

WIN In-House Counsel Week 2024

Legal professional privilege for inhouse counsel – CPD Seminar

Presenters: The Hon. John E Middleton AM KC and Gowri Kangeson



WIN what in-house
lawyers need



Introduction slide

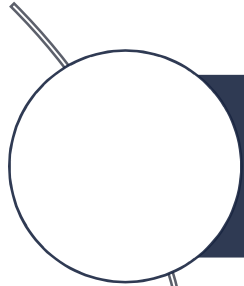
What will be discussed in the session.....

1. LPP - views from the bench
2. Case studies
3. Insights (when briefing experts)
4. Practical tips for dealings with experts
5. Ethical considerations for lawyers

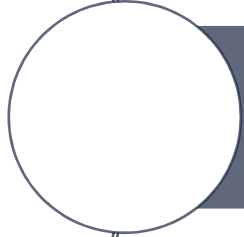
Case Studies



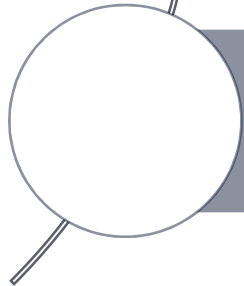
Robertson v Singtel Optus Pty Ltd [2023] FCA 1392



Why Optus failed to prove its Legal Professional Privilege claim



Evidencing the purpose of the engagement from the beginning



Letter of engagement with expert, Media Releases, Public statement to Shareholder, Affidavit evidence



Optus commissions independent external review of cyberattack

03 October 2022, 11:30 AM

Deloitte to lead forensic review of cyberattack.

Optus is appointing international professional services firm Deloitte to conduct an independent external review of the recent cyberattack, and its security systems, controls and processes.

The review was recommended by Optus Chief Executive Officer, **Kelly Bayer Rosmarin**, and was supported unanimously by the Singtel Board, which has been closely monitoring the situation with management since the incident came to light.

As part of the review, Deloitte will undertake a forensic assessment of the cyberattack and the circumstances surrounding it.

Ms Bayer Rosmarin said the forensic review would play a crucial role in the response to the incident for Optus, as it works to support customers.

"We're deeply sorry that this has happened and we recognise the significant concern it has caused many people. While our overwhelming focus remains on protecting our customers and minimising the harm that might come from the theft of their information, we are determined to find out what went wrong."

She added, "This review will help ensure we understand how it occurred and how we can prevent it from occurring again. It will help inform the response to the incident for Optus. This may also help others in the private and public sector where sensitive data is held and risk of cyberattack exists.

"I am committed to rebuilding trust with our customers and this important process will assist those efforts."

Deloitte's global specialists will work with the Singtel and Optus teams and other international cyber experts. Optus will continue also to engage with relevant stakeholders.

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OPTUS

Urgent update about your personal information

Dear Former Optus Customer,

It is with great disappointment I'm writing to let you know that Optus has been a victim of a cyberattack. As a former Optus customer this has resulted in the disclosure of some of your personal information.

Importantly, no financial information or passwords have been accessed. The information which has been exposed is your name, date of birth, email, phone number, address associated with your former account, and the numbers of the ID documents you provided such as drivers licence number or passport number. No copies of photo IDs have been affected.

Takeaways from Optus

1



The engagement of IT forensic providers and any report prepared must be for the dominant purpose of a lawyer advising the company in respect of legal risk

2



The timing of engaging lawyers is critical

3



Precautionary measures should a large company or government announce the commissioning of an external review

4



Companies must recognise the rewards and risk of an external review, and clearly decide upfront whether it is for legal purposes (and so privileged) or for broader purposes (and so not privileged).

5



Everyone, in particular the CEO, board and publicity team, must be aligned in their understanding and statements regarding reports.

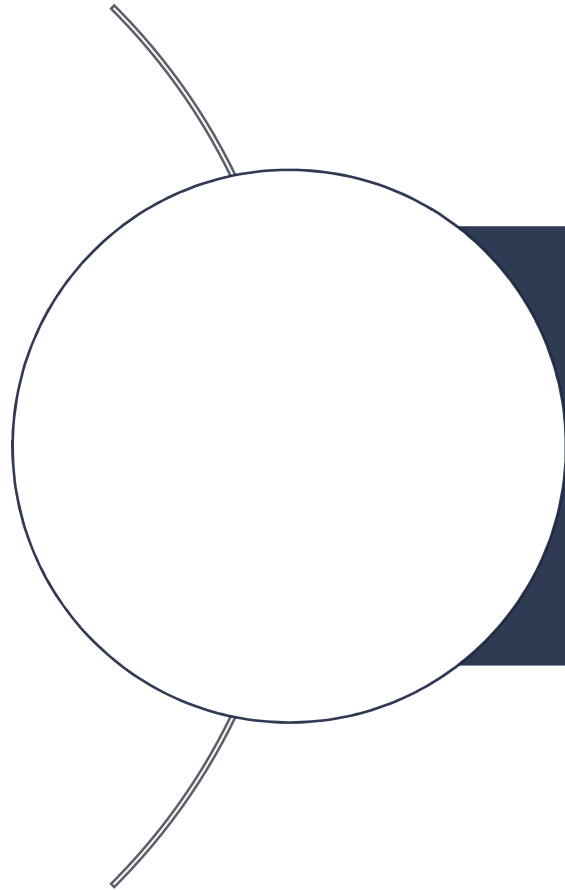
6



When defending the privilege of a report, evidence should be led from all the decision makers



Glencore International AG v Commissioner of Taxation [2019] HCA 26



What if your legal advice is leaked in a data breach?



Insights



When briefing experts, what could be exposed?

Type of material	Does privilege apply?	Authority
Briefing and Instructions	Yes	Privilege will apply to confidential briefing and instructions by a litigant's lawyers to an expert for the purpose of providing a report of their opinion for use in anticipated litigation (sections 118 and 119 of the Evidence Act 1995 (NSW) and <i>Australian Securities and Investments Commission v Southcorp Ltd</i> [2003] FCA 804).
Communications between experts and legal advisers	Yes	Communications between an expert and legal advisers will attract privilege (sections 118 and 119 of the Evidence Act 1995 (NSW)).
Documents provided to experts	Yes	Where copies of documents are made for the purpose of forming part of confidential communications between a client's legal advisers and an expert witness, privilege will generally apply (sections 118 and 119 of the Evidence Act 1995 (NSW) and <i>Australian Securities and Investments Commission v Southcorp Ltd</i> [2003] FCA 804 at [21]).
Expert's working notes and field notes	No	Privilege will not apply to expert witness's own documents such as working notes and field notes (<i>Australian Securities and Investments Commission v Southcorp Ltd</i> [2003] FCA 804 at [21]).

When briefing experts, what could be exposed?

Type of material	Does privilege apply?	Authority
Legal adviser's file notes	Yes	Privilege will apply to file notes made by legal advisers in the course of communications and meetings with experts and clients (sections 118 and 119 of the Evidence Act 1995 (NSW) and <i>Gillies v Downer EDI Ltd</i> [2010] NSWSC 1323 at [70]).
Other documents	No	There is no privilege over documents used by an expert to form an opinion or write a report regardless of how the expert came by those documents (<i>Australian Securities and Investments Commission v Southcorp Ltd</i> [2003] FCA 804 at [21]).
Draft Expert reports	Yes and No	<p>There are two competing authorities on this issue.</p> <p>In <i>Southcorp</i>, Justice Lindgren held that a witness's own drafts of their report will not attract privilege because they are not in the nature of, and would not expose, communications.</p> <p>In <i>New Cap Reinsurance</i>, Justice White, made a distinction between the intentions behind the creation of draft reports:</p> <ul style="list-style-type: none">• those created to set out the evidence the expert expects to give in his or her final report to be provided to the court (which doesn't attract privilege); and• those created to communicate the report to the legal adviser to be considered and commented on by the legal adviser (which attracts privilege).
Final Expert reports	Yes and No	As the dominant purpose of an expert's final report is to provide guidance to the Court on certain facts in issue, the expert's final report will not attract privilege (<i>New Cap Reinsurance Corporation Ltd (In Liq) v Renaissance Reinsurance Ltd</i> [2007] NSWSC 258).

Practical tips for dealings with experts



DLA Piper's Practical tips



Our number 1 rule – Engage an expert on the assumption that all materials and communication could be disclosed!



Carefully consider the documentation provided to an expert.



Where possible, communications from the expert should come directly to the legal adviser.



Advise the expert that draft reports or other documents should not be sent to the legal adviser or any other party unless it is agreed

For more information, see our [Legal privilege global guide](#)

Ethical considerations for lawyers



Privilege and ethics

- The principles relating to privilege and the ethical duties of a lawyer co-exist
- Although the right to claim privilege vests in the client, it is the lawyer's role to oversee and advise on the exercise of the right
 - It is usually the lawyer who determines what communications may be the subject of a claim for privilege
- Legal privilege is meant to assist in the administration of justice, so that clients can make frank disclosure to lawyers without this being revealed to others
- Although professional conduct rules do not specifically address privilege, the lawyer's paramount duty to the court and to the administration of justice dictate that a lawyer must act in accordance with those obligations when making or advising on a claim for privilege (Rule 3 & 5 of 2015 Conduct Rules)



Privilege and ethics

- Lawyers have a professional obligation to claim privilege on a client's behalf. Failure may be a breach of professional duty
- However, a knowingly inappropriate claim for privilege may constitute an ethical breach
- Section 39 of the Legal Profession Uniform Law provides:
39 Undue influence: A person must not cause or induce or attempt to cause or induce a law practice or a legal practitioner [associate](#) of a law practice to contravene this Law, the Uniform Rules or other professional obligations.
- It follows that in-house counsel may be in breach of this Act by failing to make proper disclosure to the lawyer of relevant documents or claiming privilege over non-privileged documents
- Such a breach may constitute an ethical breach on the part of in-house counsel



WIN In-House Counsel Week

Thank you for joining our webinar:
Ethics & Legal professional privilege
for inhouse counsel

Session presenters:



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