Federal Court of Australia

INPEX Operations Australia Pty Ltd v AkzoNobel NV (No 4) [2025] FCA 320

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| File numbers: |  |
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| Judgment of: | **BANKS-SMITH J** |
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| Date of judgment: | 7 April 2025 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application for production of non-redacted copies of communications over which legal privilege claimed – whether privilege waived – inconsistency – application allowed in part |
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| Legislation: | *Evidence Act 1995* (Cth) ss 118, 119, 122  *Federal Court Rules 2011* (Cth) r 20.22 |
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| Cases cited: | *Banksia Mortgages Ltd v Croker* [2010] NSWSC 535  *College of Law Limited v Australian National University* [2013] FCA 492  *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCA 46; (2013) 250 CLR 303  *Federal Treasury Enterprise (FKP) Sojuzplodoimport v Spirits International B.V. (No 6)* [2019] FCA 337  *French v Triple M Melbourne Pty Ltd (Ruling No 1)* [2008] VSC 547  *GR Capital Group Pty Ltd v Xinfeng Australia International Investment Pty Ltd* [2020] NSWCA 266  *INPEX Operations Australia Pty Ltd v AkzoNobel NV (No 3)* [2024] FCA 1221  *Lactalis Jindi Pty Ltd v Jindi Cheese Pty Ltd* [2013] VSC 475  *Mann v Carnell* [1999] HCA 66; (1999) 201 CLR 1  *Osland v Secretary to the Department of Justice* [2008] HCA 37; (2008) 234 CLR 275  *Procter v Kalivis* [2009] FCA 1518  *Roberts-Smith v Fairfax Media Publications Pty Limited (No 33)* [2022] FCA 420  *TerraCom Ltd v Australian Securities and Investments Commission* [2022] FCA 208 |
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| Division: | General Division |
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| Registry: | Western Australia |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Number of paragraphs: | 88 |
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| Date of hearing: | Determined on the papers |
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| Counsel for the Applicants: | Mr J Gleeson KC with Ms G Crafti SC and Ms E Bateman |
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| Solicitor for the Applicants: | Corrs Chambers Westgarth |
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| Counsel for the Respondents: | Mr N Kirby |
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| Solicitor for the Respondents: | Clayton Utz |
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| Counsel for the Cross‑Claimants: | Mr N Kirby |
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| Solicitor for the Cross‑Claimants: | Clayton Utz |
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| Counsel for the First and Second Cross-Respondents: | Mr J Gleeson KC with Ms G Crafti SC and Ms E Bateman |
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| Solicitor for the First and Second Cross-Respondents: | Corrs Chambers Westgarth |
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| Counsel for the Third Cross‑Respondent: | The third-cross respondent did not appear |

ORDERS

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|  | | WAD 162 of 2021 |
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| BETWEEN: | INPEX OPERATIONS AUSTRALIA PTY LTD  First Applicant  ICHTHYS LNG PTY LTD  Second Applicant | |
| AND: | AKZONOBEL NV  First Respondent  INTERNATIONAL PAINT LIMITED  Second Respondent  AKZO NOBEL PTY LIMITED  Third Respondent | |
|  |  | |
| AND BETWEEN: | AKZONOBEL NV  First Cross-Claimant  **INTERNATIONAL PAINT LIMITED**  Second Cross-Claimant  **AKZO NOBEL PTY LIMITED**  Third Cross-Claimant | |
| AND: | INPEX OPERATIONS AUSTRALIA PTY LTD  First Cross-Respondent  **ICHTHYS LNG PTY LTD**  Second Cross-Respondent  **JKC AUSTRALIA LNG PTY LTD**  Third Cross-Respondent | |

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| order made by: | BANKS-SMITH J |
| DATE OF ORDER: | 7 april 2025 |

THE COURT ORDERS THAT:

1. Within seven business days the respondents produce to the applicants a complete unredacted version of the document identified in the interlocutory application dated 20 December 2024 as CTRL\_01679149\_RH.
2. The application is otherwise dismissed.
3. Costs reserved.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BANKS-SMITH J:

1. In *INPEX Operations Australia Pty Ltd v AkzoNobel NV (No 3)* [2024] FCA 1221 (***INPEX (No 3)***), I permitted cross-examination to proceed during trial of the deponents of affidavits relating to the discovery regime utilised by the respondents, ANIP. Two of those deponents were Mr Timothy Donisi, a partner of Clayton Utz, and Ms Marni Lancaster, a lawyer and the Director Litigation of the AkzoNobel NV group of companies.
2. The **cross-examination hearing** proceeded on 30 October 2024. During cross-examination, senior counsel for INPEX made calls for the production of various documents.
3. The trial currently stands part-heard, with a further week set aside in May 2025.
4. After the cross-examination hearing, the solicitors for INPEX (Corrs Chambers Westgarth) and ANIP (Clayton Utz) exchanged correspondence about the calls for production.
5. In response, ANIP produced certain documents with redactions, asserting that the redacted parts (referred to by the parties as the **Embedded Comments**) contain information that is immune from production on the basis of legal professional privilege. ANIP also declined to permit inspection of communications involving Ms Lancaster (**Lancaster Communications**), again asserting they were privileged. INPEX asserts that any privilege has been waived.
6. In order to resolve this issue, INPEX filed an interlocutory application on 20 December 2024 seeking production of a list of particular unredacted documents.
7. The parties have asked that the interlocutory application be determined on the papers. Four sets of submissions have subsequently been filed.
8. For the following reasons, the application is allowed in part.

## The comments/communications the subject of privilege claims

1. Copies of two categories of documents are sought. The first is identified in the submissions as complete unredacted copies of five document histories including Embedded Comments extracted from Clayton Utz's 'Relativity' database (the document database described in *INPEX (No 3)* at [78]). Each of the five document histories in redacted form have been provided by Clayton Utz to Corrs in response to the call for production. Copies are attached to an affidavit of Ms Kirsty Sutherland, a partner of Corrs, relied upon in support of this application, as annexures KS-13 to KS-17.
2. Mr Donisi provided two affidavits relevant to the cross-examination application the subject of *INPEX (No 3)* in which he addressed the processes implemented by Clayton Utz for discovery. They are referred to as **Donisi 3** and **Donisi 4**. Mr Donisi's evidence by way of these affidavits and under cross-examination forms the basis for INPEX's submission that privilege in the Embedded Comments has been waived.
3. The second category of documents sought is complete unredacted versions of the Lancaster Communications, described as communications passing between Ms Lancaster and either or both of Mr Gutierrez and Mr Wajahat Syed, comprising source documents and their attachments.
4. Ms Lancaster provided affidavit evidence, discussed below. Her evidence by way of these affidavits and under cross-examination forms the basis for INPEX's submission that privilege in the Lancaster Communications has been waived.

## Principles

1. INPEX's application proceeds on the assumption that the Embedded Comments and the Lancaster Communications are otherwise immune from production on the basis of privilege.
2. The parties agreed that Division 1 of Part 3.10 (Privileges) of the *Evidence Act 1995* (Cth) applies. To paraphrase, s 118 and s 119 provide that evidence is not to be adduced of communications the subject of legal advice privilege or litigation privilege respectively.
3. Section 122(2) deals with waiver. It permits the adducing of evidence which is privileged where a party has acted in a way that is inconsistent with the maintenance of the privilege.
4. Section 122(3) of the *Evidence Act* provides that:

Without limiting subsection (2), a client or party is taken to have so acted if:

(a) the client or party knowingly and voluntarily disclosed the substance of the evidence to another person; or

(b) the substance of the evidence has been disclosed with the express or implied consent of the client or party.

1. Both INPEX and ANIP proceeded on the basis that common law principles as to waiver continue to be relevant: *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCA 46; (2013) 250 CLR 303 at [32].
2. The principles are usefully summarised by Griffiths J in *College of Law Limited v Australian National University* [2013] FCA 492 at [24] and it is not necessary to set them out in any detail. The parties were generally agreed as to the principles relating to implied waiver, and the focus on inconsistency of conduct. As described in ***Mann v Carnell*** [1999] HCA 66; (1999) 201 CLR 1 (Gleeson CJ, Gaudron, Gummow and Callinan JJ) at [29]:

… Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is 'imputed by operation of law'. This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege. … 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.

1. In *GR Capital Group Pty Ltd v Xinfeng Australia International Investment Pty Ltd* [2020] NSWCA 266, Macfarlan JA (McCallum JA and Simpson AJA agreeing) relevantly said at [57]:

Enquiring whether the privilege holder has made express or implied assertions about the contents of the confidential communications, and whether its conduct has therefore 'laid open the communications to scrutiny', assists in ensuring that the court's focus is on inconsistency rather than simply relevance. If the privilege holder is understood to be asserting something about the contents of the communications, it is but a short step to conclude that it would be inconsistent for it to prevent those contents being scrutinised.

1. Other useful authorities referred to by the parties include *Federal Treasury Enterprise (FKP) Sojuzplodoimport v Spirits International B.V. (No 6)* [2019] FCA 337 at [25] (partial disclosure); and *Lactalis Jindi Pty Ltd v Jindi Cheese Pty Ltd* [2013] VSC 475 at [40] (whether disclosure is sufficient to warrant loss of privilege).

## First category - Embedded Comments

### Privilege claim

1. Clayton Utz described the basis of ANIP's claim to privilege over the Embedded Comments as follows:

The comments embedded within the document history logs as part of the legal review of the documents remain subject to a claim for legal professional privilege. The basis for the claim is that the comments disclose consideration of documents prepared in the course of both litigation and the provision of legal advice. Accordingly, these have been redacted within the logs visible through the designation [REDACTED - PRIVILEGED].

### INPEX (No 3)

1. As indicated in *INPEX (No 3)*, there have been numerous discovery applications and rulings made in this proceeding: [75] of those reasons. It became apparent in the lead up to and during trial that certain documents that should have been discovered had not been: [20]. For example, ANIP produced an additional 2,972 documents during the course of the 11-week period of the liability trial that proceeded during June 2024 to August 2024: [24]. The late or non-disclosure of a range of other documents is referred to at [27]-[44].
2. The order for cross-examination was made against that backdrop of late disclosure. It was made in circumstances where there were apparent deficiencies in the disclosure process which called for some explanation: [57] (citing *Procter v Kalivis* [2009] FCA 1518). I indicated during the trial, as a matter of procedural fairness, that the occasion might arise to draw inferences about the discovery process: [72], [76].
3. I concluded that in the particular circumstances of the proceeding, there were reasonable grounds for being fairly certain that there were other relevant documents that have not been disclosed: [89]. I also decided that cross-examination was the appropriate means in the particular circumstances whereby INPEX might expose whether there were inadequacies in the existing discovery process that might have denied them access to highly relevant documents and may potentially cause prejudice: [93].
4. Mr Donisi and Ms Lancaster were on notice as a result of (amongst other things) the reasons in *INPEX (No 3)* of the risk of inferences being drawn in relation to the discovery processes undertaken to date, and the purpose of the proposed cross-examination.

### Circumstances of waiver

1. INPEX contends that any privilege that existed in relation to the Embedded Comments has been waived by ANIP by reason of the evidence given by Mr Donisi in Donisi 3, Donisi 4 and in his cross‑examination.
2. Donisi 3 was filed on 29 August 2024, day 36 of the trial. Mr Donisi accepted under cross‑examination that it was put on in order to explain why many documents had been discovered during (rather than before) the trial. He accepted that it was put on to present facts that would help persuade the Court that while there were isolated instances of error in the discovery process, the overall process was sound and reliable. Donisi 4 was filed for the purpose of opposing the application for cross-examination. Mr Donisi accepted during the cross-examination hearing that the objective of the affidavit was to demonstrate that any failure to produce discovered documents was inadvertent and that from the facts given the process overall was sound and reliable.
3. It is not the purpose of these reasons to address Mr Donisi's evidence or ANIP's discovery regime as a whole. It remains the position (as I understand it) that the parties intend to make further submissions generally about ANIP's discovery. In this regard I note that ANIP received certain correspondence from INPEX (Corrs to Clayton Utz) prior to the cross-examination hearing.
4. For example, on 10 September 2024, INPEX told ANIP:

As to the consequences that may flow from any evidence given under cross‑examination, that will depend upon the evidence. Without limitation, INPEX may then:

(a) ask the Court to draw adverse inferences; and/or

(b) invite the Court to conclude that ANIP has made admissions against interest; and/or

(c) seek orders for further discovery; and/or

(d) apply to strike out parts of the defence.

1. In the same letter INPEX invited ANIP to:

… put forward a proposal as to how ANIP can satisfy INPEX and the Court that ANIP has made or will make full and proper discovery on the key questions of problems, complaints or claims regarding I228 on other projects and the culpability of the first respondent.

1. I acknowledge that broader issues remain between the parties as to disclosure of information for the purpose of the trial, and that they may be addressed further in due course.
2. However, in these reasons I am concerned with the particular application before me.
3. I have summarised relevant parts of Mr Donisi's evidence in *INPEX (No 3)* at [78]-[86]. Relevantly, Mr Donisi describes the Relativity database in Donisi 3.
4. In Donisi 3 and Donisi 4, Mr Donisi deposes that information about the discovery of identified documents was based on 'the information available to [him] from the Relativity database' about the documents and that non-disclosure was inadvertent: for example, Donisi 3 at paras 31‑32; Donisi 4 at paras 49‑51.
5. Mr Donisi does not refer in his affidavit or oral evidence to Relativity containing any embedded comments. However as is self-evident from the privilege claim, the document histories in Relativity include not only the bare details about dates of review and coding, but comments.
6. There is no suggestion that Mr Donisi has or could have reviewed the document histories for every document reviewed by Clayton Utz and assessed as either discoverable or not discoverable. There was a system in place, and it was his role to oversee it. Where Mr Donisi has made generalised assertions that any mistakes relating to discovery were inadvertent, I do not consider (and INPEX did not suggest) that Mr Donisi on behalf of ANIP has thereby waived any privilege over all embedded communications in Relativity as a whole. Having regard to the significance of the privilege, the question of any waiver must be approached with greater precision.
7. However, where it is apparent that Mr Donisi seeks to rely on particular document histories for the purpose of his evidence, the position may well be different.
8. In such a case there may be inconsistency (of the kind discussed in *Mann v Carnell*) between assertions made about a particular document, or as to the reliability of a discovery process, or as to whether failure to disclose a document was inadvertent, and the maintenance of confidentiality of aspects of the information in document histories that are likely to bear upon the soundness of such assertions. There would be unfairness in forcing INPEX to meet forensically such an assertion without access to all the information in a document history relating to its discovery, including relevantly embedded comments. In my view, legal privilege in such embedded comments may well be waived.
9. I will now turn to the five document histories the subject of this application.

### What the document histories indicate

1. INPEX seeks copies of certain document histories with unredacted Embedded Comments. These document histories (referred to in ANIP's submissions as audit logs) are listed with Bates document numbers in the interlocutory application and, including the annexure reference used in Ms Sutherland's affidavit, are as follows:
2. AKZ.135.001.1546\_RH [**KS-14**];
3. AKZ.135.001.3058\_RH [**KS-15**];
4. CTRL\_01679149\_RH [**KS-13**];
5. CTRL\_01672828\_RH [**KS-16**]; and
6. CTRL\_01679151\_RH [**KS-17**].

#### KS-14

1. KS-14 is a document history related to a document titled 'The Spotlight on Performance Coatings PowerPoint' dated 2 December 2010. According to ANIP, this document is now **exhibit 9422**. KS-14 indicates that the document was coded by a Clayton Utz employee as discoverable on 24 March 2024. Two days later that status was 'unset' and coded as 'refer', and a comment was added. On 2 April 2024 it was coded as not discoverable, and a comment was included. The comments are redacted. The document was discovered on 9 August 2024.
2. On being taken to exhibit 9422 at the cross-examination hearing, Mr Donisi accepted that the document should have been discovered. However, he did not refer to the document in Donisi 3 or Donisi 4 and he did not refer to Relativity or the document history when giving his evidence at the cross-examination hearing. There is no evidence that he reviewed this document history in Relativity. In those circumstances, I am not satisfied that there has been a waiver through Mr Donisi's conduct of any privilege in the Embedded Comments.

#### KS-15

1. KS-15 is a document history for the document titled 'BA Performance Coatings Rulebook - Third Draft'. According to ANIP, the document is now **exhibit 9425**. It was originally coded as discoverable on 15 March 2024 (by a paralegal) and on 22 March 2024 as confidential (by a senior associate), and then 'unset' on 22 March 2024 and coded as not discoverable after a review by Mr Donisi. A comment was added on 28 March 2024 which is redacted. The document was discovered on 9 August 2024.
2. On being taken to exhibit 9425 during the cross-examination hearing, Mr Donisi accepted that the document is a relevant document. He also gave general evidence about having reviewed ANIP's discovery process after *INPEX (No 3)* was published. However, Mr Donisi did not refer to the document in Donisi 3 or Donisi 4 and he did not refer to Relativity or the document history when giving his evidence about this document during the cross-examination hearing. There is no evidence that he reviewed this document history in Relativity or had knowledge of it. In those circumstances, I am not satisfied that there has been a waiver through Mr Donisi's conduct of any privilege in the Embedded Comments.

#### KS-13

1. The situation is somewhat different in regard to KS-13. This is a document history related to the **Ward letter** dated 1 March 2017. In *INPEX (No 3)* I explained the relevance of the Ward letter to the matters in issue in the proceedings at [34]-[36].
2. In Donisi 3, Mr Donisi deposed at para 43:

There are 20 copies of the 1 March Ward Letter stored in the Relativity database. It appears from the information on Relativity that these copies of the documents were provided by the Respondents and uploaded to Relativity from around 6 April 2018 onwards. The document histories for those copies of the 1 March Letter on Relativity record that the first time any copy of the 1 March Ward Letter was formally reviewed for relevance was on 18 February 2019 and the last time any copy of the 1 March Ward Letter was formally reviewed for relevance (prior to August 2024) was on 9 June 2021. At no time was a copy of the 1 March Ward Letter identified as responsive to any discovery category. That is why none of them had been previously produced.

1. A separate document history for another version of the Ward letter (CTRL\_01672826\_RH) was coded in May 2021 by a Clayton Utz lawyer as discoverable, with the JKC discovery category code noted. In June 2021 a senior associate unset the coding and coded it as not discoverable. The discovery category code was also unset.
2. On the same day, in the document history for the Ward letter attached as version KS-13, the senior associate made a comment. The comment is redacted in KS-13.
3. There were clearly separate document histories for separate versions of the Ward letter, including one with an embedded comment.
4. It is apparent that, contrary to Mr Donisi's affidavit evidence, the Ward letter was identified as discoverable by a Clayton Utz lawyer and identified as falling within a discovery category in May 2021. However, it is also apparent that on further review by a senior associate, the lawyer's coding was reversed. The same senior associate made a comment about the Ward letter in a separate document history for the Ward letter. I do not consider the fact that the Embedded Comment the subject of this application is included in a separate document history to be of any great significance. The document histories relate to the same Ward letter.
5. Mr Donisi accepted during cross-examination that the Ward letter should have been discovered (although apparently on the basis that it was part of a family of documents and within a discovery protocol, and Mr Donisi maintained the position that it was not discoverable in isolation, having regard to discovery categories).
6. It is apparent from Mr Donisi's affidavit evidence that there is information about the Ward letter in Relativity (and potentially in 20 different entries). The document histories are expressly referred to. Mr Donisi makes an assertion about what those document histories record. Objectively, his evidence indicates to a reader that the document histories have been looked at and relied upon (even if not by Mr Donisi personally). The affidavit evidence suggests that there is nothing in the entire document history (or histories) that reveals that the Ward letter was ever identified as discoverable. Mr Donisi makes reference to the document histories in order to justify decisions made by ANIP in relation to discovery and in the face of issues raised by INPEX as to the veracity of ANIP's discovery. This is relevant to ANIP's contention that the Court should find the discovery process has been sound and reliable and that any errors were inadvertent. In all of the circumstances, it is inconsistent and unfair for ANIP to seek to disclose a selected part of the identified document history upon which it relies and to refuse to disclose the Embedded Comments. I am satisfied that any privilege in those comments is waived.

#### KS-16 and KS-17

1. KS-16 and KS-17 are referred to as document histories for the 'HHI PowerPoint' that was attached to the same email as the Ward letter. Both were coded as discoverable in May 2021 and coded to a JKC discovery category. The coding was changed by a senior associate to not discoverable on 9 June 2021 and a comment inserted. The comment is redacted in KS-16 and KS-17. At the same time, there was a further version of the HHI PowerPoint that was reviewed and identified as discoverable in May 2021 (AKZ.145.001.0074\_RH). Despite being further reviewed after 9 June 2021, three lawyers at Clayton Utz did not change its coding from discoverable. One of the lawyers was the same senior associate that changed the version at KS-16 and KS-17 to not discoverable. The document was discovered on 20 August 2024.
2. There is no evidence in Mr Donisi's affidavits or under cross-examination that indicates that Mr Donisi reviewed any document histories in relation to the HHI PowerPoint. No reference was made to any comments about it in any document histories or in the Relativity database.
3. In those circumstances, I am not satisfied that there has been a waiver through Mr Donisi's conduct of any privilege maintained by ANIP in the Embedded Comments.

## Second category - Lancaster Communications

1. The second category is referred to as unredacted copies of the **Lancaster Communications**. As explained in *INPEX (No 3)* at [49], Ms Lancaster holds the position of Director Litigation of the AkzoNobel NV group of companies, being a global role.

### Background to provision of Lancaster affidavit

1. On 29 November 2023 INPEX filed an interlocutory application seeking that ANIP be required to give discovery of various documents including organisational charts of the ANIP group, documents related to internal decision-making within ANIP, documents related to ANIP's Australian projects, documents concerning employment of specified personnel in ANIP, documents related to services provided by ANIP and documents related to ANIP's Key Account Manager Team. INPEX requested that this discovery be verified by an affidavit sworn in accordance with r 20.22 of the *Federal Court Rules 2011* (Cth). INPEX filed a second interlocutory application seeking discovery of further documents on 18 December 2023. These applications (together with a discovery application brought by ANIP) were managed and heard together.
2. A major issue that arose during the progress of the applications was the apparent deletion by ANIP of the electronic mailboxes of certain members of ANIP's executive committee. INPEX said that ANIP had first notified it on 8 March 2024 that the mailboxes had been deleted and had provided it with no information on the circumstances surrounding the deletions. The mailboxes were described by ANIP as being 'unavailable' or having 'ceased to be held'.
3. Having regard to the significance of this information, on 20 March 2024 INPEX proposed an order that ANIP be required to file an affidavit explaining the relevant archiving and classification processes for mailboxes between certain dates, and the dates and circumstances of the deletion of the mailboxes of Leif Darner, Robert Molenaar, Hans Wijers, Keith Nichols, Vic Fraser, Bill McPherson and Robert Taylor (see generally *INPEX (No 3)* as to the attribution issue at [14]-[17]).
4. ANIP opposed INPEX's request, submitting (amongst other things) that such a task would be manifestly excessive and would require a long and detailed affidavit to be prepared. It also submitted that requiring ANIP to undertake such a course of action would not be a pragmatic way to conduct the discovery process. Further, this was only one of a number of rulings requiring both parties to undertake additional disclosure and searches made at that time.
5. Having regard to ANIP's arguments as to 'manifest excessiveness' and the need for a long affidavit, and the inference that there was a considerable quantity of information to be disclosed, I considered an efficient response in the circumstances was to require ANIP to provide an affidavit as requested by INPEX, but to permit it to be sworn by the deponent on the basis of their knowledge and belief. Such a course does not abrogate the responsibility of a deponent from disclosing the basis of their knowledge and belief. One reason such disclosure is required is so that the basis can be tested if required.
6. Accordingly, on 15 May 2024 I ordered that the respondents (ANIP) file and serve an affidavit explaining the dates of and the circumstances regarding the deletion of the mailboxes of Leif Darner, Robert Molenaar, Hans Wijers, Keith Nichols, Vic Fraser, Bill McPherson and Robert Taylor.
7. As is apparent, I did not specify who should depose any affidavit. ANIP elected to have the affidavit sworn by Ms Lancaster. Indeed, it later emerged from Ms Lancaster's cross‑examination that ANIP had initially intended that a person described as a 'technical subject matter expert' (Mr Gutierrez) would provide the affidavit. It was ANIP's choice as to who might provide the evidence.

### Lancaster affidavit

1. Ms Lancaster's affidavit was filed on 12 June 2024, and contains 18 paragraphs.
2. Ms Lancaster deposed at para 3:

Each of the matters to which I depose in this affidavit is true to the best of my knowledge, information and belief. Where statements are not made from my own personal knowledge, I believe them to be true to the best of my information and belief, I have made them after due inquiry and I have set out the sources of my belief.

1. In *INPEX (No 3)* I referred to Ms Lancaster's affidavit: [49], [50], [110]-[115]. For convenience I extract pertinent paragraphs:

[111] With respect, Ms Lancaster's evidence is of a general nature and does not descend into any great detail, having regard to the significance of the apparent loss or deletion of a body of communications involving senior people. …

[112] Ms Lancaster deposes to the end date of 2015 being relevant, because key named persons ceased employment with the various entities in the AkzoNobel group prior to that time. **Ms Lancaster states that she was informed by Mr Adolfo Gutierrez,** the Domain Lead Cybersecurity Risk and Compliance Manager within the AkzoNobel group, that the group currently uses Microsoft Office 365 and Deloitte has access to the platform. **Ms Lancaster states that she was informed by Mr Wajahat Syed**, who leads the IT team responsible for managing the Office 365 platform across the AkzoNobel group, that he and his team have been unable to find email content for the relevant employees on Office 365.

[113] In summary, Ms Lancaster deposes to the effect that the 'most likely reason' the mailboxes were not found or deleted is because they were not migrated to Office 365. **Alternatively, Ms Lancaster said that Mr Gutierrez had informed her** that there was a possibility that the mailboxes were 'lost' before the Office 365 migration because at the relevant time email inbox sizes 'were very limited' and 'employees needed to regularly manually delete or archive their own mailboxes'. Ms Lancaster states that she believes based on her own experience and on information from Mr Gutierrez that the AkzoNobel group migrated to Office 365 'between around 2016 and 2018'. **Mr Gutierrez told her that in order to manage costs the key focus of the migration was to transfer active user mailboxes**. To manage costs the team exercised a discretion as to what data was transferred, including prioritising active users.

[114] For context, it must be recalled that the JKC action commenced in 2017. ANIP was involved in investigations as to the degradation of I228 on the Project from at least 2016.

[115] Ms Lancaster did not have any involvement in these proceedings prior to February 2023 and attested to no personal knowledge of the circumstances of the deletion of the mailboxes. Whilst the court order allowed for an explanation for the deletion of mailboxes to be given on the basis of information and belief, it is implicit in any such direction that there will be a sound basis for such knowledge and belief. In my view, the general nature of the information apparently given to Ms Lancaster by Mr Gutierrez called for further interrogation by Ms Lancaster or by others within ANIP as to the timing and circumstances of the deletion, including whether back-ups were arranged prior to the migration to Office 365. Whether or not there was any further interrogation of such issues is a legitimate matter for cross‑examination.

(emphasis added)

1. The emphasised extracts were based on passages from Ms Lancaster's affidavit that indicated that she was informed of matters by Mr Gutierrez and Mr Syed. Relevant statements in her affidavit include the following:
2. 'In advance of preparing this affidavit I have made relevant enquires with the technical subject matter experts within the AkzoNobel group to understand the circumstances which lead to the Relevant Employees' mailboxes no longer being available to the Respondents' (para 7);
3. 'I am informed by Mr Adolfo Moreno Gutierrez, the Domain Lead Cybersecurity Risk and Compliance Manager within the AkzoNobel group, that…' (para 9);
4. 'I am informed by Mr Syed and verily believe that…' (para 11);
5. 'Mr Syed has informed me that…' (para 12);
6. 'I am also informed by Mr Syed and by Mr Moreno Gutierrez, that…' (para 14);
7. 'Mr Moreno has informed me and I believe that…' (para 16 and in context likely intended to refer to Mr Gutierrez);
8. 'I am informed by Mr Moreno Gutierrez…' (para 18); and
9. 'For example, Mr Moreno Guiterrez's understanding is that…' (para 18).

### The cross-examination

1. During cross-examination, Ms Lancaster amended the evidence in para 7 of her affidavit by deleting the words 'I have made relevant enquiries' and substituting the words 'I have caused relevant enquiries to be made'. This distancing from personal involvement or inquiry was further revealed under cross-examination.
2. The cross-examination revealed that in fact Ms Lancaster had not spoken to either Mr Gutierrez or Mr Syed for the purpose of preparing her affidavit. Nor did she meet with either of them in person or otherwise. She did not correspond with either of them directly. Objectively, the affidavit portrays a different picture and in this regard is misleading.
3. However, that does not answer the question of waiver.
4. Ms Lancaster's evidence under cross-examination was that she was copied in to exchanges of emails and that Clayton Utz was involved in that process. It follows that the source of much of Ms Lancaster's evidence in her affidavit is presumably those emails.
5. There was no objection taken to questions to Ms Lancaster during cross-examination about the emails or about the sources of her knowledge on the basis of privilege.

### The call and the privilege claim

1. During the cross-examination INPEX made a call for the communications involving Ms Lancaster and Mr Gutierrez and/or Mr Syed either to which she was directly involved or copied into.
2. ANIP subsequently provided a list of 44 emails said to relate to the call, extracted from a spreadsheet. INPEX seeks unredacted copies of 39 of those emails. The spreadsheet includes information that indicates that lawyers from Clayton Utz were senders or recipients of each of those emails. ANIP asserts that the documents are privileged on the basis that they were 'created in the course of providing legal services to [ANIP] as part of the current litigation and for the dominant purpose of legal advice'. I take this to be an assertion of both litigation privilege and legal advice privilege.
3. Leaving aside the question of waiver, ANIP's claim to privilege in the emails has apparently not been challenged. It may be that redacted versions of the emails have already been provided to INPEX. Experience suggests that there will be many parts of the emails that contain communications that are not confidential and are not privileged (at minimum, for example, dates, authors, recipients, headings, etc). For present purposes I will assume the privilege claim is not challenged by INPEX.
4. INPEX contends that any privilege that may have existed in such communications has been waived by ANIP disclosing the substance of the communications and relying on the communications as the basis for Ms Lancaster's belief. INPEX asserts that Ms Lancaster made the disclosure of the communications knowingly and voluntarily.
5. INPEX does not suggest that, as a general proposition, where an affidavit is sworn on information and belief, privilege in an underlying communication will be lost. It is possible in such circumstances for there to be a waiver of privilege. An example is provided by *Banksia Mortgages Ltd v Croker* [2010] NSWSC 535, in which information including disclosure about identified emails was deployed for the purpose of a summary judgment application. Privilege in the emails was found to have been waived (at [35]-[39]). However, it is always necessary to focus on the particular scenario. Questions of waiver are always matters of fact and degree, to be considered in the given context: *Osland v Secretary to the Department of Justice* [2008] HCA 37; (2008) 234 CLR 275 at [45], [49].
6. Ms Lancaster in her affidavit set out matters of fact without reference to any emails or documents. Whilst I accept INPEX's submission that Ms Lancaster provided the information in the affidavit voluntarily (having regard to what is said at [63] above and regardless of the court order), I do not consider that her reference to those matters of fact is inconsistent with a maintenance of privilege in the 39 emails that apparently led to the final version of her affidavit.
7. The observations of Forrest J in *French v Triple M Melbourne Pty Ltd (Ruling No 1)* [2008] VSC 547 are useful in this regard:

[20] In *Osland v Secretary to the Department of Justice*, Gleeson CJ, Gummow, Heydon and Kiefel JJ said as follows:

Waiver of the kind presently in question is sometimes described as implied waiver, and sometimes as waiver 'imputed by operation of law'. It reflects a judgment that the conduct of the party entitled to the privilege is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. Such a judgment is to be made in the context and circumstances of the case, and in the light of any considerations of fairness arising from that context or those circumstances.

Whether, in a given context, a limited disclosure of the existence, and the effect, of legal advice is inconsistent with maintaining confidentiality in the terms of advice will depend upon the circumstances of the case. As Tamberlin J said in *Nine Films and Television Pty Ltd v Ninox Television Ltd*, questions of waiver are matters of fact and degree.

[21] Mere identification of the existence of a document or, in the context of this case, a statement as to the existence of instructions does not of itself constitute a waiver. In *State of Victoria v Davies* the Court of Appeal said:

As Gibbs CJ stated in *Attorney General (NT) v Maurice* by reference to authority, it has been held that the privilege in respect of a document is not waived by the mere reference to that document in pleadings or in an affidavit, although the position will be different if the document is reproduced in full in the pleading or affidavit.

…

[23] In my view, what was done by the letter of 5 November is no different to what is done day in day out by solicitors either forwarding a letter of demand or responding to allegations made by another party. Such demands or responses are made upon instructions (which may be stated expressly or implicitly) given by the client; there is, in my view, no inconsistency in the requisite sense where a solicitor sets out the client's instructions in respect of matters of fact. In this case, the reference to taking instructions and then asserting that 'the response was based on instructions' cannot, without more, place this letter in any different position to any other letter asserting or disputing factual contentions based on instructions given by the client.

(footnotes omitted)

1. It can similarly be said that the affidavit sets out a number of facts that are the client's instructions in respect of those facts, but without waiving privilege in those instructions.
2. The question of whether there was waiver arising out of the cross-examination is more finely balanced. The cross-examination traversed Ms Lancaster's understanding of discovery processes and obligations. It revealed the process by which the affidavit was prepared and the existence of the emails. It revealed that Ms Lancaster spoke to Clayton Utz 'who were preparing' the affidavit but not Mr Gutierrez or Mr Syed. She accepted that she made her inquiries about the apparent migration of mailboxes through the agency of Clayton Utz. The apparent involvement of Clayton Utz at every step of the affidavit preparation and drafting was explained by Ms Lancaster. It appears that the affidavit was prepared by Clayton Utz by gathering instructions from Mr Gutierrez or Mr Syed (and potentially others), collating the information and circulating drafts of the affidavit. Ms Lancaster was included in the exchanges of emails.
3. Ms Lancaster was cross-examined as a result of an order to that effect flowing from *INPEX (No 3)*. As already observed, some of her evidence was revealing. However, having been ordered to attend for cross-examination, Ms Lancaster was required to answer questions. This context must be taken into account. Further, her oral evidence relevantly addressed the process undertaken to obtain information, and in particular the extent of any inquiries made by her or Clayton Utz to locate persons who might assist in providing information, rather than illuminating or disclosing further the substance of the emails. Although INPEX points to the fact that Ms Lancaster did not object to answering questions on the basis of privilege, I am not convinced that answers she gave were of a nature that disclosed or sufficiently disclosed privileged communications. Failure to object to answering a question on the basis of privilege during oral evidence is not necessarily sufficient to render a disclosure voluntary or indicate waiver of privilege in any particular circumstances: see, for example, *Roberts-Smith v Fairfax Media Publications Pty Limited (No 33)* [2022] FCA 420 at [32].
4. There was limited evidence that might point to a contrary conclusion. For example, I take into account that at one point in the cross-examination Ms Lancaster said that as part of the process she 'satisfied [herself] that what's in the affidavit was reflected and backed up in the email correspondence'. This could on the one hand be understood as Ms Lancaster seeking to strengthen her affidavit evidence by reference to the undisclosed emails, and so deploying them in a limited manner for forensic advantage. However, on the other, it can be said that by the evidence Ms Lancaster is not asserting something about the contents of the communications as against asserting something about the process by which the affidavit was prepared.
5. I am not satisfied that this conduct was sufficient in the circumstances to lay open all of the email exchanges to scrutiny. As a matter of fact and degree, I am not persuaded that Ms Lancaster's evidence was inconsistent with ANIP's maintenance of any privilege in the emails within the meaning of s 122(2) of the *Evidence Act*.
6. It remains open to INPEX to make whatever submissions it considers are appropriate about what weight should be given to Ms Lancaster's affidavit.

## Alleged delay

1. As I have allowed the application in part, I deal briefly with ANIP's contention that the application should not be granted having regard to alleged delay by INPEX in bringing this application or disclosing its purpose. Although I have taken the submission into account in the overall assessment of fairness, I was not persuaded by it. The reason for the urgency in relation to the cross‑examination hearing arose as a result of late production of documents by ANIP. By that time, the Court was constrained as to the options that might best facilitate a fair trial without adjournment: *INPEX (No 3)* at [92]-[93]. The Court facilitated the cross-examination hearing on short notice. INPEX's application for production was made on 20 December 2024. It was made after the parties were unable to resolve the issues by exchange of correspondence which proceeded during December 2024. ANIP is well aware of the nature of the submissions that might be made about the discovery process generally, informed by the reasons in *INPEX (No 3)* and the cross-examination hearing. The parties have proceeded on the basis that they intend to make further submissions about a number of trial matters, including discovery, during the further five-day trial period set aside in May 2025. In those circumstances, the application has not operated in a manner that is unfair to ANIP in the context of the trial as a whole.

## Access to documents

1. ANIP suggested that the Court inspect the documents in order to assist with the application. I assume it was intended that another judge of the Court undertake the inspection, in light of the privilege claim. Although there are occasions when such a course is useful, and it has been undertaken in the context of waiver (***TerraCom*** *Ltd v Australian Securities and Investments Commission* [2022] FCA 208 at [78] (Stewart J)), I did not consider it was required in this case. I have been able to determine the question of waiver without the Court examining the various documents. The difficulties to which Stewart J referred in *TerraCom* in relation to partial disclosure have not arisen in this case.

## Orders

1. There will be orders accordingly.

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| --- |
| I certify that the preceding eighty-eight (88) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Banks-Smith. |

Associate:

Dated: 7 April 2025