IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT

Not Restricted

S ECI 2017 00145

ALPHINGTON DEVELOPMENTS PTY LTD (ACN 164 529 864) — Plaintiff

v

AMCOR LIMITED (ACN 000 017 374) — Defendant

JUDGE:	Daly AsJ
WHERE HELD:	Melbourne
DATE OF HEARING:	19 March 2018, further written submissions filed 30 July 2018, 3 August 2018, 7 August 2018 and 17 September 2018
DATE OF JUDGMENT:	20 September 2018
CASE MAY BE CITED AS:	Alphington Developments Pty Ltd v Amcor Limited (No 3)
MEDIUM NEUTRAL CITATION:	[2018] VSC 544

PRACTICE AND PROCEDURE – Legal professional privilege – Claim in respect of documents produced by third party pursuant to plaintiff's subpoena – Section 131A of *Evidence Act 2008* (Vic) ('Act') does not apply – Third party engineering consultant retained by defendant during relevant period – Whether any duty of confidence owed, such that communications exchanged pursuant to retainer were confidential – Finding that retainer carried an implied obligation of confidence – Whether the nature of the retainer established or informed the purpose of individual communications initiated or received pursuant to that retainer – Finding that the scope of the third party's retainer informs the determination of the purpose of individual communications but not the question of protection by legal professional privilege – *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357, applied - Contract for sale between the parties contained provision for expert determination process – Meaning of 'Australian court' under the Act – Whether the common law doctrine of litigation privilege extends to the expert determination process – *Evidence Act 2008* (Vic), s 119 – *Dura Constructions Pty Ltd v Hue Boutique Living Pty Ltd* [2011] VSC 377, referred to – *AWB v Cole (No 5)* [2006] 155 FCR 30, applied – *Ingot Capital Investments Pty Ltd v Macquarie Capital Markets Ltd* (2006) 67 NSWLR 91, referred to – Finding that common law test does not extend to the expert determination process – Whether defendant has waived privilege by appointing the third party as its technical expert, or any 'issue waiver' – *Commissioner of Taxation v Rio Tinto* (2006) 151 FCR, 341, referred to – *Cargill Aust Ltd & ors v Viterra Malt Pty Ltd & ors (No 7)* [2018] VSC 99, applied – *Viterra Malt Pty Ltd & ors v Cargill Australia & ors* [2018] VSCA 118, applied – No waiver of privilege

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APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr D Aghion with Ms G Douglas	Kalus Kenny Intelex
For the Defendant	Ms K O'Gorman	Gilbert + Tobin

HER HONOUR:

Introduction and procedural history

1 The plaintiff ('Glenvill') is a special purpose vehicle established for the purpose of purchasing and redeveloping a substantial redundant industrial site in Alphington ('site'), an established suburb in north-east Melbourne. The defendant ('Amcor'), is the vendor of the site. Under the terms of the contract of sale dated 28 June 2013 ('contract of sale'), which has subsequently been novated and varied, Amcor is obliged to fund the remediation of any part of the site found to have been subject to contamination not identified by an environmental consultant engaged by Amcor ('Ramsay') prior to the execution of the contract of sale. Relevantly, the contract of sale also provided for an expert determination process triggered by notice of one party to the other in the event of a dispute between the parties concerning the need for remediation and the scope and cost of the works necessary to enable the development of the site for residential and commercial purposes. The disputes between the parties about these matters are the subject of this proceeding.

2 By March 2015, the parties were aware of the existence and, in general terms, the scope of previously unidentified asbestos contamination. Over the course of 2015 and 2016, the parties, along with technical consultants engaged by them, met and corresponded with each other to, among other things, develop an agreed remediation strategy for the site. From time to time, Glenvill submitted claims for the costs of remediation, some of which Amcor disputed and did not pay in full. By October 2016 it became apparent that Glenvill and Amcor could not agree upon a remediation strategy for the site, and a substantial proportion of remediation costs claimed by Glenvill remained unpaid.

3 On 23 December 2016, Glenvill notified Amcor that it intended to trigger the expert determination process provided for in the contract of sale. However, while there is no evidence before me on this matter, I have gleaned from the pleadings that the parties could not agree upon the issues to be referred to the expert, and the identity of the expert. This proceeding was issued on 16 June 2017.

4 As noted above, both parties retained technical experts to assist them over the course of 2015 and 2016. In or around July 2015, Amcor retained Golder Associates Pty Ltd ('Golder'), which, among other things, provides environmental engineering consulting services. On 6 July 2015, Roger Foenander of Amcor informed Craig Joel of Glenvill of Golder's forthcoming appointment, as follows:

> We have appointed Golder to assist us. Tom Harper is the Golder resource we would use and is aimed at increasing Amcor's real time understanding of field observations, strategy for remediation etc.

5 As it turned out, before long, Ian Kluckow of Golder was the main Golder representative on the site. As submitted by Amcor, the nature and scope of Golder's retainer 'evolved' over time. I agree. However, the precise nature of Golder's retainer is not of great significance to the resolution of the issues in this application. It is only necessary for present purposes to note that Mr Kluckow clearly became part of the inner circle of Amcor commercial and legal personnel dealing with claims made by Glenvill and in considering Glenvill's proposed remediation strategy for the site. At this stage, it appears that Mr Kluckow will also be called as an expert witness on behalf of Amcor in this proceeding.[1]

6 On 27 October 2017, Glenvill issued a subpoena directed at Golder ('subpoena'). In November 2017, 6,435 unique documents were produced by Golder pursuant to the subpoena. Over the course of January and February 2018, the solicitors for Amcor reviewed the documents, and identified 2,477 documents over which Amcor claimed legal professional privilege ('Golder documents'). The solicitors for Glenvill rejected Amcor's claim for privilege over the Golder documents on a global basis, and the matter first came before me on 19 March 2018.

7 Prior to the hearing on 19 March 2018, the parties had filed reasonably extensive evidence and reasonably detailed submissions concerning the dispute over Glenvill's entitlement to inspect the Golder documents. At the time, the parties were bound by a relatively tight timetable, with the determination of Amcor's privilege claims over the Golder documents feeding in to the preparation of expert reports and the

[1] An expert witness report prepared by Mr Kluckow was filed while judgment was reserved.

conduct of expert conclaves over the course of April and May 2018, with a trial scheduled for October 2018. With this in mind, along with the practical difficulties associated with ruling upon nearly 2,500 documents, I proposed, and the parties agreed, that I review and rule upon a substantial sample of the Golder documents ('sample documents'), being approximately ten per cent of the Golder documents. A quarter of the sample was chosen by Amcor, a quarter by Glenvill, with the remainder chosen at random.

8 I made orders giving effect to my ruling on the sample documents on 28 March 2018, accompanied by some brief observations concerning the review exercise. I made the following orders:

1. Subject to paragraph 3(a) of these orders, by 4.00pm on 6 April 2018 Amcor produce to Glenvill for inspection the documents identified as not being subject to a claim for legal professional privilege in Schedule A to these orders.

2. Subject to paragraph 3(a) of these orders, by 4.00pm on 6 April 2018 Amcor produce to Glenvill redacted copies of the documents identified in Schedule B to these orders, with the redactions to be made consistently with the instructions referred to in Schedule B of these orders.

3. By 4.00pm on 6 April 2018, the solicitors for Amcor notify the other parties and the Court as to whether:

   (a) Amcor seeks to apply to the Court to adduce further evidence and/or make further submissions on the question of whether the documents referred to in paragraphs 1 and 2 of these orders must be produced to Glenvill; and

   (b) there is any need to clarify the instructions in Schedule B to these orders.

4. For the avoidance of doubt:

   (a) the terms of paragraph 3(a) of these orders is not intended to foreshadow the result of any such application; and

   (b) Amcor is not required to produce for inspection any document which is the subject of any application pursuant to paragraph 3(a) of these orders prior to 12 April 2018.

5. By 4.00pm on 10 April 2018, the solicitors for Amcor file and serve an updated list of Golder documents (excluding the documents in the representative sample) over which claims for legal professional privilege are made, with such list to have been created having regard

to the ruling of today's date, including the reasons, and the findings in Schedules A and B concerning the representative sample.

6. In addition to the information provided of the list of the representative sample, the list to be filed and served pursuant to paragraph 5 of these orders identify whether any privilege claims are made under s 118 of the *Evidence Act 2008* (Vic) or s 119, or both.

7. The parties circulate draft orders to the Court by 4pm on 11 April 2018.

8. The parties' costs be reserved.

9 However, prior to the next return date, Glenvill lodged an application for leave to appeal. The orders made on 28 March 2018 were stayed by consent, and thereafter, Amcor lodged a cross-appeal. The grounds of the appeal and cross-appeal do not need to be elaborated upon here, but related to the observations I made in the course of my ruling on 28 March 2018, as well as the adequacy of reasons given in that ruling.

10 The hearing of the appeal and cross-appeal were listed before Connock J on 16 May 2018. Prior to the hearing, Glenvill gave notice of an application to amend the notice of appeal to contend that, by reason of the terms of s 131A of the *Evidence Act 2008* ('Act'), and the fact that the privilege claims were advanced by Amcor, not Golder (being the party producing the documents), Amcor's privilege claims were to be assessed in accordance with the common law, and not ss 118 and 119 of the Act, which was the basis upon which all of the parties (and the Court) proceeded on 19 March 2018. In his reasons for decision delivered on 1 June 2018, his Honour agreed, and ordered that the consideration of the sample documents be remitted to me for further consideration in accordance with common law principles. It is apparent from his reasons that his Honour and the parties considered that any material difference concerned the difference between s 118 of the Act ('advice privilege'), and the test for third party communications in accordance with the decision of the Full Federal Court in *Pratt Holdings Pty Ltd v Commissioner of Taxation*[2] ('*Pratt*'). As it turns out, as will be explained further in these reasons, there is also a material difference, at least in the context of the current application, between the

[2] (2004) 136 FCR 357.

terms of s 119 of the Act and the common law test for determining whether a communication is protected by what is commonly described as 'litigation privilege', at least for the purpose of giving reasons with respect to the status of individual sample documents.

11 By reason of the determination of the issue of whether the common law or the Act applies to Amcor's privilege claims, his Honour declined to consider the remaining grounds of appeal and cross-appeal. However, his Honour made a number of observations concerning what is required for the giving of reasons for ruling upon individual documents, which I have had regard to when preparing these reasons, including the schedules to these reasons.

12 In his reasons, Connock J made the following observations regarding the standard of reasons required in applications such as these (citations omitted):[3]

> The degree of detail in a judge's reasoning should be commensurate with the degree of finality attending the decision, such that reasons for decisions finally determining the rights of the parties ought ordinarily to be expressed in more detail than those relating to interlocutory or evidentiary rulings. The 'firm warnings of courts of high authority against over-lengthy judgments' should also be kept in mind.
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> In the context of claims of legal professional privilege over particular documents or categories of documents, some further observations can be made.
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> First, legal professional privilege is not merely a rule of substantive law but is a substantive legal right or immunity.
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> Second, it is well accepted that the party claiming the privilege bears the onus of establishing each of the claims, including establishing each of the necessary factual matters required to make out a privilege claim over a particular document or category of documents.
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> Third, in respect of any privilege claim over a particular document or category of documents that is to be determined by the court, it is self-evidently necessary for the party claiming the privilege to identify sufficiently the particular basis or bases upon which it is contended that privilege attaches. In turn that will expose the facts that need to be established and provide the framework of assessment for consideration by a court determining such a claim in any given case.
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> Fourth, keeping in mind the established importance of legal professional privilege as a substantive right, it is necessary for a court to give adequate

[3] At [45]-[53].

reasons when determining a privilege claim with respect to a particular document or category of documents. The nature and extent of the reasons required will depend upon the circumstances and will be informed by general principles regarding the giving of reasons such as those referred to above.

Fifth, while a judge may need to be circumspect when giving reasons so as not to reveal privileged content, adequate reasons must still be provided. Those reasons will at least reveal the basis upon which a privilege claim is upheld in a particular case.

Sixth, the fact that documents have been inspected does not lessen the obligation to provide adequate reasons.

Seventh, it does not follow from the above that reasons in relation to any particular claim of privilege need to be lengthy. There are many cases illustrating instances where short but adequate reasons succinctly and sufficiently expose the basis upon which a privilege claim has been upheld and thereby reveal the path of reasoning without compromising privileged content. In this context, the important role that Associate Justices play in the efficient operation of the court and in the administration of justice must be kept in mind, as must what was said by Ferguson J on the topic in *Oswal v Carson*.

13 Following the hearing and determination of the appeal, the matter was mentioned before me on 22 June 2018, when I made the following orders:

1. By 4.00pm on 27 July 2018:

   (a) the parties file and exchange written outlines of submissions with respect to the relevant difference between the common law and the *Evidence Act* 2008 (Vic); the question of waiver; the date upon which litigation would have been reasonably anticipated, and any other matter agreed between the parties; and

   (b) the defendant provide any updated list of Golder Subpoena documents and any documents over which a claim for privilege is no longer pressed.

2. The parties file and serve submissions in reply by 7 August 2018.

3. The further hearing of the objection, if required, be listed for 13 August 2018 at 10.30am.

4. The parties' costs are reserved.

5. There be liberty to apply.

14 The orders made on 22 June 2018 contemplated that, following the exchange of further written submissions, it was open for the parties to agree that the further

hearing scheduled for 13 August 2018 was not necessary, and that I could determine the issues in the application on the basis of the evidence and the parties' written submissions (including the submissions filed prior to the hearing on 19 March 2018). The parties ultimately elected not to have a further hearing.

Review of sample documents

15 There was no disagreement between the parties as to the applicable test for determining whether communications between Amcor and third parties, and Amcor's lawyers (including internal lawyers) are protected by advice privilege. The relevant principles, as derived from *Pratt*,[4] and elaborated further upon by Beach J in *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Ltd (No 4)* ('*Asahi*'),[5] are referred to in the parties' submissions.

16 For present purposes, the relevant test is set out in the following extract of the head note in *Pratt*:[6]

> Legal advice privilege is capable of extending to non-agent, third party authored documentary communications. Where a third party authors a document, that party's relationship (eg, agency) with the party that engages it is not relevant to the issue of legal professional privilege. Rather, the important consideration is the nature of the function which the third party performs. If that function is to enable the engaging party to make the communication necessary to obtain legal advice which it requires, then privilege should attach to the documentary communication authored by the third party.
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> The availability of the privilege should not depend on whether the document is authored by an agent or another third party, nor on whether the document is delivered to the lawyer directly by the author or through the client. Provided that the dominant purpose requirement is met, the privilege should extend to communication by the author to the client.

17 In short, the difference between the test for advice privilege under s 118 of the Act and the common law with respect to third party communications is that while under the Act, the legal relationship between the third party and the client is paramount, while under the common law, the key issue is the function performed by the third

4 (2004) 136 FCR 357.
5 [2014] FCA 796, [38]-[44].
6 (2004) 136 FCR 357.

party in making or receiving the communication. In both cases, the critical issue is still the dominant purpose of the communication. However, at common law it is not necessary to establish a relationship of agency between Amcor and Golder.

18 In the ruling made on 28 March 2018, I found that Golder was the agent of Amcor, such that communications between Golder and Amcor's internal and external lawyers for the purpose of Amcor receiving legal advice were protected from disclosure under s 118 of the Act. I see no reason to depart from that view, but it is not relevant to the question of whether, at common law, those communications attract advice privilege. In some respects, the common law test is more generous (to privilege claimants) in that there is no need to establish a relationship of agency in order to protect third party communications. All that is required is to establish that the communication is confidential, and that it was made for the dominant purpose of Amcor obtaining legal advice. In determining whether individual communications are protected by legal professional privilege, it is desirable to have specific, focussed evidence regarding the purpose for which the communication was made. However, where the documents are inspected by the Court, as is the case here, the purpose of the communication can be inferred from its provenance and audience, its contents, and its context. If it is not possible to discern the purpose of a particular communication from the face of the document, even with some knowledge of the context in which it came into existence, Amcor has not discharged the onus upon it to establish that the dominant purpose of the communication was a privileged purpose, despite having had ample opportunity to do so since 28 March 2018. For completeness, I should add that there is nothing in the evidence or the contents of the Golder documents which indicated that documents were being 'routed' through lawyers in order to protect otherwise non-privileged communications from disclosure.

19 Given that the inquiry as to whether Golder was Amcor's agent is not relevant to the question of whether the Golder documents or any of them are protected from disclosure on the basis of advice privilege, the nature and scope of Golder's retainer

is relevant in only two respects: first, whether Golder owed Amcor a duty of confidence, such that any communications between them pursuant to the terms of the retainer did not lose their confidential character, and secondly, whether the nature of the retainer (whereby Golder was in effect to be Amcor's resource on the site) established or informed the purpose of individual communications initiated or received pursuant to that retainer.

20 In relation to the first matter, I agree that the retainer between Amcor and Golder carried with it an implied obligation of confidence. In effect, Mr Kluckow was Amcor's 'eyes and ears' on the site, and represented Amcor in a number of meetings with Glenvill and its consultants which canvassed both technical and commercial matters. He clearly had a partisan role. While the question of whether litigation was reasonably anticipated at the time the retainer was entered into is a separate issue, it is apparent that at the time that the retainer commenced (July 2015) Amcor was troubled by the discovery of significant amounts of previously unidentified asbestos contamination at the site, and was understandably concerned about its potential commercial exposure under the contract of sale. It is apparent from the evidence and sample documents themselves that Mr Kluckow was not only Amcor's representative on site, but was also a trusted advisor to the relatively small group of Amcor executives and lawyers responsible for managing the relationship with Glenvill, including the assessment of claims made by Glenvill under the contract of sale, and evaluating the efficacy and cost effectiveness of Glenvill's proposed remediation plans for the site.

21 In relation to the second matter, in my view, the scope of Golder's retainer informs the determination of the purpose of individual communications, but it is not itself determinative of whether any particular communication is protected by legal professional privilege. I accept that the role and scope of Golder's retainer 'evolved' over time, and I accept that Mr Kluckow had a number of different roles and a number of different functions over the course of his dealings with Amcor, Glenvill, and the other consultants involved with the site. However, ultimately the matter for

determination is the dominant purpose of each individual communication. Golder's multiple roles and functions are reflected in the fact that the majority of the documents produced by Golder in response to the subpoena were not the subject of a claim for privilege by Amcor, and, of those that were, I have found that in a modest but not insignificant subset of the sample documents, those claims were not made out.

22 Turning to the other submissions relied upon by the parties, I do not accept Glenvill's submission that any Golder documents prepared or received for the purpose of assessing claims made by Glenvill under the contract of sale lose their privileged character on the basis that receiving and assessing claims is part of Amcor's ordinary course of business. While I understand that Amcor's presence in Australia is now relatively limited, I do not understand that the focus of Amcor's Australian business has shifted from paper and packaging to managing claims made by Glenvill. Rather, the claims are assessed pursuant to a contract of sale for a somewhat unique property. The insurance cases relied upon by Glenvill do not offer any assistance in the current application.

23 Both parties made submissions on the question of the date at which litigation might reasonably have been anticipated by Amcor. Amcor suggests various dates in 2015, after the nature and scope of the previously unidentified contamination had been identified, thus triggering Glenvill's entitlement to make claims for the cost of remediation pursuant to clause 11.5 of the contract of sale. Glenvill submitted that I should adopt either 23 December 2016, being the date that Glenvill notified Amcor that it considered the parties to be in dispute, or, alternatively, some time in October 2016, when it became clear that Amcor and Glenvill could not agree upon a remediation strategy going forward.

24 Upon reflection, the resolution of this issue has limited practical relevance to the determination of the status of the sample documents, and is complicated by the terms of the contract of sale, by what I consider to be the difference between the test for litigation privilege under the Act and the common law, and the absence of any

evidence as to the circumstances which led Glenvill to issue this proceeding, rather than follow through with the expert determination process under the contract of sale, as foreshadowed on 23 December 2016. I elaborate further upon each of these matters below.

25 Amcor's submissions appear to assume that, once litigation is anticipated, an umbrella of litigation privilege is raised over all communications brought into existence after that time. Any such assumption is misconceived. One must still examine the purpose of individual communications. By way of example, I have identified a number of documents in 2017, including documents post-dating the issue of this proceeding, which are protected by advice privilege, not litigation privilege, because they came into existence for the purpose of Amcor obtaining advice regarding claims made by Glenvill under the contract of sale. While those claims are made against the backdrop of litigation between the parties, the advice sought and obtained by Amcor could not be characterised as being for the purpose of this litigation, but rather, as being for the purpose of Amcor obtaining legal advice concerning its ongoing obligations under the contract of sale.

26 Further, the practical relevance of the distinction between advice privilege and litigation privilege is limited, regardless of whether the status of the sample documents is considered under the Act or the common law. In the former case, Amcor benefited from my finding that Golder was Amcor's agent; in the latter case, Amcor enjoys the extended protection given to third party communications by the common law. The distinction affects only the reasons for protection from disclosure, not the entitlement to protection.

27 A further difficulty with the identification of a particular date is the fact that the terms of the contract of sale, at least until July 2017, provided that any dispute concerning the scope and cost of remediation works, including Amcor's obligations to pay claims submitted by Glenvill for those works from time to time, would be resolved by expert determination, not a court proceeding. There is some evidence, given the (albeit unparticularised) notices of dispute delivered by Amcor to Glenvill

with respect to Glenvill's claims for remediation, that as early as 2015 it was reasonably anticipated that the parties might, despite their best endeavours to reach a commercial resolution of the issues between them, proceed to expert determination. However, there was no evidence before me that the parties reasonably contemplated embarking upon a court proceeding to resolve these issues prior to June 2017.

28 This issue would be of limited relevance if Amcor's claims for privilege were to be evaluated under s 119 of the Act. Section 119 of the Act protects from disclosure communications made for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (either anticipated, pending, or on foot). Schedule 2 of the Act provides an extended definition of an Australian court to include, relevantly:

> a person or body authorised by an Australian law, or by consent of parties, to hear, receive and examine evidence. (emphasis added)

29 It is strongly arguable that s 119 extends to private, contract based dispute resolution processes such as the expert determination process contemplated by the contract of sale. In *Dura Constructions Pty Ltd v Hue Boutique Living Pty Ltd* ('*Dura*'),[7] Macaulay J held that an adjudicator under the *Building and Construction Industry Security of Payment Act 2002* (Vic) was a person authorised by that Act to 'hear, receive and examine evidence' within the meaning of Schedule 2 of the Act. His Honour stated as follows:[8]

> I agree with Dura's submission that, because an adjudicator is not bound to apply the laws of evidence, such a person does not qualify as an 'Australian court' on that basis. But, is an adjudicator authorised by the Security of Payment Act to 'hear, receive and examine evidence'? In considering whether, as a matter of statutory interpretation an adjudicator meets that description I am to prefer a construction that promotes the purpose or object of the *Evidence Act*. Assuming, as I do, that the regime of privilege is intended to ensure fairness between participants in the conduct of litigious processes, I would not give that expression a narrow meaning.
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> The adjudication occurs in a patently adversarial setting. It is determined upon the basis of evidence presented in documentary form, and upon written

7 [2011] VSC 477.
8 Ibid, [48].

> submissions. The process employed by Dura and Hue itself bears out that reality. Despite the fact that the adjudication may not ultimately determine the parties' rights if, in a subsequent court proceeding, the parties' entitlements are litigated, the adjudication result is enforceable at law and is binding upon the parties unless and until a subsequent court order changes that outcome. I think that the nature of adjudications is such that preserving the confidentiality of communications, made for the dominant purpose of enabling the provision of legal services to participants in the adjudication, would promote the object of fairness for and between those participants.

30 The decision in *Dura*[9] is not on all fours with the current case. However, the terms of clause 18 of the contract of sale, which until July 2017 prescribed the dispute resolution process under the contract of sale, makes it clear that the function of the expert was to determine any dispute, the expert was required to consider the submissions of the parties, and any decision of the expert would be 'final and binding on [sic] save in the face of manifest error'. While the contract of sale was silent on the question of whether the expert was required to or entitled to review evidence, the expert determination process was clearly an adjudicative process, and I consider that, while the matter is not beyond doubt, the better view is that it is caught by the extended definition of litigation privilege under the Act.

31 However, I do not consider that the protection afforded by litigation privilege extends so far at common law. In *AWB Limited v Honourable Terence Rhoderic Hudson Cole (No 5)* ('*AWB v Cole (No 5)*'),[10] Young J found that litigation privilege did not extend to a commission of inquiry, stating:

> In my view, the authorities establish that the reason why litigation privilege has been recognised as a substantive rule of law and as a fundamental right, is that it operates to secure a fair civil or criminal trial within our adversarial system of justice. The rationale for litigation privilege does not support its extension to a commission of inquiry.

32 Having not received any submissions regarding the matter, on 11 September 2018 my associate wrote to the parties seeking submissions on the following questions:

> (a) whether…it could be said that litigation privilege at common law extends to the expert determination process contemplated by the contract of sale; and

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9 [2011] VSC 477.

10 [2006] 155 FCR 30.

(b) accepting, for present purposes, that it is arguable that the parties may have reasonably anticipated that the expert determination process might be triggered, at least by 23 December 2016, if not earlier, whether there is any material which is before [the Court] to support a finding that the parties reasonably anticipated that they might be engaged in court proceedings such as the current proceeding.

33 On 18 September 2018 I received helpful submissions from the parties. I will not dwell extensively upon those submissions or the authorities referred to in those submissions. These submissions reinforced my preliminary view that the common law test for litigation privilege is substantially more restrictive than the test under the Act, that the common law test does not extend to the expert determination process contemplated by the contract of sale, and that the evidence before me does not satisfy me that Amcor reasonably anticipated there might be litigation prior to June 2017. My conclusion is supported by the following observations:

(a) there appears to be no relevant Australian or UK authority which directly addresses this question;

(b) while there is authority that litigation privilege at common law extends to arbitrations,[11] the expert determination process under the contract of sale specifies that the expert is not an arbitrator. Furthermore, in the decision referred to by Amcor in its submissions, the relevant arbitration process was prescribed by statute, not by agreement between the parties;

(c) given the absence of any authority to the contrary in the years post-dating the decision in *AWB v Cole (No 5)*,[12] litigation privilege is limited to curial proceedings. In the interests of comity, I am bound to follow *AWB v Cole (No 5)*[13] and the subsequent decision of the NSW Supreme Court in *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* ('*Ingot Capital*')[14] unless I consider they are plainly wrong. While I have some doubts

11 See *Alfred Compton Amusement Machines Ltd v Customs and Excise Commissioner (No 2)* [1974] AC 405 (HL).
12 [2006] 155 FCR 30.
13 Ibid.
14 (2006) 67 NSWLR 91.

concerning the correctness of the decision in *Ingot Capital*,[15] insofar as it states that litigation privilege does not apply to proceedings brought in the Commonwealth Administrative Appeals Tribunal, those doubts do not assist Amcor in the current application;

(d) indeed, the terms of Schedule 2 of the Act extend the protection of s 119 to commissions of inquiry, which supports my view that there is a material distinction between the Act and the common law in that regard, in that Parliament clearly intended to overcome the limitation on the scope of litigation privilege reinforced by the decision in *AWB v Cole (No 5)*;[16]

(e) the authorities referred to by Glenvill in its submissions which support its contention that the expert determination process under the contract of sale is an inquisitorial, not adversarial process also casts some doubt on my tentative finding that it would be caught by the extended definition of litigation privilege under the Act. However, it is not necessary to decide that issue in the current application;

(f) the authorities referred to by Glenvill in its submissions do bolster my view that an expert determination process does not attract litigation privilege under the common law; and

(g) Amcor's contention that a court proceeding was contemplated as early as March or April 2015 is not supported by the contents of the documents relied upon by it in its further submissions, or any other evidence. The email from Glenvill to Amcor dated 19 March 2015 was simply an update as to the condition of the site: it forwarded a report from an environmental consultant concerning the extent of unidentified asbestos contamination and the estimated remediation costs and said Glenvill would continue to keep Amcor 'fully briefed' on the matter. No mention is made of the expert determination process, let alone litigation. The letter merely alerted Amcor to a problem

15 Ibid.
16 Ibid.

with contamination on the site and its potential commercial significance. Further, the letters sent by Amcor's solicitors to Glenvill's solicitors on 10 April 2015, while adversarial in tone, did no more than challenge the status of the letter dated 19 March 2015 and a subsequent letter (which was not in evidence) constituted notices under clause 11.5(a) of the contract of sale. Such notices trigger the obligation of Glenvill to carry out remediation works, and the obligation of Amcor to pay for the works. If Amcor objected to such a notice, that objection triggers the expert determination process. These letters support a finding that as at April 2015, Amcor might have reasonably anticipated being engaged in an expert determination process. They take no further the resolution of the question as to whether Amcor might have reasonably anticipated being engaged in a court proceeding.

34 In conclusion, the results of the further review are summarised in the schedule to these reasons. The results differ from the results of the first review to a very limited extent. First, there are some documents which were previously described as 'part' which I have now found to be fully protected, focussing upon the purpose of the communication. Secondly, upon reflection I have determined that the status of internal Golder communications (which are relatively few in number and of not great moment) should mirror the status of the forwarded communication from Amcor to Golder. Finally, there are a small number of documents (being largely communications between Amcor's internal legal counsel and Yarra Council) which, upon reflection, are documents where I cannot be satisfied that the dominant purpose of the communication was the provision of legal advice to Amcor. The changes in the result of the review are indicated in Schedule A by underlining the finding under the heading 'LPP'.

35 The schedules to these reasons include a column headed 'reasons'. However, rather than providing a narration in relation to each individual document, I have assigned each document a letter or an alphanumeric code which corresponds to a narration set out in the legend at the end of these reasons. For those documents for which I

have ruled Amcor is entitled to maintain a claim for privilege:

(a) I have distinguished between litigation privilege and advice privilege; and

(b) within the category of litigation privilege, I have distinguished between documents brought into existence for the purpose of the current proceeding, documents brought into existence for the purpose of the proceeding in which Amcor has brought claims against Ramsay, and (if I am wrong about the ambit of protection afforded by litigation privilege at common law) documents brought into existence for the purpose of any anticipated expert determination process; and

(c) within the category of advice privilege, I have distinguished documents according to whether they concern communications for the purpose of obtaining legal advice from Amcor's internal or external lawyers, whether they concern advice regarding individual claims by Glenvill or other matters, and documents where legal advice is copied to Golder where it can be inferred from the evidence, the content of the document, and the context that Golder received that advice for the purpose of Golder being able to perform its function of providing an informed contribution with respect to the subject matter of that advice for the ultimate purpose of Amcor obtaining further legal advice on that matter.

36 The above also applies to documents where I have found that part of a document may be redacted to protect privileged communications.

37 In relation to documents where Amcor's privilege claims have not been made out, I have identified whether the claim fails for one or more of the following reasons:

(a) Amcor has not established that the dominant purpose of the communication was for Amcor to obtain legal advice or for the purpose of current or anticipated litigation; or

(b) there is insufficient evidence concerning the provenance, audience or purpose

of the document from the evidence (including the schedule of Golder documents) or the contents of the document.

38 Again, the above also applies to documents where I have found that part of the document must be made available for inspection.

39 Given the nature of many of the sample documents, being chains of emails, emails with attachments, and communications involving Amcor's internal and external lawyers, a substantial number of the documents have a number of 'reasons' assigned to them. Where a document is an attachment, I have assigned the attachments the same status as the host document,[17] save in the relatively rare circumstances where it has not been established that the dominant purpose of the host communication is for Amcor to be provided with legal advice, but where the attachment itself is a document which is patently subject to legal professional privilege (such as a formal advice from an external solicitor). Given my finding that Golder owed Amcor a duty of confidentiality, disclosure of such advice to Golder would not alter the confidential and privileged nature of that communication. I accept that this approach rests on somewhat shaky grounds of principle, but it is consistent with practice.[18]

40 I have adopted what might be considered to be a truncated approach to giving reasons, given:

(a) the sheer number of documents (approximately 250) which have been inspected and ruled upon;[19]

(b) the need to avoid exposing the contents of any privileged material;

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17 See *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, *Cargill Aust Ltd & Ors v Viterra Malt Pty Ltd & Ors (No 8)* [2018] VSC 193.

18 See *Asahi*, [78]-[80], where Beach J also had some reservations concerning this approach, but upheld the claim for privilege in 'forwarded' legal advice.

19 By way of comparison, in *Asahi*, Beach J inspected eight documents. In *Cargill Australia Ltd & Ors v Viterra Malt Pty Ltd & Ors (No 8)* [2018] VSC 193, Macaulay J inspected 53 documents. Recently, in an application concerning whether certain documents ought to be subject to a confidentiality regime (*Fonterra Brands Australia Pty Ltd & Anor v Bega Cheese Ltd* [2018] VSC 471, 24 August 2018), I inspected thirteen documents.

(c) the review process having led to a substantially similar outcome as in the previous ruling;

(d) while the urgency present in March 2018 has fallen away, the last orders made by the managing judge indicate that the process of adducing expert evidence is now underway, and the proceeding has now been on foot for well over a year. This ruling postdates my earlier ruling by nearly six months; and

(e) in light of the above, consideration needs to be given to the appropriate use of court resources in applications of this nature. One objective of undertaking a review exercise of this nature is to resolve disputes of this nature promptly and efficiently.

Waiver

41 Throughout the course of this application, Glenvill has asserted that Amcor has waived privilege in otherwise privileged Golder documents by reason of:

(a) the role played by Golder at the site and the nature of the interactions and communications between Golder and Glenvill's representatives ('waiver by conduct'); and

(b) the allegations made by Amcor in its amended defence to the effect that it is not liable to Glenvill to pay outstanding payment claims for remediation, on the basis that the remediation works were unnecessary, or Glenvill did not use its reasonable endeavours to minimise the costs of remediation works ('issue waiver').

42 Glenvill asserts, in relation to 'waiver by conduct', that Amcor has acted inconsistently with the maintenance of confidentiality in the Golder documents. Further or alternatively, by pleading the matters in (b) above in its amended defence, Amcor has:

> made an assertion as part of [its] case which puts the contents of the [Golder] documents in issue, or necessarily lays them open to scrutiny, with the consequence that an inconsistency arises between the making of the assertion

and the maintenance of the privilege.

43 It is common ground between the parties, and I agree, that there is no material difference between the test for waiver pursuant to s 122 of the Act and the common law, as the test in s 122 of the Act is merely a codification of the principle laid down by the High Court in *Mann v Carnell*,[20] which focuses upon the inconsistency of the conduct of the privilege holder with the maintenance of confidentiality.

44 Glenvill relied upon the decision of the Full Federal Court in *Commissioner of Taxation v Rio Tinto Ltd* ('*Rio Tinto*'),[21] where the Court identified the relevant question is whether a party has:

> made an assertion as part of his case that puts the contents of the privileged scheduled documents in issue, or necessarily lays them open to scrutiny, with the consequence that an inconsistency arises between the making of an assertion and the maintenance of the privilege.

45 In *Rio Tinto*,[22] the Commissioner of Taxation ('Commissioner') was found to have waived privilege in certain documents by expressly referring to them in particulars provided regarding what documents and information was relied upon by the Commissioner in assessing the liability of a taxpayer. In hindsight, *Rio Tinto*[23] represented a reasonably clear cut case of waiver. A review of cases decided after *Rio Tinto*[24] will show that the occasions in which a court has found that a party has waived privilege by reason of inconsistent conduct, or putting a matter in issue in their pleadings, are quite rare, and issue waiver tends to be found in rather unusual circumstances.[25] Where it is asserted that a party has acted inconsistently with the maintenance of privilege by raising certain issues in their pleadings, it is commonplace for the relevant issue to concern the knowledge or state of mind of that party, or another party, rather than disputes concerning objective facts.

46 Glenvill relied upon the role and conduct of Golder in support of its submissions

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20 [1999] 201 CLR 1.
21 (2006) 151 FCR 341.
22 Ibid.
23 Ibid.
24 (2006) 151 FCR 341.
25 See, for example, *Vic Hotel Pty Ltd v DC Payments Australasia Pty Ltd* (2015) 321 ALR 191; *Cargill Australia Ltd v Viterra Malt Pty Ltd and ors* [2017] VSC 126.

that Amcor, by its conduct in appointing Golder as its presence on the site, acted inconsistently with the maintenance of any privilege in the Golder documents. Glenvill submitted as follows:

> The detailed chronology set out above, and the Nuttall and Joel affidavits, evidence that Golder's presence on Site was extensive and involved Golder directly guiding the methodology and scope of remediation at the Site, from July 2015 to late 2016. In this capacity Golder:
>
> (a) recommended processes Glenvill should take to assess and remediate asbestos on Site;
>
> (b) recommended further testing be conducted at the Site;
>
> (c) assessed Glenvill's claims for payments for remediation works;
>
> (d) attended technical workshops with GHD and Glenvill employees to attempt to reach agreement on technical questions concerning contamination, such as zoned land used, total volume of remediated fill per zone, and level of contamination per zone on site based on different risk scenarios;
>
> (e) provided numerous schedules to Glenvill purporting to determine the assessment of payment claims and the appropriate levels of remediation of zones of land; and
>
> (f) set task and action lists for Glenvill to comply with, requiring Glenvill to provide further information or reporting to Golder and Amcor concerning its approach to remediation on Site.

47 Amcor rejects any contention that it has, by its conduct, waived any privilege in any of the Golder documents, or any subset of the Golder documents. In relation to the first limb of Glenvill's argument, Amcor submitted, in summary, as follows:

(a) Glenvill does not identify which communications between Golder and Glenvill are said to have constituted conduct inconsistent with maintenance of any privilege, or how those communications are said to amount to inconsistent conduct;

(b) Glenvill has not identified how any conduct of Amcor is allegedly inconsistent with the maintenance of privilege;

(c) Amcor submitted:

> …there is nothing inconsistent between a party engaging an expert to

> assist it in fighting a battle with its adversary, and the party then withholding from its adversary the expert's communications in which the expert assisted the party to instruct lawyers.

(d) Glenvill's submissions do not address the question of which of the Golder documents are documents over which privilege has been waived.

48 In relation to the asserted 'waiver by conduct', I cannot see how, by appointing Golder as its technical expert on the site, Amcor has waived any privilege over its otherwise privileged communications with Golder. It is commonplace for clients to engage both legal and non-legal experts to assist them in dealing with transactions and potential disputes: indeed, it was communications between non-legal experts and a client that was the subject of determination in *Pratt*.[26] What was contestable in that case was whether legal professional privilege extended to those communications, not whether the appointment of those non-legal experts (who may well have dealt separately with the Tax Office on their client's behalf) meant that any privilege had been waived by the client.

49 Further, and while this was not the subject of any direct submissions from Amcor, I do not believe, to the extent that it is relevant to the question of waiver, that I can accept unreservedly Glenvill's evidence and submissions to the effect that Golder was 'directly guiding the methodology and scope of remediation at the site'. I suspect the extent to which Glenvill accepted Mr Kluckow's recommendations may well be a live issue at trial: indeed, had Glenvill followed each of Mr Kluckow's recommendations Amcor might be hard-pressed to contend that Glenvill had acted unreasonably. If I were to find that there had been waiver by conduct based upon this assertion alone, I consider that such a finding would be based upon a flimsy factual foundation.

50 Further, to the extent that it is relevant to the question of waiver (and I am not convinced that it is), Amcor has always been completely transparent about Golder's role on the site. It has not been, and could not be suggested that Golder was anything other than Amcor's representative on the site. The amount and nature of

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26 (2004) 136 FCR 357.

information and assistance provided to Golder by Glenvill and its representatives was entirely a matter for them. Given that Mr Kluckow accompanied Amcor's internal legal counsel to meetings with Glenvill, it could be of no surprise to Amcor that Golder was providing assistance to Amcor's legal team (indeed, again, if that was relevant).

51 The fact that Mr Kluckow was carrying out a number of functions on behalf of Amcor, including functions which involved communication with and collaboration with Glenvill's representatives, does not amount to Amcor's maintenance of its claim for privilege in some communications with Golder being inconsistent with that conduct. The different roles played by Golder might influence the determination of whether particular communications are privileged: it is not conduct on the part of Amcor which amounts to waiver. By way of comparison, Amcor's internal legal counsel, Ms McPherson, was also engaged in commercial negotiations regarding Glenvill's claims for remediation costs and the proposed remediation strategy. Could it really be suggested that Amcor's conduct in appointing Ms McPherson as one of its lead commercial representatives in its dealings with Glenvill meant that privilege in the legal advice she provided to Amcor has been waived? Her dual legal/commercial role might cause communications authored or received by her to be subject to greater scrutiny as to their dominant purpose, but it does not of itself amount to inconsistent conduct of Amcor.

52 Further, while I accept when in determining questions of waiver each case turns on its own facts and circumstances, it is significant that Glenvill's submissions do not cite any authority which has found waiver by reason of a party appointing a technical expert to assist in a commercial transaction or in dealing with commercial issues, and I have no recollection of any such instance from my knowledge of the authorities.

53 Finally, in its written submissions filed 7 August 2018, Glenvill stated as follows:

> Further, the fact that these witnesses 'entered the field' and recommended courses of action as to remediation, their own conduct and judgment will be at issue in the proceeding. Precisely what Golder were reporting to Amcor

> about the remediation works, throughout the relevant period, will inform the court as to whether there is any basis to Amcor's allegations of Glenvill's failures.

54 Two observations can be made about this submission. First, as will be elaborated upon further later in these reasons, the fact that documents might be relevant to the issues in the proceeding does not, without more, cause privilege in those documents to be waived. Second, while Mr Kluckow may be called as a witness in the proceeding, that of itself does not give rise to any waiver. It may well be that, once Mr Kluckow gives evidence, something might transpire that could amount to a waiver of privilege over some or all of the Golder documents. I cannot speculate as to what such an event or evidence might be, but no such event has occurred yet.

55 Turning now to the question of issue waiver, Glenvill, referring to Amcor's defences to Glenvill's claims, submitted as follows:

> Each of these defences require scrutiny of Glenvill's conduct during the remediation process. As the above chronology, and the Nuttall and Joel affidavits explain, from July 2015 until late 2016 Golder was directly involved in guiding the remediation works on site. Amcor's defences to payment have created an issue waiver over the entirety of the Golder documents. It is inconsistent with Amcor's defences set out above, to withhold a key participant in Amcor's on-site review of the remediation process. For Amcor to prosecute the above defences and allegations that Glenvill acted unreasonably or unnecessarily with respect to remediation, in accordance with [Rio Tinto] it must lay the Golder documents open to scrutiny, otherwise it is acting inconsistently between the making of its defence and the maintenance of its privilege.

56 In relation to the question of issue waiver, Amcor rejected Glenvill's contention that there has been a waiver because the Golder documents may be relevant to a fact in issue in the proceeding. Amcor submitted as follows:

> Privilege is waived where a party's pleading 'makes it inconsistent to withhold privileged communications'. The fact that Amcor put in issue the necessity of the remediation works or the reasonableness of Glenvill's endeavours in minimising costs does not mean that it is now 'inconsistent' for Amcor to withhold from production the communications. These issues of fact do not require the Court to make any finding as to Amcor's subjective understanding or state of knowledge as to the necessity of the works or the reasonableness of Glenvill's endeavours. At issue is only the objective facts in relation to the necessity of the works and the reasonableness of Glenvill's activities. As a result, there is nothing inconsistent between Amcor:
>
> (a) arguing that the remediation works were unnecessary, or Glenvill's

endeavours were unreasonable (as objective facts); and

(b) withholding from production documents that prove Amcor's subjective understanding or knowledge about the necessity of the remediation works or the reasonableness of Glenvill's efforts to minimize costs.

57 The principles concerning issue waiver were recently and conveniently summarised by Macaulay J in *Cargill Aust Ltd & ors v Viterra Malt Pty Ltd & ors (No 7)*,[27] as follows (omitting citations):

(a) Legal professional privilege is an important common law right (not just a rule of evidence).

(b) That right is only destroyed if the right-holder acts inconsistently with the maintenance of the privilege: that is, the relevant inconsistent act needs to be the act of the right-holder, not some other person.

(c) It follows that the combination of the relevance of the confidential material to an issue in the case, and the forensic unfairness that may follow if the material is not made available to the other party, does not of itself bring about waiver: it is the inconsistent act of the right-holder that does that.

(d) Accordingly, the task for this Court is not to make a choice between one public interest or right over another, or to balance 'fairness and justice' against the right-holder's interest in the maintenance of confidentiality. Instead, the task is deciding whether the important common law right has been lost by the right-holder's act of waiver.

(e) The right can be waived even though the right-holder did not subjectively intend to waive it: that is, the waiver can be imputed objectively from the inconsistent acts of the right-holder.

(f) Inconsistency refers to a contradiction between the confidential nature of the communication, on the one hand, and the act of the privilege holder which necessarily lays open the communication to scrutiny, on the other: so inconsistency is the test for waiver because it exposes the contradictory act which effects the waiver.

(g) Relevant inconsistency is found in the making of an assertion (express or implied) or the bringing of a case either about the contents of a confidential communication or which necessarily lays open the confidential communication to scrutiny.

(h) In either event, it is the contents of the privileged communication which the assertion or the case must be about or which is necessarily laid open to scrutiny — not merely some 'state of mind' to which legal advice might be relevant.

(i) Putting a state of mind in issue, even together with a likelihood that

[27] [2018] VSC 99.

legal advice was obtained that might be relevant to the issue (for example, by showing chronological coincidence[43]), is not necessarily enough. The privileged communication must itself be 'central' to the case.

(j) An assessment of whether an act is in fact contradictory and inconsistent may involve questions of judgment and degree.

(k) Because it does not involve a 'balancing exercise' between competing public interests, the waiver of privilege is not determined by the application of a general test of fairness;

(l) Rather, as Mann v Carnell explains, where necessary, considerations of fairness may inform the Court's perception of the essential ingredient of inconsistency[46] — it follows, considerations of fairness are subordinate to the essential test of inconsistency.[28]

58 His Honour's decision was upheld by the Court of Appeal in *Viterra Malt Pty Ltd & ors v Cargill Australia & ors*.[29] In its reasons, the Court of Appeal confirmed that mere relevance of legal advice to the issues in the proceeding is insufficient to establish waiver, and expressed reservations regarding the adoption of a test of 'centrality' of the privileged communications to the issues in the proceeding to establish waiver, emphasising once again that each case much depend upon its own facts and circumstances.[30]

59 I agree with the submissions advanced on behalf of Amcor that merely by defending Glenvill's claims on the basis that the remediation works undertaken on the site were not necessary and were unreasonable as to their nature and scope, Amcor has not put in issue the contents of its legal advice regarding these matters. Mere relevance is insufficient to establish waiver. Further, even if the applicable test was one of 'centrality', which it is not, Amcor's legal advice concerning its rights and obligations under the contract of sale is arguably only tangentially relevant to the issues in the proceeding, which concerns the reasonableness of Glenvill's conduct, not Amcor's conduct.

60 Finally, I agree that the question of the reasonableness of Glenvill's conduct is a matter to be determined at trial based upon objective facts and (non-legal) expert

28 Ibid, [49].
29 [2018] VSCA 118.
30 Ibid, [44], [71], [75].

opinion. Amcor's subjective understanding and/or opinions concerning its obligations under the contract of sale, and of Glenvill's compliance with its obligations under the contract of sale, whether informed by legal advice or otherwise, are largely, if not completely, irrelevant to the issues in the proceeding.

Conclusion

61 Accordingly, Amcor is entitled to withhold from inspection those documents identified in the Schedule A which have been found to be privileged, and must produce those documents which have been identified as not being privileged, or only in part (with appropriate redactions) as indicated in Schedule B. There has been no waiver of any privilege in any of these documents, and I consider that finding applies to the entirety of the Golder documents.

62 I shall hear further from the parties on the form of orders and the question of costs. I anticipate that those orders would provide Amcor with an opportunity to review the balance of the Golder documents and produce an updated schedule of Golder documents in conformity with these reasons.

LEGEND

Documents where Amcor's claim for privilege has been made out (including in part)

Litigation Privilege

A1 Documents brought into existence for the purpose of this proceeding

A2 Documents brought into existence for the purpose of the proceeding brought by Amcor against Ramsay

A3 Documents brought into existence for the purpose of the anticipated expert determination process under the contract of sale

Advice Privilege

B1 Communications between Amcor and Golder for the purpose of Amcor obtaining legal advice from internal lawyers regarding individual remediation claims by Glenvill

B2 Communications between Amcor and Golder for the purpose of Amcor obtaining legal advice from external lawyers regarding individual remediation claims by Glenvill

C1 Communications between Amcor and Golder for the purpose of Amcor obtaining advice from internal lawyers regarding other matters (excluding, but not limited to, the proposed remediation strategy)

C2 Communications between Amcor and Golder for the purpose of Amcor obtaining advice from external lawyers regarding other matters (excluding, but not limited to, the proposed remediation strategy)

D Communications between Golder and Amcor's internal and/or external lawyers for the purpose of Amcor receiving legal advice

D1 Communications between Golder and Amcor's internal lawyers for the purpose of Amcor obtaining legal advice

D2 Communications between Golder and Amcor's external lawyers for the purpose of Amcor obtaining legal advice

E1 Communications where internal legal advice is copied or forwarded to Golder for the purpose of Golder making an informed contribution regarding the subject matter of that advice for the ultimate purpose of Amcor obtaining further legal advice on that subject matter

E2 Communications where external legal advice is copied or forwarded to Golder for the purpose of Golder making an informed contribution regarding the subject matter of that advice, for the ultimate purpose of Amcor obtaining further legal advice on that subject matter

F Attachments where the status of the attachment follows the status of the host document

Documents where Amcor's claim for privilege has not been made out (including in part)

X Not established that the dominant purpose of the communication was for the provision of legal advice to Amcor (or the purpose of current or anticipated litigation): other purposes evident from the face of the document

XX Insufficient evidence to establish the provenance, audience, or purpose of the document