

LAWYERLY

INPEX did not waive privilege over law firm instructions, court rules in \$45B Ichthys project spat



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By [Cindy Cameronne](#) | Sydney

Dutch paint company AkzoNobel has lost a mid-trial bid to inspect instructions given by Allen & Overy to experts who tested its allegedly unsuitable protective coating used on pipework on the \$45 billion Ichthys natural gas project.

Federal Court Justice Katrina Banks-Smith on Friday rejected an application by AkzoNobel and unit International Paint — together ANIP — to look at the instructions

and briefing materials given by the law firm to two scientific experts who attended the Ichthys onshore LNG plant in 2017 and 2018.

Those experts were later retained by Corrs Chambers Westgarth to create expert reports in the proceeding on behalf of Japanese oil company INPEX, which claims that ANIP misled it about the suitability of the protective coating.

Justice Banks-Smith found INPEX had not waived legal professional privilege over the material and said ANIP did not need the documents to understand the expert reports.

“I do not accept ANIP’s submission to the effect that it is in the dark as to the purpose of the visits, what occurred at those visits or how the sampling was undertaken, and that it must have access to the documents in order to understand those things and to understand the expert reports,” the judge said.

Contractor JKC Australia and INPEX [brought the proceedings](#) in September 2017 and July 2021, respectively, both alleging that AkzoNobel misled them about the protective coating product, known as Intertherm 228, which was used on pipework and equipment modules on the Ichthys LNG project.

JKC and INPEX claim they were misled or deceived into believing I228 was a suitable product for use on the project.

ANIP, which is also named as a respondent, argued privilege had been waived over the instructions from Allen & Overy because the instructions “influenced” the reports and were necessary for them to be understood. ANIP claimed it was “unfair and inconsistent” with maintaining privilege for INPEX to rely on the reports without disclosing the instructions.

INPEX argued that just because the experts had referred to Allen & Overy’s instructions in the reports, that did not mean it had waived privilege. It claimed the instructions did not influence the content of the reports and said they were not based on communications with Allen & Overy that had not already been disclosed.

Justice Banks-Smith said it could be inferred that the visits related to investigating degradation in the coating on the piping and equipment at the plant since INPEX, JKC and ANIP were discussing that issue.

“Much can be inferred as to the reason for the site visits. It was no secret by 2017 (as the lay evidence has disclosed) that degradation in the I228 coating on piping and equipment at the plant had been identified and its cause was being investigated, including by ANIP,” the judge said.

Further, one of the reports clarified the reason for the site visits was to investigate the areas displaying breakdown and determine whether it related to the formulation and application of the coating or the service environment, said Justice Banks-Smith.

The judge was not persuaded that there was evidence showing the instructions and briefing documents influenced the content of the expert reports.

“For the reasons given, the expert reports disclose in a transparent manner the tasks undertaken, the questions asked by Corrs, and the materials and assumptions relied upon for the purpose of answering those questions,” she said.

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.

Trial in the cases commenced in June and will continue until November.

INPEX is represented by Harriet Lenigas, instructed by Corrs Chambers Westgarth. AkzoNobel and International Paint are represented by Michael Sims SC, instructed by Clayton Utz.

The Federal Court cases are [JKC Australia LNG Pty Ltd v AkzoNobel NV](#) and [INPEX v AkzoNobel NV](#).