide for Employers, "*Understanding the role of in-house lawyers*" set out in Appendix B may assist you in commencing discussions with your employer about such issues.

14. Benefits of having in-house lawyers - What are in-house lawyers there for?

As an in-house lawyer, while your role and professional obligations are the same as that of any other lawyer, because your role requires an in-depth understanding of your client's core business, you can provide legal advice that takes into account the constraints imposed upon your client by their business and the environment in which it operates.

Your role includes the recognition of legal and regulatory risks (and sometimes related non-legal risks such as reputational risk), the management or resolution of those risks in a timely manner, as well as the provision of legal advice that can help your client to achieve its business objectives within the law. An in-house lawyer is also able to advise companies that do business in innovative areas where the laws are emerging as they are able to guide businesses in their strategic decision-making.

Your role provides you with the opportunity to ensure that your client complies with the law and establishes good corporate governance and legal compliance processes and procedures. It also provides you with an opportunity to influence your client, particularly at any Board and senior management levels, to pursue ethical and socially responsible practices.

It may be, however, that your client maintains an in-house legal function for other reasons, such as the proximity and on-going availability of legal advice, early detection of legal and regulatory risks, the protection of the confidentiality of business information, greater control over legal costs and the provision of more relevant instructions to private practitioners, if required.

Whatever the reasons, your professional obligations remain the same.



15. Understanding your client's objectives and speak their language

As a member of an in-house legal function that assists the executives of your client to achieve their business objectives in line with the organisation's strategies, you need to understand what those organisational strategies and business objectives are, and how they have evolved over time. This helps to ensure that your legal support is closely aligned with your client's needs.

To engage effectively with the executives of your client, whether providing legal advice, or articulating concerns about legal risks, it is useful for you to try and speak to them in their language. This doesn't mean using business "jargon". Rather, it means understanding and acknowledging the business drivers that your client pays the most attention to and showing an interest in how to influence them.

When reporting on the achievements of the in-house legal function, it may also be useful to align your report with the measures being reported by your client (using one or more of the measures suggested in Hint 13 above) to highlight how the in-house legal function has supported the business objectives and thereby demonstrate the value add of that function.

Recently, the need to properly measure, understand and report the value of legal services has become a hot topic for in-house legal departments. There has been much written on this topic, including by Stirling L. Miller in his comprehensive book *"Showing the Value of the Legal Department: More Than Just a Cost Centre"*. He has also published a number of useful articles on this topic on his [*"Ten Things"*](#) blog website.

**Like any other lawyer,
your first obligation is as
an officer of the court**

16. As lines blur – Wearing multiple hats

As an in-house lawyer, the opportunity to be involved in the commercial decisions of your client often provides a welcome opportunity to provide valued input, from a legal perspective, into the business operations or strategic decision-making processes of your client.

The challenge for you is to ensure you are able to conduct your legal practice in accordance with your professional legal obligations, while potentially taking on the legal obligations of an “officer” of the client under the provisions of the *Corporations Act 2001* (Cth) where your client is a corporation registered under that Act. This may occur where, for example, you make or participate in making, decisions that affect the whole, or a substantial part, of the business of the corporation (see *Shafroon v ASIC* [2012] HCA 18 for further information on this topic).

In addition, your client could find it loses the opportunity to claim client legal privilege over “advice” you provide that is objectively considered to be “commercial” advice, rather than “legal” advice.

The involvement of an in-house lawyer at senior management or Board level in a corporation provides your client with some benefits, particularly with regard to leadership, strategy, governance, project management, ethics and risk management.

Some commentators suggest that in-legal departments of the future will offer far broader range of services. This concept is comprehensively explored by Peter Connor in his text “*The T-Shaped Lawyer: A New Vision for You and Your Work*” and is conveniently encapsulated by the origination of his “*businessperson mindset*” concept. Regardless, in-house lawyers should still bear in mind that they may be performing any non-legal work still as lawyers, which brings into play their regulatory and ethical considerations such as the need for independence, candour, avoiding conflicts, and competence in relation to everything they do.

Accordingly, if you find yourself in this position it may be prudent to have a separate in-house legal function reporting into you so that the in-house lawyers in that function can meet the tests required to enable your client to maintain its opportunities to claim client legal privilege [see Solicitors’ Conduct Rule 12].

There has been much written about the structure of in-house legal functions and how they interact and are integrated within their organisations. One of the most comprehensive texts has been published by Ben W. Heneman, JR. in his landmark work “*The Inside Counsel Revolution: Resolving the Partner-Guardian Tension*”, *It is very US-centric but nevertheless provides some useful pointers for in-house counsel who are new to their roles. Those eager to learn more might also wish to read Richard Susskind’s international bestseller “Tomorrow’s Lawyers - An introduction to Your Future”.*

17. Guide to ethical obligations of in-house lawyers for non-lawyer colleagues

The Guide for Employers, “*Understanding the role of in-house lawyers*” set out in Appendix B may assist you in commencing discussions with your employer about such issues.

One of the biggest challenges in the practice of an in-house lawyer is dealing with non-lawyers. A common problem is a non-lawyer telling you how he/she thinks things that require legal expertise should be done. It is of paramount importance to advise as to the legal position and the best interests of the client at the same time as maintaining legal and ethical independence as an officer of the court and a lawyer.

For example:

- it is common for a non-lawyer to think it is acceptable for a person attesting to the signing of a document, *not* to have been present to see the signatory physically sign the document. To a non-lawyer, it may be seen as being inefficient to insist on having the witness present or, worse still, as obstructionist when, as the lawyer, you must insist on the re-signing of the document with the signatory and the witness present;
- non-lawyers who have not been educated in the obligations of a trustee may not know that a trustee must at all times act in the best interests of its beneficiaries, or that a trustee cannot profit from its office unless authorised to do so;
- non-lawyers often will not appreciate that admitting liability to another party, even if the facts are such that your client may be liable, is not in the interests of the client and may invalidate any potential liability insurance claim;
- with limited knowledge and understanding of the law, some business people may believe that if an advice that they have drafted is simply sent from a lawyer’s email address, it is privileged and provides protection from discovery.

As an in-house lawyer, one of your roles should be to educate non-lawyers as to what is legally correct. Have confidence in yourself and in your training as a lawyer and remember that the support and resources provided by the Law Society of New South Wales, as well as your professional colleagues, are always available to you.

It can be difficult explaining to non-lawyer colleagues why you have certain obligations as an officer of the court. Here is a link to a useful document which sets out what your ethical obligations are and why you can’t always do what your colleagues might want.

The Guide for Employers, “*Understanding the role of in-house lawyers*” set out in Appendix B may assist you in commencing discussions with your employer about such issues.



18. Providing legal advice on sensitive issues– Implications arising from the Robodebt Scheme Royal Commission

As in-house counsel you may be asked to provide legal advice on complicated, controversial and problematic matters.

The purpose of your advice is not to anticipate ‘what the client wishes to hear’, but, rather, to provide timely and reasoned advice on the range of evidence-based, lawful options and solutions available. While it is appropriate to recommend one option over the others, after outlining the pros and cons of each, the decision-maker is ultimately the client.

In this context it is noteworthy that the [Report of the Royal Commission into the Robodebt Scheme](#) was released in July 2023 and contains a series of lessons for in-house lawyers.

The Report examines why institutional and systemic checks and balances (including the role of in house and external lawyers in providing advice during the decision-making process) failed to stop the Scheme proceeding. The Report concluded that factors including organisational structure and business culture can undermine the independence of in-house lawyers and create an environment in which in-house lawyers saw their role only to advise on the narrow issues on which they were instructed.

The Commission concluded that the role of a senior lawyer should include the capacity to recommend that external legal advice be obtained when significant legal issues are identified.

The Commission was critical of legal advice and commentary being provided by in-house lawyers without sufficient and proper critical analysis, including reference to relevant statutory and case law.

The Commission was critical of the practice of circulating draft legal advice and recommended that legal advice should always be finalised, or if not, reasons documented as to why not.

In your role as an in-house lawyer, you may find you provide commercial advice as well as legal advice. Where commercial advice (as opposed to legal advice) is provided, you must be mindful not to blur the two. Otherwise, you may jeopardise any legal privilege claim.

Options to distinguish legal and commercial advice include:

- sending the commercial and legal advice in separate communications; and
- sending the commercial advice and the legal advice separately in the same document.

19. Cyber security

In-house lawyers must remain vigilant when navigating the complex landscape of cyber security, as it directly impacts the legal responsibilities and liabilities of their organisations. Understanding the foundational principles of cyber security legislation such as the Privacy Act 1988 (Cth) and the Notifiable Data Breaches scheme is important, along with taking proactive steps to implement robust data protection measures and regularly assessing vulnerabilities.

Collaboration with other departments in the organisation is crucial both to the development of a comprehensive incident response plan, and to ensure that all staff are adequately aware of cyber threats and know how to respond.

By taking a proactive approach to cyber security, in-house lawyers play a pivotal role in safeguarding their organisations from legal and reputational harm in an increasingly digital world.

A link to a webinar on cybersecurity which is of relevance to in-house lawyers (**insert name**) can be found here.

20. Artificial Intelligence

This is a rapidly evolving space. For the most recent updates, see the guidance from the Professional Support Unit of the Law Society who prepared detailed information on a solicitor's responsible use of artificial intelligence.

<https://lsj.com.au/articles/a-solicitors-guide-to-responsible-use-of-artificial-intelligence/>

21. Pro Bono Legal Work

Engaging in legal practice as a volunteer at a Community Legal Service (CLS) or otherwise on a pro bono basis

– Engaging in legal practice as a volunteer at a CLS, or otherwise on a pro bono basis, enables you to play an active role in supporting access to justice in the community and build on your legal and professional skills.

As the holder of a corporate practising certificate (**Corporate PC**), you are entitled to engage in legal practice as a volunteer at a CLS, or otherwise on a pro bono basis, in accordance with s 47(5) of the Uniform Law.

Change in Particulars – Prior to undertaking any volunteer work with a CLS or otherwise on a pro bono basis, you are required to notify the Law Society of any change in particulars, pursuant to Reg 61 of the *Legal Profession Uniform Law Application Regulation 2015*. If your Corporate PC is subject to condition 2 (supervised legal practice) you must ensure that any legal practice - including any work undertaken as a volunteer or on a pro bono basis - is supervised by the holder of an unsupervised practising certificate authorising them to supervise legal practice by others.

Professional indemnity insurance – As the holder of a Corporate PC, you are exempt from the requirement to hold or be covered by an approved professional indemnity insurance (**PII**) policy in NSW (Lawcover) for your legal practice as a corporate legal practitioner. It is very important to note that the exemption only applies to you whilst engaging in legal practice as a corporate legal practitioner. The exemption does not extend to you engaging in legal practice as a volunteer at a CLS, or otherwise on a pro bono basis.

The Australian Pro Bono Centre (APBC) has established the National Pro Bono PI Insurance Scheme. The Scheme can offer free PII through Lawcover to corporate legal practitioners providing pro bono legal work through projects approved by the APBC. Lawcover is the approved insurer in NSW. For further information on this scheme, please contact the APBC directly.

How can I volunteer within the requirements of the Uniform Law?

If you intend to engage in legal practice as a volunteer at a CLS, or otherwise on a pro bono basis, please check which of the following four scenarios applies to you and ensure you take the relevant steps set out below:

- If you are volunteering with a CLS you should:
 - contact the Law Society to ensure that the CLS is registered with the Law Society (only CLSs registered with the Law Society are authorised to engage in legal practice in NSW); and
 - that your legal practice is covered under the PII policy held by the CLS with which you volunteer.
- If you intend to volunteer with an organisation other than a CLS registered with the Law Society, you must ensure that your legal practice is either insured with the National Pro Bono PI Insurance Scheme established by the APBC; or you hold, or are covered by, an approved PII policy purchased directly through Lawcover. Any engagement in legal practice in this manner will need to be in compliance with any conditions on your Corporate PC.
- If you intend to:
 - volunteer at an organisation other than a CLS that is registered with the Law Society; **and**
 - your practice is not insured by the National Pro Bono PI Insurance Scheme, then you will need to set up your own *law practice* (as defined in the Uniform Law) so as to be eligible to obtain PII with Lawcover.

Under the Uniform Law a *law practice* includes a sole practitioner; to be a principal of a sole practice you must hold a principal of a law practice PC. This will allow you to engage in legal practice as a sole practitioner *and* in your capacity as a corporate legal practitioner. However, Condition 2 (supervised legal practice) and Condition 3 (Completion of a Practice Management Course) must be lifted from your current PC to vary to a principal's PC.

If you would like to engage in legal practice exclusively as a volunteer at a CLS (and in no other capacity) you may apply to the Law Society for a volunteer PC which does not attract a PC fee. To obtain a volunteer practising certificate, the applicant will first need to be employed by a registered CLS. Please note however, that you cannot hold both a volunteer PC and a Corporate PC concurrently.

Access the [Pro Bono Centre website for further information about volunteering](#) and the [Law Society website for further information about a principal's PC](#).



Take opportunities to demonstrate to the business the value and benefits of maintaining and engaging with an in-house legal function

22. Your health and wellbeing

The Law Society increasingly is focused on the broader wellbeing of its members, and in-house lawyers are no exception. Mental health and wellbeing in the profession is a shared responsibility. Workplace culture, workload and design, leadership, level of psychological trust and safety, client expectations, societal and cultural commentary, global environmental issues can all impact on your wellbeing.

We can all benefit from being open to learning from professionals outside of law and applying science-backed wellbeing practices.

In 2023 the International Bar Association formed a [Global Wellbeing in Law Commission](#), with representatives from around the globe. In 2023 the psychosocial risk legislation was formed, which holds all workplaces and businesses, including all legal sectors leaders responsible to assess and mitigate psychosocial hazards (risks). The code of practice is a comprehensive guide to the ongoing consultative management of all workers wellbeing, including contractors, casual, part-time, and full-time employees, consultants, and volunteers. Leaders are held accountable and advised to consult regularly with all people/workers.

- The Law Society of NSW has some excellent resources to help you if you are experiencing difficulties. These include:
 - Website: <https://www.lawsociety.com.au/resources/mental-health-and-wellbeing>
 - Mental Health and Wellbeing Portal titled: Staying Well in the Law (SWitL) – Numerous Professional Development Wellbeing Modules specific to all NSW Solicitors. New presentations each month as live webinars.
 - Solicitors Outreach Service – Access to 3, free confidential consultations with experienced registered psychologist. Outsourced to maintain privacy and confidentiality. Contact: PeopleSense on 1800592296
 - Wellbeing Champions – Mental Health First Aid training – comprehensive awareness and prevention training.

23. Ethics challenges

The law is a challenging profession which confronts solicitors with sensitive issues requiring fine judgments to be made at every turn. Legal practice has also long been one of the most highly regulated professions in the country, with strict codes of conduct and prescriptive legislation.

In response to this complex environment, the Law Society's Ethics Unit can assist practitioners with their professional and ethical obligations.

Part of the Professional Standards Department, the Ethics Unit is staffed by a team of experienced ethics solicitors. They provide prompt and reasoned information to solicitors in line with established ethical and legal principles.

The unit researches relevant ethical and legal developments and submits timely and informative reports to the Law Society's Ethics Committee. It also provides [ethics education](#), including the publication of articles in the *LSJ* and CPD to solicitors. [Ethics & Standards Quarterly](#), is a dedicated publication which aims to provide the profession with more information about the co-regulatory role of the Law Society and the outcomes it achieves through regulation.

Ethics assistance: [02 9926 0114](tel:0299260114)

Email: ethics@lawsociety.com.au

24. Collaboration with colleagues

We understand the importance of connecting with your colleagues and have created several ways that you can reach the wider in-house segment. We run events such as The Practice Network, In-House Corporate Lawyers Committee forums, the Law Society's Leadership Program for In-House Lawyers and our flagship Annual Conference, with a designated full-day stream for in-house lawyers. There is also a biannual publication you can subscribe to, *In The House*, which deals with issues relevant to the segment.

To stay up to date with all things in-house, visit the [In-House Corporate Counsel webpage](#) on the Law Society website.



APPENDIX



Appendix A

[In-house legal function name] Independence Statement

The lawyers in the [in-house legal function name] need to remain independent of the various lines of business, any Board and the management team of [organisation] to ensure that the legal advice they provide is sufficiently objective and impartial, and to comply with their professional obligations as lawyers.

Independence Policy of [in-house legal function]:

1. Legal services must be provided in an independent and professional manner in accordance with each lawyer's responsibilities as an officer of the Court or Courts in which they are admitted to practice and the laws, regulations and professional rules applying to legal practitioners in Australia.
2. In certain circumstances, the professional duties of the lawyers in the [in-house legal function name] may take precedence over their duties to [corporate entity] or individuals within [corporate entity].
3. The role of the [In-house legal function name] is to provide legal advice as opposed to commercial advice. This distinction must be clearly understood where a lawyer is providing legal advice to the business to assist the business in making a commercial assessment of a particular matter.
4. [Corporate entity] [management, such as a Chief Executive Officer or Managing Director, individuals in senior management positions, directors of any Board etc] and other employees must not seek to inappropriately influence the proper exercise of the independent professional judgment of a lawyer in the [in-house legal function name].
5. If a lawyer in the [in-house legal function name] forms the view that their ability to provide impartial legal advice has been, or may be, compromised he or she should immediately inform the General Counsel or the Chief Executive Officer, Managing Director or equivalent.
6. Where a lawyer in the [in-house legal function name] performs both legal and non-legal roles, those roles must be clearly delineated, and the distinction identified where appropriate in relevant communications.

The lawyers in the [in-house legal function name] acknowledge that they owe a duty of confidentiality to those whom they advise and have a duty to act always with the utmost integrity.

Appendix B

Understanding the role of in-house lawyers

A guide for Employers (including Chief Executive Officers and Boards)

1. Outline

- Key benefits of in-house lawyers
- Regulatory and fiduciary obligations of in-house lawyers
- What you can expect from your in-house lawyers
- What your in-house lawyers cannot do
- What your in-house lawyers need from you!

2. Key benefits of in-house lawyers

In-house lawyers play a key role in helping organisations to behave legally, fairly and ethically, including by:

- Maintaining high standards of integrity, honesty and fairness
- Supporting good corporate governance
- Improving accountability and managing risk
- Supporting robust evidence based and lawful decision making
- Supporting good corporate culture and ethical values within the business
- Generally helping businesses to solve problems the right way

3. Regulatory and fiduciary obligations of in-house lawyers

The regulatory and fiduciary obligations of in-house lawyers are no different to the regulatory and fiduciary obligations of all other solicitors. However, in-house lawyers are distinguishable from their private practice counterparts in that they do not have a range of clients, but instead provide legal services to their employer who is their sole client (typically, a corporation).

This means that, in practical terms, an in-house lawyer's client will generally be the Board of Directors or similar governing body, representing the company's shareholders. It also means that in-house lawyers owe their regulatory and fiduciary duties to the company itself, and not to any individual director, executive or other employee. These obligations include the following:

- Having a primary or paramount duty to uphold the law as an officer of the Court, including by upholding the administration of justice, the rule of law and public confidence in the legal profession
- Prioritising their primary or paramount duty as an officer of the Court over their duties to their client
- Being loyal to their client and avoiding conflicts of interest, for example by prioritising their client's best interests over their own or any other external interests

- Acting competently and keeping commercially sensitive corporate information confidential (except where this conflicts with their regulatory obligations)
- Putting at the organisation's disposal all information within the lawyer's knowledge and control which is relevant to a particular matter
- Often continuing to be subject to regulatory requirements even if the in-house lawyers is performing other roles in the company (ie wearing multiple hats) and are undertaking work which may not necessarily be considered to be legal work in the traditional sense

4. What you can expect from your in-house lawyers

You can expect your in-house lawyers to uphold the law as an officer of the Court as well as the company as its sole client.

You can also expect your in-house lawyers to:

- Hold a current Practising Certificate issued by the NSW Law Society (which must be an unrestricted Practising Certificate if they are the most senior in-house lawyer in the company and are not being supervised by another solicitor)
- Act competently and in good faith, including by demonstrate high standards of professionalism integrity, honesty and fairness
- Pursue ethically and socially responsible business practices
- When providing legal advice, ensure the company is made aware of all relevant legal and regulatory requirements, including what action the organisation should take if they are not being met and the risks which might materialise if they are not
- Put the client's interests above their own interests and provide advice which is independent, impartial and free from any external or personal interests
- Develop a sound understanding of their employer organisation and provide advice that is business-oriented and aligned to their organisation's strategy and values
- Maintain their competence to carry out their role and keep their professional knowledge up to date, including by undertaking required Mandatory Continuing Legal Education each year
- Effectively and appropriately supervise work done by any individuals they are responsible for managing or supervising
- Avoid conflicts of interest and not act on a matter where there is a conflict with their own interests
- Keep the company's affairs confidential assist the organisation in making legitimate claims for legal professional privilege

5. What your in-house lawyers cannot do

Like all other solicitors, your in-house lawyers must safeguard the administration of justice above the interests of its client and therefore must always act honestly and with integrity. This means that there may be situations where an in-house lawyers cannot do what you ask them to do or may advise against a particular course of action.

For example, your in-house lawyers cannot:

- Do anything which conflicts with their regulatory obligations, including by approving, supporting, facilitating or ignoring any dishonest or illegal action
- Act in ways which compromises their independence, for example by pressuring another solicitor to change their legal advice to prioritise commercial goals
- Make false or misleading claims to the Court or others, for example by failing to disclose relevant documents in legal proceedings
- Talk directly to other side without consent of any legal lawyers which is representing them in relation to the matter which is being discussed
- Act dishonestly, for example by:
 - destroying documents which may be used in litigation;
 - backdating a document or a record to a date that fell prior to the actual date of the document or event, even by a day;
 - witnessing a signature that they did not physically witness, no matter how well they know the individual concerned; or
 - certifying a copy of something as a true copy if the original hasn't been produced to compare it with
- Breach confidentiality (unless this conflicts with other regulatory obligations), even if 'everybody knows'
- Provide legal services to related entities if that would conflict with the interest of the employer entity
- Give you personal legal advice as if YOU individually were their client, even hypothetically
- Act outside their areas of competence

6. What your in-house lawyers need from you!

Your in-house lawyers needs your support to ensure they can perform their role properly, including by helping them comply with their regulatory obligations. This means that you each need to set realistic expectations around the ability of in-house lawyers to perform their role effectively and independently in light of the overall challenges facing the business at any given time, for example by:

Providing adequate budget, resources, systems and processes to allow in-house lawyers to meet their regulatory obligations

- Providing appropriate reporting lines and governance structures which support the need for in-house lawyers to raise any concerns at Board level
- Agreeing realistic timeframes for the delivery of legal advice
- Setting appropriate boundaries around the scope of the in-house legal function in the context of the business more broadly
- Providing in-house lawyers with visibility over the whole of the business, together with access to key decision makers and information which is necessary or relevant to the performance of their functions
- Not penalising or disciplining an in-house lawyers for declining to participate in an activity which they consider poses a risk to infringing their regulatory obligations
- Agreeing to include an acknowledgement of the role of in-house lawyers and their overarching regulatory obligations in their contract of employment (for example by including the independent statements in "*Handy Hints for Inhouse Lawyers*"), if requested

Endnotes

¹ Legal Profession Uniform Regulations 2015, Legal Profession Uniform Law Application Regulation 2015, Legal Profession Uniform General Rules 2015, Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, Legal Profession Uniform Legal Practice (Solicitors) Rules 2015, Legal Profession Continuing Professional Development (Solicitors) Rules 2015 and the Legal Profession Uniform Admission Rules 2015.

² Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015

