

Protecting reports from disclosure

by Philippa Murphy and Andrew Emmerson

The decision of *Perry v Powercor Australia Limited* is important for those involved in construction and engineering failures or incidents. Identifying the root cause of any failure is critically important to any investigation and potential litigation. Ensuring that your root cause reports are protected from disclosure may be important when assessing your risks and any potential liability.

Lessons for commissioning pre-litigation investigative reports

To best prevent disclosure of pre-litigation investigatory reports, or your root cause analysis, it is prudent to:

- arrange for the reports to be commissioned either through your inhouse lawyer or through your external law firm;
- record in specific instruction and correspondence the dominant purpose for which the report is being commissioned;
- use the report commissioned for a privileged purpose only for that purpose (as you may risk diluting the privileged purpose or waiving privilege if used for ancillary purposes); and
- where you have other legislative or internal reporting policies to comply with, ensure that a separate and distinct report is commissioned for compliance with those regimes, quarantining your pre-litigation investigatory report from such use.

The background

On 4 July 2011, Justice Robson handed down a decision (*Perry*) in the Supreme Court of Victoria which rejected a claim to client legal privilege over expert reports commissioned in the wake of the Black Saturday bushfires. Broadly, client legal privilege is a fundamental legal right which allows a party to confidentially investigate an incident, and to resist the production of expert reports and confidential communications to another party in the course of litigation.

After the Black Saturday bushfires, one specific fire northwest of Coleraine resulted in a claim against Powercor for negligent maintenance of the powerline, which passed over a farming property and was alleged to have failed and started the bushfire. The fire caused extensive damage to neighbouring land and one person suffered extensive burns to 40% of their body. Powercor's inhouse counsel was informed

on the day after the fire that the company's assets were the alleged cause of the fire. Importantly, the counsel formed the view that litigation against Powercor was likely to follow and, having met with the CEO, was asked to arrange an investigation into the fire to assist in providing legal advice to Powercor on its legal exposure.

A number of reports were commissioned by Powercor from different sources, all with a view to determining what, if any, role Powercor's assets had in causing the fire.



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Client legal privilege: preserving confidentiality and preventing disclosure

Under Australian common law (and now preserved in the uniform Evidence Acts), there are two means of attaining client legal privilege and resisting disclosure of such communications to an opposing party. These are whether the communication (the report) was created for the dominant purpose of:

- provision or receipt of legal advice (advice privilege); or
- use in anticipated or contemplated litigation (litigation privilege).

Where pre-litigation investigatory reports are commissioned with either of these as the paramount or prevailing purpose, then the report will be privileged and protected from disclosure.

In *Perry*, Powercor relied on both advice and litigation privilege to support its claim for client legal privilege over its pre-litigation reports into the cause of the specific bushfire.

The decision

The only issue required to be determined was whether or not the reports were confidential documents prepared for the dominant purpose of Powercor's lawyers

providing legal advice to Powercor or for Powercor being provided with professional legal services relating to an anticipated Australian proceeding.

Powercor argued that it was clear, from the evidence of its inhouse lawyer, that the reports had been commissioned for a privileged purpose, namely in advance of anticipated litigation arising from the fire, and for the provision of legal advice to the company.

The plaintiffs argued that while these may have been relevant purposes behind the commissioning of the reports, these were by no means the dominant purpose. The plaintiffs pointed to a number of other attendant purposes for which Powercor created the reports, including to:

- deal with issues that would be raised at the Royal Commission;
- comply with its reporting requirements under relevant legislation;
- inform its management so that Powercor could take whatever steps were necessary, including for its insurers; and
- to inform through Powercor's internal reporting policy as part of its normal business operations and asset management.

The judge determined that the reports were not created for a privileged purpose, as neither seeking advice nor preparing for anticipated litigation was the dominant purpose. As there were a multiple number of prevailing purposes, there was no dominant privileged purpose. The judge ordered that the reports be provided to the plaintiffs.

The decision reaffirms the need for pre-litigation investigatory reports to be for the dominant purpose of obtaining or receiving legal advice, or commissioned in circumstances where litigation is reasonably anticipated. Where investigatory reports are made for a multiplicity of purposes, such as compliance with internal reporting mechanisms, statutory obligations or director's duties, any privileged purpose will be diluted and thus not dominant, increasing the likelihood of disclosure of such reports.

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