



HERBERT
SMITH
FREEHILLS

LawyersWeekly MASTERCLASS SERIES

MANAGING INTERNAL INVESTIGATIONS

WORKBOOK

2 June 2021

Presenters:

Jason Betts,
Partner, Herbert Smith Freehills

Christine Tran,
Partner, Herbert Smith Freehills

Moderator:

Jerome Doraisamy,
Deputy Editor, Lawyers Weekly

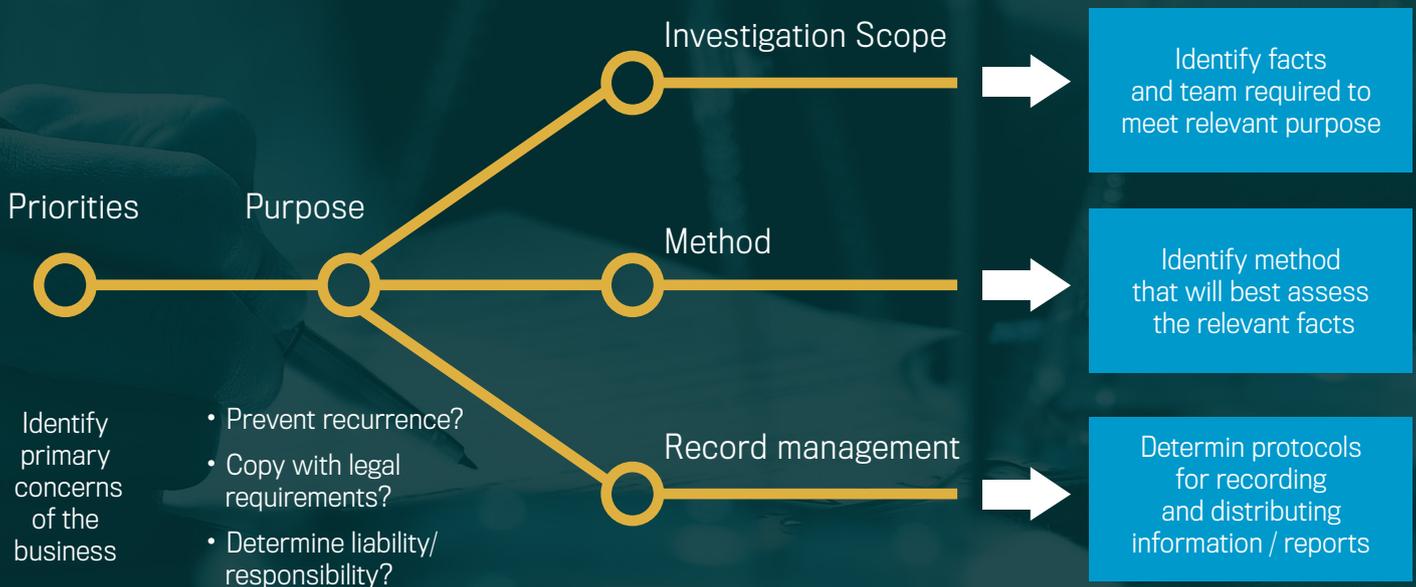
Investigation Framework

Could this issue result in:

- regulatory action;
- class action proceeding;
- third party liability; or
- criminal prosecution?

If the answer is “Yes” or “I don’t know”, then you need to think about conducting the investigation in a way that minimises these risks and, if possible, attracts privilege.

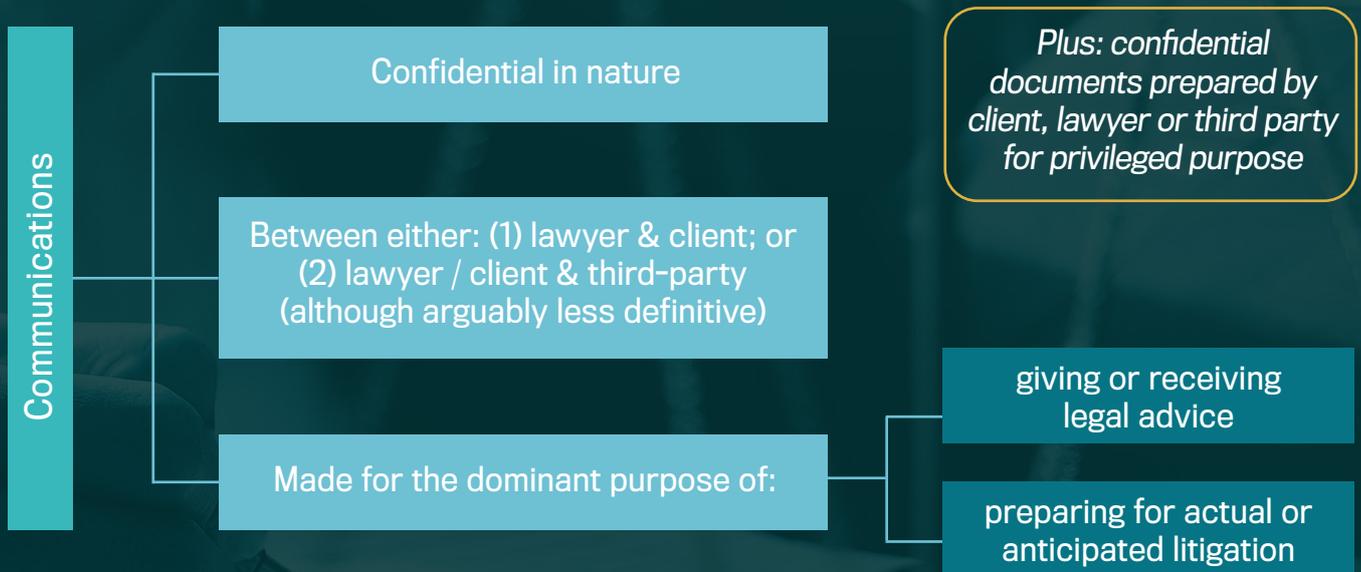
What are the key stages of an internal investigation?



What are the possible competing priorities and how do you balance them?

Privilege in internal investigations

A refresher on legal professional privilege



Key questions to consider:

- What is the dominant purpose of a document?
- When will legal privilege be lost?
- What is the effect of creating documents without legal privilege?

Document management

What considerations are relevant to record management?



What considerations are relevant to document retention and collation?

Difficulties at outset of investigation of knowing who and what is relevant

Important therefore to apply a logical thought process (which custodians, which time periods, which applications) and maintain a clear audit trail: structured discussion about type, source, location of documents

Subject to any cost implications, consider preserving (but not necessarily harvesting) more, rather than less

Suspend relevant routine destruction policies for potentially relevant data



Structuring internal investigations

You're an in-house lawyer. It is Monday evening and you receive an email containing a whistleblower report. It alleges large scale fraud committed by a number of named employees in relation to customer accounts. The report does not contain other supporting detail or evidence.

The CEO tells you that the Company needs to understand the veracity of the report and its possible legal exposure and reporting obligations.

You are asked to structure the internal investigation to preserve privilege over the investigation materials.

Do you:

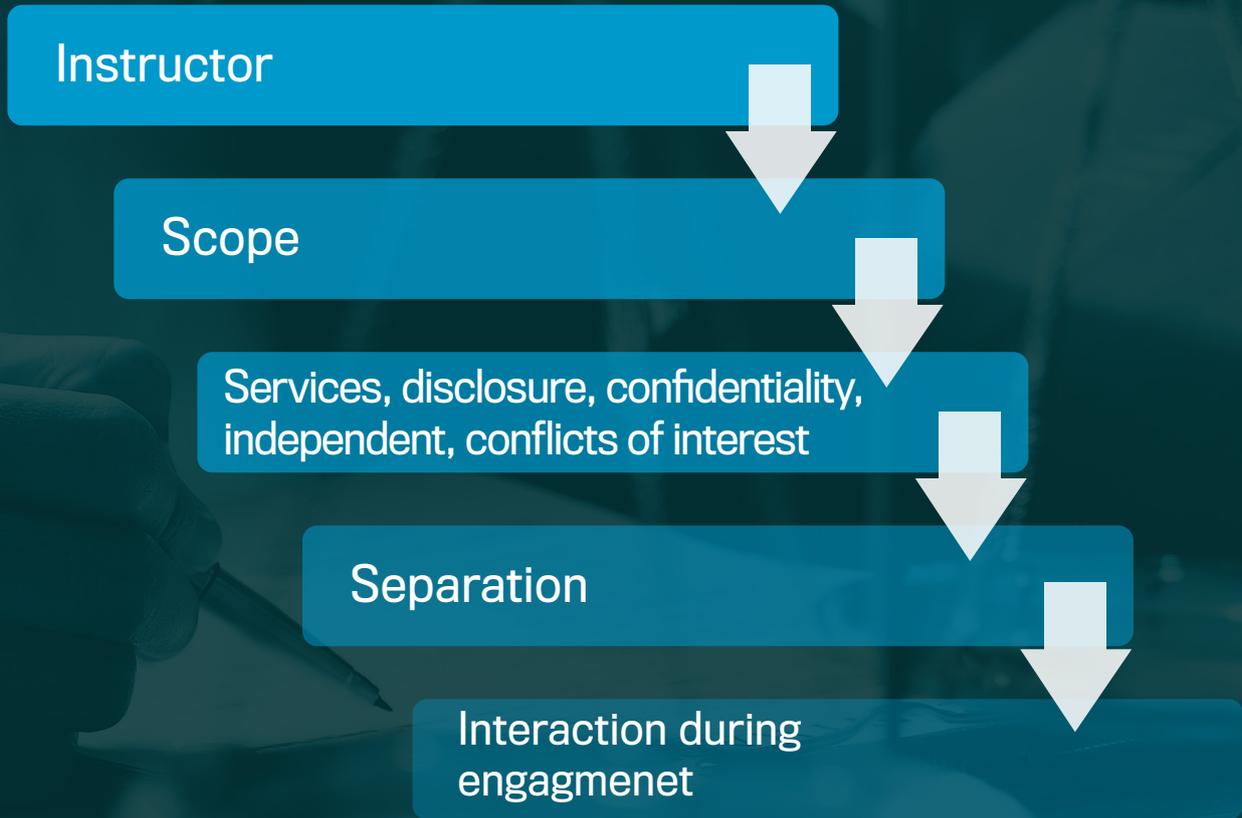
1. engage external lawyers to provide legal advice, including necessary fact finding
2. use your in-house legal team to provide legal advice, including necessary fact finding
3. engage forensic accountants to investigate and provide findings to the lawyers
4. ask the internal risk or audit team to investigate and provide findings to the lawyers
5. establish two work-streams, one to obtain legal advice, the other to assist in identifying root causes and remediation

What are the specific challenges related to legal privilege in this context?

What are the practical implications in structuring this investigation?

Engaging external legal advisers

How do we structure the engagement?



Fact gathering

What are the factors involved in considering whether to conduct interviews?

How should the interview be conducted?

Closing out

Reporting to decision makers

Can you provide written progress updates on the investigation for the company's executive committee without waiving privilege?



Remedial steps

- Investigations require organizations to look both ways to:
 - protect the company and its staff from legal and reputation risk; and
 - to ensure all reasonable action is taken to address the causes and prevent a recurrence
- Careful balance between operational risk management, commercial risk management and legal risk management
- Communications are crucial
- Preparation is key
 - Does your system need to change?
 - Do your people understand the issues?

Golden rules

What to do

- Properly consider the investigation plan and purpose at the outset
- Test whether the investigation can and should be conducted as a privileged exercise
- Control the dissemination of information
- Manage conflicts or potential conflicts
- Address and manage any multi-jurisdictional dimensions

What not to do

- Trust the investigation plan as 'set and forget'
- Include unnecessary commentary or speculation in investigation findings
- Not reassessing reporting obligations

Additional notes

LawyersWeekly

Lawyers Weekly is the authoritative source of independent news, analysis and opinion about the business of law in Australia. Published daily, and reaching over 130,000 lawyers, www.lawyersweekly.com.au is the essential resource for news, business and market developments for legal businesses and practitioners - both corporate and in-house. In addition to its digital platform and awards, including the 30 Under 30, the Australian Law Awards and the Women in Law Awards, the quarterly Lawyers Weekly print magazine brings the best of in-depth reporting and feature writing to leaders in the profession. Lawyers Weekly not only takes pride in its news-breaking reporting, but also in its active role in shaping and progressing the way legal business is conducted in Australia.