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INPEX can cross-examine AkzoNobel's lawyers over 'inadequate' discovery

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INPEX has won a bid to cross-examine AkzoNobel's solicitors about discovery at the end of an 11-week trial over allegedly defective paint used on the $45 billion Ichthys natural gas project.

On Tuesday, Federal Court Justice Katrina Banks-Smith allowed INPEX to cross-examine Clayton Utz partner Timothy Donisi, risk and liability manager at AkzoNobel unit International Paint, Sarah McCague, and director of litigation at AkzoNobel NV, Marni Lancaster, after they provided affidavits explaining the late discovery of several documents.

"Whilst I have decided to allow the application, its circumstances are unusual," said Justice Banks-Smith.

The judge allowed cross-examination despite the liability trial being "largely complete", with only potential further oral closing submissions and evidence from one witness remaining. However, Justice Banks-Smith said she had not assumed there was any "inappropriate conduct" by the solicitors or companies.

"My decision to permit cross-examination is not premised on any view or assumption as to any inappropriate conduct by the deponents of the affidavits. I have not formed such views or made any such assumptions," said Justice Banks-Smith.

"Indeed, there are indications that aspects of the process have been undertaken conscientiously and (unsurprisingly) involved the allocation of enormous resources, in terms of people and time. What I am concerned about is ensuring that INPEX is able to fairly put its case and fairly address ANIP's defence."

Contractor JKC Australia and Japanese oil company INPEX brought the proceedings in September 2017 and July 2021, respectively, alleging that Dutch paint company AkzoNobel and unit International Paint — together ANIP – misled them about the protective coating product, known as Interthern 228, which was used on pipework and equipment modules on the Ichthys LNG project off the coast of Western Australia.

JKC and INPEX claim they were misled or deceived into believing I228 was a suitable product for use on the project, with the cost of rectification said to be in the billions of dollars. The trial centred on whether ANIP bears any liability for the alleged defective paint.

During the trial, INPEX raised issues with discovery of documents that go to whether parent company AkzoNobel can be held responsible for any wrongdoing, as well as the alleged representations contained in a product data sheet as to the intended use and curing times of the paint.

Justice Banks-Smith said that an affidavit from Donisi showed there was a basis for finding there were other relevant documents that had not been discovered.

"Collecting all of these matters and having regard to the centrality of attribution and the PDS/cure to the outcome of this high stakes proceeding, questions properly arise from Mr Donisi's affidavits which persuade me that there are reasonable grounds for being fairly certain that there are other relevant documents," said Justice Banks-Smith.

The judge found that Corrs Chambers Westgarth, which represents INPEX, and Clayton Utz, representing ANIP, had taken "different approaches" to interpreting discovery categories.

"Categories can be counterproductive, and as this experience indicates, important documents relevant to facts in issue may be shielded from production through ambiguous or uncertain drafting or a lack of knowledge as to the type of documents that may exist and should be requested," the judge said.

"No doubt standard discovery may also serve to obscure relevant documents in an avalanche of data. It is unsurprising that in a dispute of this scope the parties considered that the most efficient method by which to proceed was by categories."

Justice Banks-Smith said the resolution of discovery issues was "now urgent" and that cross-examination was the only efficient way to expose alleged inadequate discovery.

"At this point, it seems to me that confined and controlled cross-examination is the only efficient and effective means whereby INPEX might expose whether there are inadequacies in the existing discovery processes that may have denied them access to highly relevant documents and may potentially cause prejudice to it in this litigation," the judge said.

While ANIP said it was uncertain what might result from the application to cross-examine and how INPEX might use any additional evidence, Justice Banks-Smith rejected arguments that the application was "preliminary discovery about an application for further discovery".

"It is an order for cross-examination in relation to affidavits that have already been filed and which, in all the circumstances, INPEX is entitled to test," the judge said.

"The uncertainty as to what might happen next should not deny INPEX the right to cross-examine."

INPEX has also brought three cases against a syndicate of 25 insurers in the Supreme Court of Western Australia, two of which have been consolidated, seeking indemnity for damages said to flow from the use of Interthern 228.

The insurers include Lloyd's, AIG Australia, Allianz Australia, Tokio Marine, Zurich Australian Insurance and Chubb Insurance Australia.

In October 2021, INPEX and JKC settled all claims relating to the construction of the project in a separate but related dispute, by entering a global settlement deed in which the parties agreed to make efforts to maximise recovery from their insurers.

Under the agreement, JKC may become liable to pay a "significant amount" to INPEX unless INPEX recovers a certain amount from its own insurers or from AkzoNobel by March 2027.

JKC relies on the settlement deed to prove part of its claim against AkzoNobel.

INPEX is represented by Jeffery Gleeson KC, Gabby Crafti SC and Elizabeth Bateman, instructed by Corrs Chambers Westgarth. AkzoNobel and International Paint are represented by Bret Walker SC and Nicolas Kirby, instructed by Clayton Utz.

The Federal Court cases are JKC Australia LNG Pty Ltd v AkzoNobel NV and INPEX v AkzoNobel NV.