BEFORE THE FAIR WORK COMMISSION

Matter no. **AM2014/190**

Applicant: **Coal Mining Industry Employer Group**

Respondent: **APESMA, CFMEU, AMWU**

SUBMISSIONS FOR APESMA ON PRIVILEGE

1. APEMSA has called for documents. Ashurst have produced documents but claimed privilege in respect of them.
2. The claim of privilege should be rejected and the documents produced to APESMA.

<u>Relevant principles</u>

3. In nine pages of closely typed submissions, CMIEG (or perhaps DGHR Pty Ltd) address the question of privilege as it pertains to documents called for by the APESMA order for production. The submissions cite very many authorities but obscure more than they elucidate. The position is more straightforward than the CMIEG submissions.
4. CMIEG accept that the common law of privilege (as opposed to the *Evidence Act 1995* (Cth)) applies in this case. The starting point for the assessment of a privilege claim in tht context is *ASIC v Southcorp Ltd* [2003] FCA 804. There Lindgren J summarised the principles as follows at [21] (citations omitted):

> 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…

5. The *Southcorp* summary has been adopted in very many cases and is authoritative. It has not been doubted, save to the limited extent that principle (4) should be read to mean that privilege will not be waived unless it would be unfair in the circumstances for privilege to be maintained: *New Cap Reinsurance Corporation Ltd (In Liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258 at [53]. In practice it is unlikely that the further requirement will have practical importance, because it must follow almost as a matter of course that it would be unfair to withhold a document or communication which influenced a report.

6. Otherwise and to the to the extent that the approach ultimately taken in cases such as *New Cap Reinsurance* has departed from *Southcorp*, that is principally the product of the intervention of the *Evidence Act 1995* (Cth) and particularly s119(b). Section 119(b) extends the protection of privilege from communications to confidential documents prepared for the dominant purpose of being provided with legal advice. The ambit of privilege under the common law of evidence is more limited. In particularly, it is s119(b) which means that principle (3) in Southcorp may not apply in the *Evidence Act* context. In cases (such as the present) where the common law applies, the true position is that documents generated by an expert including draft reports are not privileged.

7. The CMIEG assertion that the discussion in *New Cap Insurance* applies equally in the common law context should not be accepted. White J in *New Cap Insurance* emphasised that importance of s119 to his conclusions. Contrary to the CMIEG contention, is it the *Evidence Act* cases which must be treated with caution, not *Southcorp*.

8. Similarly, decisions involving reports which were never relied upon at trial are not apt. In that category is the decision of Mansfield J in *Brookfield v Yevad Products Pty Ltd* [2006] FCA 1180 (which is cited by the CMIEG without identifying that critical distinction).

9. The relevant principles for present purposes are as follows:

    (a) The party claiming privilege bears the onus of demonstrating, by admissible evidence, that the relevant documents are privileged: *Hancock v Rinehart (Privilege)* [2016] NSWSC 12.

    (b) Draft reports and statements (that is the documents of the kind sought in 4(c) and 5(c) of the Order) are not privileged at all: *Southcorp* at [21]; *New Cap Reinsurance* at [18].

    (c) The filing of the final report operates as a waiver of privilege over any communications between the lawyer and the witness unless the communications had no influence on the

content of the report: *Southcorp* at [21] and unless it would not be unfair in the circumstances for privilege to be maintained: *New Cap Reinsurance* at [53].

Evidence in support of the claim for privilege

10. The evidence produced in support of the claim for privilege is the affidavit of Trent Sebbens. The affidavit has no utility in the assessment of the claim for privilege, for at least three reasons.

11. **First**, most (although not all) of the relevant communications were sent to Ashurst, not by Ashurst. Mr Sebbens cannot give evidence of the purpose of those communications. That evidence must come from Dr Adam and Mr Gunzburg respectively and any evidence Mr Sebbens give is hearsay.

12. **Second** and in any case, the key part of the affidavit is comprised of inadmissible conclusory assertions as to the nature of the relevant communications. Although the affidavit is 17 pages long, the parts dealing with the purpose of the communications are limited to four paragraphs ([25]–[28]). Those paragraphs are rolled-up conclusions which assert, without explanation, that the communications are confidential and are "*made for the dominant purpose of providing professional legal services to the CMIEG (through DGHR)*". The deponent has simply adopted the form of words seen as most likely to attract privilege.

13. Conclusory statements of that kind are entitled to no weight, and evidence of that kind is inadequate to the task. As Brereton J explained in *Hancock v Rinehart (Privilege)* [2016] NSWSC 12 at [7]:

> To sustain a claim of privilege, the claimant must not merely assert it; but must prove the facts that establish that it is properly made. Thus a mere sworn assertion that the documents are privileged does not suffice, because it is an inadmissible assertion of law; the claimant must set out the facts from which the court can see that the assertion is rightly made, or in other words "expose … facts from which the [court] would have been able to make an informed decision as to whether the claim was supportable". The evidence must reveal the relevant characteristics of each document in respect of which privilege is claimed, and must do so by admissible direct evidence, not hearsay.

14. Although the evidence in this case goes one step beyond an assertion that the documents are privileged by asserting that they are confidential documents "*made for the dominant purpose of providing professional legal services to the CMIEG (through DGHR)*", the position remains unchanged and the evidence remains in the form of inadmissible conclusions.

15. In the absence of any explanation which would support the conclusion, the Commission could not be satisfied that the documents fall into the asserted category.

16. **Third**, the affidavit says nothing about documents exchanged with the experts (as opposed to the communications themselves). It does not demonstrate that any document provided to or by the expert was "*made for the purpose of forming part of confidential communications between the client's lawyers and the expert witness*" (as required to attract privilege: *Southcorp* principle (2)).

Resolving the claim for privilege

17. It is plain that documents described in paragraphs 4(c) and 5(c), being draft reports and statements, are not privileged and should be produced.

18. As to the communications described in paragraphs 4(a) and 5(a):

    (a) there is no admissible evidence to demonstrate that they were made for the dominant purpose of providing legal advice to the Ashurst's client, DHGR Pty Ltd; and

    (b) there is no evidence at all to displace the inference that the communications with the expert were intended to, and did, influence the content of the reports.

19. The foregoing analysis is equally apt in respect of Mr Gunzburg's statements. Mr Gunzburg's statements consists of a series of opinions. The fact that Ashurst has not labelled the statement as a report, and not labelled Mr Gunzbug as an expert, does not change the nature of the evidence. The fact that Mr Gunzburg is not independent, and is unqualified to give the opinions he offers, does not mean that it is entitled to a greater degree of protection than an expert report. To the contrary, Mr Gunzburg's lack of expertise and lack of independence mean that his opinions are very likely to have been influenced by the content of communications with him. It would be particularly unfair to withhold the content of communications with Mr Gunzburg. If the relevant communications were ever privileged, they were waived by service of the statement.