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Sent: Thursday, 28 September 2017 5:06 PM
To: Chambers - Kovacic DP
Cc: Adrian.Morris@ashurst.com; Elysse.Lloyd@ashurst.com;
aguy@professionalsaust.onmicrosoft.com; athomas@cfmeu.com.au; abha.devasia@amwu.org.au;
gunzburg@bigpond.net.au
Subject: AM2014/190 – Four Yearly Review of Modern Awards – Transitional Provisions – Accident
Pay Provisions [BD-CM.30002560.02-3000-0722]

Dear Associate

**AM2014/190 – four yearly review of modern awards – transitional provisions –
accident pay provisions – Black Coal Mining Industry Award**

We refer to the directions hearing before Deputy President Kovacic yesterday (27 September 2017) concerning the Application for order for production of documents etc filed by the Association of Professional Engineers, Scientists and Managers, Australia on 14 September 2017 (**Application**).

We confirm that the Coal Mining Industry Employer Group (**CMIEG**) objects to the production of documents in respect of Items 4(a) and (c) and 5(a) and (c) of the Schedule to the proposed Order in the Application, based on a claim for legal professional privilege in respect of the relevant documents in answer to those items.

In accordance with the directions of the Deputy President issued orally at the directions hearing, we **attach**, by way of filing on behalf of the CMIEG, an affidavit of Trent Daniel Sebbens sworn 28 September 2017 in support of the CMIEG's objection.

The CMIEG will also shortly file, by way of a separate email, submissions on behalf of the CMIEG.

We have copied into this correspondence APESMA, CFMEU and AMWU.

Please contact us if you have any questions concerning these matters.

Yours sincerely

Trent Sebbens

Partner

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IN THE FAIR WORK COMMISSION

Matter: AM2014/190 - four yearly review of modern awards – transitional provisions – accident pay provisions

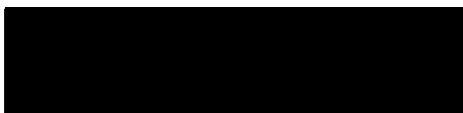
AFFIDAVIT OF TRENT DANIEL SEBBENS

On 28 September 2017, I Trent Daniel Sebbens, of c/- Ashurst Australia, Level 11, 5 Martin Place NSW 2000 say on oath:

1. I am a solicitor and partner of Ashurst Australia (**Ashurst**).
2. Ashurst is instructed as the legal representative for the group known as the Coal Mining Industry Employer Group (**CMIEG**).
3. I have the day-to-day conduct of this matter.
4. I make this affidavit from my own knowledge except where I state otherwise. Where I make statements based on information provided to me, I believe such information to be true and correct in every particular.
5. This affidavit is made in respect of the Application for order for production of documents etc filed by the Association of Professional Engineers, Scientists and Managers, Australia on 14 September 2017 (**Application**), particularly in respect of items 4(a) and (c), and 5(a) and (c) of the Schedule to the proposed Order in the Application. The Application is sought in respect of the "CMIEG".

Background

6. The name "CMIEG" has been used in the present proceedings, as the description to describe a group of coal mine owners and operators that employ persons who are covered by the *Black Coal Mining Industry Award 2010* (the **Award**). The CMIEG is represented by Ashurst in the proceedings (in the manner described), and Ashurst has done so since the commencement of the proceedings.
7. The description "CMIEG" was also used in the award modernisation process (AM2008/2), the two yearly review (AM2012/77), and other aspects of the present four yearly review (including AM2014/47; AM2016/8; and AM2104/67).
8. For the purpose of the present proceedings, the employer companies or company groups described as the CMIEG are Anglo American; BHP; Centennial Coal; Ensham Resources (Idemitsu); Fitzroy Resources; Glencore; Jellinbah Resources; New Hope; Peabody Energy;

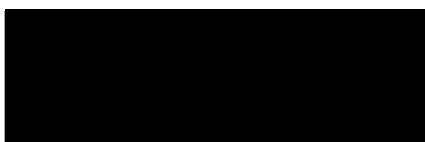


Rio Tinto; South32; Curragh (Wesfarmers Resources); Whitehaven Coal and Yancoal. The CMIEG is not a registered organisation, association or society.

9. The arrangements that have established for the CMIEG to provide Ashurst with instructions are as follows. DGHR Pty Ltd (**DGHR**), who acts through its principal and Managing Director, David Gunzburg, is engaged by each of the company groups that constitutes the CMIEG to provide advice and assistance in relation to the four yearly review process conducted by the Fair Work Commission, including in relation to Award. In accordance with the terms of the engagement of DGHR by each of the company groups that constitutes the CMIEG, DGHR has instructed Ashurst to act in these proceedings for the CMIEG.
10. In the day to day conduct of the present matter, DGHR acts as the convenor of the CMIEG, and the agent for each of the company groups that constitute the CMIEG in respect of the present matter. In accordance with the engagement by each of the company groups that constitutes the CMIEG, DGHR through Mr Gunzburg provides instructions to Ashurst for the CMIEG. From time to time, Ashurst is also involved in communications between DGHR (through Mr Gunzburg) and relevant CMIEG members in obtaining instructions directly from those members.
11. In the present proceedings, on 30 January 2017, Ashurst engaged Dr Keith Adam to provide expert opinion in the proceedings.

Documents in answer to items 4(a) and (c) and 5(a) and (c) of the Schedule to the Application

12. The Schedule to the proposed Order in the Application describes the following documents:
 4. *In respect of the statements of Mr David Gunzburg dated 24 February 2017 and 18 August 2017:*
 - a. *any correspondence between the CMIEG or any member of the CMIEG or the solicitors for the CMIEG and Mr David Gunzburg, including without limitation:*
 - i. *any letter of instruction to Mr David Gunzburg; and*
 - ii. *any letter of engagement of Mr David Gunzburg.*
 - ...
 - c. *any draft of the statement of Mr David Gunzburg.*
 5. *In respect of the letter/report of Dr Keith Adam dated 28 February 2017:*
 - a. *any correspondence between the CMIEG or any member of the CMIEG or the solicitors for the CMIEG and Dr Adam; and*
 - ...
 - c. *any draft of the letter/report of Dr Adam.*
13. In response to the Application, I have caused steps to be taken, and have also undertaken steps myself, to:
 - (a) identify and collate documents that would be in answer to items 4(a) and (c) and 5(a) and (c) of the proposed Order in the Schedule, from the files maintained by Ashurst in



this matter, and the email accounts of lawyers involved in day to day conduct of the matter, namely Elyse Lloyd and myself; and

- (b) liaise with Mr Gunzburg to identify and obtain documents in answer to items 4(a) and (c) and 5(a) and (c) of the proposed Order in the Schedule.
14. I have caused to be prepared a table listing documents in answer to items 4(a) and (c) and 5(a) and (c) of the proposed Order in the Schedule, which is annexed to this affidavit and marked "**TDS-1**".
15. The CMIEG objects to producing those documents that are marked in the document as being subject of a claim of legal professional privilege.

Relevant background in respect of the statements of Mr Gunzburg and the report of Dr Adam

16. On 31 October 2016, Vice President Watson, the then presiding member of the Full Bench in the present proceedings, issued directions for the filing of evidence and submissions.
17. On 30 January 2017, Vice President Watson issued directions for the filing of evidence and submissions.
18. On 24 February 2017, the CMIEG filed submissions and a witness statement of Mr Gunzburg, signed 24 February 2017.
19. On 28 February 2017, the CMIEG filed an expert report of Dr Adam dated 28 February 2017.
20. On 27 June 2017, Deputy President Kovacic issued further amended directions for the filing of evidence and submissions.
21. On 31 July 2017, Deputy President Kovacic issued further amended directions for the filing of evidence and submissions.
22. On 18 August 2017, the CMIEG filed submissions in reply and a supplementary witness statement of Mr Gunzburg, signed on 18 August 2017.

Mr Gunzburg and Dr Adam

23. As set out above, Mr Gunzburg has prepared and signed two witness statements for the purpose of the proceedings, signed on 24 February 2017 and 18 August 2017. These were filed on behalf of the CMIEG in accordance with the directions issued by the Commission. The CMIEG wishes to rely upon these witness statements at the substantive hearing of the proceeding. I refer to and rely upon each of these witness statements in relation to the present objection to production of documents under items 4(a) and (c) and 5(a) and (c) of the Schedule to the proposed Order in the Application.
24. Dr Adam has prepared and signed an expert report in the substantive proceeding on 28 February 2017. This was filed on behalf of the CMIEG. The CMIEG wishes to rely upon this expert report at the substantive hearing of the proceeding. I refer to and rely upon this expert



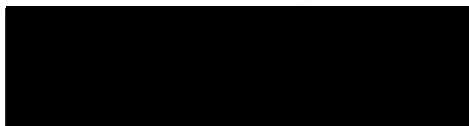
report in relation to the present objection to production of documents under items 4(a) and (c) and 5(a) and (c) of the Schedule to the proposed Order in the Application.

Communications between Ashurst and Mr Gunzburg

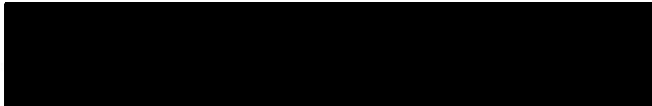
25. In relation to the documents sought by paragraphs 4(a) and (c) of the proposed Order in the Schedule to the Application, the communications between Ashurst and Mr Gunzburg (of DGHR) concerning the preparation of his first and second witness statements were confidential communications made for the dominant purpose of providing professional legal services to the CMIEG (through DGHR) relating to this proceeding. The communications are therefore protected from disclosure by legal professional privilege.
26. Each of the communications was confidential, and each was made for the dominant purpose of providing professional legal services to the CMIEG (through DGHR) in relation to this proceeding, as the communications were made in connection with Mr Gunzburg acting as a witness for the CMIEG in the proceeding and correspondingly preparing witness statements to be filed in the proceedings and relied upon by the CMIEG.

Communications or contact between Ashurst and Dr Adam

27. In relation to the documents sought by paragraph 5(a) and (c) of the proposed Order in the Schedule to the Application, the communications between Ashurst and Dr Adam relating to the preparation of an expert report for use in the proceedings were confidential communications made for the dominant purpose of providing professional legal services to the CMIEG relating to this proceeding and are therefore protected from disclosure by legal professional privilege.
28. Each of the communications was confidential, and each was made for the dominant purpose of providing professional legal services to the CMIEG in relation to this proceeding, as the communications were made in connection with Dr Adam, in accordance with his engagement, acting as an expert to provide expert opinion in the proceedings, and correspondingly preparing an expert report that would be relied upon by the CMIEG in the proceedings.



Sworn by the deponent
at 5 Martin Place
in New South Wales
on 28 September 2017
Before me:



) Signature of deponent
)

Signature 

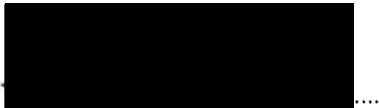
Full name of witness: Louise Kate Ritchard
Address of witness Ashurst Australia, Level 11, 5 Martin Place, Sydney NSW 2000
Capacity of witness Solicitor (Law Society No. 68270)

IN THE FAIR WORK COMMISSION

Matter: AM2014/190 - four yearly review of modern awards - transitional provisions - accident pay provisions

ANNEXURE CERTIFICATE

This and the following 9 pages is the annexure "**TDS-1**" referred to in the affidavit of Trent Daniel Sebbens sworn at 5 Martin Place on 28 September 2017.



Louise Kate Ritchard
Solicitor (Law Society No. 68270)
Ashurst Australia
Level 11, 5 Martin Place, Sydney NSW 2000

AM2014/190 - four yearly review of modern awards – transitional provisions – accident pay provisions

List of documents in answer to Application for order for production to the CMIEG – Items 4(a) and (c), 5(a) and (c)

No	Schedule – Item No.	Date	Document description	Source	Recipient	Basis for claim for privilege
1.	4(a)	3 February 2017	Email entitled "Draft Statement" from David Gunzburg to Trent Sebbens, Adrian Morris and Elysse Lloyd (AA) attaching draft witness statement and proposed annexures	David Gunzburg	Ashurst Australia (AA)	Communication between client (and proposed witness) and lawyers engaged to conduct proceedings concerning a proposed witness statement, for the purpose of providing legal advice about the proposed statement
2.	4(a)	3 February 2017	Email entitled "CMIEG – Up to date spreadsheet – Qld coal injury frequency rates" from Elysse Lloyd (AA) to David Gunzburg attaching a more recent version of a proposed annexure being a document on Queensland coal to injury frequency rates	AA	David Gunzburg	Communication between client (and proposed witness) and lawyers engaged to conduct proceedings concerning a proposed witness statement, for the purpose of providing legal advice about the proposed statement
3.	4(a)	3 February 2017	Email entitled "RE CMIEG – Up to date spreadsheet – Qld coal injury frequency rates" from David Gunzburg to Elysse Lloyd (AA) regarding the proposed annexures being Queensland coal to injury frequency rates	David Gunzburg	AA	Communication between client (and proposed witness) and lawyers engaged to conduct proceedings concerning a proposed witness statement, for the purpose of providing legal advice about the proposed statement
4.	4(a)	3 February 2017	Email entitled "Link" from David Gunzburg to Elysse Lloyd (AA) with link to a proposed annexure to the witness statement being Queensland mining and quarrying safety reports and statistics	David Gunzburg	AA	Communication between client (and proposed witness) and lawyers engaged to conduct proceedings concerning a proposed witness statement, for the purpose of providing legal advice about the proposed statement

No	Schedule - Item No.	Date	Document description	Source	Recipient	Basis for claim for privilege
5.	4(a)	4 February 2017	Email entitled "RE Draft Statement" from Trent Sebbens (AA) to David Gunzburg acknowledging receipt of the draft statement, making initial comments on content and annexures, and requesting instructions regarding evidence to be prepared	AA	David Gunzburg	Communication between client (and proposed witness) and lawyers engaged to conduct proceedings concerning a proposed witness statement, for the purpose of providing legal advice about the proposed statement
6.	4(a)	4 February 2017	Email entitled "RE Draft Statement" from David Gunzburg to Trent Sebbens (AA) regarding draft witness statement and annexures and providing instructions on evidence	David Gunzburg	AA	Communication between client (and proposed witness) and lawyers engaged to conduct proceedings concerning a proposed witness statement, for the purpose of providing legal advice about the proposed statement
7.	4(a)	22 February 2017	Email entitled "CMIEG - Witness Statement" from Elysse Lloyd (AA) to David Gunzburg attaching draft witness statement and requesting draft be reviewed and response be provided to comments for clarification	AA	David Gunzburg	Communication between client (and proposed witness) and lawyers engaged to conduct proceedings concerning a proposed witness statement, for the purpose of providing legal advice about the proposed statement
8.	4(a)	23 February 2017	Email entitled "Re: CMIEG - Witness Statement" from David Gunzburg to Elysse Lloyd (AA) attaching revised draft witness statement and respond to requests for comments and clarification	David Gunzburg	AA	Communication between client (and proposed witness) and lawyers engaged to conduct proceedings concerning a proposed witness statement, for the purpose of providing legal advice about the proposed statement
9.	4(a)	23 February 2017	Email entitled "Table supporting my Figure 5" from David Gunzburg to Elysse Lloyd (AA) attaching table for proposed inclusion in draft witness statement	David Gunzburg	AA	Communication between client (and proposed witness) and lawyers engaged to conduct proceedings concerning a proposed witness statement, for the purpose of providing legal advice about the proposed statement

No	Schedule – Item No.	Date	Document description	Source	Recipient	Basis for claim for privilege
10.	4(a)	23 February 2017	Email entitled "Updated table 2" from David Gunzburg to Elysse Lloyd (AA) attaching table for proposed inclusion in draft witness statement	David Gunzburg	AA	Communication between client (and proposed witness) and lawyers engaged to conduct proceedings concerning a proposed witness statement, for the purpose of providing legal advice about the proposed statement
11.	4(a)	23 February 2017	Email entitled "Additional tables" from David Gunzburg to Elysse Lloyd (AA) attaching table for proposed inclusion in draft witness statement	David Gunzburg	AA	Communication between client (and proposed witness) and lawyers engaged to conduct proceedings concerning a proposed witness statement, for the purpose of providing legal advice about the proposed statement
12.	4(a)	24 February 2017	Email entitled "CMIEG – Witness Statement and Date" from Elysse Lloyd (AA) to David Gunzburg attaching draft witness statement and requesting annexure	AA	David Gunzburg	Communication between client (and proposed witness) and lawyers engaged to conduct proceedings concerning a proposed witness statement, for the purpose of providing legal advice about the proposed statement
13.	4(a)	24 February 2017	Email entitled "RE CMIEG – Witness Statement and Date" from Elysse Lloyd (AA) to David Gunzburg about draft witness statement	AA	David Gunzburg	Communication between client (and proposed witness) and lawyers engaged to conduct proceedings concerning a proposed witness statement, for the purpose of providing legal advice about the proposed statement
14.	4(a)	24 February 2017	Email entitled "Re: CMIEG – Witness Statement and Data" from David Gunzburg to Elysse Lloyd (AA) about draft witness statement	AA	David Gunzburg	Communication between client (and proposed witness) and lawyers engaged to conduct proceedings concerning a proposed witness statement, for the purpose of providing legal advice about the proposed statement

No	Schedule – Item No.	Date	Document description	Source	Recipient	Basis for claim for privilege
15.	4(a)	24 February 2017	Email entitled "AM2014/190 - four yearly review of modern awards – transitional provisions – accident pay provisions" from Elysse Lloyd (AA) on behalf of Trent Sebbens and Adrian Morris (AA) to FWC Registrar attaching annexures to witness statement of David Gunzburg	AA	FWC – AMOD and Sydney Registry (copying David Gunzburg)	(No privileged claimed)
16.	4(a)	24 February 2017	Email entitled "AM2014/190 - four yearly review of modern awards – transitional provisions – accident pay provisions" from Elysse Lloyd (AA) on behalf of Trent Sebbens and Adrian Morris (AA) to FWC Registrar attaching submissions on behalf of CMIEG and witness statement of David Gunzburg	AA	FWC – AMOD and Sydney Registry (copying David Gunzburg)	(No privileged claimed)
17.	4(a)	16 August 2017	Email entitled "CMIEG – Accident Pay – Supplementary Statement" from Trent Sebbens and Elysse Lloyd (AA) to David Gunzburg attaching draft witness statement (and proposed annexures) and requesting confirmation and amendments to be made to certain paragraphs	AA	David Gunzburg	Communication between client (and proposed witness) and lawyers engaged to conduct proceedings concerning a proposed witness statement, for the purpose of providing legal advice about the proposed statement
18.	4(a)	17 August 2017	Email entitled "RE CMIEG – Accident Pay – Supplementary Statement" from David Gunzburg to Elysse Lloyd (AA) attaching annotated revised draft witness statement, responding to requests for comments and amendments	David Gunzburg	AA	Communication between client (and proposed witness) and lawyers engaged to conduct proceedings concerning a proposed witness statement, for the purpose of providing legal advice about the proposed statement

No	Schedule – Item No.	Date	Document description	Source	Recipient	Basis for claim for privilege
19.	4(a)	18 August 2017	Email entitled "CMIEG – Accident Pay – Further revised statement" from Trent Sebbens and Elysse Lloyd (AA) to David Gunzburg attaching draft revised witness statement	AA	David Gunzburg	Communication between client (and proposed witness) and lawyers engaged to conduct proceedings concerning a proposed witness statement, for the purpose of providing legal advice about the proposed statement
20.	4(a)	18 August 2017	Email entitled "RE CMIEG – Accident pay – Further revised statement" from David Gunzburg to Elysse Lloyd (AA) attaching revised witness statement	David Gunzburg	AA	Communication between client (and proposed witness) and lawyers engaged to conduct proceedings concerning a proposed witness statement, for the purpose of providing legal advice about the proposed statement
21.	4(a)	18 August 2017	Email entitled "RE CMIEG – Revised statement and final version of submissions" from Trent Sebbens and Elysse Lloyd (AA) to David Gunzburg attaching draft revised witness statement (and submissions)	David Gunzburg	AA	Communication between client (and proposed witness) and lawyers engaged to conduct proceedings concerning a proposed witness statement, for the purpose of providing legal advice about the proposed statement
22.	4(a)	18 August 2017	Email entitled "CMIEG – Revised statement and final version of submissions" from David Gunzburg to Elysse Lloyd (AA) responding to email concerning revised witness statement	David Gunzburg	AA	Communication between client (and proposed witness) and lawyers engaged to conduct proceedings concerning a proposed witness statement, for the purpose of providing legal advice about the proposed statement
23.	4(a)	18 August 2017	Email entitled "AM2014/190 – four yearly review of modern awards – transitional provisions – accident pay provisions" from Trent Sebbens and Elysse Lloyd (AA) to FWC Registrar attaching submissions in reply on behalf of CMIEG and supplementary witness statement of David Gunzburg	AA	FWC – AMOD and Sydney Registry (copying David Gunzburg)	(No privileged claimed)

No	Schedule – Item No.	Date	Document description	Source	Recipient	Basis for claim for privilege
24.	4(c)	3 February 2017	Draft witness statement of David Gunzburg (attached to email sent on 3 February 2017 (see item 1))	AA	N/A	Draft witness statement prepared for the purpose of providing legal advice about the proposed statement
25.	4(c)	22 February 2017	Draft witness statement of David Gunzburg (attached to email sent on 22 February 2017 (see item 7))	AA	N/A	Draft witness statement prepared for the purpose of providing legal advice about the proposed statement
26.	4(c)	16 August 2017	Draft supplementary witness statement of David Gunzburg (attached to email sent on 16 August 2017 (see item 17))	AA	N/A	Draft witness statement prepared for the purpose of providing legal advice about the proposed statement
27.	4(c)	17 August 2017	Draft supplementary witness statement of David Gunzburg (attached to email sent on 17 August 2017 (see item 18))			Draft witness statement prepared for the purpose of providing legal advice about the proposed statement
28.	4(c)	18 August 2017	Draft supplementary witness statement of David Gunzburg (attached to email sent on 18 August 2017 (see item 19))	AA	N/A	Draft witness statement prepared for the purpose of providing legal advice about the proposed statement
29.	4(c)	18 August 2017	Draft supplementary witness statement of David Gunzburg (attached to email sent on 18 August 2017 (see item 20))	AA	N/A	Draft witness statement prepared for the purpose of providing legal advice about the proposed statement
30.	4(c)	18 August 2017	Draft supplementary witness statement of David Gunzburg (attached to email sent on 18 August 2017 (see item 21))	AA	N/A	Draft witness statement prepared for the purpose of providing legal advice about the proposed statement

No	Schedule – Item No.	Date	Document description	Source	Recipient	Basis for claim for privilege
31.	5(a)	30 January 2017	Email entitled "Confidential and Privileged - CMIEG - Accident Pay Proceedings", from Trent Sebbens and Elyse Lloyd (AA) enclosing engagement letter (enclosed letter is item 32)	AA	Keith Adam	(No privileged claimed – enclosed letter is item 32 and is annexed at Appendix D of expert report)
32.	5(a)	30 January 2017	Letter from AA to Dr Adam engaging him as an expert to provide an expert report (signed by Trent Sebbens and Adrian Morris (AA))	AA	Keith Adam	(No privileged claimed – annexed at Appendix D of expert report)
33.	5(a)	1 February 2017	Email entitled "Re Confidential and Privileged - CMIEG - Accident Pay Proceedings" from Adrian Morris and Elyse Lloyd (AA) to Dr Adam attaching "List of questions to be addressed in expert report"	AA	N/A	(No privileged claimed – the attachment is annexed at Appendix D of expert report)
34.	5(a)	3 February 2017	Letter from AA to Dr Adam providing a brief of electronic materials as described in the letter	AA	Keith Adam	(No privileged claimed – the letter is annexed at Appendix D of expert report and the electronic files enclosed with the letter on a USB device have been provided electronically to APESMA, CFMEU and AMWU)
35.	5(a)	17 February 2017	Email entitled "Confidential and Privileged - CMIEG - Accident Pay Proceedings" from Keith Adam to Trent Sebbens and Elyse Lloyd (AA) attaching draft expert report	Keith Adam	AA	Communication between lawyers engaged to conduct proceedings and expert engaged to prepare expert report for the purposes of providing legal advice on the proposed expert report

No	Schedule - Item No.	Date	Document description	Source	Recipient	Basis for claim for privilege
36.	5(a)	17 February 2017	Email "Re Confidential and Privileged - CMIEG - Accident Pay Proceedings" from Trent Sebbens (AA) to Keith Adam acknowledging receipt of draft expert report	AA	Keith Adam	Communication between lawyers engaged to conduct proceedings and expert engaged to prepare expert report for the purposes of providing legal advice on the proposed expert report
37.	5(a)	17 February 2017	Email entitled "Re Confidential and Privileged - CMIEG - Accident Pay Proceedings" from Adrian Morris (AA) to Keith Adam acknowledging receipt of draft expert report	AA	Keith Adam	Communication between lawyers engaged to conduct proceedings and expert engaged to prepare expert report for the purposes of providing legal advice on the proposed expert report
38.	5(a)	20 February 2017	Email entitled "Re Confidential and Privileged - CMIEG - Accident Pay Proceedings" from Keith Adam to Trent Sebbens (AA) regarding arrangements for telephone call to discuss draft expert report	Keith Adam	AA	Communication between lawyers engaged to conduct proceedings and expert engaged to prepare expert report for the purposes of providing legal advice on the proposed expert report
39.	5(a)	20 February 2017	Email entitled "Re Confidential and Privileged - CMIEG - Accident Pay Proceedings" from Trent Sebbens (AA) to Keith Adam regarding arrangements for telephone call to discuss draft expert report	AA	Keith Adam	Communication between lawyers engaged to conduct proceedings and expert engaged to prepare expert report for the purposes of providing legal advice on the proposed expert report
40.	5(a)	20 February 2017	Email entitled "Re Confidential and Privileged - CMIEG - Accident Pay Proceedings" from Keith Adam to Elysse Lloyd (AA) regarding arrangements for telephone call to discuss draft expert report	Keith Adam	AA	Communication between lawyers engaged to conduct proceedings and expert engaged to prepare expert report for the purposes of providing legal advice on the proposed expert report

No	Schedule – Item No.	Date	Document description	Source	Recipient	Basis for claim for privilege
41.	5(a)	20 February 2017	Email entitled "Re Confidential and Privileged - CMIEG - Accident Pay Proceedings" from Elysse Lloyd (AA) to Keith Adam regarding arrangements for telephone call to discuss draft expert report	AA	Keith Adam	Communication between lawyers engaged to conduct proceedings and expert engaged to prepare expert report for the purposes of providing legal advice on the proposed expert report
42.	5(a)	24 February 2017	Email entitled "Re Confidential and Privileged - CMIEG - Accident Pay Proceedings" from Keith Adam to Elysse Lloyd (AA) attaching draft expert report	Keith Adam	AA	Communication between lawyers engaged to conduct proceedings and expert engaged to prepare expert report for the purposes of providing legal advice on the proposed expert report
43.	5(a)	24 February 2017	Email entitled "Re Confidential and Privileged - CMIEG - Accident Pay Proceedings" from Elysse Lloyd (AA) to Keith Adam confirming receipt of second draft expert report and regarding arrangements for a telephone call to discuss draft expert report	AA	Keith Adam	Communication between lawyers engaged to conduct proceedings and expert engaged to prepare expert report for the purposes of providing legal advice on the proposed expert report
44.	5(a)	25 February 2017	Email entitled "Re Confidential and Privileged - CMIEG - Accident Pay Proceedings" from Trent Sebbens (AA) to Keith Adam regarding arrangements for telephone call to discuss draft expert report	AA	Keith Adam	Communication between lawyers engaged to conduct proceedings and expert engaged to prepare expert report for the purposes of providing legal advice on the proposed expert report
45.	5(a)	25 February 2017	Email entitled "Re Confidential and Privileged - CMIEG - Accident Pay Proceedings" from Keith Adam to Elysse Lloyd (AA) regarding arrangements for telephone call to discuss draft expert report	Keith Adam	AA	Communication between lawyers engaged to conduct proceedings and expert engaged to prepare expert report for the purposes of providing legal advice on the proposed expert report

No	Schedule - Item No.	Date	Document description	Source	Recipient	Basis for claim for privilege
46.	5(a)	27 February 2017	Email entitled "Re Confidential and Privileged - CMIEG - Accident Pay Proceedings" from Keith Adam to Trent Sebbens (AA) regarding arrangements for a telephone call to discuss draft expert report	Keith Adam	AA	Communication from expert engaged to prepare expert report for the purposes of providing legal advice on the proposed expert report
47.	5(a)	27 February 2017	Email entitled "Re Confidential and Privileged - CMIEG - Accident Pay Proceedings" from Keith Adam to Trent Sebbens (AA) attaching draft expert report	Keith Adam	AA	Communication from expert engaged to prepare expert report enclosing draft expert report for the purposes of providing legal advice on the proposed expert report
48.	5(a)	28 February 2017	Email entitled "Re Confidential and Privileged - CMIEG - Accident Pay Proceedings" from Keith Adam to Elysse Lloyd (AA) attaching expert report	Keith Adam	AA	Communication from expert engaged to prepare expert report for the purposes of providing legal advice on the proposed expert report
49.	5(a)	28 February 2017	Email entitled "Re Confidential and Privileged - CMIEG - Accident Pay Proceedings" from Keith Adam to Elysse Lloyd (AA) attaching expert report	Keith Adam	AA	Communication between lawyers engaged to conduct proceedings and expert engaged to prepare expert report for the purposes of providing legal advice on the proposed expert report
50.	5(c)	16 February 2017	Draft expert report marked "Strictly Confidential and Privileged" (attached to email sent on 17 February 2017 (see item 35))	Keith Adam	AA	Draft expert report provided by expert engaged to the lawyers engaged to conduct proceedings, for the purpose of the lawyers providing legal advice on the proposed expert report
51.	5(c)	24 February 2017	Draft expert report marked "Strictly Confidential and Privileged" (attached to email sent on 24 February 2017 (see item 42))	Keith Adam	AA	Draft expert report provided by expert engaged to the lawyers engaged to conduct proceedings, for the purpose of the lawyers providing legal advice on the proposed expert report

No	Schedule - Item No.	Date	Document description	Source	Recipient	Basis for claim for privilege
52.	5(c)	27 February 2017	Draft expert report marked "Strictly Confidential and Privileged" (attached to email sent on 27 February 2017 (see item 47))	Keith Adam	AA	Draft expert report provided by expert engaged to the lawyers engaged to conduct proceedings, for the purpose of the lawyers providing legal advice on the proposed expert report
53.	5(c)	28 February 2017	Draft expert report marked "Strictly Confidential and Privileged" (attached to email sent on 28 February 2017 (see item 48))	Keith Adam	AA	Draft expert report provided by expert engaged to the lawyers engaged to conduct proceedings, for the purpose of the lawyers providing legal advice on the proposed expert report
54.	5(c)	28 February 2017	Draft expert report marked "Strictly Confidential and Privileged" (attached to email sent on 28 February 2017 (see item 49))	Keith Adam	AA	Draft expert report provided by expert engaged to the lawyers engaged to conduct proceedings, for the purpose of the lawyers providing legal advice on the proposed expert report

FAIR WORK COMMISSION

Four yearly review of modern awards – Annual leave

AM2014/190

Submissions - Coal Mining Industry Employer Group

Four yearly review of modern awards – Transitional provisions – Accident pay provisions – Black Coal Mining Industry Award

Objection to production of documents in respect of Items 4(a) and (c) and 5(a) and (c) of the Schedule to the proposed Order in the Application for order for production of documents etc filed by APESMA on 14 September 2017.

1. These submissions are made on behalf of the Coal Mining Industry Employer Group (**CMIEG**) in accordance with the directions issued by Deputy President Kovacic at the directions hearing conducted on 27 September 2017.
2. The submissions are made in support of the objection of the CMIEG to the production of documents in respect of Items 4(a) and (c) and 5(a) and (c) (the **Objected Items**) of the Schedule to the proposed Order in the "Application for order for production of documents etc to the Fair Work Commission" filed by Association of Professional Engineers, Scientists and Managers, Australia on 14 September 2017 (**Application**).
3. The Schedule to the proposed Order in the Application describes the following documents:
 4. *In respect of the statements of Mr David Gunzburg dated 24 February 2017 and 18 August 2017:*
 - a. *any correspondence between the CMIEG or any member of the CMIEG or the solicitors for the CMIEG and Mr David Gunzburg, including without limitation:*
 - i. *any letter of instruction to Mr David Gunzburg; and*
 - ii. *any letter of engagement of Mr David Gunzburg.*
 - ...
 - c. *any draft of the statement of Mr David Gunzburg.*
 5. *In respect of the letter/report of Dr Keith Adam dated 28 February 2017:*
 - a. *any correspondence between the CMIEG or any member of the CMIEG or the solicitors for the CMIEG and Dr Adam; and*
 - ...
 - c. *any draft of the letter/report of Dr Adam.*

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4. The CMIEG objects to the production of documents in respect of the Objected Items on the basis that the documents in answer are subject to legal professional privilege.

Legal professional privilege

5. It may be accepted that in Federal courts and tribunals, when issues of privilege arise at the pre-trial stage (such as an application for an order for production as in the present case) they are determined by reference to the common law: see *Seven Network Limited v News Limited* (2005) 144 FCR 379 at [32].
6. There can be no doubt that the two witness statements of David Gunzburg (signed 24 February 2017 and 18 August 2017) and the expert report of Dr Keith Adam (signed 28 February 2017), were each prepared for the dominant purpose of use by the CMIEG in present proceedings and were accordingly subject to legal professional privilege.
7. It may be further accepted, however, that the filing, and intended reliance at hearing, of the witness statements and expert report will result in an implied waiver of legal professional privilege in the witness statements and draft report: *Mann v Carnell* (1999) 201 CLR 1 (***Mann v Carnell***) at [29].
8. The critical questions for the Commission is, therefore, whether:
 - (a) the communications relating to, and the drafts of, those witness statements and expert report are subject to legal professional privileged; and
 - (b) if so, whether there has been any waiver of privilege,and, accordingly, whether the Application in respect of the Objected Items ought to be granted.

Documents in answer to Items 5(a) and (c) – Expert report of Dr Keith Adam

9. It is convenient to commence with a consideration of Item 5(a) and (c) of the Objected Items first, which seek communications with the Dr Adam and the drafts of his expert report.
10. In assessing a claim for legal professional privilege in respect of communications and drafts of expert reports, the leading authority is *ASIC v Southcorp Ltd* (2003) 46 ACSR 438 (***ASIC v Southcorp***), in which Lindgren J at [21] formulated the following principles:
 - (1) Ordinarily the confidential briefing or instructing by a prospective litigant's lawyers of an expert to provide a report of his or her opinion to be used in the anticipated litigation attracts client legal privilege.
 - (2) Copies of documents, whether the originals are privileged or not, where the copies were made for the purpose of forming part of confidential communications between the client's lawyers and the expert witness, ordinarily attract the privilege.
 - (3) Documents generated unilaterally by the expert witness, such as working notes, field notes, and the witness's own drafts of his or her report, do not attract privilege because they are not in the nature of, and would not expose, communications.
 - (4) Ordinarily disclosure of the expert's report for the purpose of reliance on it in the litigation will result in an implied waiver of the privilege in respect of the brief or instructions or documents referred to in (1) and (2) above, at least if the appropriate inference to be drawn is that they were used in a way that could be said to influence the content of the report, because, in these circumstances, it would be unfair for the client to rely on the report without disclosure of the brief, instructions, or documents.

- (5) Similarly, privilege cannot be maintained in respect of documents used by an expert to form an opinion or write a report, regardless of how the expert came by the documents.
- (6) It may be difficult to establish at an early stage whether documents which were before an expert witness influenced the content of his or her report, in the absence of any reference to them in the report.

(emphasis added, citations omitted)

11. The question in respect of waiver in respect of documents in answer to item 4(a) and (c), falls for answer within Principle 4. (It is noted that no claim for privilege is maintained by the CMIEG in respect of documents coming within Principles 1, 2 and 5.)
12. The principles set out in *ASIC v Southcorp* require some modification by reference to *Mann v Carnell*, in which the High Court set out the test for waiver in the following terms:

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.

That such modification, particularly of Principle 4, is required has been recognised on a number of occasions: see *New Cap Reinsurance Ltd (in liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258 (**New Cap**) at [53] per White J; *Kentish Council v Bellenjuc Pty Ltd* [2011] TASSC 58 at [33]ff per Porter J.

13. The tasks of the Commission will, accordingly to be whether there has been a waiver of privilege. As a limbs of waiver, the Commission will need to determine whether the documents over which privilege is claimed influenced the content of the expert report of Dr Adam in such a way that it would be unfair for the CMIEG to rely upon the expert reports without disclosing the documents over which privilege is claimed.
14. In determining whether such documents may be said to have influenced the content of the report, the decision of Dodds-Streeton J in *Shea v TruEnergy Services Pty Ltd (No 5)* [2013] FCA 937; 303 ALR 230 (**Shea v TruEnergy**) is apposite. At [60], her Honour stated (at [60]-[61]):

[60] Recent persuasive authority, such as *New Cap*, makes clear that relevant inconsistency may subsist where the draft reports or communications may have influenced the content of the final report in a substantial sense, as in such a case, there would be inconsistency informed by notions of fairness between, on the one hand, withholding the documents or communications while, on the other hand, relying on the final report. If, however, the relevant documents or communications have not influenced the content of the final report, or may have influenced it but in relation only to form or peripheral matters, the inconsistency would be unlikely to be established.

[61] The party asserting wavier of privilege has no automatic entitlement to test whether the privileged documents influenced the contents of the expert's report in the relevant sense. Rather, it will be a balancing exercise in the circumstances of each particular case.

Similar comments were made in *New Cap*, where White J stated at [53].

Item 5(a) - communications

15. It may be noted, at the outset, that Dr Adam was engaged by Ashurst, the lawyers acting in the proceedings, to provide expert opinion in the proceedings: Affidavit of Trent Daniel Sebbens sworn 28 September 2017 (**Sebbens Affidavit**) at [11].

16. Having regard to the principles set out above, the documents in answer to item 5(a) that are subject to a claim for privilege, are clearly communications between the expert, Dr Adam, who was engaged to provide expert opinion in the proceedings, and the lawyers, Ashurst, who are instructed to act in the proceedings and who have engaged him. Those communications concern the preparation of his expert report.
17. These communications clearly come within the category described by Lockhart J in *Trade Practices Commission v Sterling* (1979) 36 FLR 244 at 246 as follows:

(e) Communications and documents passing between the party's solicitor and a third party if they are made or prepared when litigation is anticipated or commenced, for the purposes of the litigation, with a view to obtaining advice as to it or evidence to be used in it or information which may result in the obtaining of such evidence.

(See also *Australian Securities and Investments Commission v Mining Projects Group Ltd* [2007] FCA 1620; 164 FCR 32 at 41-42 [27] per Finkelstein J).

18. Such communications may be seen from their description in the Schedule (Annexure TDS-1; Sebbens Affidavit (Items 31-49)), and if considered necessary by the Commission to do so, on inspect of the documents, as communications about the preparation of the report between the lawyers and the expert.

Item 5(c) – draft expert reports

19. A draft report prepared by an expert for the dominant purpose of comment or advice by a lawyer, is one that is subject of legal professional privilege. In *New Cap* (although there referring to section 119 of the *Evidence Act 1995* (NSW)), stated at [34]-[36]:

[34] ... The question however is what that purpose is. If an expert prepares a draft report, or notes for the report, with the dominant purpose of a draft report (whether the precise draft then prepared by the expert or an intended later draft) being furnished for comment or advice by the lawyer, then it is privileged. If not, it is not.

[35] The issue may not be an easy one to determine. In all probability, an expert witness retained by a lawyer for a party will prepare a draft report with the intention (and purpose) that it will set out the evidence which he or she expects to give, but also with the intention and purpose of its being considered and commented on by the party's lawyers. If the latter purpose is dominant, the document so produced is privileged. If not, it is not privileged.

[36] In this way, in the case of claims for privilege over working notes and expert's draft reports not communicated to a client's lawyer, the same practical outcome may be reached in many cases whether the privilege is claimed at common law or under s 119 of the Evidence Act. However, the analysis of the claims must proceed on different paths.

It may be accepted that section 119 is different in scope to the common law, extending to confidential documents whether communicated or not, however the comments of White J on the dominant purpose of the communication apply equally in respect of the common law test for privilege.

20. Further, in *Brookfield v Yevad Products Pty Ltd* [2006] FCA 1180 at [15] Mansfield J stated:

I do not think that Lindgren J's principle (3) in *Southcorp* should be read as suggesting that a draft report provided by an expert to solicitors for the purpose of litigation is not itself privileged. It operates precisely as a communication for the purposes for which privilege exists... Provided that document was brought into existence for such a purpose, that is to record information to be submitted to a solicitor for the purpose of litigation, it may be privileged even in the hands of the expert. (emphasis added)

His Honour held that a draft expert report, in those proceedings, was privileged from production at an interlocutory stage.

21. The draft expert reports prepared by Dr Adam (and sent by email to Ashurst as attachments) may be seen from their description in the Schedule (Annexure TDS-1, Sebbens Affidavit (Items 50-54)) and the manner and context of their communication (and if considered by the Commission as necessary to do so, on inspection of the documents), that they were communications prepared for the purpose of obtaining advice from Ashurst on their content.
22. The draft reports were clearly communicated by Dr Adam to Ashurst, and such communications were on a confidential basis (cf *Interchase Corporation Ltd v Grosvenor Hill (Queensland) Pty Ltd (No 1)* [1999] 1 Qd R 141 at 162 per Thomas J).
23. That Dr Adam prepared and sent draft reports to Ashurst for comment and advice is hardly unusual. It is completely orthodox for lawyers to play a role in the preparation of expert reports, to ensure that such reports are in admissible form, and comply with the rules of evidence and Code of Conduct of guidelines for experts.
24. In *Traderight (NSW) Pty Ltd v Bank of Queensland Ltd* [2013] NSWSC 211, Ball J in considering section 122(2) of the *Evidence Act 1995* (NSW) (although noting it is generally accepted this section codifies the common law test) considered that service of a final expert's report was not inconsistent with maintaining privilege over draft reports and communications which produced the final product. Ball J provided found that there was nothing to suggest that the opinions stated by the expert in the report were not her own or based on material other than the material disclosed in her report. At [23], Ball J went on to deal with the communication of the report to the lawyers involved in the matter, and stated:

[23] ... It is common for a party's legal advisors to communicate with an expert retained by the party for the purpose of giving instructions and commenting on the form of the expert's report. In some cases, those advisors may test tentative conclusions that the expert has reached and in doing so may cause the expert to reconsider his or her opinion. In some cases, the legal advisors may suggest wording to be included in the report which expresses in admissible form an opinion stated by the expert in an inadmissible form. The court depends heavily on the parties' legal advisors to assist experts to address properly the questions asked of them and to present their opinions in an admissible form and in a form which will be readily understood by the court. Equally, the court depends heavily on the parties' legal advisors to ensure that any opinion expressed by an expert is an opinion the expert holds for the reasons that the expert gives and that the expert otherwise complies with the Expert Witness Code of Conduct. That requirement is reinforced by the acknowledgment that the expert is required to give concerning the code. The fact that legal advisors have communicated with an expert and provided comments on drafts of a report in a way which is consistent with discharging the first obligation is not a reason of itself for supposing that they have failed to discharge the second; and, as I have said, there is nothing else in the material Mr Couper [counsel for the Bank] points to suggest that the OMB Parties' legal advisors have failed to discharge that obligation in the case of Professor Burton's [the expert's] report. (emphasis added)

(See also *Natuna Pty Ltd v Cook* [2006] NSWSC 1367 and *New Cap* in which Biscoe AJ and White J respectively took a similar approach to Ball J to uphold privilege claims in respect of draft reports and communications between the expert and the lawyers.)

Implied waiver

25. There is no implied waiver (or inconsistency in the maintenance of privilege) over the documents in answer to Items 5(a) and (c).

26. *First*, both the communications between Ashurst and Dr Adam and the draft expert reports cannot be seen to have "influenced" Dr Adam's final report. In respect of the communications between Ashurst and Dr Adam, it may be seen from the description (and, if necessary, on inspection of the documents), that the communications were to provide the draft reports to Ashurst for the purpose of advice on content, or were communications simply acknowledging receipt or making arrangements to discuss the draft report. There is nothing on the face of the final expert report of Dr Adam which would lead to conclusion that the prior communications influenced the final report: *New Cap* at [53]; *Shea v TruEnergy* at [60]-[61]
27. *Second*, the filing and service of an expert report does not constitute waiver of privilege in the communications, or the draft reports communicated, between the expert and the lawyers engaged. In *ML Ubase Holdings Co Ltd v Trigem Computer Inc* [2007] NSWSC 859; (2007) 69 NSWLR 577 at [45], Heery J stated:

In my opinion, service and tender of an expert witness' report in proceedings does not constitute a waiver of the privilege which attaches to communications between the expert and the solicitors who instructed him or her, save to the extent that those communications are associated documents reasonably necessary to an understanding of the report. "Proper understanding" of a document or communication will sometimes, but not always require that documents to which it responds or refers be available. It may very likely be so when the primary document contains a summary or excerpt from an earlier communication, or responds to questions which are not themselves restated in it. But I do not accept that "a proper understanding of the communication or document" involves an appreciation of the manner in which the opinions contained in the document have been formed over time, or the iterations and evolutions through which they have passed. The test is concerned with the comprehensibility of the primary communication or document: if it can be completely or thoroughly understood without more, then access to the related communications or documents is not reasonably necessary. (emphasis added)

(See also *New Cap* at [45]-[47] and the cases cited therein.)

28. Heery J in *ML Ubase* was here referring to the principles of "associated documents waiver", that is, whether it is necessary to know what is in associated materials to understand the content of the expert report. There is no implied waiver that operates in respect of the draft reports of Dr Adam, on this basis. There are simply no "associated documents" to the expert report of Dr Adam to which a claim of privilege has been made. There is not reliance or incorporation of any of, or any part of, the privileged communications between Dr Adam and Ashurst. As Aldous LJ in *Bourne Inc v Raychem* [1999] 3 All ER 154 at 166 put it, "there must at least be reference to the contents and reliance." There are no such references or reliance in the final expert report on the privileged communications.
29. Further, the service of final expert report of Dr Adam did not disclose the substance of the prior communications between Ashurst and Dr Adam: see *New Cap* at [43]. There is nothing in the body of the report that refers to the prior communications or drafts.
30. *Third*, there are cogent policy reasons that support the conclusion that draft expert reports are privileged from production: see *Linter Group Ltd v Price Waterhouse (a firm)* [1999] VSC 245 at [16] per Harper J; *Natuna Pty Ltd v Cook* [2006] NSWSC 1367 at [15] per Bischoff AJ.
31. Accordingly, the privilege in the prior communications between Ashurst and Dr Adam continue to subsist and have not been waived.

Documents in answer to Items 4(a) and (c) – Witness statements of David Gunzburg

32. At common law, it is well established that communications between a party or its solicitor and a witness for the dominant purpose of use in or in relation to pending or anticipated litigation are privileged (*Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia* [1999] HCA 67; (1999) 201 CLR 49, Gleeson CJ, Gaudron and Gummow JJ said (at 64 [35]); *Grant v Downs* [1976] HCA 63; (1976) 135 CLR 674, Barwick CJ said (at 677); *Attorney-General (NT) v Maurice* [1986] HCA 80; (1986) 161 CLR 475 Deane J (at 490)).
33. DGHR Pty Ltd (**DGHR**), who acts through its principal and Managing Director, Mr Gunzburg, is engaged by each of the company groups that constitutes the CMIEG in the present proceedings. DGHR Pty Ltd has instructed Ashurst to act in these proceedings for the CMIEG; and DGHR (through Mr Gunzburg) provides instructions to Ashurst for the CMIEG (Sebbens Affidavit at [9]-[10]).
34. It must be noted that Mr Gunzburg is not called as an expert witness in the proceedings. He is clearly a lay witness. This is apparent on the face of the witness statements signed by Mr Gunzburg. While the common law principles in respect of privilege obviously apply, the cases dealing with expert witnesses (being third parties engaged for the proceedings) are not as apposite in respect of lay witness statements.
35. As with Items 5(a) and (c), Items 4(a) and (c) call for communications about the witness statements of Mr Gunzburg, and the drafts of those witness statements.

Item 4(a) - communications

36. Similar to the case with Dr Adam, the communications between Ashurst and Mr Gunzburg may be seen from their description in the Schedule (Annexure TDS-1, Sebbens Affidavit (Items 1-14, 17-22)), and if considered necessary by the Commission to do so, on inspection of the documents, as communications about the preparation of the witness statements of Mr Gunzburg with the lawyers acting in the matter, Ashurst. Such communications are clearly ones which were confidential. They are communications in respect of which advice was being sought and provided, both about the content of the statement, and also about the conduct of the matter more generally.
37. It is clear that communications about a witness statement, between the witness and the lawyers engaged to act in proceedings, attracts legal professional privilege. It is completely orthodox that a lawyer would liaise with a proposed witness (who in this case is also the instructor in the matter), about a proposed witness statement. In that regard, in *New Cap*, White J at [29] stated:
- [28] A lawyer will provide professional legal services in relation to a witness' statement of evidence where the lawyer is asked to advise on what the statement should contain and settle the form of the statement. The deployment of the final report by the plaintiff's lawyers through its service on the opposite party and its tender into evidence will also constitute the provision of professional legal services relating to the proceeding. (emphasis added)
38. Further, it is also apparent from the communications between Mr Gunzburg and Ashurst attaching the draft versions of the witness statements themselves, that the purpose of the communications was for Ashurst to provide legal advice on the content of the draft statements for the purpose of the proceedings (as per *New Cap* at [28]). Accordingly, legal professional privilege will attach to such communications.

Item 4(c) – draft witness statements

39. In respect of the draft witness statements (Annexure TDS-1, Sebbens Affidavit (Items 24-30)), the context in which the draft statements were communicated, that is for the purpose of seeking legal advice about their content, correspondingly leads to the conclusion that they are subject of legal professional privilege. Further, it is clear that the drafts were in fact communicated between Mr Gunzburg and Ashurst, and that this was done on a confidential basis.
40. Legal professional privilege will attach to such draft witness statement of themselves, whether they formed were communicated or not. In *Re Southland Coal Pty Ltd (rec & mgrs apptd) (in liq)* (2006) 59 ACSR 87 at [16] – [20], Austin J stated:

[18] This difference in content or emphasis, between the Evidence Act provisions and the observations in *Propend [Commissioner Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501] and *AWB Ltd v Cole* [[2006] FCA 571; 152 FCR 382], may have no significant practical consequences. Take two examples. First, a confidential draft pleading or draft witness statement prepared for the requisite dominant purpose is protected from disclosure under both the Evidence Act and the general law, whether or not the draft reflects some communication that has occurred or is a wholly uncommunicated draft. Under the Evidence Act the result flows from the simple application of the statute, which applies to the contents of the confidential document whether delivered or not. Under the general law, as propounded in *Propend* and *AWB Ltd v Cole*, the contents of the document are protected if their disclosure would reveal (or allow the reader to infer) the content or substance of a privileged communication that has been incorporated into the draft (*AWB Ltd v Cole* at [132]). Arguably the contents are also protected if the confidential draft, having been prepared for the purpose of legal advice or proceedings, is intended to be communicated in pursuit of that purpose.

Implied waiver

41. There has been no waiver of privilege in the communications between Ashurst and Mr Gunzburg or the draft witness statements.
42. To the extent that it is relevant to a lay witness, there is nothing on the face of the witness statements which would lead to conclusion that the prior communications influenced the final witness statements: *New Cap* at [53]; *Shea v TruEnergy* at [60]-[61].
43. It appears that the proper test for a lay witness, however, is the test of "inconsistency" in *Mann v Carnell*. There has been no inconsistency in the way in which the privileged communications have been dealt with by the CMIEG in the sense described in *Mann v Carnell*.
44. *First*, it is not necessary to review the draft witness statements in order to understand either of the final witness statements Mr Gunzburg signed and that were filed by the CMIEG. As noted by the Full Court of the Federal Court in *ACCC v Cadbury Schweppes Pty Ltd* [2009] FCAFC 32; 174 FCR 547 at [46] and [73]:

[46] ... the purpose for creating the finalised version of the proofs of evidence is different from the purpose for preparing drafts of proofs of evidence. Such proofs of evidence to be used by Counsel and drafts of proofs of evidence would be privileged in the normal course of events.

...

[73] ... Drafts and final proofs [of evidence] are by nature and in fact different documents. A draft may well include information which is not included in a final version of a witness statement given to an opposing party. A draft may well be a 'discussion' document, intended only to be seen and considered by the party's legal advisor. It should not be assumed that

the final version is just a reproduction of anything that comes before it. Even if it be so, once the decision has been made to call a particular witness to give evidence and that the evidence will comprise that which is in the witness statement, that final witness statement assumes a different character. The final version of a proof of evidence is the document prepared for disclosure to the court and to the opponent. ...

(See also *Buzzle Operations v Apple Computer Australia* [2009] NSWSC 225).

45. *Second*, the service of the witness statements of Mr Gunzburg did not disclose the substance of the prior privileged communications between Ashurst and Mr Gunzburg. There is simply nothing in the body of the witness statements that refers to the prior communications or drafts.
46. Accordingly, the privilege in the prior communications between Ashurst and Mr Gunzburg, and the draft witness statements of Mr Gunzburg, continue to subsist and have not been waived.

Conclusion

47. The Commission should uphold the objection of the CMIEG on the basis of legal professional privilege, and not grant the Application in respect of items 4(a) and (c) and 5(a) and (c)

Ashurst Australia
Solicitors for the CMIEG

28 September 2017