DECISION

Fair Work Act 2009
s.248 - Application for a single interest employer authorisation

Association of Professional Engineers, Scientists and Managers, Australia, The

v

Great Southern Energy Pty Ltd T/A Delta Coal, Whitehaven Coal Mining Ltd, Peabody Energy Australia Coal Pty Ltd, Ulan Coal Mines Ltd
(B2023/1339)

DEPUTY PRESIDENT HAMPTON
DEPUTY PRESIDENT WRIGHT
COMMISSIONER MATHESON

ADELAIDE, 28 MAY 2024

Application by Association of Professional Engineers, Scientists and Managers, Australia – whether documents produced following of an order made by the Commission attracted legal professional privilege or some other discretionary considerations.

1. What this decision is about

[1] On 20 February 2024, Peabody Energy Australia Coal Pty Ltd (**Peabody**) made an application relying upon s.590(2)(c) of the *Fair Work Act 2009* (the **FW Act**) for orders requiring the Association of Professional Engineers, Scientists and Managers, Australia (**APEMSA**) to produce documents relating to an application made by APESMA for a single interest employer authorisation under s.248 of the FW Act.

[2] The authorisation is sought in respect of bargaining for an enterprise agreement to cover certain employees in the black coal mining industry. In particular, in its current form, the application seeks authorisation of the commencement of multi-employer bargaining with four employers, including Peabody (collectively the **Respondents**). The application is being opposed by the Respondents.

[3] For reasons[1] previously stated, we subsequently issued an Order for Production on 5 March 2024[2] (**Production Order**). In brief terms, the Production Order required that APESMA produce documents concerning written communications with relevant employees pertaining to the application before the Commission. Further, those communications involved information provided to members of APESMA in the lead up to a ballot to support the s.248 application as ultimately made by that organisation. The Order also stated that any documents produced would be provided to the Respondents, subject any objection and further order.

[4] APESMA produced a bundle of documents on 19 March 2024. In producing the bundle, APESMA claimed that two documents included in the bundle were subject to legal professional privilege and should not be provided (in full) to the Respondents. APESMA produced the two documents in both redacted, and unredacted form to the Commission. The bundle of documents, with the two relevant documents redacted to remove the asserted privileged elements, were also provided to the other parties to the proceedings.

[5] The claim for privilege was opposed by Peabody, and the Commission subsequently received written submissions and some evidence concerning the claim and the basis of each parties' position on the issue.

[6] The two documents concerned can be described as follows:

1. An internal email dated 11 October 2023 (**Email**); and

2. A single slide of a PowerPoint presentation used during a meeting with APESMA members or "delegates" conducted on 18 November 2023 (**PowerPoint slide**).

[7] APESMA claimed that the relevant parts of the Email and the PowerPoint Slide were protected by legal professional privilege (**Relevant Parts**).

[8] The evidence[3] before the Commission establishes that the email was an internal communication between officers of APESMA. Further, the PowerPoint Slide was a document prepared by APESMA's Senior Legal Officer which sought to summarise the legal advice received by APESMA associated with what has become the present application.

[9] The redated versions of the two documents supplied disclosed only the nature and headings of the content.

[10] On 17 April 2024, this Full Bench advised the parties that it would uphold APESMA's objection in relation to the Email. The Full Bench dismissed APESMA's claim in relation to the PowerPoint Slide. The reasons for our decision are as follows.

2. The Doctrine of Legal Professional Privilege as Applied Under the FW Act

[11] Sections 589 and 590 of the FW Act empower the Commission to exercise discretionary powers in determining the procedure to be followed in the matters before it, and how it informs itself in relation to those matters. In doing so, the Commission has a discretionary power to inform itself by requiring the production of documents, records or other information.[4]

[12] Further, s.591 provides that the Commission is not bound by the rules of evidence and procedure. Importantly, the doctrine of legal professional privilege is not merely a rule of evidence under the *Evidence Act 1995* (Cth), but it is also a rule of substantive law and an important common law immunity, which applies to the Commission.[5] Legal professional privilege cannot be abrogated by statute except by clear express words. The Full Bench in *Kirkman v DP World Melbourne Limited* [2015] FWCFB 3995 noted that there is no provision

in the FW Act which excludes the operation of the doctrine of legal professional privilege in relation to proceedings before the Commission.[6]

[13] There are two main categories of legal professional privilege. These categories were outlined by the Full Bench in *Stephen v Seahill Enterprises Pty Ltd*[7] (***Seahill Enterprises***):

> "[62] There are two main categories of legal professional privilege. The first is legal advice privilege. It applies to confidential written and oral communications between a lawyer and a client or between lawyers acting for a client, or the contents of a confidential communication prepared by the lawyer, the client, or another person, for the dominant purpose of the lawyer(s) providing legal advice to the client. Thus, not only is the advice of the lawyer to the client protected, but also any communication or document passing from the client to the lawyer (such as the request for advice or a set of factual instructions) for the purpose of the provision of the legal advice. The second is litigation privilege. It applies to a confidential communication between a client and another person or the client's lawyer and another person, or the contents of a confidential document that was prepared, for the dominant purpose of the client being provided with professional legal services relating to a current, anticipated or pending Australian or overseas legal proceeding (including a proceeding before the Commission) in which the client is, was or may be a party."[8]

[14] Relevantly, it is clear that legal advice privilege attaches to the contents of a confidential communication prepared by the lawyer, the client, or another person for the dominant purpose of the lawyer(s) providing legal advice to the client.

[15] Further, litigation privilege applies to confidential communication between a client and another person for the dominant purpose of the client being provided with professional legal services relating to a current, anticipated or pending Australian legal proceeding, in which the client is, was or may be a party.

[16] A Full Bench of this Commission in *Seahill Enterprises* outlined a number of principles concerning legal professional privilege:

(1) Legal professional privilege is a right belonging to the client, not the lawyer or any relevant third party.

(2) Legal professional privilege protects confidential communications rather than documents as such, and it is the nature of the communication within the document which determines whether or not the privilege attaches.

(3) A client making a claim of privilege carries the onus of establishing its claim.

(4) The "dominant purpose" for a communication is its "ruling, prevailing, paramount or most influential purpose", and is not merely the "primary" or "substantial" purpose.

(5) A communication in a document brought into existence for the dominant purpose of a client being provided with professional legal services will be

privileged notwithstanding that some ancillary or subsidiary use of the document was contemplated at the time.

(6) What is the dominant purpose is a question of fact, to be determined objectively.

(7) An appropriate starting point when applying the dominant purpose test is to ask what was the intended use or uses of the document which accounted for it being brought into existence.

(8) Usually the purpose of a document will be that of the maker of the document, but in some cases it will be the purpose of the person who called the document into existence, such as a solicitor commissioning the provision of a technical report.

(9) Conduct inconsistent with the maintenance of the confidentiality which legal professional privilege is intended to protect may give rise to an imputed waiver of the privilege. Whether inconsistent conduct gives rise to waiver is informed by notions of fairness. Questions of waiver are matters of fact and degree.[9]

[17] It is clear that the assessment of whether legal professional privilege attaches to a document is clearly a question of fact to be determined on an objective basis, having regard to the evidence, the nature of the documents or communications and the parties' submissions.[10]

[18] Staff members of unions (employers and employer organisations) engage in internal discussions and deliberations relating to industrial strategy and policy matters. There is no express statutory protection preventing the Commission from ordering the production of documents relating to those deliberations. However, the Commission and its predecessors have treated internal deliberations with caution.

[19] Munro J in *Clerks (Alcoa)*[11] said:

"The determination of whether a party should be compelled to produce information which may be within its possession must in my view be primarily guided by the considerations referred to by the 1975 National Wage Case Bench when it said:

> "This wide-ranging discretion conferred on the Commission is statutory recognition of the complex exigencies which permeate industrial relations. What procedures are fair and reasonable in the handling of a dispute must depend upon the particular mix of factors involved and inevitably calls for the exercise of broad discretion and judgment."

…There are many instances in Australian practice recognising that participants in industrial relations will be sheltered from compulsory production of information categorised as internal to their deliberations in industrial relations matters…

Against the application of the practice of sheltering the company's internal industrial relations deliberations in this instance must be balanced the consideration that production is sought to be compelled of what may be evidence relevant to important

> issues of fact. Findings on the particular facts in issue undoubtedly have relevance to the overall determinations to be made in this case. This circumstance leads me to a question whether this is a case where production of such documents as may be relevant ought be compelled. I have concluded that production should not be compelled. Resolution of the issues of fact as to the company's attitude toward the FCU and toward the maintenance of award coverage is not essential to the determination of the matters in dispute."[12]

[20] Further, Watson SDP in *Health Services Union v Austin Health & Ors*[13] noted that the Commission '*will not in normal circumstances allow the investigation of deliberative processes leading to tactical decisions taken'*.

[21] Another Full Bench of this Commission in *Clermont Coal*[14] discussed the Commission's approach to ordering the production that would reveal internal deliberations relating to policy or industrial strategy as follows:

> " … [T]his Commission and its predecessors have traditionally been cautious in ordering any party to produce documents which would reveal internal deliberations as to its industrial strategy or policy. However, this has never been elevated to an absolute rule, akin to a privilege, that any such documents will never be ordered to be produced…"[15]

[22] Although stated in the context of the production of documents, we consider that the same considerations may be applicable in a given case about whether documents that are produced, should be disclosed.

3. APESMA's Claim of Privilege

The Email

[23] APESMA contended that the Email was an exchange between a senior organiser and a delegate of the Union but that it conveyed the content of legal advice provided by external lawyers. Accordingly, APESMA submitted the Relevant Parts of the Email conveyed the content of communications from its external lawyers to it, which was provided for the dominant purpose of providing legal advice.

[24] Further, APESMA claim the Relevant Parts of the Email conveyed advice that was provided in the context of a discussion about the launching of what is now the present proceedings.

The Power Point slide

[25] The relevant part was prepared by Mr Robert Coluccio. Mr Coluccio is a Senior Legal Officer in the Collieries Staff Division of APESMA and holds a current practicing certificate.

[26] APESMA submitted that the relevant slide was prepared with direct reference to the written and oral advice provided by external lawyers.

[27] APESMA submitted that the dominant purpose of the relevant part was to convey legal advice to its members during the meeting.

4. Peabody's Submissions

The Email

[28] Peabody contended that the Relevant Parts of the email are not 'legal advice', and are instead, a non-legally qualified person's interpretation, or paraphrasing of, 'legal advice'. In support, they noted that the recipient and author of the Email do not appear to be legally qualified, or hold a current practicing certificate.

[29] Alternatively, Peabody submitted that the Email was prepared by the author for the dominant purpose of providing an update to the delegate about the progress, and next steps, in 'the vote to start bargaining'.

[30] With respect to litigation privilege, Peabody acknowledged that there was anticipated legal proceedings of the relevant kind, and that APESMA had engaged legal representatives in connection with the anticipated proceedings, at the time the PowerPoint was prepared. However, Peabody submitted that the above, in and of itself, is not sufficient to attract litigation privilege.

[31] Peabody submitted that it is unclear how the Relevant Parts could be said to be made for the dominant purpose of the client being provided with professional legal services.

The PowerPoint Slide

[32] Peabody contended that any privilege was lost either:

- as a result of the PowerPoint ceasing to have the requisite character of confidentiality; and/or
- as a consequence of issue waiver.

[33] Peabody noted that the PowerPoint was used in communications to at least 204 employees.[16]

[34] Peabody observed that there was nothing in the PowerPoint to suggest that the members with whom the PowerPoint was shared were required to keep confidential the substance of any advice communicated within the PowerPoint.

[35] Accordingly, APESMA sharing the PowerPoint with its members in that manner was inconsistent with the maintenance of privilege over the communication in the relevant slide.

[36] Peabody alternatively argued that the privilege contained within the relevant slide had been lost through what it described as "issue waiver".

[37] In addressing issue waiver, Peabody referred to the judgment of Allsop J in *InterTAN Inc* where his Honour held that privilege of an otherwise privileged communication may be lost where:

> … the party entitled to the privilege makes an assertion (express or implied), or brings a case, which is either about the contents of the confidential communication or which necessarily lays open the confidential communication to scrutiny and, by such conduct, an inconsistency arises between the act and the maintenance of the confidence, informed by the forensic unfairness of allowing the claim to proceed within disclosure of the communication[17]

[38] Peabody submitted that a substantive issue in these proceedings is APESMA's engagement with employees who would be covered by the Single Interest Employer Authorisation, and subsequently, multi-employer enterprise agreement and whether the employees apparently supporting the commencement of bargaining were properly informed.

[39] Accordingly, Peabody contended that APESMA fell within the scope of issue waiver as described by Allsop J.

5. Consideration

[40] The immediate context for this matter is that amongst other requirements, in determining APESMA's application for a single interest employer authorisation to be made, the Commission must assess whether APESMA has demonstrated that a majority of relevant employees at each of the Respondents want to bargain for the proposed multi-employer agreement (s.249(1B)(d) of the FW Act). APESMA relies upon a combination of meetings and employee petitions/votes to support that contention, which is disputed by all but one of the Respondent employers.

[41] The Relevant Parts of the email were in our view, the express confirmation (duplication) of the legal advice received by APESMA in direct contemplation of the present application. It was also conveyed as part of the internal deliberations and decision making of APEMA, and there was no indication that the advice set out the email was communicated more generally. That is, it was communicated only to one delegate as part of the leadership of APEMSA making decisions about the potential application and was not in any meaningful sense an element in the information process for members more generally associated with the employee votes.

[42] We considered that although perhaps not privileged in its own right, the Relevant Parts of the email fell within that category of documents about which the Commission should, in this particular case, exercise the kind of caution referred to in the authorities cited earlier. Further, given the limited nature of this communication, some of the other considerations attached to the PowerPoint Slide, did not apply.

[43] The Relevant Parts of the PowerPoint Slide represented a dot-point summary of the legal advice provided to APEMSA about the operation of the FW Act relevant to the application that is now before the Commission. It was developed and delivered by Mr Coluccio and we accept that it was provided by APESMA for the dominant purpose of conveying the legal advice it had

obtained to its members during the meeting concerned. These aspects engage both the notion of legal privilege and the caution around internal deliberations.

[44] However, we were not advised of any significant steps taken by APEMSA to limit access to the slide or to ensure that those who it was provided to understood the privileged nature of the information. That is, it was provided and made available to a relatively broad group of its membership in a manner that was inconsistent with the maintenance of privilege over the communication in the relevant slide.

[45] Further, the subject matter of the PowerPoint Slide was directly relevant to the matter at issue before the Commission. That is, the existence of majority employee support for the bargaining at each of the Respondents. This direct relevance, and the broad nature of the communication of the slide to the APESMA membership, meant that its probative value outweighed the internal deliberation concerns otherwise applying.

6. Conclusions

[46] We found that it was not appropriate that the disputed content of the Email be provided to the Respondents. As such, only the redacted version of the Email was provided to all the parties in the present proceedings.

[47] We found that any privilege attaching to the relevant PowerPoint slide was waived and that it was appropriate for it to be provided to the Respondents in an unredacted form.

DEPUTY PRESIDENT

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[1] [2024] FWCFB 106.
[2] PR772057.
[3] An Affidavit sworn by Aron Neilson of AEN Legal, Solicitor for APESMA acting in this matter (**Neilson Affidavit**).
[4] Section 590(2)(c) *FW Act*.
[5] *Stephen v Seahill Enterprises Pty Ltd* [2021] FWCFB 2623 at [61]; *Kirkman v DP World Melbourne Limited* [2015] FWCFB 3995 at [23] (*DP World Melbourne Limited*).
[6] *DP World Melbourne Limited* at [23].

[7] [2021] FWCFB 2623.
[8] *Seahill Enterprises* at [62].
[9] Ibid at [63].
[10] See also *The Commissioner of Taxation of the Commonwealth of Australia v Pratt Holdings Pty Ltd* [2005] FCA 1247 at [30].
[11] *Clerks (Alcoa of Australia – Other Than Mining and Refining) Consolidated Award 1985* [1988] AIRC 391, cited by *United Firefighters' Union of Australia v Emergency Services Telecommunications Authority T/A ESTA* [2018] FWC 7454 at [45] – note that *Clerks (Alcoa)* was a decision of the Australian Conciliation & Arbitration Commission.
[12] Ibid at 4-5.
[13] [2008] AIRC 530 at [19].
[14] *Clermont Coal Pty Ltd* v *Troy Brown & Ors* [2015] FWCFB 2460.
[15] Ibid at [23], cited by *Application by the Australian Workers' Union and Construction, Forestry, Mining and Energy Union* [2019] FWC 2567 at [8]; *Application by the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2017] FWC 262 at [18]. See also *Joshua Brewer v St Columba College Munno Para Inc T/A St Columba College* [2018] FWC 4661.
[16] Referring to Supplementary Statement of Robert Coluccio dated 29 January 2024 at [4]; Aron Neilson Affidavit at [11].
[17] *DSE (Holdings) Pty Ltd v InterTAN Inc* (2003) 127 FCR 499 at [58].