

WIN In-House Counsel Week 2025

Ethics and Legal Professional Privilege

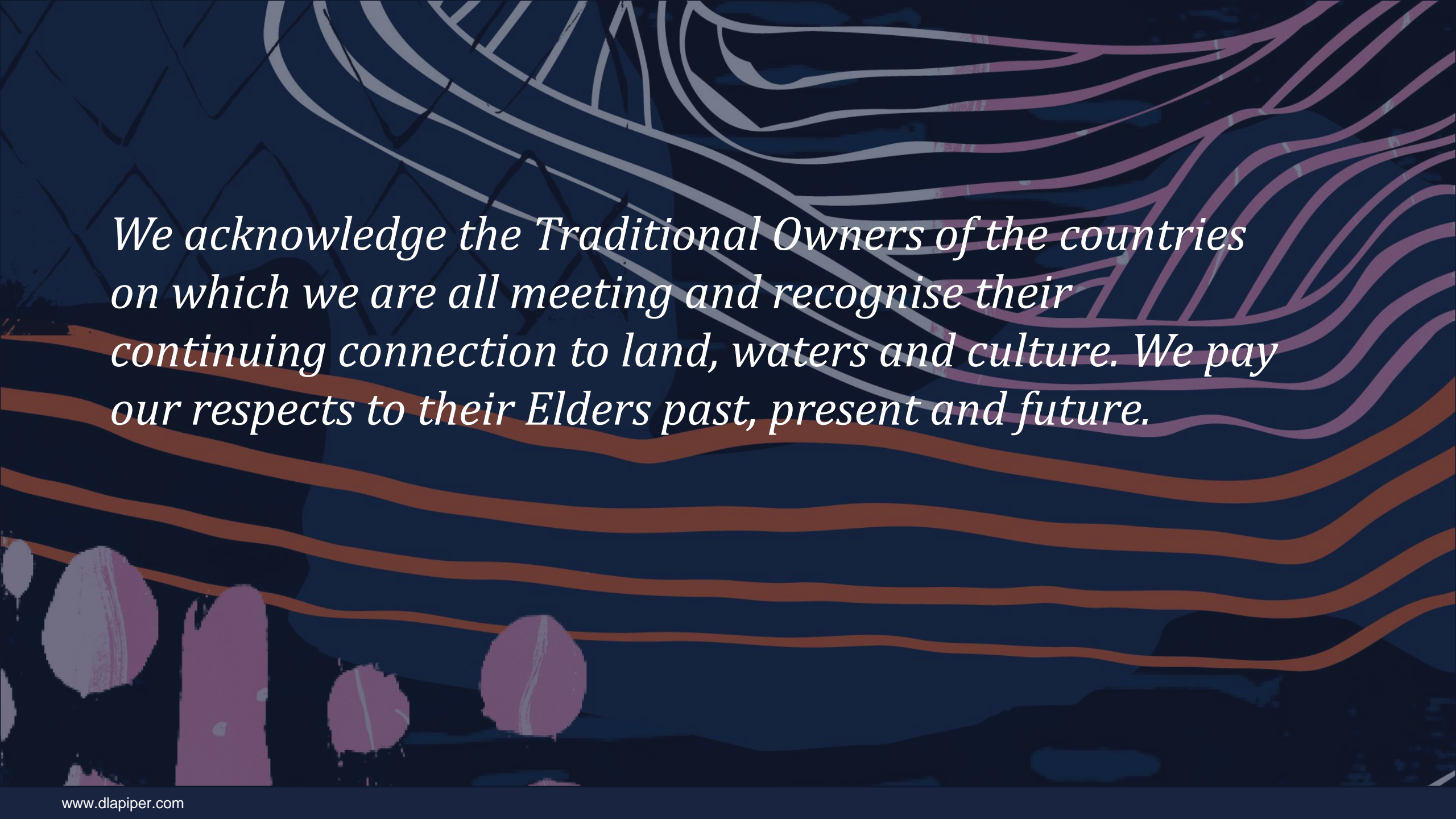
Protecting privilege in the regulatory space

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

Friday, 21 February 2025
09:00 AWST
11:00 AEST
12:00 AEDT



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

1. Why is this important?
2. LPP basics
3. Some case studies
4. Ethics & LPP review

Presenters



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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

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

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

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 (eg ASX releases)

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

An aerial photograph of a river with turbulent rapids. The water is dark blue and black, with white foam and spray from the rapids. The scene is captured from a high angle, showing the intricate patterns of the water's flow.

Case studies

PWC case (2022)

- The Commissioner of Taxation (**Commissioner**) issued a notice to PricewaterhouseCoopers (**PWC**), requiring it to provide the Commissioner with documents concerning particular audits
- In responding to this notice, PWC claimed LPP over approximately 15,500 documents which in turn were withheld from production to the Commissioner
- The Commissioner sought a declaration that these documents were not covered by LPP, as they were not the type of documents created for the dominant purpose of giving legal advice
- While the Court disagreed with the Commissioner's broad claim, it undertook a LPP analysis of a random sample of the 15,500 documents
- Of 116 sample documents, it found that only 49 (42%) were properly classified as attracting LPP, 6 documents were part privileged and 61 documents (52%) were subject to incorrect claims of LPP

NSW Independent Liquor and Gaming Authority (2022)

- In June 2022, the inquiry into The Star Pty Ltd (**The Star**) by the NSW Independent Liquor and Gaming Authority heard that The Star refused an AUSTRAC request to provide a copy of an adverse report, based on LPP
- Although legal counsel considered the report attracted LPP at the time it was prepared, it was determined that this was not the case
- In addition, it was intimated that many emails that were headed “privileged” or over which claims of privilege were made, were not as a matter of law properly privileged, and that counsel had deliberately sought to cloak these documents in LPP so as to ensure they could not be produced in any future inquiry or proceeding

Similar with Crown’s approach as discussed in the 2021 Royal Commission report

Voluntary Disclosure Agreements, regulators, LPP

- *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 (appeal reasons yet to be published)
- 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

ASIC v Noumi [2024] FCA 349

- **Proceedings:** ASIC commenced proceedings in 2023 against Noumi, its former CEO and its former CFO for alleged contraventions of the *Corporations Act 2001* (Cth) associated with disclosure of information about the value of inventories in its financial reports
- In the discovery process, Noumi claimed privilege over the PwC Report
- Noumi's former CEO argued that the PwC Report was not privileged, and alternatively, that its voluntary disclosure to ASIC gave rise to an implied waiver of privilege
- Initial hearing:
 - The Court held that the PwC Report was privileged
 - The sharing of the report with ASIC did not negate privilege
 - As to waiver, the Court examined whether Noumi's conduct was inconsistent with the maintenance of privilege, informed by consideration of fairness
 - Justice Shariff found that the disclosure to ASIC did constitute a waiver
 - Finding relating to privilege, successfully appealed to the Full Court of the Federal Court

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”.*

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.

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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

Contrasting 2024 decision – Nazir v State of NSW (2024)

- Proceedings for compensation to relatives and personal injury as a result of a rockfall in a national park
- Defendant objected to production of a geotechnical report obtained by defendant shortly after incident
- Defendant claimed the report was subject to legal professional privilege
- Whether report was prepared for the dominant purpose of seeking legal advice or for use in legal proceedings
- Where inevitable Coroner would be involved & more likely than not that civil proceedings would be instituted
- Letter of instruction demonstrated that dominant purpose of report was for legal advice and use in legal proceedings
- Plaintiff submitted various matters demonstrated that dominated purpose was not seeking advice:
 - Statement of NSW Premier that he would be seeking advice as to whether the Track should have been open on the day concerned, together with the Department's public statement that a comprehensive review would be undertaken
 - Department had a Geotech engineer on standby to analyse the footage received from the police, and the consideration that the engineer would be admitted to the site to provide a more detailed assessment (public safety purpose)
- Claim of legal professional privilege upheld

Expert reports into catastrophic failures

- In response to the catastrophic failure of the C4 power unit at the Callide Power Station on 25 May 2021, the leadership and board of Callide Energy, which operated the power unit for its owners, did what was expected.
- They commenced an independent investigation into the causes of the incident, made public statements about preventing similar incidents from recurring and briefed solicitors to provide legal advice and to engage the independent expert in relation to the incident
- The solicitors engaged Dr Brady via a confidential letter setting out the expert's obligations of confidentiality and noting LPP applied to all communications between the expert, the solicitors and Callide
- Why then on 13 June 2024 in the decision in *Sparks, in the matter of IG Energy Holdings (Australia) Pty Ltd (Administrators Appointed) [2024] FCA 613* did Justice Derrington of the Federal Court of Australia find that LPP does not attach to Dr Brady's report, any drafts of that report or communication between the expert, the solicitors and Callide Energy?

Sparks, in the matter of IG Energy Holdings (Australia) Pty Ltd (Administrators Appointed) [2024] FCA 613S

- Faced with a subpoena from an indirect unit owner that sought the disclosure of the Brady report, its drafts and all communications related to it, Callide Energy did not dispute that there was more than one purpose for Dr Brady's report
- Callide Energy accepted as true its public statements that the report was also to be obtained for the purpose of ascertaining how the failure of the C4 unit occurred so that:
 - the safety of workers and plant could be improved; and
 - a separate report could be prepared for public dissemination so that the power generation industry at large could learn from the incident.
- Callide strived for a model response to an event that endangered the lives of workers and concerns the provision and potential improvements in the provision of a public good, while also making every effort to preserve privilege, including by instituting an internal communications protocol and a communications protocol with the Queensland Government in relation to the report

Sparks, re IG Energy(Administrators Appointed) [2024]

- Callide Energy, however, could not escape the essential tension between its otherwise commendable intentions to use the report for various publicly beneficial purposes and the efforts it made to preserve privilege over the report.
- In affidavits and submissions to the court, Callide Energy contended that the steps taken to preserve legal professional privilege established that Callide Energy’s subjective dominant purpose in commissioning the report was obtaining legal advice from its solicitors
- Justice Derrington instead found that the public statements made by Callide Energy articulated other important purposes for the report.
 - These purposes that were so important to Callide Energy, concluded the judge, that they “felt compelled to publicly articulate them and did so repeatedly.”
 - As a result, Justice Derrington found it impossible to conclude that the procurement of legal advice was the dominant purpose in engaging Dr Brady
- **Conflict Between Public Disclosure and Legal Privilege**
 - engaging separate experts to deliver reports that respond to different purposes
 - duplication of costs and the possibility that experts may present inconsistent analysis and recommendations

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 expected in 2025 subject to the Federal Election
- 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