



When (Legal) Privilege escalation Fails



Long Title

How Optus failed to stop the
forensic investigation report
from its 2022 data breach
being disclosed.



[Robertson v Singtel Optus Pty Ltd \[2023\] FCA 1392](#)
[Singtel Optus Pty Ltd v Robertson \[2024\] FCAFC 58](#)



Ms-dos_5 (C:)

6:00 PM

About Me



<https://blog.kavadias.net>



nicholas-kavadias



@nkav

```
Server - HyperTerminal
File Edit View Call Transfer Help
~$ whoami
Segmentation Fault (core dumped)
Disconnected Auto detect Auto detect SCROLL CAPS NUM Capture Print echo
```

About Me (cont.)



DISCLAIMER: This presentation does not constitute legal advice. Don't take legal advice from me.

What are we doing here tonight?

1. Why is this interesting?
2. Main data breach timeline
3. The class action
4. Legal theory
5. Reasons for the decision
6. What does it mean for cybersecurity?

Why this interesting?

“Entities should involve legal advisors early in a breach response to maximise privilege protection.”

“Accurately record and evidence the basis for any decision to commission a third-party provider to prepare a report.”



Why is this interesting? (cont.)



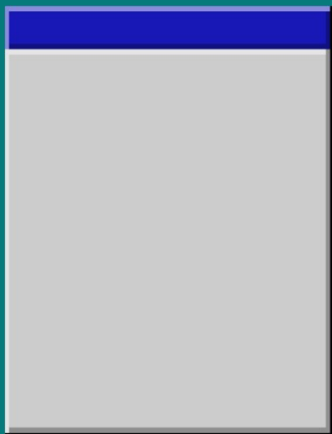
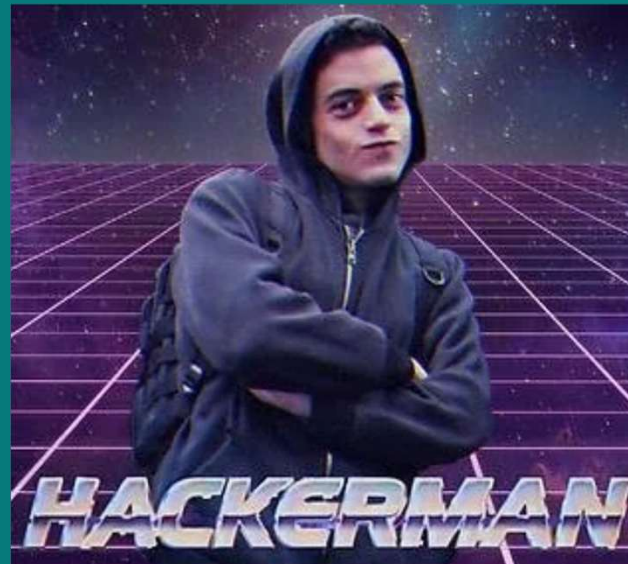
The Story: players



Optus CEO
Ms Rosmarin



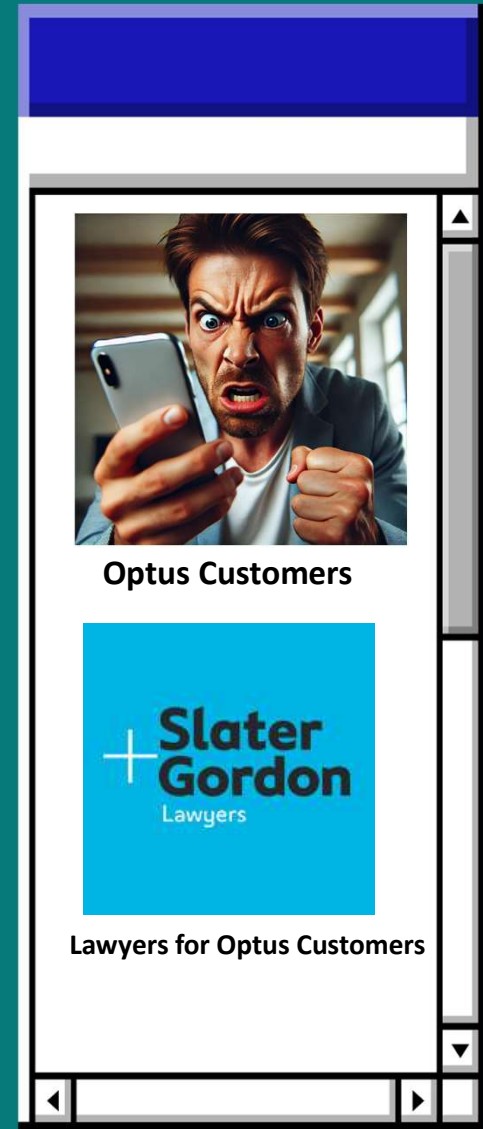
Consultants



General Counsel
Mr Kusalic



**External
lawyers**



The Story: Timeline

Date	Event
17 – 20 September 2022	Unauthorised access of 9.8 million customer data records
22 September 2022	Public announcement by Optus of cyber-attack & Optus lawyers up with Ashurst
26 -28 September 2022	Slater & Gordon and other law firms announce possibility of class actions, start signing up unhappy customers.
3 October 2022	Media press release by CEO announcing “independent external review” by Deloitte
9 October 2022	In-house lawyer drafts Optus board resolution to approve Deloitte’s engagement for external review
11 October 2022	Optus board approves revised circular for appointing Deloitte
17 October 2022	In house lawyer tells external lawyers (Ashurst) to write engagement letter to Deloitte, even though review is already underway
21 October 2022	Deloitte formally engaged by Ashurst to conduct review with terms of reference
13 July 2023	Deloitte submits final report to Optus and Ashurst

The Story you know

ABC NEWS

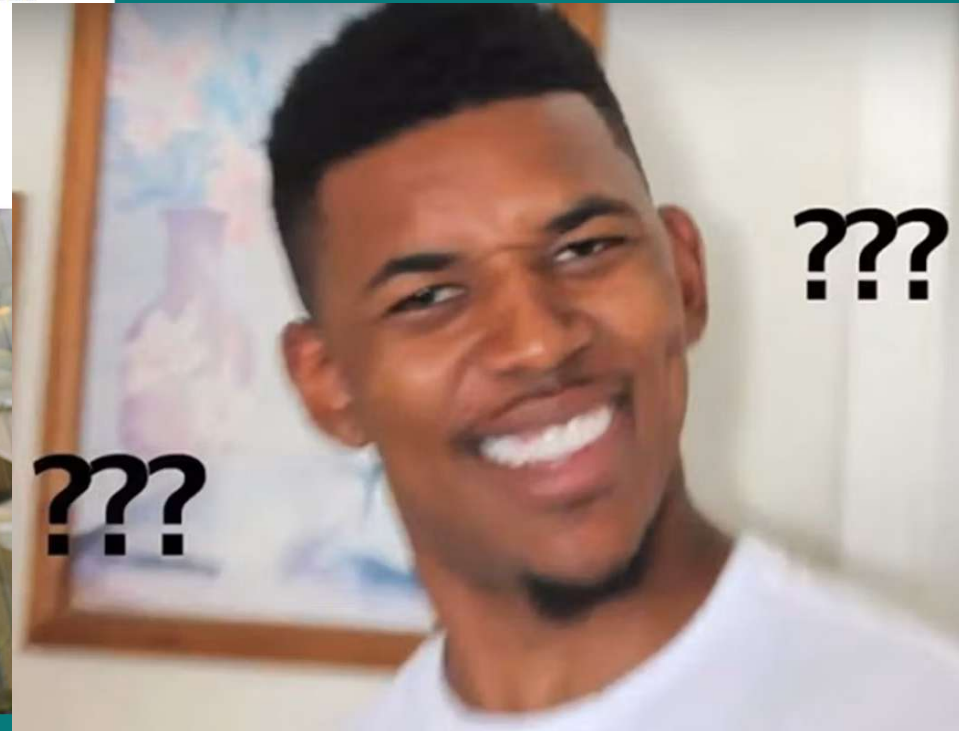
Search the news, stories & people

Log In

Online account claiming to be behind data leak apologises, drops ransom threat

Cyber Crime

Tue 27 Sep 2022



The Story you know (cont.)

ABC NEWS



Home Affairs Minister Clare O'Neil says Optus 'left the window open' for cyber criminals to conduct simple hack

By political reporter Jake Evans

Federal Government

Mon 26 Sep 2022



The class action



26 – 28 September 2022:

- Slater & Gordon and other law firms announce possibility of class actions, start signing up unhappy customers.

21 April 2023:

- Slater & Gordon file class action in Federal Court against Optus.
- Over 100,000 participants (still growing)
- The claim alleges Optus breached:
 - its contract with Optus customers;
 - the Privacy Act 1988 (Cth);
 - Australian Consumer Law; and
 - its duty of care to its customers (negligence)

Optus data breach class action launched for millions of Australians caught up in cyber attack

By Ben Knight and staff

Information Technology Industry

Fri 21 Apr 2023



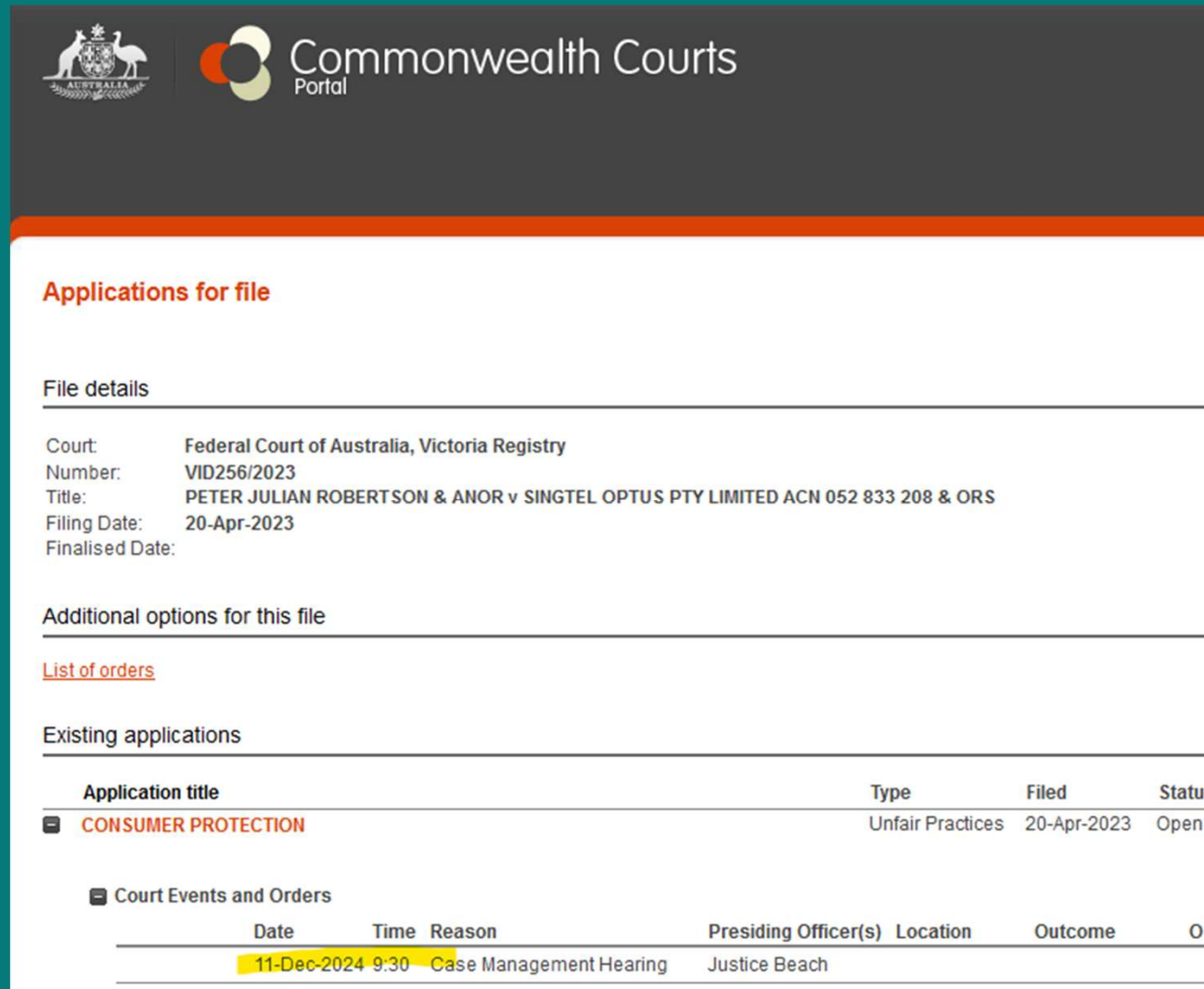
The class action (cont.)

- Join the class action:

<https://www.slatergordon.com.au/class-actions/current-class-actions/optus-data-breach>

- Online file for class action:

<https://www.comcourts.gov.au/file/Federal/P/VID256/2023/actions>



The screenshot displays the Commonwealth Courts Portal interface. At the top, the Australian coat of arms and the 'Commonwealth Courts Portal' logo are visible. The main heading is 'Applications for file'. Below this, the 'File details' section provides the following information: Court: Federal Court of Australia, Victoria Registry; Number: VID256/2023; Title: PETER JULIAN ROBERTSON & ANOR v SINGTEL OPTUS PTY LIMITED ACN 052 833 208 & ORS; Filing Date: 20-Apr-2023; Finalised Date: (blank). The 'Additional options for this file' section contains a link to 'List of orders'. The 'Existing applications' section features a table with columns for Application title, Type, Filed, and Status. One application is listed: 'CONSUMER PROTECTION' (Type: Unfair Practices, Filed: 20-Apr-2023, Status: Open). Below this, the 'Court Events and Orders' section contains a table with columns for Date, Time, Reason, Presiding Officer(s), Location, Outcome, and a final column. One event is listed: '11-Dec-2024 9:30 Case Management Hearing' (Presiding Officer(s): Justice Beach).

Commonwealth Courts Portal

Applications for file

File details

Court: Federal Court of Australia, Victoria Registry
Number: VID256/2023
Title: PETER JULIAN ROBERTSON & ANOR v SINGTEL OPTUS PTY LIMITED ACN 052 833 208 & ORS
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Finalised Date:

Additional options for this file

[List of orders](#)

Existing applications

Application title	Type	Filed	Status
CONSUMER PROTECTION	Unfair Practices	20-Apr-2023	Open

Court Events and Orders

Date	Time	Reason	Presiding Officer(s)	Location	Outcome	
11-Dec-2024	9:30	Case Management Hearing	Justice Beach			

The class action (cont.)

This decision has been appealed • [2024] FCAFC 58

FEDERAL COURT OF AUSTRALIA

Robertson v Singtel Optus Pty Ltd [2023] FCA 1392

File number: VID 256 of 2023

Judgment of: BEACH J

Date of judgment: 10 November 2023

Catchwords: LEGAL PROFESSIONAL PRIVILEGE – privilege – third party report – investigation into cyber-attack – whether multiple purposes – deficiencies in evidence – common law principles – whether document created for dominant purpose of legal advice – waiver of privilege – privilege claim not made out

Cases cited: *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Limited (No 4)* [2014] FCA 796
AWB Ltd v Cole (No 5) (2006) 155 FCR 30
Commissioner of Australian Federal Police v Propend Finance Pty Limited (1997) 188 CLR 501
Kirby v Centro Properties Ltd (No 2) (2012) 87 ACSR 229
Mann v Carnell (1999) 201 CLR 1
Osland v Secretary, Department of Justice (2008) 234 CLR 275
Pratt Holdings Pty Ltd v Commissioner of Taxation (2004) 136 FCR 357
Singapore Airlines Ltd v Sydney Airports Corporation [2004] NSWSC 380
TerraCom Ltd v Australian Securities and Investments Commission (2022) 401 ALR 143

FEDERAL COURT OF AUSTRALIA

Singtel Optus Pty Ltd v Robertson [2024] FCAFC 58

Robertson v Singtel Optus Pty Ltd [2023] FCA 1392

VID 986 of 2023

MURPHY, ANDERSON AND NESKOVICIN JJ

27 May 2024

PRIVILEGE – legal professional privilege – third party report – investigation into cyber-attack – whether the report was created for the dominant purpose of legal advice – multiple purposes for commissioning report – unchallenged evidence – adverse inference – failure to adduce specific and focused evidence – time for assessing dominant purpose

PRACTICE AND PROCEDURE – application for leave to appeal – whether leave to appeal against interlocutory ruling ought to be granted – leave denied

Evidence Act 1995 (Cth) s 75

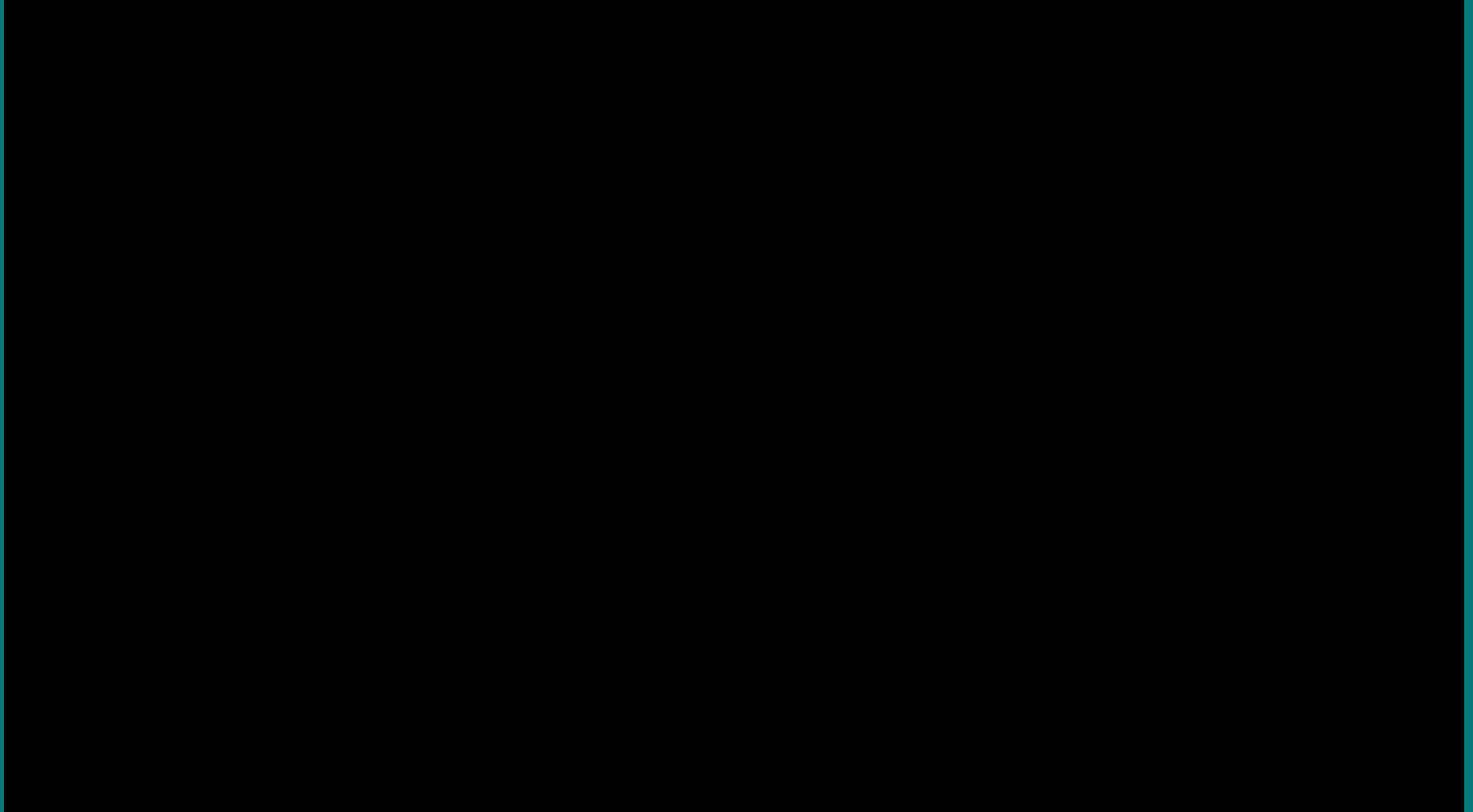
What is Discovery?



What is client-legal privilege?



What is client-legal privilege?



Client-legal privilege (cont.)

- Foundation of the ***dominant purpose test***:

"A document is privileged if it was brought into existence for the dominant purpose of giving or obtaining legal advice or preparing for litigation."

Esso Australia Resources Ltd v Commissioner of Taxation [1999]
HCA 67 (Esso case)



- Burden of proof on the asserter
- Multi-purpose OK, but dominant must be legal advice
- The privileged communication/document must be kept confidential

Client-legal privilege (cont.)

“One practical test is to ask whether the communication... [or] document would have been brought into existence irrespective of the obtaining of legal advice”

Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Limited (No 4) [2014] FCA 796.



The Story: Timeline

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FAIL

3 October 2022

Optus commissions independent external review of cyberattack

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.

Press Release

"The media message being massaged by the CEO and the SOPL Board was all about the Deloitte review being carried out to identify the cause of what occurred so that rectification steps could be carried out to prevent a recurrence."

Beach J

Press Release (cont.)



3 October 2022

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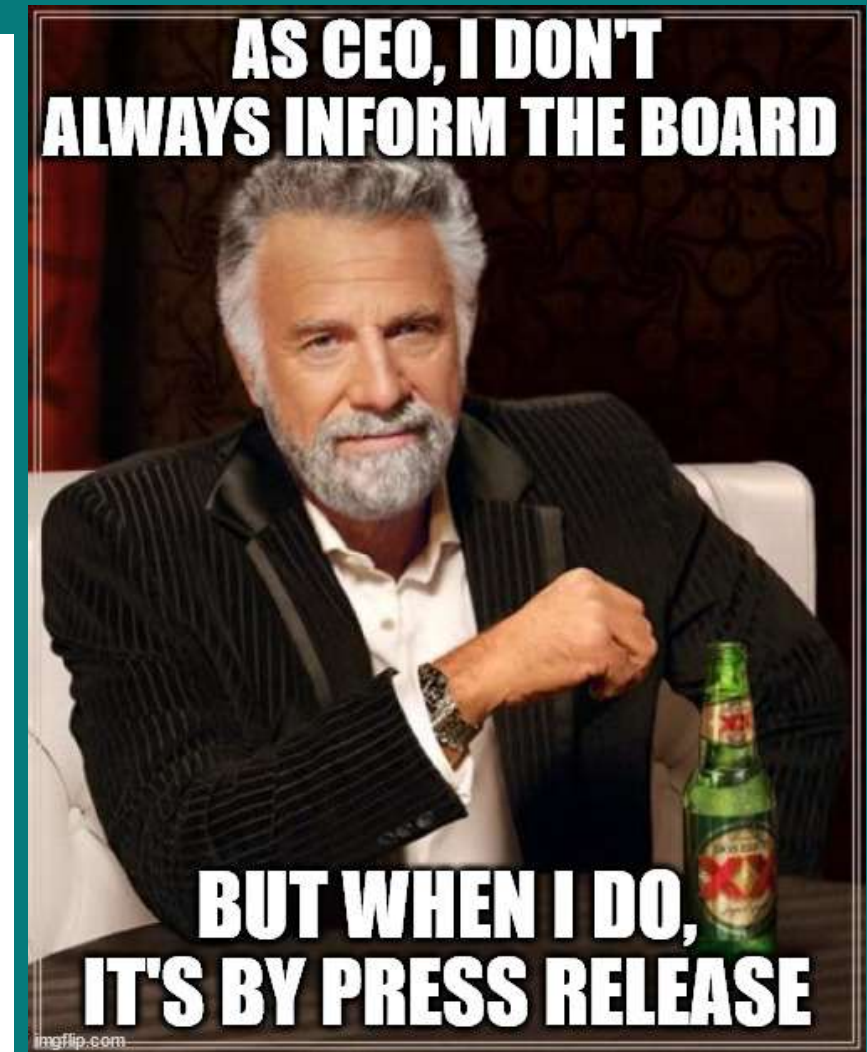
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Optus Board Resolution

Date	Event
9 October 2022	In house lawyer (also the secretary) drafts Optus board resolution to approve Deloitte's engagement for external review
11 October 2022	Optus board approves revised circular for appointing Deloitte

The directors of Optus RESOLVE:

- (a) that Deloitte be appointed to undertake independent external forensic reviews of the Cyberattack, including:
1. to identify the circumstances and root causes leading to the Cyberattack;
 2. to review Optus's management of cyber risk in the context of the applicable cyber risk management policies and processes in connection to the Cyberattack; and
 3. to review the Cyberattack incident response, and the appropriateness of actions taken, having regard to the existing crisis management policies and procedures; and
- (b) that, in relation to the reviews, Optus management be requested to report back to the Board, and in accordance with the Optus delegation framework.

Request

Please find attached for your consideration and approval circular resolutions approving the appointment of Deloitte to carry out a forensic review of the recent cyberattack on Optus. I will circulate this for execution by DocuSign.

Context

- Further to the various briefings that have been provided in relation to the recent cyberattack, *Optus and Singtel have announced that Deloitte was being appointed to conduct an independent forensic review of this incident and Optus' cyber security systems, controls and processes relating to it.*
- *Whilst Deloitte has commenced urgent aspects of its reviews at the request of management, in support of this the Board is being asked to confirm the appointment of Deloitte to carry out the overall review into the incident.*

The Story: Timeline

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11 October 2022	Optus board approves revised circular for appointing Deloitte
17 October 2022	In house lawyer tells external lawyers (Ashurst) to write engagement letter to Deloitte, even though review is already underway
21 October 2022	Deloitte formally engaged by Ashurst to conduct review with terms of reference *here, Ashurst mentioned privileged advice*
13 July 2023	Deloitte submits final report to Optus and Ashurst



The Appeal

FEDERAL COURT OF AUSTRALIA

FEDERAL COURT OF AUSTRALIA

Robertson v Singtel Optus Pty Ltd [2023] FCA 1392

File number: VID 256 of 2023

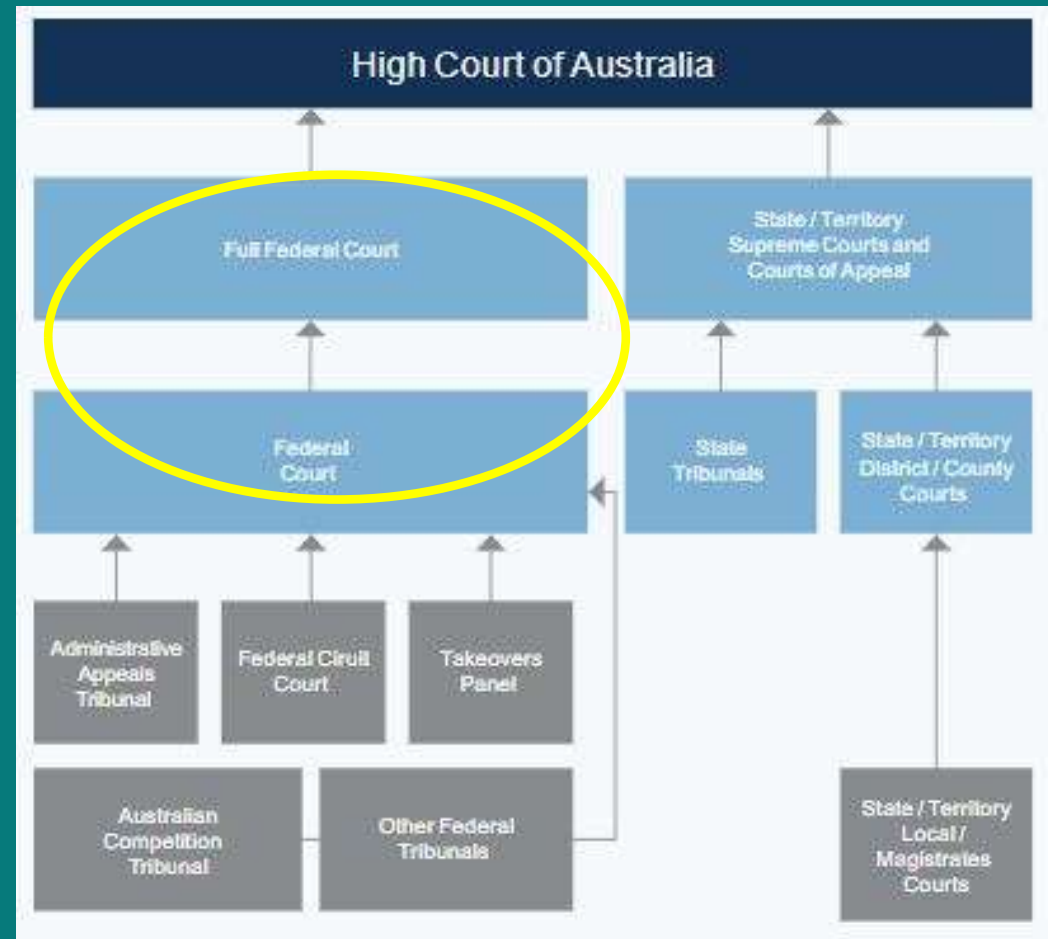
Judgment of: BEACH J

Date of judgment: 10 November 2023

dominant purpose
PRACTICE AND PROCEDURE – application for leave to appeal –
whether leave to appeal against interlocutory ruling ought to be granted
– leave denied

Legislation: [Evidence Act 1995 \(Cth\) s 75](#)

Cases cited: [Ashby v Slipper](#) [2014] FCAFC 15; (2014) 219 FCR 322
[Attorney-General \(NSW\) v Melco Resorts & Entertainment Ltd](#) [2020] NSWCA 40; 102 NSWLR 47; 380 ALR 1
[Australian Securities and Investments Commission v Nouri](#) [2024] FCA 349
[Australian Securities and Investments Commission v RI Advice Group Pty Ltd](#) [2020] FCA 1277; 148 ACSR 1
[AWB Ltd v Cole \(No 5\)](#) [2006] FCA 1234; 155 FCR 30
[Barnes v Commissioner of Taxation \(Cth\)](#) [2007] FCAFC 88; 242 ALR 601
[Browne v Dunn](#) (1893) 6 R 67; 1 WLUK 44



What does it all mean?



“Channelling material through lawyers or having lawyers make the retainer, belatedly, cannot cloak material with any privilege that it did not otherwise have”

Beach J [161]

Thank you

Questions?

