Equity Division
Supreme Court
New South Wales

Case Name:	**Komlotex Pty Ltd v AMP Ltd**
Medium Neutral Citation:	**[2022] NSWSC 1525**
Hearing Date(s):	12 October 2022
Date of Orders:	9 November 2022
Date of Decision:	9 November 2022
Jurisdiction:	Equity - Commercial List
Before:	Rees J
Decision:	Motion to produce unredacted documents dismissed with costs.
Catchwords:	EVIDENCE – client legal privilege – defendant has in-house and external lawyers – external lawyers retained to conduct "independent" investigation and advise board – investigation reveals employee misconduct – external lawyers retain consultant to conduct "independent" workplace investigation – external lawyer's investigation report later produced to Banking Royal Commission. PRIVILEGE – difficulty adducing evidence in support of claim due to authors leaving employ – whether Court should inspect documents – principles at [7]-[12] – *Hancock v Rinehart* does not introduce 'two-step' process – exercise discretion to inspect documents. DOMINANT PURPOSE – principles at [33]-[39] – a purpose was to persuade regulator that defendant was taking the matter seriously – dominant purpose was to provide defendant with legal advice. WAIVER – principles at [111]-[112] – whether waiver of external legal advice led to waiver of in-house advice – whether waiver over subsequent legal advice – issue waiver – no waiver.

Legislation Cited:	*Australian Securities and Investments Commission Act 2001* (Cth) *Corporations Act 2001* (Cth) *Evidence Act 1995* (NSW), ss 118, 119, 142 *Superannuation Industry (Supervision) Act 1993* (Cth) Uniform Civil Procedure Rules 2005 (NSW), r 1.8
Cases Cited:	*789Ten v Westpac Banking Corporation Ltd* [2005] NSWSC 123; (2005) 215 ALR 131 *Archer Capital 4A Pty Ltd (as trustee for the Archer Capital Trust 4A) v Sage Group plc (No 2)* [2013] FCA 1098; (2013) 304 ALR 384 *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 *AWB Ltd v Cole (No 5)* (2006) 155 FCR 30; [2006] FCA 1234 *Barnes v Commissioner of Taxation* [2007] FCAFC 88; (2007) 242 ALR 601 *Bowker v DP World Melbourne Ltd* [2015] FWC 7887 *Cantor v Audi Australia Pty Ltd* [2016] FCA 1391 *Chen v City Convenience Leasing Pty Ltd* [2005] NSWCA 297 *Commissioner of Taxation v Rio Tinto Limited* (2006) 151 FCR 341; [2006] FCAFC 86 *Cooper v Hobbs* [2013] NSWCA 70 *Council of the New South Wales Bar Association v Archer* (2008) 72 NSWLR 236; [2008] NSWCA 164 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543; [2002] HCA 49 *DSE (Holdings) Pty Ltd v Intertan Inc* (2003) 135 FCR 151; [2003] FCA 1191 *Esso Australia Resources Ltd v Commissioner of Taxation (Cth)* (1999) 201 CLR 49; [1999] HCA 67 *Expense Reduction Analysts Group Pty Limited v Armstrong Strategic Management and Marketing Pty Limited* (2013) 250 CLR 303; [2013] HCA 46 *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 *Gibbins v Bayside Council* [2020] NSWSC 1795 *GR Capital Group Pty Ltd v Xinfeng Australia International Investment Pty Ltd* [2020] NSWCA 266 *Grant v Downs* (1976) 135 CLR 674 *Hancock v Rinehart (Privilege)* [2016] NSWSC 12 *Hastie Group Ltd (in liq) v Moore* [2016] NSWCA 305; (2016) 339 ALR 635 *In the matter of Global Advanced Metals Pty Ltd* [2019] NSWSC 1545

In the matter of Northern Energy Corporation Ltd [2020] NSWSC 1073; (2020) 147 ACSR 572
Kirby v Centro Properties Ltd (No 2) [2012] FCA 70; (2012) 87 ACSR 229
Mann v Carnell (1999) 201 CLR 1; [1999] HCA 66
McKenzie v Cash Converters International Ltd [2017] FCA 1564
Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority (2002) 4 VR 332; [2002] VSCA 59
Neal v Neal [2018] NSWSC 1356
New South Wales v Jackson [2007] NSWCA 279
Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd (1985) 3 NSWLR 44
Price Waterhouse (a firm) v BCCI Holdings (Luxembourg) SA [1992] BCLC 583
R (Morgan Grenfell and Co Limited) v Special Commissioner of Income Tax [2003] 1 AC 563
R v Derby Magistrates' Court; Ex parte B [1996] AC 487
Rawlinson & Hunter Trustees SA v Akers [2014] EWCA Civ 136
Rawlinson and Hunter Trustees SA v Akers [2013] EWHC 2297 (QB)
Rinehart v Rinehart [2016] NSWCA 58
SA E.Med Pty Ltd v Calvary Health Care Adelaide Ltd (No 2) [2011] FCA 835
Stephen v Seahill Enterprises Pty Ltd [2021] FWCFB 2623; (2021) 306 IR 140
Stewart v State of Victoria (No 2) [2015] VSC 373
Sugden v Sugden (2007) 70 NSWLR 301; [2007] NSWCA 312
TerraCom Ltd v Australian Securities and Investments Commission [2022] FCA 208; (2022) 401 ALR 143
Three Rivers District Council v Governor and Company of the Bank of England (No 6) [2005] 1 AC 610
Traderight (NSW) Pty Ltd v Bank of Queensland Limited (No 16) [2013] NSWSC 418

Category: Procedural rulings

Parties: Komlotex Pty Ltd (First Plaintiff/First Applicant)
Fernbrook (Aust) Investments Pty Ltd (Second Plaintiff/Second Applicant)
AMP Limited (Defendant/Respondent)

Representation: Counsel:

	Mr C Moore SC / Mr J Entwisle (Plaintiffs/Applicants) Ms E Collins SC / Mr H Atkin (Defendant/Respondent) Solicitors: Maurice Blackburn (Plaintiffs/Applicants) Herbert Smith Freehills (Defendant/Respondent)
File Number(s):	2018/310118

JUDGMENT

1 **HER HONOUR:** This is a challenge to claims of client legal privilege. The defendant, AMP Ltd, has discovered some 29,000 documents in these proceedings. Claims for client legal privilege have been made in respect of part or all of some 9,000 documents. The plaintiffs challenge some of these claims.

2 Specifically, the Court is asked to determine the claims for privilege in respect of 27 sample documents. On the basis of these rulings, the parties expect to resolve the remaining claims for privilege between themselves, following the approach adopted by Ball J in *Traderight (NSW) Pty Ltd v Bank of Queensland Limited (No 16)* [2013] NSWSC 418. The sample documents fall into two broad categories:

(a) documents which relate to AMP's retainer of Clayton Utz in respect of an investigation undertaken by the Australian Securities and Investments Commission (*ASIC*), which became known as the "fees for no service" investigation; and

(b) documents which relate to AMP's engagement via Clayton Utz of another legal practice, Workdynamic Australia, to conduct an investigation and provide advice in relation to employment law matters, referred to as "*Project White*".

3 AMP claimed legal advice privilege under section 118 of the *Evidence Act 1995* (NSW) in respect of both categories of documents and, in addition, litigation privilege under section 119 of the *Evidence Act* in respect of the Project White documents. Three issues arose:

(a) whether AMP's evidence in support of its claim for privilege was of sufficient cogency that the Court ought inspect the documents when determining the claim for privilege, or should simply reject the claim;

(b) whether the "*dominant purpose*" of the confidential communications was the provision of legal services to AMP; and

(c) whether privilege in the first category of documents has been waived by AMP's production of an investigation report prepared by Clayton Utz (the *CU Report)* to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

4 As the existence of privilege is heavily dependent upon the circumstances which exist when the document was created, I have considered the sample documents in chronological order to enable me to bear those circumstances in mind. I will endeavour, however, to draw these 'threads' together at the end, to the extent that it may assist the parties to resolve any remaining privilege disputes without recourse to the Court: see [127].

5 The plaintiffs relied on the evidence of their solicitor, Vavaa Mawuli. AMP relied on the evidence of its solicitor, Jason Betts, and Group General Counsel, David Cullen. There was no cross-examination.

6 The principles were largely not in dispute and set out in the parties' comprehensive written submissions. Obviously, AMP bears the evidentiary and persuasive onus of proving the facts to support the privilege claim: *Grant v Downs* (1976) 135 CLR 674 at 689 (per Stephen, Mason and Murphy JJ). The plaintiffs bear the onus of establishing that privilege has been waived: *Archer Capital 4A Pty Ltd (as trustee for the Archer Capital Trust 4A) v Sage Group plc (No 2)* [2013] FCA 1098; (2013) 304 ALR 384 at [100] (per Wigney J). The standard of proof is on the balance of probabilities: section 142, *Evidence Act*.

INSPECTION OF DOCUMENTS

7 Dealing with the first issue, the Court may inspect documents subject to privilege claims: section 133, *Evidence Act*; rule 1.8, Uniform Civil Procedure Rules 2005 (NSW). The plaintiffs contended that, for six of the sample

documents, AMP's evidence in support of the claim for privilege did not satisfy a "minimum threshold" such that the Court should not exercise its discretion to inspect the documents but should simply reject the claim: *Hancock v Rinehart (Privilege)* [2016] NSWSC 12 (per Brereton J, as his Honour then was).

8 I considered a similar argument in *In the matter of Global Advanced Metals Pty Ltd* [2019] NSWSC 1545, where I reviewed *Hancock v Rinehart (Privilege)* at first instance and on appeal in *Rinehart v Rinehart* [2016] NSWCA 58: at [7]-[13] (per Beazley P, Leeming and Simpson JJA). In short, there a well-resourced litigant advanced *no evidence* in support of her claim of privilege, nor any explanation for the "conspicuous deficiency" in evidence. Nor was it impossible to adduce evidence from Gina Rinehart or her lawyers who had been engaged when the documents were prepared: *Rinehart v Rinehart* at [26]-[27]. As first instance, Brereton J concluded that, in these circumstances, "it would be contrary to justice to uphold her claim solely on the basis of an inspection of the documents": *Hancock v Rinehart* at [36]. On appeal, the Court concluded that a deliberate forensic choice had been taken to adduce no evidence in support of the claim for privilege and the Court should not itself review the documents over the opposition of the plaintiffs: *Rinehart v Rinehart* at [39].

9 I do not consider that *Hancock v Rinehart (Privilege)* establishes a strict two-stage process for considering claims for privilege, where the Court must first be satisfied that the party claiming privilege has adduced evidence to a certain level of detail and quality before deciding whether to inspect the documents. In some instances, one may simply point to the *nature* of the documents in order to establish a claim for privilege: *Grant v Downs* at 689. In *Hastie Group Ltd (in liq) v Moore* [2016] NSWCA 305; (2016) 339 ALR 635, whilst acknowledging Brereton J's statements in *Hancock v Rinehart (Privilege)*, Beazley P and Macfarlan JA observed that the Court is not confined to express statements made in support of a claim for privilege and may *draw inferences* from other proven facts: at [33]-[34]. For example, in *Neal v Neal* [2018] NSWSC 1356, Hallen J accepted a simple and global description of the basis of a claim for privilege, where a subpoena sought production of a solicitor's file in a family law

matter. The solicitor's affidavit, albeit brief, "would, as a matter of common sense, be more likely than not. It is an inference that can, and should, be drawn": at [15].

10 The fact that a claim for privilege is devoid of supporting evidence – such that the burden of determining whether the claim for privilege is sound is, effectively, cast entirely on the Court – is certainly relevant to the exercise of discretion to inspect the document. Beyond this, however, the powers of the Court to inspect documents are "wide and should not be unduly circumscribed": *Rinehart v Rinehart* at [20].

11 Further, where there is a *reason* why the party claiming privilege has been unable to adduce detailed evidence in support of the claim, the Court may be reluctant to reject the claim for privilege outright, given the importance of the privilege as a fundamental common law right: *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543; [2002] HCA 49; at [9]-[11]. The privilege exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers: *Esso Australia Resources Ltd v Commissioner of Taxation (Cth)* (1999) 201 CLR 49; [1999] HCA 67 at [35]; *Cantor v Audi Australia Pty Ltd* [2016] FCA 1391 at [56] (per Bromwich J). As Lord Taylor CJ described it in *R v Derby Magistrates' Court; Ex parte B* [1996] AC 487, "Legal professional privilege … is a fundamental condition on which the administration of justice as a whole rests": at 507.

12 Thus in *Global Advanced Metals*, the party claiming privilege had made an effort to adduce evidence but the solicitor's affidavit was inadmissible, likely by reason of the urgent circumstances in which the issue was been brought before the Court whilst a parallel substantive hearing was underway. I there noted, "I am not sure that much is to be gained by rejecting a party's claim for privilege out of hand in those circumstances, particularly as it may have the result of abrogating an important privilege … due to their solicitor's drafting infelicity": at [14]. The party was given a further opportunity to put on evidence.

13 Here, AMP encountered difficulties marshalling affidavit evidence to support its claim for privilege. At the time of the communications in respect of which privilege is claimed:

(a) Catherine Brenner was the chairman of AMP,

(b) Craig Meller was chief executive officer, and also a director, of AMP,

(c) Jack Regan was Group Executive, Advice, Australia and New Zealand,

(d) Brian Salter was Group General Counsel and the head of AMP's in-house legal team, and

(e) amongst those reporting to Mr Salter was Larissa Baker Cook, the Head of Litigation, and Peta Bissell, the Head of Commercial Legal.

14 At the time of this application, the authors of the documents in question had left AMP, largely as a consequence of the subject matter of the substantive proceedings. While Mr Cullen provided details of the basis for the maintenance of privilege in respect of the sample documents, he was not the author or recipient of any of the documents and did not become Group General Counsel until after most of the documents had come into existence: see [118]. Indeed, for this reason, Mr Cullen's affidavit was the subject of wholesale objections.

15 That is, unlike in *Hancock v Rinehart (Privilege)*, it was not possible for AMP to adduce evidence from those involved in the preparation of the documents. To some extent, this difficulty was alleviated by AMP's waiver of privilege in the CU Report and related documents, which shed some light on what was happening at the time. However, it is also apparent from the nature of the documents, or may be readily inferred from the circumstances in which the document was created or shared, that the documents likely contained a

privileged communication: see [49], [57], [125] and [126]. I have no hesitation exercising my discretion to inspect the documents. Indeed, by and large, inspection was hardly necessary.

FACTS

16 On 27 May 2015, AMP self-reported breaches of the *Corporations Act 2001* (Cth), the *Australian Securities and Investments Commission Act 2001* (Cth) and *Superannuation Industry (Supervision) Act 1993* (Cth) to ASIC. Specifically, AMP advised that it had received ongoing advice fees in circumstances where an advisor had sold their "financial planning register" back to an AMP Advice Licensee. On 12 June 2015, ASIC advised AMP that it had commenced an investigation into major Australian financial services licensees charging advice fees without providing advice. This became known as the "fees for no services" investigation.

17 ASIC proceeded to conduct what appears to have been an extensive investigation, making multiple requests for the production of documents and conducting a number of compulsory examinations of AMP's current and former employees and authorised representatives under section 19 of the *ASIC Act*. AMP retained King & Wood Mallesons in relation to the ASIC investigation. AMP retained Clayton Utz to act for current and former employees. AMP retained K & L Gates to act for current and former authorised representatives. As Mr Cullen explained, AMP also had an in-house legal department, which appears to have been quite substantial.

18 One aspect of ASIC's investigation involved conduct described as the "90 Day Exception", by which ongoing service fees continued to be received after a client register was bought back by AMP as a "buyer of last resort". On 3 April 2017, ASIC issued a notice to AMP under section 33 of the *ASIC Act*, requiring the production of books in relation to the "90 Day Exception". The notice indicated that ASIC was then investigating numerous contraventions of the *Corporations Act* and *ASIC Act*, including breaches of directors' duties and false, misleading, deceptive and unconscionable conduct.

Retainer of Clayton Utz

19 In late April 2017, AMP terminated King & Wood Mallesons' retainer and engaged Clayton Utz to act in relation to ASIC's investigation. On 2 May 2017, Mr Salter advised ASIC that AMP had done so.

20 On 25 May 2017, Ms Baker Cook sent Mr Mavrakis and Mr Salter three documents which had been prepared by Clayton Utz or, perhaps, co-authored by AMP and Clayton Utz, being:

(a) a chronology in respect of ASIC's investigation;

(b) an "Investigation Plan Outline" detailing four work streams, of which Stream 1 related to ASIC's investigation; and

(c) speaking notes for a meeting with ASIC the following day.

The Investigation Plan Outline recorded work completed to date, consistent with AMP's evidence that it had retained Clayton Utz sometime earlier.

21 According to the speaking notes, collation of documents in answer to ASIC's notice of 3 April 2017 had brought to light documents which suggested that AMP's earlier explanation to ASIC that fees were charged as an "administrative error" was wrong. The chairman and chief executive officer had been informed of this matter, as had the board. The speaking notes stated: (emphasis in original)

> 3.1 … the Board wishes to get to the bottom of the underlying conduct of the business in relation to the failure to switch off fees during the buy-back arrangements, and AMPFP's response to the ASIC investigation.
>
> 3.2 To assist in that, the AMP Board has appointed Clayton Utz to undertake a root-and-branch external and independent investigation of these matters, with instructions to be taken from the Board via the General Counsel and Head of LDR, <u>who shall provide advice to and report directly</u> to the AMP Limited Board Chair and the CEO. Clayton Utz will be required to report <u>only</u> to the AMP Board through its CEO.

3.3 This investigation will be entirely independent of the business and is commissioned exclusively by the Board through the Chairman and the CEO.

3.4 The AMP Board regards this investigation as a necessary and critical means by which it can demonstrate its commitment to identifying the full nature and extent of any overcharging of OSFs in connection with the 90 Day Exception and the BOLR buy-back process more generally.

3.5 This work has already commenced and when it is concluded we shall seek to meet with you again to share AMP's conclusions (as opposed to the Clayton Utz work product and/or report).

22 The speaking notes confirm that Clayton Utz's work had "already commenced", consistent with AMP's evidence that it had retained Clayton Utz sometime earlier. Further, as the speaking notes were at pains to emphasise, AMP proposed to share its conclusions reached in light of Clayton Utz's work "as opposed to the Clayton Utz work product and/or report". It would appear that, if clarification was needed, the speaker was to make clear that AMP maintained confidentiality and privilege in confidential communications made between AMP and its lawyer.

23 Later that evening, Ms Brenner emailed her fellow directors, advising that she and Mr Meller, through Mr Salter and Mr Regan, had instructed Clayton Utz to undertake an investigation. Further, Mr Salter was in the course of settling the terms of the instructions with Clayton Utz. Clayton Utz's full final report would come to the board in due course.

Clayton Utz investigation

24 On 5 June 2017, Ms Brenner sent a letter of instruction to Clayton Utz, requesting that the firm undertake an independent investigation in respect of AMP's ongoing service fees and licensee buy-back arrangements. Ms Brenner repeated the history and concerns as outlined in the speaking notes, adding:

> … as part of the process of collecting the documents in response to [ASIC's notice of 3 April 2017], privileged internal legal advices came to light indicating that on a number of occasions, dating back to 2011, AMP Internal Legal had advised … that the 90 Day Exception … may not be in accordance with the law.

25 The letter of instruction stated that, given the concerns of the AMP board, Clayton Utz was now retained by the board to conduct its investigation independent of AMP's business. Further: (emphasis added)

> Investigation reporting
>
> At the conclusion of the investigation, Clayton Utz will provide to the AMP board the final report which shall set out your *findings and advice* in line with the Terms of Reference.
>
> Confidentiality and Legal Professional Privilege
>
> All work produced by Clayton Utz under this engagement is being brought into existence for the purpose of providing legal advice to AMP. Any documents or communications that are brought into existence by Clayton Utz under this engagement will be kept confidential and marked as "Privileged and Confidential".

26 As will become apparent, whilst the letter of instruction envisaged that Clayton Utz would provide the board with a final report setting out its findings *and advice*, as matters unfolded, the findings and advice were provided to the board separately, referred to here as the *CU Report* and *CU Advice* respectively.

27 Attached to the letter of instruction were Terms of Reference, which appear to have been a further draft of the "Investigation Plan Outline" referred to at [20]. In particular, Clayton Utz was to investigate the circumstances in which the 90 Day Exception rule or practice had arisen and why it was maintained in the face of a number of internal advices that it was contrary to law. Clayton Utz was also instructed to "determine whether the 90 Day Exception was in the opinion of Clayton Utz contrary to the law". That is, although AMP's internal lawyers had advised that the 90 Day Exception "may not be in accordance with the law", a more definitive opinion was sought from Clayton Utz.

Dominant purpose – Clayton Utz documents

28 It is timely to consider the second issue as it relates to documents generated following the retainer of Clayton Utz. The plaintiffs submitted that Clayton Utz was not engaged for the dominant purpose of providing legal advice to AMP. Rather, the dominant purpose was to gather evidence concerning the genesis of charging "fees for no service" so that AMP could report those findings to

ASIC and improve its internal governance. Despite the passing references to "legal advice" in the letter of engagement, it was said to be apparent that any such advice was ancillary to the main purpose of the engagement: Clayton Utz was performing the role of fact-finder to 'head off' further investigation by the regulator. Further, as Mr Regan later conceded in cross-examination before the Royal Commission, AMP "did not need to receive legal advice to know that [it] cannot charge somebody for services that [it is] not providing". Accordingly, the Court should find that all documents recording Clayton Utz' work or communications in connection with its engagement are not privileged.

29 The plaintiffs' submission may be thought somewhat cynical, perhaps infused by the dramatic events which unfolded when AMP's conduct and the CU Report were disclosed to the Royal Commission nine months after the letter of instruction. Whether privilege attaches to a document largely depends upon the circumstances at the time that the document was brought into existence: *Barnes v Commissioner of Taxation* [2007] FCAFC 88; (2007) 242 ALR 601 at [5] (per Tamberlin, Stone and Siopis JJ); *TerraCom Ltd v Australian Securities and Investments Commission* [2022] FCA 208; (2022) 401 ALR 143 at [34] (per Stewart J).

30 As to those circumstances, Clayton Utz was retained some six weeks before the letter of instruction of 5 June 2017 and by a retainer more broadly described than the terms of that letter. As Mr Salter told ASIC on 2 May 2017, "AMP has now decided to retain Nicholas Mavrakis of [Clayton Utz in Sydney] to act for AMP *in relation to ASIC's investigation*". By then, AMP had been investigated by ASIC for nearly two years. More important, it had recently become apparent from ASIC's notice of 3 April 2017 that ASIC was forming views that were seriously adverse to AMP and its directors. Further, as a consequence of collating documents in answer to the notice, it had also become apparent to AMP's board that the explanation which it had been given to date – that this was an "administrative error" – was wrong. Rather, AMP's staff had been charging "fees for no service" contrary to internal legal advice. Further still, AMP had been giving ASIC an explanation that was wrong.

31 The seriousness with which AMP viewed these developments is indicated by its decision to change lawyers. As part – but obviously not all – of its retainer, Clayton Utz was tasked to find out what had been going on in relation to the "90 Day Exception". Unsurprisingly, not only did AMP want to know what had happened, but also the legal implications for the company, where AMP and its directors faced the distinct possibility of enforcement action being taken by the regulator for contraventions of the *Corporations Act* and *ASIC Act*, including breaches of directors' duties and false, misleading, deceptive and unconscionable conduct. In these circumstances, retaining lawyers to provide legal advice was unremarkable. Indeed, it would have been more remarkable had AMP not done so.

32 Focusing then on the specific work with which Clayton Utz was tasked by the letter of instruction of 5 June 2017, whether the CU Report was commissioned for the dominant purpose of obtaining legal advice is no moot point, even though AMP has since waived privilege in the report. This is because the question whether AMP has thereby waived privilege in related documents depends on whether the CU Report was privileged in the first place.

Principles

33 Drawing on my judgment in *In the matter of Northern Energy Corporation Ltd* [2020] NSWSC 1073; (2020) 147 ACSR 572, for privilege to attach, the *dominant* purpose of the communication must be obtaining or giving legal advice. The "dominant purpose" is the ruling, prevailing or most influential purpose having the element of clear paramountcy: *789Ten v Westpac Banking Corporation Ltd* [2005] NSWSC 123; (2005) 215 ALR 131 at [22] (per Bergin J); *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 at 416. The Court will look at the document's 'purpose' from an objective standpoint, considering all relevant evidence including evidence of subjective purpose: *Rawlinson & Hunter Trustees SA v Akers* [2014] EWCA Civ 136 at [13]; *789Ten v Westpac* at [46].

34 A confidential communication with a legal adviser will not attract privilege unless the dominant purpose is to obtain or give *legal* advice rather than advice of a purely commercial or public relations nature, although the concept of legal advice will be interpreted widely so as to include advice as to what a client should prudently or sensibly do: *AWB Ltd v Cole (No 5)* (2006) 155 FCR 30; [2006] FCA 1234; at [47] (per Young J). In *DSE (Holdings) Pty Ltd v Intertan Inc* (2003) 135 FCR 151; [2003] FCA 1191, Allsop J stated at [52]:

> [T]he obligation of the lawyer to advise, once retained, is pervasive. It would be rare that one could, with any degree of confidence, say that a communication between client (or agent) and lawyer, in the circumstances of a retainer requiring legal advice and the directing of the client by a legal adviser, was not connected with the provision or requesting of legal advice. … too literal a requirement of identifying legal advice as express advice about the law would place undue emphasis on formalism and undermine the privilege.

35 Legal advice may include advice about what a client should prudently and sensibly do in connection with an investigation or inquiry: *AWB Ltd v Cole (No 5)* at [55], [57]. In that case, Young J referred to Lord Brown's observation in *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610 at [120]:

> [T]he process by which a client seeks and obtains his lawyer's assistance in the presentation of his case for the purposes of any formal inquiry — whether concerned with public law or private law issues, whether adversarial or inquisitorial in form, whether held in public or in private, whether or not directly affecting his rights or liabilities — attracts legal advice privilege.

36 Privilege may attach to factual investigations carried out by lawyers as well as reports prepared by non-lawyers so that advice may be given by lawyers: *Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd* (1985) 3 NSWLR 44 at 57-58 (reports from loss adjusters); *Kirby v Centro Properties Ltd (No 2)* [2012] FCA 70; (2012) 87 ACSR 229 at [49]-[92] (factual investigations by solicitors); *TerraCom Ltd v ASIC* (investigation report prepared by accountants prepared for the dominant purpose of solicitors providing legal advice). The focus remains on the '*dominant purpose*' for which the report was obtained.

37 For example, in *Price Waterhouse (a firm) v BCCI Holdings (Luxembourg) SA* [1992] BCLC 583, an auditor provided a report to a bank's lawyers. Millett J held that the dominant purpose of the report was to establish the bank's financial position. The auditor's report did not attract privilege merely because legal advice might be necessary in order to fully evaluate the financial implications of the facts, or because recovery proceedings may need to be taken in the future. Whilst aspects of Millett J's judgment which are not presently relevant were overturned or have been disapproved (*R (Morgan Grenfell and Co Limited) v Special Commissioner of Income Tax* [2003] 1 AC 563 at [37]; *DSE (Holdings)* at [80]-[96]), the assessment of "dominant purpose" continues to be cited: *Rawlinson and Hunter Trustees SA v Akers* [2013] EWHC 2297 (QB) [54]-[55], upheld on appeal in *Rawlinson & Hunter Trustees SA v Akers* [2014] EWCA Civ 136 at [16]-[18]. See likewise *789Ten v Westpac*.

38 Closer to home, in *Gibbins v Bayside Council* [2020] NSWSC 1795, the Council retained an engineer to prepare a report following a serious injury on a water slide. Harrison J did not accept a claim for privilege in respect of the report as, although one of the purposes for which the report was commissioned was so that the Council's legal advisers could provide legal advice, another purpose was to decide whether or not to demolish the slide. His Honour concluded that "whatever might have been the relevant purpose, neither was dominant", and thus the report was not privileged: at [41].

39 Where the purpose of obtaining legal advice is to provide it to a third party such as a regulator, then the implications for 'dominant purpose' are as described by Bromwich J in *Cantor v Audi* at [68]: (emphasis added)

> If the facts as found on the evidence demonstrate objectively that subsequent use, for example by provision to a third party, was a purpose in creating it equal to or greater than the purpose of providing legal advice, that will be sufficient to displace the provision of the advice to the client as being dominant in the sense of being the ruling, prevailing, or most influential purpose. In that event, there is no privilege. *But a later decision to use legal advice in that way, even if made immediately after communication and perhaps dependent on considering the contents of the advice or the conclusions reached in making that decision, will not displace the dominant purpose otherwise established.*

Conclusion

40 As AMP submitted, the letter of instruction to Clayton Utz recorded that the investigation was to be conducted for the purpose of AMP's chairperson and board receiving legal advice. This was a clear and contemporaneous statement of purpose, borne out by the fact that AMP did in fact receive legal advice from Clayton Utz based on the results of its investigation.

41 Also relevant is AMP's statement, in the letter of instruction, that Clayton Utz' work product was privileged. Further, AMP did not then intend to provide either the letter of instruction or Clayton Utz's work product to ASIC, as is apparent from the speaking notes: see [21]. Consistently with this, when the CU Report was presented to the AMP board, it was marked "Confidential and subject to legal professional privilege": see [66].

42 The plaintiffs rightly emphasised that, somewhat unusually, AMP instructed Clayton Utz to "undertake an external and independent investigation … entirely independent of the business and … commissioned exclusively by the Board". The speaking notes indicate that AMP deployed the same adjectives when describing Clayton Utz' retainer to ASIC. As I read it, Ms Brenner thereby sought to describe how Clayton Utz was being asked to go about its task and to emphasise Clayton Utz' imprimatur. The suggestion that the report was "independent" did not necessarily detract from the reason why the report had been commissioned and how AMP intended to use the report.

43 Also noteworthy, AMP informed ASIC of Clayton Utz's retainer, presumably in order to demonstrate that AMP was taking the situation most seriously and, further, to tell ASIC what AMP was doing. The speaking notes record that the board regarded the investigation "as a necessary and critical means by which it can *demonstrate its commitment*" to ascertain the extent of overcharging. That is, *a* purpose of obtaining the CU Report was to demonstrate to the regulator that AMP was taking the regulator's concerns seriously. But there is insufficient evidence on this application to conclude that AMP retained Clayton Utz for the "dominant purpose" of "heading off" further investigation by the

regulator. Rather, the evidence indicates that ASIC's investigation was longstanding, extensive and escalating. I consider it highly unlikely that Ms Brenner would have thought, for one moment, that ASIC would 'down tools' simply because AMP had retained new lawyers to investigate the matter.

44 I am satisfied on the balance of probabilities that AMP retained Clayton Utz in late April 2017 to provide legal services in relation to ASIC's investigation. On 5 June 2017, Clayton Utz was tasked with a specific piece of work, being to investigate and report on the charging of "fees for no service" at AMP and, further, to provide legal advice to AMP's board on the implications of those findings. I am satisfied that the dominant purpose of retaining Clayton Utz to investigate, report and advise was – as the letter of instruction stated – for the purpose of the AMP's board obtaining legal advice. The letter of instruction sought to confer comprehensive instructions and clear authority on an external, well-resourced law firm to get to the bottom of what had been happening and to advise AMP's board accordingly. The CU Report (and later the CU Advice) was privileged, albeit that privilege in the CU Report has since been waived.

45 Of course, the "dominant purpose" in retaining Clayton Utz to conduct an investigation and report on its findings is relevant but not determinative as to the dominant purpose of each of the sample documents. Whether each sample document is privileged depends upon the particular circumstances in which *that document* was brought into existence.

First and second sample documents (AMP.0005.0035.0143 and 0144)

46 On 25 August 2017, being some three months after AMP's letter of instruction, Mr Mavrakis provided a first draft of one section of the CU Report to Mr Salter and Ms Baker Cook. On 30 August 2017, Mr Salter reported to AMP's directors that Clayton Utz' report was taking longer than originally anticipated but was now expected to be completed in late September 2017 for discussion at the board meeting on 16 October 2017.

47 On 19 September 2017, Mr Mavrakis emailed a draft CU Report – entitled "AMP BOLR Investigation – to Mr Salter and Ms Baker Cook for provision to Mr Meller and Mr Regan.

48 Some 15 minutes later, Mr Salter sent an email to Mr Meller and Mr Regan, copied to Ms Baker Cook and Fiona Wardlaw (AMP Group Executive, People & Culture), entitled "CU report: Privileged and Confidential". Attached to the email was a document entitled "AMP BOLR [buyer of last resort] - Draft Report - 19 Sep 2017". Mr Cullen said the email and attachment (being *the first and second sample documents*) were confidential communications for the purpose of the AMP board receiving legal advice from its in-house counsel, Mr Salter and Ms Baker Cook, in relation to matters the subject of the CU Report, being advice separate to and not for the purpose of Clayton Utz preparing its report.

49 The plaintiffs submit that the evidence adduced by AMP to support its claim for privilege was wholly inadequate such that the Court should not proceed to examine the documents in question. I infer that the attachment to Mr Salter's email was a draft of Clayton Utz's report provided moments earlier by Mr Mavrakis for provision to Mr Meller and Mr Regan. I note that the email was sent by AMP's most senior in-house lawyer to AMP's most senior executive. It is apparent from the material to which I have already referred that the contents of Clayton Utz' investigation report was not only likely to be of serious concern to Mr Meller but may also warrant guidance and advice from AMP's in-house lawyers. Mr Cullen says that Mr Salter's email did just that. Given the nature of the documents and the circumstances in which the documents came into existence, it is likely that the documents are privileged.

50 Having now read the email and attachment, I am satisfied that the claim for legal advice privilege is well made. Although AMP had retained external lawyers, Clayton Utz, to undertake a significant piece of work in accordance with the letter of instruction of 5 June 2017, AMP also had in-house lawyers. Having received the first draft of Clayton Utz's report, AMP's in-house lawyers continued to play a role in providing legal advice to the company and its

directors, including in respect of the external lawyer's work product. I will return to whether privilege has been waived at [94].

Third and fourth sample documents (AMP.6000.0062.5814 and 5815)

51 In a portion of Mr Cullen's affidavit entitled "Separation of the Clayton Utz Report and Advice", Mr Cullen said that, on 22 September 2017, Mr Mavrakis sent an email to Mr Salter, copied to Ms Baker Cook and Edmond Park of Clayton Utz, providing a high level summary of the legal advice which Clayton Utz was preparing based on the findings of the Clayton Utz investigation (the *CU Advice*). The email was entitled "BOLR Summary of Legal Advice" and the attached document was entitled "AMP BOLR - Draft Summary of Legal Advice - 22 Sept 2017". Mr Cullen said the confidential communication arose from AMP's engagement of Clayton Utz to provide legal advice to the AMP board.

52 As I understand this evidence, having completed its investigation into the existence and continuation of the 90 Day Exception, Clayton Utz was now providing legal advice as to the implications of those findings for the AMP board. Whilst the letter of instruction of 5 June 2017 envisaged that Clayton Utz would provide the board with a final report setting out its findings *and advice* (see [25]), as matters unfolded, the findings and advice were provided to the board separately.

53 The third and fourth sample documents appear to be the first iteration of the CU Advice. It is hardly necessary to examine the underlying documents to confirm that the claim for legal privilege is well taken, but I have done so to ensure that there can be no doubt about it. These documents are clearly privileged. I will return to whether privilege has been waived at [94].

Project White

54 Also on 22 September 2017, Ms Bissell emailed Cilla Robinson of Clayton Utz, seeking legal advice relating to employment issues. Mr Cullen said this became known as Project White, for which Ms Bissell had primary responsibility at AMP. It is noteworthy that legal advice on employment issues was sought the same

day that AMP received a first draft of the CU Advice. Presumably, the CU Advice had implications for some AMP employees, where the CU Report had already identified employees about whom serious concerns were expressed.

55 On 25 September 2017, Mr Mavrakis sent Mr Salter a revised draft of the CU Report. On 25 September 2017, Mr Mavrakis sent the CU Report to Ms Brenner. On 3 October 2017, Mr Mavrakis provided the CU Advice to Mr Salter.

Fifth and sixth sample documents (AMP.6000.0062.7270 and 7329)

56 Having now received both the CU Report and the CU Advice, AMP in-house counsel turned their attention to preparing board papers in respect of these documents. On the evening of 5 October 2017, Mr Mavrakis sent an email to Ms Baker Cook entitled "Re: Draft Board Paper re CU Report - Privileged & Confidential". On the morning of 6 October 2017, Ms Robinson sent an email to Ms Baker Cook and Ms Bissell, copied to Rebecca Byun and Nick Boyce of Clayton Utz with, essentially, the same email title. AMP claims legal advice privilege over these documents on the basis that they record the substance of a confidential communication in respect of legal advice to be provided by AMP in-house counsel (Mr Salter and Ms Baker Cook) to the AMP Board.

57 The plaintiffs submit that the evidence in support of these claims for privilege is devoid of evidence such that the Court should reject the claim without proceeding, if thought necessary, to inspect the documents in question. I do not agree. Without even looking at the underlying documents, it is apparent from the description of the emails in question that AMP's external solicitors, Clayton Utz, are communicating with AMP's in-house counsel, apparently in respect of the contents of board papers then being prepared for the AMP board in respect of the CU Report. As much is confirmed by the details provided by Mr Cullen in the annexure to his affidavit.

58 To be sure, I have examined the documents in question. The claim for privilege over both documents is well made. The only additional feature of these documents to the first and second sample documents is that AMP's in-house counsel are communicating with AMP's external lawyers in the course of

preparing advice for AMP's board on the work of those external lawyers. I will return to whether any such privilege has been waived at [94].

Seventh and eighth sample documents (AMP.0005.0035.1679 and 1680)

59 Further emails were exchanged between AMP's in-house counsel in the course of preparing board papers. On 8 October 2017, Ms Baker Cook sent an email to Mr Salter entitled "Further version of Board Memo", attaching a document entitled "Board Memo re CU Report 8 October (JR and CM edits)". AMP claims legal advice privilege over the email as it records a confidential communication in the nature of legal advice to be provided by AMP in-house counsel to the AMP Board, and the attachment to that email. The plaintiffs accept that it is appropriate to proceed to review the documents, if necessary, and I have done so. Both documents are privileged, for essentially the same reasons as the first, second, fifth and sixth sample documents.

Ninth sample document (AMP.6000.0062.7599)

60 On 9 October 2017, Mr Baker Cook sent an email to Mr Meller, Mr Regan, Pally Bargri (AMP Head of Enterprise Risk Management), Ms Bissell, Rachel Banks (People & Culture BP Director, Advice, New Zealand and Bank) and Ms Wardlaw, copied to Mr Salter, Mr Mavrakis and Ms Robinson entitled "Memorandum to AMP Limited Board in response to CU Report - Privileged & Confidential". AMP claims legal advice privilege on the basis that it records the substance of the confidential communication in the nature of legal advice to be provided by AMP in-house counsel to the AMP board. The document is privileged for essentially the same reasons as the first, second and fifth to eighth sample documents.

61 On 11 October 2017, Mr Salter emailed Mr Mavrakis, copied to Ms Baker Cook and Mr Regan, advising that ASIC had issued a section 33 notice for, amongst other things, all records relating to a document, "FOFA Practice Proposition Stream – Orphan contracts Policy and Process Changes and Recommendations". Mr Salter noted in his email that it was the existence of this document, as well as the legal advices, which led to the investigation

undertaken by Clayton Utz. In its report, Clayton Utz had concluded that no evidence had been located that the document was actually sent or finalised. Mr Mavrakis was asked to provide details of the searches and materials on which his conclusion was based, "to convince ASIC that the document did not have any formal or other official standing in the organisation." Further, Mr Mavrakis was asked to re-approach two persons who had had input into the document but had not been interviewed, being Brian Magellan and Laura Basile, as the absence of their version of events was seen as a point of vulnerability. Mr Mavrakis was also asked whether Mr Magellan and Ms Basile had been the subject of section 19 examination.

62 On 12 October 2017, Ms Bissell sent a further email to Ms Robinson requesting advice and providing instructions to Clayton Utz in respect of Project White.

Tenth sample document (AMP.6000.0062.8170)

63 Mr Cullen said that, following completion of the CU Report, Clayton Utz and AMP in-house counsel continued to provide legal advice to AMP in relation to ASIC's investigation and "fees for no service" issues generally. The information or advice sought from Clayton Utz or AMP in-house counsel may have involved matters or documents that also happen to be referred to in the CU Report, but the information or advice being sought was not for the purpose of Clayton Utz preparing that report.

64 One such document was an email from Ms Baker Cook to Mr Mavrakis and Mr Park, copied to Mr Salter on 13 October 2017 entitled "RE: FOFA Practice Proposition Stream - Orphan contracts Policy and Process Changes and Recommendations" and thus, presumably, a 'forward' of the email referred to at [61].

65 The plaintiffs did not contend that I should not look at the document and I have found it necessary to do so in order to decide whether the claim for privilege is well-founded. The document is, in fact, an email chain containing the email referred to at [61], followed by an email from Clayton Utz in response, with a final email from Ms Baker Cook to Clayton Utz clarifying AMP's instructions in

respect of what was sought. The email chain is privileged. I will return to whether privilege has been waived at [94].

Eleventh sample document (AMP.6000.0005.8984)

66 On 16 October 2017, the CU Report was presented to the AMP board. The CU Report was marked "Confidential and subject to legal professional privilege". As I read the report – and I have not read every word – Clayton Utz detailed its factual investigation as to the existence of the 90 Day Exception practice, how it came about, who knew about internal legal advice that the practice may be contrary to law, how it was that the practice continued in the face of such advice and the extent to which AMP had informed, or mis-informed, ASIC about the matter. As the plaintiffs observed, the CU Report did not contain legal advice and, in particular, did not address the terms of reference calling for an opinion as to whether the 90 Day Exception was contrary to the law. This is consistent with Mr Cullen's evidence that, although it was initially anticipated that Clayton Utz's investigation report and advice would be provided in one document, these items of work were ultimately presented separately.

67 The AMP board papers have been redacted for both privilege and otherwise irrelevant material. The eleventh sample document is an unredacted set of board papers. Portions of these board papers are, so far as I can tell, irrelevant to these proceedings. Also included is a memorandum from Mr Salter and Ms Baker Cook to the AMP board providing advice in respect of the CU Report and CU Advice. It is this memorandum which was the subject of the sample documents referred to at [56]-[60], that is, on which AMP in-house counsel communicated, including with Clayton Utz, to prepare their advice for the AMP board. Having reviewed the memorandum, I am satisfied that it is privileged.

68 The minutes of the AMP board meeting record that the CU Report was discussed. The board also noted that a meeting was scheduled later that day with ASIC to discuss the findings of the report "and to provide ASIC with a copy of the report". It will be recalled that AMP had not initially anticipated providing

a copy of the report to ASIC but rather "to share AMP's conclusions": see [20(c)].

Twelfth sample document (AMP.6000.0075.8707)

69 Following the board meeting, Mr Salter contacted ASIC and requested a Voluntary Disclosure Agreement in respect of documents to be provided to ASIC at a meeting that afternoon. ASIC and AMP exchanged counterparts of an agreement entitled "Voluntary Confidential Legal Professional Privilege Disclosure Agreement". In addition, on 16 October 2017, ASIC issued a section 33 notice to AMP requiring production of the CU Report, together with all versions of AMP internal legal advices referred to in the report and instructions given to Clayton Utz in respect of its investigation, including the scope, methodology and assumptions made in undertaking the investigation.

70 In preparation for the meeting with ASIC, a document dated 16 October 2019 entitled "Speaking notes for meeting with ASIC 16 October 2017". AMP claims privilege over the document as it discloses confidential communication from AMP's in-house counsel, Mr Salter and Ms Baker Cook, for the purposes of providing Ms Brenner with legal advice in relation to the ASIC investigation. It is a detailed document marked privileged and confidential. The document contains legal advice and is privileged.

71 On 17 October 2017, Ms Baker Cook produced documents to ASIC in response to the section 33 notice. Given the circumstances in which these documents were produced, it is likely to have resulted in "limited waiver". Where a person is requested or obliged to disclose privileged material to a regulator, they may nonetheless maintain privilege to prevent the material being used in a wider context: *Goldberg v Ng* (1995) 185 CLR 83 at 95-96; *Northern Energy* at [60]-[64]. The CU Advice was not produced to ASIC.

Thirteenth to eighteenth sample documents (AMP.6000.0054.6837, 6839, 6891 and AMP.6000.0054.6893, 6948 and 6896)

72 It will be recalled that, following the completion of the Clayton Utz report, Clayton Utz and AMP in-house counsel continued to provide legal advice to AMP in relation to the ASIC investigation and "Fees for no service" issues generally.

73 On 26 October 2017, Ms Baker Cook sent an email to Mr Mavrakis and Mr Park, copied to Mr Salter, entitled "Telephone call with Brian Magellan". Attached to the email were two emails sent by Ms Baker Cook to Mr Magellan that day. Later that day, a further email was sent to Ms Baker Cook to Mr Mavrakis and Mr Park, again attaching the two emails sent by Ms Baker Cook to Mr Magellan.

74 The plaintiffs did not oppose me inspecting these documents, and it was necessary to do so in order to consider whether the claims for privilege were well founded. I am satisfied that each of these emails is privileged. I will return to whether the privilege has been waived at [94].

Nineteenth sample document (AMP.4000.0482.2021)

75 On 1 November 2017, Ms Bissell sent an email to Ms Wardlaw attaching a draft AMP board paper dated 1 November 2017 and an engagement letter to Workdynamic. The subject of the email was "Privileged & Confidential: Project White: Board Paper". Ms Bissell's email contains legal advice and is privileged.

76 On 10 November 2017, a letter of engagement was signed by Ms Robinson of Clayton Utz and addressed to Jane Wright of Workdynamic Australia. On 14 November 2017, Mr Salter advised ASIC of Workdynamic's engagement, noting that Clayton Utz's report had identified a number of employees whose conduct may warrant "employment consequences". Further, "*We* have appointed Jane Wright, a Director and Principal of Workdynamic Australia to conduct an independent external workplace investigation in relation to these employees." Mr Salter advised that the investigation would involve extracting allegations from Clayton Utz's report in respect of each individual and linking

those allegations to any relevant breaches of the AMP code of conduct. The allegations would be provided to the individuals ahead of an interview in which they would be invited to respond. Following the interviews, any other relevant lines of enquiry which arose during the course of the investigation would be pursued. The findings from the investigation would be presented to AMP and any recommendations on consequences would be made by the Group Executive, People & Culture to the board and AMP Group Leadership Team Committee. AMP offered to brief ASIC as soon as possible regarding its approach to standing down individuals from their roles pending the outcome of the workplace investigation process.

Dominant purpose – Project White

77 It is necessary to pause again to consider whether the “dominant purpose” of communications with Clayton Utz and Workdynamic was as asserted by AMP. AMP submitted that Mr Cullen's evidence made clear that it was anticipated that AMP might take action against its employees. It was far from fanciful that, in response to such action being taken, those employees might themselves respond with legal proceedings. That was properly characterised as "anticipated" proceedings. Mr Cullen's evidence made clear that this was one of the purposes of the report, being to obtain advice about matters of employment law.

78 The plaintiffs submitted that the suggestion of litigation privilege could be immediately dismissed, where there was no evidence that would suggest a reasonable anticipation that legal proceedings would be commenced by any of the employees. There must be a real prospect of litigation as distinct from a mere possibility, although it does not need to be more likely than not: *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority* (2002) 4 VR 332; [2002] VSCA 59 at [19]; *New South Wales v Jackson* [2007] NSWCA 279 at [67]. Here, there was only the mere possibility of litigation. There is no evidence of any threat by any person to commence legal proceedings against AMP as a result of the employment review that was to be undertaken.

79 Further, the plaintiffs submitted that the dominant purpose of the review was not to obtain legal advice from a lawyer but to determine the "employment and remuneration implications" for individuals involved in "fees for no service", as AMP stated in a media release made five months later, during the Royal Commission: see [119]. The "routing" of communications through Clayton Utz did not make the communications privileged, nor was it sufficient that AMP may have contemplated that Clayton Utz would provide advice in respect of the findings in the Workdynamic investigation: *Gibbons*. If the dominant or equal purpose of the engagement of Workdynamic was to consider taking disciplinary action against the relevant employees, then communications with Workdynamic and any report by Workdynamic were not privileged. The plaintiffs submitted that there was a real difference between an engagement to provide legal advice and an ordinary workplace investigation, relying on comments made by the Full Bench of the Fair Work Commission in *Stephen v Seahill Enterprises Pty Ltd* [2021] FWCFB 2623; (2021) 306 IR 140 at [71].

80 In *Stephen v Seahill Enterprises*, solicitors engaged counsel to undertake an investigation into a bullying complaint, to assist the law firm to provide legal advice to the employer and to assist in the conduct of anti-bullying proceedings. The Commission found that the investigation report was privileged. The employee had, however, been told by the employer that the investigation had been required by the Commission. Further, the employer represented that it was conducting an independent and transparent investigation in accordance with its workplace bullying and harassment policy. In this context, the Commission noted that an investigation report commissioned for such purposes would not be privileged just because the investigation was undertaken by a lawyer, as the results of the investigation would be made known to the Commission. Further, at [71]:

> As the AIRC Full Bench said in *Brown v BlueScope Steel Ltd*, "[t]here is a very real difference between an independent inquiry and the provision of legal advice to a client". A procedurally fair workplace investigation initiated by an employer the outcome of which is intended to be made known to relevant employees in the workplace and which is to lead, where necessary, to corrective or disciplinary action is not one which ordinarily has a purpose confidential to the employer.

81 The Commission observed, however, that the employer *could* conduct a workplace investigation in a manner that ensured that the product of the investigation was privileged, as long as the dominant purpose of the investigation was the provision of legal advice: *Bowker v DP World Melbourne Ltd* [2015] FWC 7887. As such, the Commission's remarks were consistent with established principles.

82 The question remains whether the "dominant purpose" of engaging Workdynamic to undertake an "independent external workplace investigation" was to obtain legal advice, either from Workdynamic or from Clayton Utz based on the contents of Workdynamic's report. Again, ascertaining the "dominant purpose" focuses attention on the circumstances at the time when Workdynamic was retained. As I read the contemporaneous documents, it is clear that AMP intended to take steps in respect of employees who had been charging "fees for no service" in the face of internal legal advice to the contrary. The CU Report contained detailed and explicit factual findings as to which employees were of interest. AMP had also received the CU Advice, based on those findings.

83 AMP sought legal advice on employment issues from Clayton Utz on the same day it received the first draft of the CU Advice: see [54]. Two weeks later, whilst AMP in-house counsel were preparing their own advice to the AMP board in respect of the CU Report and CU Advice, further instructions were provided to Clayton Utz in respect of Project White: see [62]. Two weeks later, after the AMP board had considered the CU Report and CU Advice, Ms Bissell submitted a further board paper in respect of Project White, proposing to engage Workdynamic: see [75].

84 Also relevant, AMP informed ASIC of the engagement of Workdynamic. It is evident from Mr Salter's letter that dealing with these employees – and keeping ASIC informed of AMP's progress – was considered important to address the regulator's concerns; it may be that this was *one* of the purposes for which Workdynamic was engaged. Again, the investigation was described as "independent" and "external". As I read it, this was intended to emphasise the

authority conferred on Workdynamic to undertake its task without undue deference to AMP. The adjectives deployed did not, I think, change the reason why AMP commissioned the report nor how AMP intended to use it.

85 I note that Mr Salter also informed ASIC of possible consequences for employees, including termination (either summarily or with notice), demotion, a clawback of incentives, ineligibility for or reduction in further incentives, warnings, mandatory training or coaching. It also appears to have been contemplated that AMP would stand down employees pending the outcome of the workplace investigation. Thus, AMP appears to have been determined to take action in respect of employees, including by terminating their employment. In a media release made five months later, AMP's potential actions against its employees were more gently described as "employment and remuneration implications". This does not detract from the more direct, contemporaneous observations of what AMP had in mind when Workdynamic was retained. The prospect that these employees may contest their termination or seek compensation from AMP was, with respect, obvious. WorkDynamic was retained to prepare for this eventuality.

86 Importantly, Mr Salter did not suggest that AMP would provide Workdynamic's report to ASIC. Rather, Mr Salter would "brief" ASIC after the results of the investigation had been presented to AMP. Nor is there any evidence that the report would be provided to the employees in question. That is, the investigation report was confidential to AMP.

87 Nor do I think anything turns on Mr Salter's statement to ASIC that "We" have appointed Workdynamic. The plaintiffs submitted that the use of the pronoun "we" indicated that, in truth, AMP had engaged Workdynamic directly rather than through Clayton Utz. The precise mechanism by which work Workdynamic had been retained would hardly have been a matter of interest to ASIC nor one which Mr Salter considered necessary to detail. "We" was more likely used as a collective "we", referring to AMP and its lawyers.

88 Mr Cullen said the purpose of the employment investigation undertaken by Workdynamic on instruction from Clayton Utz was to enable Clayton Utz to provide legal advice to AMP on issues of employment law concerning employees of AMP associated with ASIC's investigation into "fees for no service", and to assist AMP in preparing for legal proceedings which any of these employees might bring in relation to any action taken by AMP in connection with their employment. I accept his evidence, which is corroborated by the contemporaneous documents.

89 I am satisfied on the balance of probabilities that Workdynamic was retained by Clayton Utz for the dominant purpose of AMP obtaining legal advice. Whether AMP is also entitled to claim litigation privilege is more tenuous. I agree that there is no evidence of any threat by an employee to commence legal proceedings, but I am inclined to think that there was a real prospect that, once AMP began to take action in respect of its employees – and there is no doubt that AMP intended to take such action – that some employees would make a claim against AMP. That is, this was a not a mere possibility. Either way, the Project White documents are privileged.

Twentieth sample document (AMP.4000.0482.3696)

90 On 30 November 2017, Mr Salter sent an email to Ms Bissell, Ms Wardlaw, Mr Regan and Ms Banks entitled "RE: Privileged & Confidential: Project White". Mr Cullen said the email was in response to an email from Ms Bissell and both emails provide legal advice. Both emails contain legal advice in respect of correspondence with a particular employee. The communications are privileged.

Twenty-first sample document (AMP.0005.0035.9380)

91 On 11 December 2017, Mr Mavrakis sent an email to Mr Salter, copied to Ms Baker Cook and Jonathan Slater of Clayton Utz entitled "RE: CU Report". AMP claims legal advice privilege over the document as it records the substance of a confidential communication between AMP and Clayton Utz in relation to legal

advice which Clayton Utz continued to provide in relation to the ASIC investigation and fee for no service issues generally.

92 It is an email chain, commencing with an email from Mr Salter to Mr Mavrakis entitled "CU Report", copied to Ms Baker Cook. Mr Salter requests that a particular task be undertaken based on the CU Report. Mr Mavrakis replies, attaching the work product requested together with an explanation as to how he went about the task. The email chain and the attachment is privileged. I will return to whether privilege has been waived at [94].

Twenty-second sample document (AMP.8400.0056.8531)

93 Returning to Project White, on 23 February 2018, Elyssa Tapp, AMP People & Culture Consulting Specialist, sent an email to Mr Regan and Ms Banks entitled "Project White - documents for meetings next week". The email touches upon the work being undertaken by Ms Bissell and Ms Wardlaw and gives the recipients various tasks. It appears to be part of the work undertaken in Project White concerning matters of employment law. The communication is privileged.

WAIVER

94 In March 2018, AMP produced the CU Report to the Royal Commission without a claim for privilege, and notified ASIC that it had done so. AMP also produced a number of documents concerning the preparation of the CU Report. The CU Advice was not produced. The question is whether AMP thereby also waived privilege over the first category of sample documents, it not being suggested that any privilege in Project White documents was thereby waived.

95 The plaintiffs submitted that AMP had waived privilege over all documents concerning the subject matter of Clayton Utz' engagement, including the CU Advice: section 126, *Evidence Act*. Having disclosed the letter of instruction, the CU Report and associated communications, AMP must disclose other communications concerning Clayton Utz's engagement as being necessary to enable a proper understanding of the communications and documents that

have been disclosed: *Sugden v Sugden* (2007) 70 NSWLR 301; [2007] NSWCA 312 at [96]. Otherwise, the plaintiffs could not obtain an accurate or complete picture of the circumstances surrounding Clayton Utz's retainer and the preparation of its report: *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 481-2 (Gibbs CJ); 488 (Mason and Brennan JJ); 497-8 (Dawson J). Fairness dictated that disclosure of all communications on the subject matter of the investigation be disclosed.

96 The plaintiffs' learned senior counsel submitted that, if the CU Advice qualified or clarified the CU Report, then it would be inconsistent and unfair to maintain privilege over the CU Advice. Where AMP had waived privilege in the CU Report, it would be inconsistent to maintain privilege in the advice given by AMP's in-house counsel to the AMP board in respect of the report. As to the twelfth sample document (see [69]), it was inconsistent with the production of the CU Report to ASIC on 16 October 2017 to maintain privilege in the speaking notes for the meeting with ASIC that day. Presumably the speaking notes contained advice about what to say to ASIC about the CU Report.

97 Further, the plaintiffs submitted that it was inconsistent to maintain privilege in respect of further work done following up factual matters in the CU Report, for example, the thirteenth to eighteenth sample documents regarding telephone calls with Mr Magellan. It was said to be inconsistent not to waive privilege in what was effectively an addendum to the CU Report where privilege had been waived in the report itself.

98 AMP accepted, having voluntarily disclosed the CU Report to the Royal Commission, it waived privilege in the documents referred to in the report and documents associated with the preparation of the report, including letters of instruction, records of investigations, drafts, and documents and information taken into account in formulating, or which otherwise underpinned or influenced, the report: *AWB v Cole (No 5)* at [198], *McKenzie v Cash Converters International Ltd* [2017] FCA 1564 at [91]-[92] (per Markovic J). AMP submitted, however, that the sample documents concerned different matters, including advice from Clayton Utz and in-house lawyers about the

ASIC investigation, communications subsequent to the CU Report or legal advice in respect of the factual findings made in the report. There was no reason that waiver in the CU Report extended to such communications. Further, the plaintiffs' generalised invocation of fairness was at odds with the High Court's rejection of the proposition that "some overriding principle of fairness operating at large" gave rise to waiver: *Mann v Carnell* (1999) 201 CLR 1; [1999] HCA 66 at [29]. Nor could there be any unfairness given the disclosure of all documents referred to in the CU Report and documents associated with its preparation.

Principles

99 Drawing on my judgment in *Northern Energy*, a person who would otherwise be entitled to the benefit of legal privilege may waive that privilege; "It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege": *Mann v Carnell* (1991) 201 CLR 1 at [28] (per Gleeson CJ, Gaudron, Gummow and Callinan JJ). And further, at [29]:

> What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.

See likewise *Expense Reduction Analysts Group Pty Limited v Armstrong Strategic Management and Marketing Pty Limited* (2013) 250 CLR 303; [2013] HCA 46 at [30].

100 In order to determine whether there has been waiver of client legal privilege, the Court is bound to analyse the acts or omissions of the privilege holder that are said to be inconsistent with the maintenance of the privilege: *Commissioner of Taxation v Rio Tinto Limited* (2006) 151 FCR 341; [2006] FCAFC 86 at [45]. Mere reference to the existence of a privileged communication will not suffice; waiver ordinarily only occurs where the contents of privileged communications are relied upon: *Hastie Group v Moore* at [53] (per Leeming JA).

101 As Allsop J (as his Honour then was) summarised the position in *DSE (Holdings)* at [61], privilege will be waived where a confidential communication has been laid open to necessary scrutiny and by so doing, that is, by expressly or impliedly making an assertion about the contents of the communication or laying the communication open to scrutiny, the inconsistency enunciated in *Mann v Carnell* is brought about. Further, "quite specific inconsistency is necessary to establish waiver. Even reference to legal advice, without more, will not suffice. The inconsistency must be reasonably manifest": *Cantor v Audi* at [99]. The principles in respect of waiver were recently summarised by Macfarlan JA (with whom McCallum JA, as her Honour then was, and Simpson AJA agreed) in *GR Capital Group Pty Ltd v Xinfeng Australia International Investment Pty Ltd* [2020] NSWCA 266 at [57], which I gratefully adopt.

102 For example, in *McKenzie v Cash Converters*, the respondent filed a defence to an allegation of unconscionable conduct, asserting that it had acted in good faith when extending credit as "in or about December 2008, Cash Converters Pty Ltd obtained legal advice from Simon Couper QC to the effect that the brokerage fee model did not breach the Qld Code". The respondent provided copies of the advice to the applicant, who then sought discovery of the source documents used to prepare the advice, together with all privileged communications relating to respondent's business model. Markovic J concluded that the limits of the waiver depended on the nature of the QC's advice, what was represented by its disclosure and the character of the transaction which gave rise to that advice. Where the QC had only considered two issues, the scope of the waiver did not extend to the "loan brokerage model used by Cash Converters over a five year period", nor to the source documents as defined by the applicant: at [91]-[92].

103 Of particular interest here is the plaintiffs' submission that, by waiving privilege over the CU Report, AMP thereby waived privilege over documents which came into existence *after* the report. A similar argument was advanced in *Stewart v State of Victoria (No 2)* [2015] VSC 373, where Lansdowne AsJ observed that neither party had located an authority that discussed the proposition that waiver may extend to subsequently created documents: at [148]. Further, at [149]:

> This is for good reason in my view. I do not consider that the principle of implied waiver that OGP seeks to assert in relation to subsequently created documents can be correct, at least as an absolute proposition. There does not seem to me to be any necessary inconsistency in maintaining confidentiality in subsequently documents that are created for the purpose of obtaining legal advice or in the context of litigation which discuss an earlier advice, just because that earlier advice is no longer privileged. By definition, the subsequently created documents will contain further information, opinion and advice, and may not necessarily be confined to the earlier advice in which privilege has been waived. Even if they are so confined, further analysis or discussion of that advice goes beyond the advice in which privilege has been waived, and so there is no inconsistency in maintaining confidentiality in that further analysis or discussion.

104 I agree.

Conclusion

105 By waiving privilege in the CU Report, I do not consider that AMP thereby waived privilege in all communications made during Clayton Utz's broader retainer. As earlier mentioned, Clayton Utz was retained some six weeks before the letter of instruction of 5 June 2017 and by a retainer more broadly described than the terms of that letter, being to provide legal services in relation to ASIC's investigation. As such, privilege was not waived in confidential communications between AMP and Clayton Utz in respect of work undertaken in relation to ASIC's investigation more generally, rather than in respect of the CU Report (*tenth and thirteenth to eighteenth sample documents*).

106 By waiving privilege in the CU Report, I do not consider that AMP waived privilege in the CU Advice. As AMP submitted, a party may waive privilege in a factual investigation report procured for a privileged purpose without waiving privilege in the legal advice given based upon that report. The CU Report provided the factual substratum for the CU Advice but disclosure of the factual findings did not implicitly convey anything about the legal advice given, nor lay open the legal advice to scrutiny. Nor is it necessary to disclose the CU Advice in order to understand the CU Report or, at least, I was not taken to any particular part of the CU Report which was unclear absent the CU Advice. As such, privilege was not waived in the CU Advice (*third and fourth sample documents*).

107 The CU Report reported the investigations undertaken and conclusions reached *by Clayton Utz* and *as at the date of the report*. As to the first component – "by Clayton Utz" – it is important to bear in mind that AMP had more than one lawyer providing legal advice at the time. AMP had retained an external law firm, which authored the CU Report. AMP also continued to receive advice from its in-house lawyers. I do not consider that waiver of privilege over the CU Report necessarily resulted in waiver over advice the company received from its in-house lawyers, including in respect of the CU Report.

108 As such, I do not consider that waiver of privilege in the CU Report resulted in waiver of advice given by AMP's in-house counsel on receiving the first draft of the CU Report on 19 September 2017 (*first and second sample documents*), nor confidential communications between AMP and its in-house lawyers, or between the in-house and external lawyers, for the dominant purpose of the lawyers providing legal advice to AMP in a board paper when the CU Report and CU Advice were presented to the board (being *the second, fifth to ninth and eleventh sample documents*), nor speaking notes prepared for a meeting with ASIC when providing the CU Report (*twelfth sample document*).

109 As to the first second component – *as at the date of the report* – the CU Report envisaged that further investigations may be, or should be, undertaken. But, by waiving privilege over the CU Report, I do not consider that AMP thereby waived privilege over any subsequent documents which came into existence, including those which implemented the suggestions in the CU Report or commented upon the findings of the report, such as the CU Advice. Necessarily, the CU Report did not refer to, or rely upon, the existence of future privileged communications. No future communication was thereby laid open to scrutiny. Whether any future privileged communications may come into existence was then unknown. As such, I do not consider that privilege has been waived in the *thirteenth to eighteenth and twenty-first sample documents* (these documents may also fall within the category of confidential communications in respect of Clayton Utz' broader retainer).

Issue waiver

110 The plaintiffs submitted that, as a consequence of the pleadings in these proceedings, AMP has put its state of mind in issue such that privilege has been lost by "issue waiver".

111 Whether this is so requires "a fact-based inquiry" depending "very much on the particular character of the case": *Commissioner of Taxation v Rio Tinto* at [56]–[61], or "matters of fact and degree": *Cooper v Hobbs* [2013] NSWCA 70 at [70] (per McColl JA, with whom Bergin CJ in Eq agreed). As Hodgson CJ in Eq explained in *Wayne Lawrence Pty Ltd v Hunt* [1999] NSWSC 1044 at [12]:

> … the question of whether the advancing of a person's state of mind is to be taken … as waiving privilege, is a matter of degree in each case. It does not seem to me that the assertion of a belief must, in all circumstances, be taken as consenting to evidence being led of any legal advice or confidential communication that could be relevant to whether such a belief was held or the reasonableness of such belief. It seems to me that factors relevant to whether that consent is to be considered as having been given, or whether privilege is taken to have been waived, would include the significance of the belief to the case as a whole; the probability or otherwise of the legal advice being relevant to the holding of that belief, or being relevant to its reasonableness; and in circumstances where the Court inspects the legal advice in question in order to make a decision, the extent to which the legal advice does in fact bear upon the holding of the belief or its reasonableness, and the extent to which the legal advice relevant to those matters is inextricably bound up with legal advice going to other questions as to which there has been no consent or waiver.

See also *Mann v Carnell*; *Chen v City Convenience Leasing Pty Ltd* [2005] NSWCA 297 at [38], [41]; *DSE (Holdings)* at [102]–[104]; *SA E.Med Pty Ltd v Calvary Health Care Adelaide Ltd (No 2)* [2011] FCA 835 at [23]–[25] (per Besanko J).

112 There may well be an inconsistency between an assertion as to one's state of mind and a claim that the communications which affected the asserted state of mind (and could perhaps disprove the assertion) should be withheld from the opponent. As Hodgson JA (with whom Campbell JA and Handley AJA agreed) explained in *Council of the New South Wales Bar Association v Archer* (2008) 72 NSWLR 236; [2008] NSWCA 164 at [48]:

> … What would involve inconsistency and relevant unfairness is the making of express or implied assertions about the content of the privileged communications, while at the same time seeking to maintain the privilege. In this respect, it may be sufficient that the client is making assertions about the client's state of mind, in circumstances where there were confidential documents likely to have affected that state of mind.

113 By the Further Amended Commercial List Statement, the plaintiffs allege that AMP made various representations to ASIC which are said to be false or misleading, in particular, that the CU Report was the product of an "external and independent investigation" when, in fact, there were numerous drafts of the report provided to AMP and on which AMP provided comments. Further, AMP's officers and employees are said to have participated in numerous telephone calls about the contents of the CU Report and suggested substantive amendments such that the findings were not, in fact, the product of an "external and independent investigation".

114 By its Amended Commercial List Response, AMP accepts that the letter of instruction to Clayton Utz and the CU Report represented that Clayton Utz had undertaken an "external and independent investigation"; the allegation that these representations were misleading and deceptive is denied. **02.0196**

115 AMP did not, however, assert its state of mind. Joining issue on whether the representations were misleading and deceptive does not give rise to waiver. As Allsop J explained in *DSE (Holdings) v Intertan* at [115]:

> The act of mere denial by the respondents of an assertion by the applicants is not an act by the respondents which expressly or impliedly makes an assertion about the contents of any privileged communication or which necessarily lays any such communication open to scrutiny. There is no act of the respondents inconsistent with the maintenance of the confidentiality. There is a joinder of issue on a question of fact to which the privileged communication can be seen as relevant. That is insufficient in my view for it to be concluded that there exists the necessary inconsistency enunciated by *Mann v Carnell*.

116 There is no 'issue waiver'.

Twenty-third sample document (AMP.4000.0482.7087)

117 On 6 April 2018, Ms Wright, director and principal of Workdynamic Australia sent an email to Mr Salter concerning Workdyamic's investigation. The email is entitled, "Confidential: Investigation". The email from Ms Wright and its attachments clearly form part of the work which Ms Wright had been tasked to undertake. The email was a step in the process she was undertaking. It is privileged.

118 On 16 and 17 April 2018, Mr Regan gave evidence before the Royal Commission. On 18 April 2018, an AMP board meeting was convened on short notice to discuss the matters raised in the Royal Commission. The board expressed disappointment and concern in relation to the CU Report, including the number of drafts of the report, of which the board was unaware. Mr Salter stepped aside whilst the matter was investigated. Mr Cullen was appointed as Acting Group General Counsel in Mr Salter's absence. The board also requested that the independent investigation into employee conduct, overseen by the AMP Ltd Advice Culture & Compliance committee, be extended to include Mr Salter.

119 On 20 April 2018, AMP issued a media release apologising for misconduct and failures in regulatory disclosures in the advice business and advising that Mr Meller had stepped down as chief executive officer. AMP stated that it would be making submissions to the Royal Commission, including addressing the issue of the independence of the CU Report. The media release stated that AMP's actions would build on an existing program of work instigated in 2017, including an independent investigation into employee conduct, "Based on the review's findings, the Board will determine the employment and remuneration implications for any relevant individuals around the fee for no service matter".

Twenty-fourth sample document (AMP.4000.0482.7600)

120 On 28 April 2018, Ms Robinson sent an email to Ms Bissell and Ms Wardlaw attaching a document prepared by Ms Wright in relation to her investigations. The email was entitled, "Confidential and Privileged: Project White [IWOV-

Legal.FID2230356]". Ms Robinson attaches a preliminary assessment prepared by Ms Wright, which is clearly privileged. Ms Robinson made some brief remarks about the preliminary assessment, which are also privileged. On 24 August 2018, Clayton Utz sent the final version of Ms Wright's investigation report to Ms Bissell.

121 On 4 May 2018, AMP made submissions to the Royal Commission in respect of a case study on "Fees for no service". These submissions describe the circumstances in which AMP had obtained the CU Report and provided it to ASIC, together with the extent to which the report had been amended before it was finally issued.

Twenty-fifth sample document (AMP.4000.0483.0989)

122 Returning to Project White, on 16 August 2018, Ms Bissell received a letter from Ms Robinson, which referred to Workdynamic's investigation and provided legal advice to AMP. On 24 August 2018, Clayton Utz sent an email to Ms Bissell attaching a final version of the investigation report prepared by Ms Wright. On 26 September 2018, Ms Robinson sent Mr Cullen an email, copied to Ms Bissell, attaching a copy of Ms Wright's report.

123 On 7 November 2018, Ms Bissell sent an email to herself entitled "FW: Privileged & Confidential s.33 Notice re: Project White [AMP-Legal.FID4024403]". At around this time, Ms Bissell was in the process of responding to a notice issued by the Royal Commission on 1 November 2018. AMP claims legal advice privilege over the document.

124 I have inspected the email and its attachments, which appear to be a collection of material by Ms Bissell in anticipation of answering the notice issued by the Royal Commission. Where the underlying documents are privileged – as they appear to be – the collation of the material with a view to ascertaining whether they should be produced does not, by that preparatory exercise, deprive the underlying documents of their privileged quality. As AMP submitted, the provision of professional assistance by an in-house lawyer in responding to a

statutory notice issued by a public inquiry falls within the concept of legal advice as explained in *Three Rivers* and in *AWB v Cole (No 5)*.

Twenty-sixth sample document (AMF.0005.0049.0001)

125 On 21 October 2019, Robert Caprioli was the subject of a section 19 examination by ASIC. A portion of the transcript has been redacted by AMP. Mr Caprioli is asked a question about an email chain between Ms Wright, Mr Caprioli and Ms Wardlaw. I infer that the question and answers which have been redacted concerned the investigation undertaken by Ms Wright. The plaintiffs opposed me inspecting the unredacted transcript. It is reasonable to infer that Mr Caprioli's answer to that question may have revealed the substance of the work undertaken by Ms Wright, being for the purpose of AMP receiving legal advice. The claim for privilege is appropriate and upheld.

Twenty-seventh sample document (AMF.0005.0067.0001)

126 On 2 March 2020, Ms Brenner was also the subject of examination by ASIC. Ms Brenner was asked whether she recalled if the AMP board received additional legal advice from Clayton Utz about the legal issue of whether the 90 Day Exception was a breach of the law and Ms Brenner's response has been redacted. Again, the plaintiffs objected to me viewing the unredacted transcript. Nor do I need to. It is reasonable to presume that Ms Brenner's answer to that question would have revealed the existence or substance of legal advice and the claim for privilege is appropriate and upheld.

CONCLUSIONS AND ORDERS

127 To summarise, the sample documents fall into broadly four types:

(a) the CU Advice (third and fourth sample documents);

(b) confidential communications between AMP and its in-house lawyers, or between the in-house and external lawyers, for the dominant purpose of the lawyers providing legal advice to AMP in a board paper when the CU Report and CU Advice were

presented to the board (being the first, second, fifth to ninth and eleventh sample documents);

(c) confidential communications regarding work undertaken subsequent to the CU Report (the tenth, twelfth to eighteenth and twenty-first sample documents); and

(d) confidential communications in respect of Project White (nineteenth, twentieth, twenty-second to twenty-fifth sample documents).

128 For varying reasons, I consider that these documents are privileged and no privilege has been waived. To the extent that this assists the parties to resolve outstanding issues in respect of privilege, I am unsure.

129 Although the plaintiffs have not succeeded in their application, the plaintiffs nonetheless resisted any costs order as, during the course of this exercise, AMP produced some 20 other sample documents over which privilege had previously been made. That may well be so, but I nonetheless consider it is appropriate to make an order that the plaintiffs pay AMP's costs of the motion, in particular, having regard to the serious nature of some of the contentions advanced by the plaintiffs in their written submissions. Whilst I accept that the plaintiffs' learned senior counsel took a more measured approach in oral submissions, AMP was obliged to meet these allegations and has been successful in that regard.

130 For these reasons I make the following orders:

(1) Dismiss the Notice of Motion filed on 19 September 2022.

(2) Order the plaintiffs to pay the defendant's costs of the motion.

(3) Order that all copies of Confidential MFI-1 produced to the Court be returned to the defendant forthwith.

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