

TIPS FOR CLAIMING LEGAL PROFESSIONAL PRIVILEGE OVER INVESTIGATION REPORTS

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What steps can an employer take to successfully claim legal professional privilege ('privilege') over an investigation report? This question was considered in the recent Fair Work Commission case of *Kirkman v DP World Melbourne Limited* [2016] FWC 605 ('*DP World*'). This article will examine why an employer may seek to claim privilege over an investigation report and draws on the reasoning set out in *DP World* to provide a checklist for lawyers and employers who intend to claim privilege over such reports.

Why claim privilege over an investigation report?

Readers will be all too familiar with the concept of privilege. Confidential lawyer/client communications made for the dominant purpose of receiving legal advice, or for use in existing or anticipated litigation, are protected from disclosure. The privilege belongs to the client, not the lawyer, and may be waived by the client expressly or impliedly.

Specialist workplace investigators regularly consult to national law firms to conduct investigations for their clients. While sometimes employers seek to structure the investigation to attract privilege, this is not always the case. So why do some employers opt to claim privilege while others do not?

There are a number of practical reasons why an employer may seek to protect an investigation report from disclosure. For example where there are a number of respondents and/or a mix of allegations, it may be beneficial not to provide a copy of the report to all respondents. Alternatively, there may be issues with disclosing complainant or witness identities and claiming privilege may assist to protect confidentiality of participants. It may also assist with the management of ongoing employee relationships. If an investigation report contains inflammatory comments by one witness about another, this may reduce the chances of those employees being able to successfully work together in the

Snapshot

- The recent Fair Work Commission decision of *Kirkman v DP World Melbourne Limited* [2016] FWC 605 provides pointers for successfully claiming privilege over an investigation report.
- There are many practical measures that can be taken to assist in structuring a workplace investigation to maximise the chances of attracting privilege.

future, regardless of the outcome of the investigation.

There may also be other information contained in the report (such as sensitive commercial information), which an employer wants to keep strictly confidential. There are situations where information disclosed or uncovered as part of an investigation is not directly relevant to the complaint but may be damaging to the employer if disclosed. If a report is privileged, this limits the potential scope for damage. Notwithstanding these potential benefits to claiming privilege, the dominant purpose test will always apply in order to establish if privilege can be claimed.

Despite the potential benefits, many employers opt not to claim privilege over investigation reports. Most commonly, this is because an employer seeks to openly rely on the detail of the investigation report to support its decision making process. This is particularly the case for many publicly funded clients, where the transparency of the process is deemed critical. Some employers also take the view that providing a copy of the investigation report to a complainant or respondent employee may decrease the chances of an employee pursuing an action against

their employer.

Not providing the relevant employee with the investigation report in certain circumstances can also raise questions about procedural fairness. For example in *Wirth v Mackay Hospital and Health Service & Another* [2016] QSC 39, Bond J made an interesting comment about the potential 'practical injustice' of a decision-maker claiming privilege over a report and refusing to provide a copy to the person about whom the decision was made. However, in the circumstances of that case, Bond J did not make any finding on this issue.

DP World case

Assuming a client does want to claim privilege over an investigation report, what is the best way to achieve this? In the recent *DP World* case, Deputy President Kovacic provided helpful commentary on the factors that indicate an investigation report will attract privilege.

By way of brief background, DP World had engaged an external investigator to investigate allegations about the conduct of one of its employees - Mr Kirkman. The investigator provided an investigation report to DP World's external legal advisors. Some months after that investigation, DP World also carried out its own internal investigation and disciplinary process which resulted in the dismissal of Mr Kirkman.

Mr Kirkman brought an unfair dismissal application to the Fair Work Commission and sought access to certain documents, including the external investigation report ([2015] FWC 2563). Commissioner Bissett denied Mr Kirkman access to the external investigation report and several associated documents ('the documents') on the basis that they were not relevant to his unfair dismissal application.

Mr Kirkman's appeal of this decision was heard by a Full Bench ([2015] FWCFB 3995). While DP World objected to the documents being provided to Mr Kirkman and claimed legal professional privilege over the documents, the Full

Bench upheld Mr Kirkman's appeal and remitted DP World's claim of privilege to Deputy President Kovacic for determination. Deputy President Kovacic ultimately held that the documents were privileged (other than in respect of three documents) and he also held that DP World had not waived privilege over the documents. Importantly for the purposes of this article, Deputy President Kovacic referred to a number of factors or circumstances, which influenced his finding about the dominant purpose of the documents:

- DP World's external legal advisors sent a letter of engagement to the investigator which clearly indicated that the purpose of the investigation and report was to assist them in the preparation of advice to their client, DP World;
- the final investigation report was marked privileged and confidential;
- the investigator's communication was exclusively directed to DP World's external legal advisors, and only one email was copied to DP World;
- the investigator communicated to the respondent at their meeting that he had been engaged by DP World's external legal advisors;
- DP World made it clear in correspondence to Mr Kirkman's union at the time of the investigation that it would not be providing details of the investigator's appointment, a copy of the investigator's report, communications with the investigator or documentation the investigator would consider; and
- the investigator provided the investigation report to DP World's external legal advisors rather than DP World.

Deputy President Kovacic noted that some correspondence referred to DP World appointing the investigator. Other correspondence did not refer to privilege as the reason why DP World would not provide a copy of the investigation report. Ultimately, however, Deputy President Kovacic concluded that based on the material available to him, it was clear that the dominant purpose at the time the documents were created was to assist DP World's external legal advisors provide legal advice to DP World.

Waiver

Deputy President Kovacic also considered whether DP World had waived privilege over the investigation report. While

Mr Kirkman argued that DP World had referred to the findings of the investigation report in correspondence to him regarding the disciplinary process, Deputy President Kovacic held that the purpose of the partial disclosure was to afford Mr Kirkman an opportunity to respond to the allegations substantiated by the investigation and that privilege had not been waived.

DP World can be distinguished from the decision in *Bartolo v Dousta Galla Aged Services Ltd* [2014] FCCA 1517, which was an adverse action claim where a reverse onus applied. In *Bartolo*, the employer's external legal advisers conducted the investigation and provided legal advice in relation to the investigation. Subsequently, Mr Bartolo was dismissed and commenced proceedings in the Federal Circuit Court. In its defence, Dousta Galla sought to rely on the investigation report regarding the state of mind of the decision maker who made the decision to dismiss Mr Bartolo. Whelan J was satisfied that it would be unfair to allow the employer to do so without disclosing the investigation report. Accordingly, it was held that privilege over the investigation report had been waived.

Engaging separate firms or entities to conduct the investigation and provide any legal advice on the investigation can help reduce the risk of inadvertently waiving privilege over both the investigation report and legal advice at the same time. Arguably, an external investigator may be perceived as more objective, and reduce the scope for a potential conflict of interest. It is also worth bearing in mind that where a lawyer conducts the investigation, he or she could potentially be called during proceedings to give evidence about the investigation, which is a position most lawyers will want to avoid.

Practical tips for lawyers

Based on the reasoning adopted in the *DP World* case, the following practical steps will help support a claim that privilege should attach to an investigation report (and associated documents):

- ideally for privilege purposes, an employer's external legal advisers should appoint the investigator;
- ensure that there is a clear engagement letter in place which confirms precisely who is engaging the investigator. This is particularly important where an external law firm engages the investigator;
- as part of the investigation process, any correspondence issued to

the complainant(s), witnesses or respondent(s) should clarify precisely who has engaged the investigator;

- the engagement letter should clearly identify that the purpose of the investigation is to assist with the preparation of legal advice, or prepare for anticipated litigation, in relation to the particular complaint. Deputy President Kovacic relied heavily on the terms of the engagement letter in *DP World* in reaching his decision;
- ensure that the investigation report (and any draft reports) are marked privileged and confidential;
- where an external law firm is engaging the investigator, ideally all communications with the investigator should be directed to that firm. While there may be some issues around logistics (such as arranging witness interviews) which may involve direct contact between the investigator and the law firm's client, all key communications relating to the investigation should be directed to the law firm;
- where an employer is engaging an investigator directly, all communications should ideally take place between the investigator and the employer's in-house legal team;
- participants in the investigation should be informed that copies of the investigation report and associated documents will not be provided to them (unless a HR policy or procedure provides otherwise);
- it is recommended that an interview protocol be drafted, which outlines the parameters of the investigation process and deals with issues such as access to documents generated as part of the investigation. This should be discussed and given to each interviewee at the commencement of their interview for them to read and sign. It is also a useful document to outline employees' duties around confidentiality and victimisation.

Conclusion

Ultimately *DP World* is good news for lawyers and employers seeking to claim privilege over workplace investigation reports. It provides a practical example of how to structure a workplace investigation to maximise the chances of attracting privilege. **LSJ**