



WIN In-House Counsel Week 2026

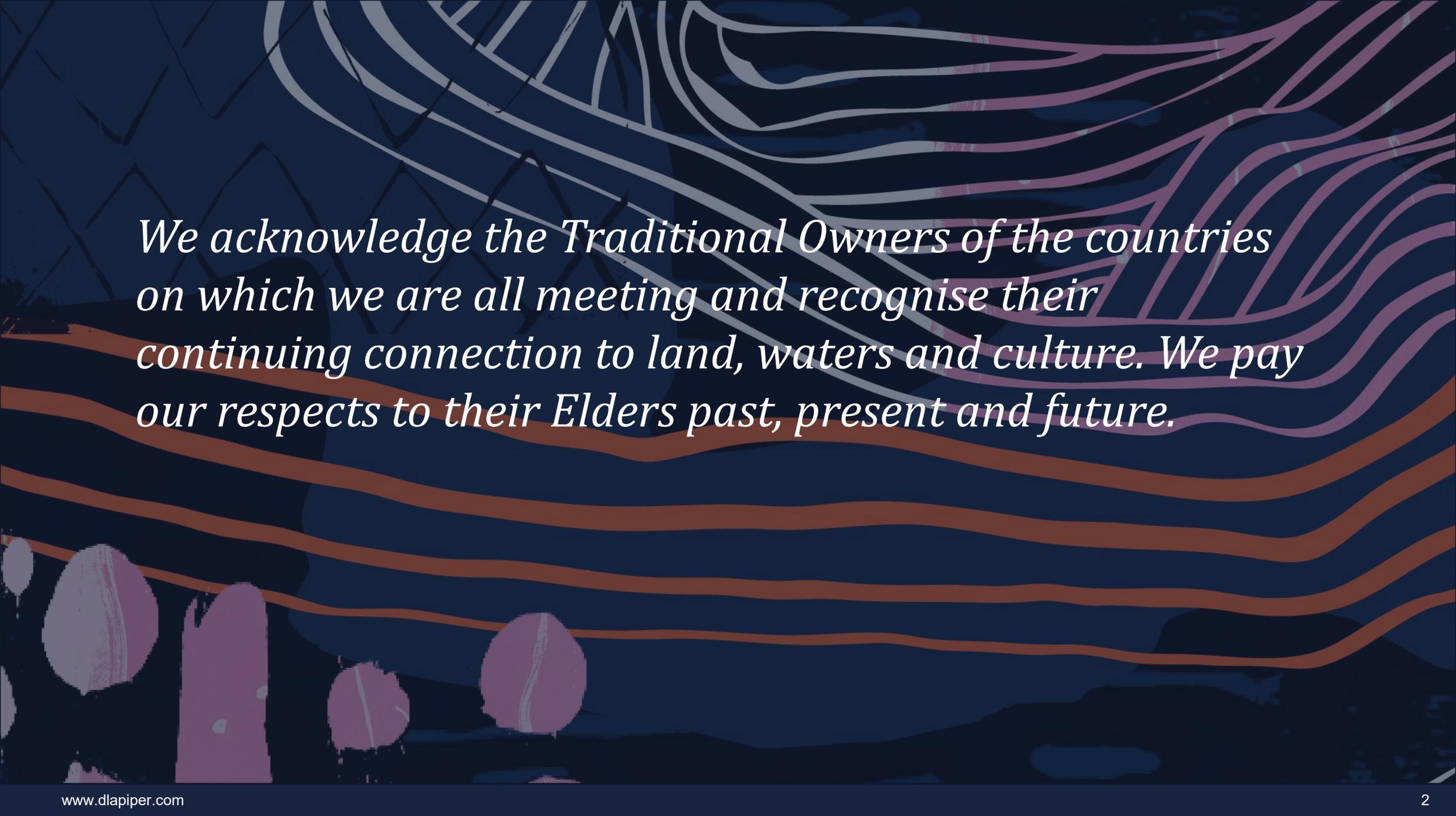
Ethics: Keeping It confidential and
privileged - Dispute resolution with
integrity

Presenters:

The Hon. John E Middleton AM KC
Gowri Kangeson



WIN what in-house
lawyers need

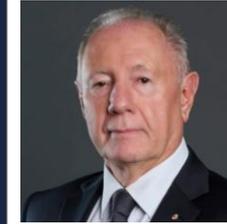


We acknowledge the Traditional Owners of the countries on which we are all meeting and recognise their continuing connection to land, waters and culture. We pay our respects to their Elders past, present and future.

Agenda

- The foundations and practical application of Legal Professional Privilege (**LPP**)
- Key elements - confidentiality, dominant purpose, and professional relationships
- Advice v Litigation privilege
- Joint interests and privilege misuse: when LPP may not apply.
- Privilege considerations in regulatory investigations.
- Strategies for addressing and avoiding privilege waiver.

Presenters



**The Hon. John E
Middleton AM KC**
Senior Advisor
T: +61 3 9274 5079
John.Middleton@dlapiper.com



Gowri Kangeson
Partner
T: +61 3 9274 5428
Gowri.kangeson@dlapiper.com

Importance

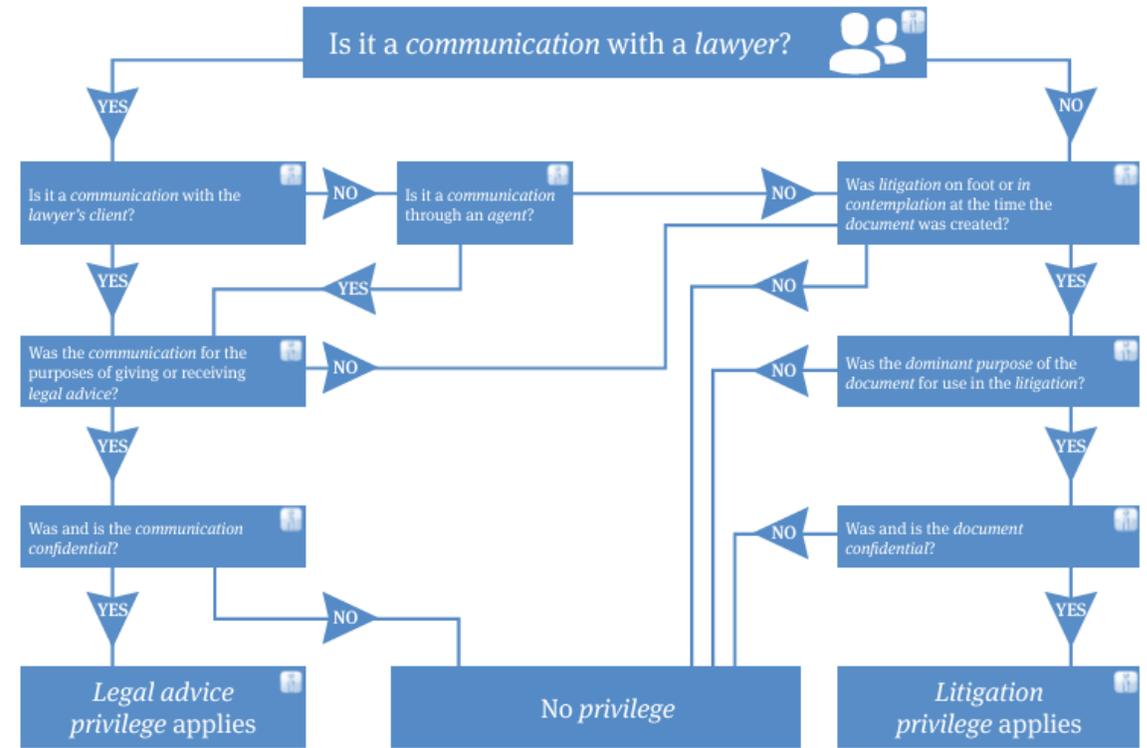
- Impacts the discharge of legal services
 - Understand what documents attract privilege
 - Esp where consultants are being used
- We need to be aware of the basics to:
 - protect our client's interests
 - make proper LPP claims
- Recent cases – questionable LPP claims & waiver of privilege

LPP Principles – well understood/imperfectly practiced

- Legal professional privilege applies to:
 - confidential communications
 - made for the dominant purpose of the client:
 - obtaining legal advice; or
 - for use in litigation or **regulatory investigations** or proceedings
- Onus is on the party seeking to claim LPP to properly establish it
- Purpose for which a document was created is a matter of fact to be determined objectively, having regard to:
 - the evidence (focused and specific evidence, not mere assertion),
 - the nature of the document, and
 - the parties' submissions

Legal Advice Privilege v Litigation Privilege

- **Legal advice privilege** - confidential communications between a lawyer and client or third party for the dominant purpose of giving or receiving legal advice
- **Litigation privilege** - confidential communications passing between a legal adviser or client and a third party if made for the dominant purpose of use in, or in relation to, litigation, provided the litigation is existing or reasonably anticipated



LPP - concepts

- Statutory claims
- Common law claims
- Need for a professional relationship
 - Legal capacity, independence, independent legal adviser, act consistently with obligations as an officer of the court
- **Joint and common interest privilege**
- **Illegal or improper purpose - so LPP does not apply**
- Investigations and LPP waiver of privilege

Evidence

- Designating documents as “subject to legal professional privilege” will not be determinative
- Communications sent or received by a legal practitioner will not of themselves be privileged
 - Is the lawyer merely a post box?
 - Is the lawyer providing legal advice?
 - Dual roles for inhouse counsel – CoSec & GC, GC & COO
- Court will assess the substance of the circumstances surrounding the creation of the document or communication
- Courts will look at: Need for advice, Instructions, Engagement letters

Waiver - When will LPP be lost?

- Critical question in determining if LPP is waived is:
 - has the party holding the LPP acted inconsistently with the fundamental confidence inherent in LPP communications –
 - Yes (Waived)
- Examples of waiver:
 - Sharing reports/advice with third parties during M&A
 - Sharing investigation reports with auditors
 - Sharing investigation reports with third parties such as regulators
 - Disclosing the contents of advice/investigation reports in public statements (e.g. ASX releases)

Privilege considerations in regulatory investigations

Current procedure for producing documents attracting LPP in regulatory investigations

- Where a document attracts LPP, it generally does not need to be provided to regulators in investigations, government inquiries (or to our opponents)
- Current practice when responding to a compulsory notice from the ACCC, ATO or ASIC is to identify which documents or part of documents attract or are likely to attract LPP and then withhold those documents (or redact parts of documents)
- An explanation required including:
 - the type of document;
 - the creators and recipients of the document;
 - the date and time of the document;
 - the category of privilege claimed; and
 - whether the whole document or only part of the document is privileged.
- **No Exemption:** NACC investigations

Regulator's more actively reviewing LPP claims

- Regulators are aware of misuse of LPP claims
- Providing the information requested will assist the regulator in assessing whether it should accept, review or challenge a claim for LPP
- While providing the information to accompany a claim for LPP is in the case of some regulators voluntary, they expect an explanation as to why the requested details have not been provided
- If the regulator believes that incorrect claims of LPP have been made, it can prosecute the relevant notice recipient for non-compliance with the notice
- In such circumstances, the party claiming LPP will bear the burden of proving that privilege was rightfully claimed
- Failure to comply with notices is a criminal offence punishable by fine or imprisonment

AFP warrants & LPP claims

- New way of dealing with LPP claims is more akin to how LPP is treated in relation to warrants issued by the Australian Federal Police (or their State or Territory counterparts)
- With AFP – depending on agreed protocol - LPP communications that are caught by the terms of the warrant, need to be marked securely, sealed separately from non-LPP communications and held by the investigator (without accessing them) until the LPP claims are resolved, by agreement or court application and order

Risk

- Broad or blanket claims will not work and could publicly be held or suggested to be deliberately or recklessly deceptive or otherwise and an abuse of process
- **Client risk**
 - Changes to how regulators will view LPP claims are likely to result in additional time and cost in complying with regulatory investigations and inquiries
 - Extensions of time may need to be sought to closely scrutinise all communications involving legal to determine whether LPP applies to those documents
- **Our risk**
 - If lawyers are actively involved in making broad and unjustified LPP claims, there is a risk their conduct may be regarded as unprofessional and if serious enough, constitute misconduct
 - Avoid the risk of adverse findings against the client/the firm/you

Case Studies - Waiver

Waiver & voluntary disclosure to regulators

- *ASIC v Noumi Ltd* [2024] FCA 349 - landmark judgment challenging the effectiveness of “Voluntary Confidential LPP Disclosure Agreement” (**VDAs**) as a mechanism to protect privilege, finding that Noumi waived privilege was overturned on appeal
- Single judge found that Noumi had waived privilege in a report prepared by PwC by disclosing the report to ASIC under a VDA
- **Context:** ASIC presently has no power to compel the production of privileged material. ASIC receives privileged material under VDAs, on the basis that the disclosure to ASIC amounts to a limited waiver of privilege to assist ASIC in its investigation but does not constitute a broader waiver of privilege
- **Background:** ASIC engaged with Noumi in 2020 about issues concerning Noumi's inventory valuation. Noumi later provided ASIC with a copy PwC's investigation report relating to the issues (**PwC Report**). The PwC Report was provided on a confidential basis pursuant to a standard form VDA. The VDA's terms were that Noumi sought to maintain privilege over the PwC Report, despite its disclosure to assist ASIC's investigations

Full Court Appeal - ASIC v Macleod [2024] FCAFC 174

Grounds of Appeal

- ASIC argued, and Noumi joined in advancing, three substantial errors, that the primary judge erred in:
 - Determining that the VDA did not prevent ASIC from engaging in “derivative disclosure” or disclosure “in circumstances where it would not be possible for ASIC to disassociate whether the source of the information was the PwC Report or some other source”;
 - Finding that Noumi’s conduct, in permitting ASIC use the disclosed information in accordance with the VDA, was not inconsistent with its maintenance of confidentiality in the documents as against the rest of the world; and
 - The analysis of unfairness and specifically that there was unfairness to Mr Macleod (the first respondent)

Full Court Appeal ASIC v Macleod [2024] FCAFC 174

Decision of Burley, Anderson and Meagher JJ

- Burley, Anderson and Meagher JJ set aside Shariff J’s decision, granting the challenge to the waiver of privilege
- The Full Court considered that Shariff J misstepped on the issues of LPP and the waiver of LPP:
 - At [145]: *“If, by that reference, the primary judge intended to convey that by “derivative disclosure”, ASIC thereby was permitted to disclose confidential information in the PwC Report, then we respectfully disagree. Use of information does not amount to disclosure of it. ASIC, by cl 4.1 was expressly prohibited from making a disclosure of the Disclosed Information. Any use that might have had the consequence that a disclosure was made was forbidden”.*
 - At [147]: *“It cannot be said that such derivative use of information amounts to a disclosure of that information. As noted above, to the extent that it might have been, ASIC was prevented by clause 4.1 of the VDA from doing so. We consider that the primary judge erred in finding at [207] that by permitting ASIC to use the Disclosed Information in a derivative way against Mr Macleod, Noumi expressly or impliedly acted in a way that was inconsistent with the maintenance of the confidentiality which the privilege is intended to protect”.*

Full Court Appeal ASIC v Macleod [2024] FCAFC 174

Response by ASIC

- In response, ASIC's Deputy Chair, Sarah Court said:
 - *“Voluntary disclosure agreements have been in use by ASIC for over a decade and are an important tool to enable ASIC to fast track its investigations and for parties to cooperate with ASIC”*
 - *“We are pleased the Full Court has determined that production of documents in accordance with these agreements does not automatically result in a waiver of privilege. We expect this decision will remove uncertainty for parties considering whether to enter into such agreements with ASIC in the future”.*
- Our views:
 - The Full Court's decision gives comfort to those wishing to cooperate with AISC by voluntarily producing privileged material under a VDA that they will not be taken to have waived legal professional privilege in doing so.
 - Caution should still be exercised when considering whether to provide privileged material to a regulator on a confidential basis and any potential benefits of doing so should be carefully weighed against the risks, such as waiver of privilege.

TerraCom v ASIC [2022] FCA 208

External Messaging & Waiver

- PwC was commissioned by TerraCom's external lawyers to prepare a report (the Report) to enable the external lawyers to provide legal advice to TerraCom.
- ASIC sought access to the Report, arguing that it was not a privileged document. TerraCom sought a declaration that the Report attracted legal professional privilege, thus preventing ASIC's inspection.
- Dominant purpose - privilege attached to the Report, as there was no evidence in the report, engagement letters or elsewhere suggesting otherwise. These documents plainly supported that conclusion.
- Waiver –
 - TerraCom stated in an open letter to shareholders and an ASX announcement - that an independent forensic investigation had found no evidence of wrongdoing by its CEO and CFO. This was a clear disclosure of the conclusion of a privileged investigation report.
 - Deploying legal advice for commercial purposes is inconsistent with the maintenance of legal professional privilege

Braziron Corporate Services v Road Rail & Mine Products (2025)(WASC)

- Advice provided in relation to a share purchase deed
- Advice in comment bubbles within the draft deed
- That draft shared with counter party
- Impact of referring to content of legal advice received in comments to a draft agreement
- Waiver - but was it relevant to the dispute?

MLC-8 SBW.0004.8565
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Share sale agreement (CN comments)

From: Cyndie Woolcock <cyndie@sbwa.com.au>
To: Jamie Morton <jamie@sbwa.com.au>
Date: Mon, 11 Dec 2017 15:59:37 +0800
Attachments: Share sale agreement (CN comments).DOCX (64.06 kB)

Here is the agreement from the lawyer with a few little changes that needed making – ie addresses etc
Happy to go over it tomorrow morning. If you need I can try and get in earlier.
Cyndie

(g) Where two or more persons are defined as a party to this Agreement that term means each of the persons jointly, each of them severally and any two or more of them jointly;

(h) an agreement, covenant, obligation, representation or warranty on the part of two or more persons binds them jointly and severally and an agreement, covenant, obligation, representation or warranty in favour of two or more persons is for the benefit of them jointly and severally.

2. Termination of Original Agreement and Shareholders' Agreement

2.1 ~~Upon execution of this Agreement and it becoming unconditional, the Parties agree that, subject to Completion occurring, on the Completion Date:~~

(a) ~~the parties shall be released and discharged from their obligations with respect to the sale and purchase of the Second Tranche Shares (including the obligations under clause 3.2 of the Original Agreement), and this Agreement shall govern the sale and purchase of the Remaining Shares;~~

(b) ~~and Shareholders' Agreement shall be terminated and each of the Parties discharged from any further performance or obligations whatsoever on the terms set out in clause~~

Commented [CN2]: It is not necessary to terminate the Original Agreement, as same obligates under the Original Agreement continue (such as payment of outstanding project costs) and warranties that were provided at completion of the First Tranche. All this agreement is doing is amending the agreement with respect to the sale and purchase of the second Tranche Shares.

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Strategies for addressing and avoiding privilege waiver

Recap on waiver

- Waiver happens when there is inconsistency with the communication remaining confidential.
- It can be intentional, unintentional or implied.
- Implied waiver – disclosure waiver, issue waiver, associated material waiver
- Often it is fact-specific but we flag usual waiver scenarios and practical steps to avoid waiver.

Steps

- Avoid commenting on legal advice publicly.
- Share legal advice on a ‘need-to-know’ basis, and confidentially.
- Think critically about the effect on privilege of relying on documents and evidence in court.
- If privileged material is inadvertently disclosed, promptly take steps to rectify and protect the material’s confidentiality to the extent possible.

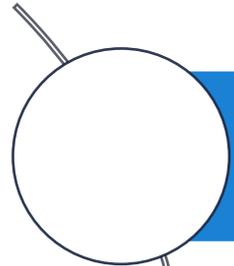
Case Studies – Dominant Purpose Analysis

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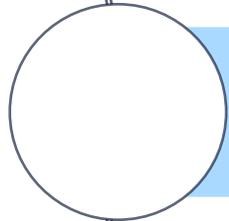
Energy Resources v Cactus Wellhead (2025) (WASC)

- Mineral Resources subsidiary, Energy Resources, took Cactus Wellhead to court, alleging a defective casing hanger caused a costly failure at its Lockyer Deep-1 well. The part allegedly failed drift testing, did not meet specification, and forced a multimillion-dollar remediation.
- Cactus Wellhead pushed back saying it followed a jointly approved testing regime and stuck to specifications agreed with Energy Resources.
- But just before a long trial, there was a privilege fight over 500 Energy Resources privileged documents. Energy Resources' in-house legal team had commenced an investigation to assess the rights and obligations re the incident and claimed privilege over documents related to the investigation.
- Court found:
 - the investigation initiated by the in-house legal team was undertaken for at least the subjective purpose of obtaining legal advice and for use in future legal proceedings
 - existence of multiple purposes for the investigation and creation of the documents (i.e. for information to be provided to management re. the incident, for gathering information to comply with reporting obligation to the relevant regulatory body (i.e. DEMIRS), and for insurance purposes
 - **Court not satisfied that the purpose of seeking legal advice was the dominant purpose**

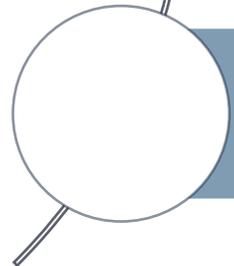
Robertson v Singtel Optus Pty Ltd [2024] FCAFC 58 (leave to appeal refused)



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.

Media contact:

Ph: (02) 9037 8179

E: media@optus.com.au

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

Ethics & LPP review

- “The privilege exists to protect the administration of justice and the right of individuals and other entities/organisations to obtain confidential advice about their legal circumstances. This promotes compliance with the law. Since lawyers owe a duty to the court and serve the administration of justice, they are required to encourage clients to obey the law.”
- An exception to the privilege is where communications facilitate fraudulent or criminal activity, or actions taken for illegal or improper purposes.
- If there are concerns about misuse of client legal privilege, there are avenues to challenge this through the courts. The Law Council’s view is that client legal privilege must always be respected and that if any contention arises between an individual or organisation and regulator in regard to client legal privilege, the court should be the ultimate decision maker.

Ethics & LPP – Attorney General’s Department and Treasury’s review of LPP

- Joint review led by Mark Dreyfus KC MP and Jim Chalmers
- First Discussion Paper published in December 2024, second Discussion Paper has not been shared,
- Key issues considered:
 1. LPP is fundamental to our legal system
 2. Commonwealth investigations underpin trust in our systems
 3. LPP claims can be made in Commonwealth investigations
 4. Concerns about some LPP claims in Commonwealth investigations
- Potential reforms options:
 1. Greater consistency with LPP processes across Commonwealth investigations
 2. Collaboration between Commonwealth agencies
 3. Statutory clarifications to provide particulars without fear of waiver
 4. Penalties for LPP claims made without a proper basis, or with an improper intent
 5. New court-appointed LPP examiner or special registrars to consider LPP disputes

WIN In-House Counsel Week

Thank you for joining our webinar:

Ethics: Keeping It confidential and privileged -
Dispute resolution with integrity

Session presenters:



The Hon. John E Middleton AM KC
Senior Advisor,
DLA Piper, Melbourne
T: +61 3 9274 5079
E: john.middleton@dlapiper.com



Gowri Kangeson
Partner
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T: +61 3 9274 5428
E: gowri.kangeson@dlapiper.com

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