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KATHLEEN BILES v STATE OF NSW**REVIEW OF 10 FOLDERS OF DOCUMENTS PROVIDED BY THE CSO
FOR PRODUCTION IN RESPONSE TO THE SUBPOENA ISSUED TO THE CSO**

Ten folders of documents have been compiled by the CSO in answer to the subpoena for production issued to the CSO.

Folders 1-9 primarily contain correspondence with Maxwell, job sheets, and the fruits of his investigations such as witness statements.

Folder 10 contains letters of instruction from the CSO to Maxwell (being documents handed up to the judge – but later returned – in answer to one of the plaintiff's calls).

I will ask the CSO to ensure that every document is either stapled or clipped to avoid confusion and wasting time at the hearing by a lack of clarity as to where each document begins and ends.

FOLDER 1 – “CORRESPONDENCE TO PETER MAXWELL”**FOLDERS 2 AND 3 – “CORRESPONDENCE FROM PETER MAXWELL”****FOLDER 10 – “LETTERS OF INSTRUCTION TO P MAXWELL”**

These folders contain correspondence primarily between the CSO and Peter Maxwell, although a small amount of the correspondence is:

- between counsel and Maxwell and copied to the CSO
- between the CSO and Maxwell and copied to counsel

Save for a small number of documents this material is responsive to the subpoena schedule.

The correspondence falls into four broad groups.

1. Investigation correspondence: correspondence directly relating to the investigations eg the status of witness statements and the flow of documents and information between the CSO and Maxwell in relation to the investigations. More specifically, they include documents such as job sheets, the ERISP transcript re Bert Gordon and Maxwell's draft affidavits.

Production of this material would disclose confidential information about evidence (other than evidence disclosed in Maxwell's affidavits) either:

- on the face of the correspondence or
- because the correspondence refers to documents such as witness statements which the plaintiff may seek by 'pulling the thread'.

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2. Administrative correspondence: being correspondence of an administrative nature eg reporting to Maxwell on the outcome of directions hearings, providing copies of the plaintiffs' evidence, serving subpoenas and arranging collection of letters of instruction. This correspondence seems to be completely irrelevant to the matters in issue.
3. Affidavit correspondence: being correspondence in relation to the preparation of Maxwell's affidavits.
4. Letters of instruction.

On 6 December 2012, Ms Haider advised that DoCS wanted to know, in effect, whether providing some of the more innocuous material would make the plaintiff's request go away. Whilst production of the 'administrative correspondence' referred to above is unlikely to prejudice the client, it seems to me that it is likely to cause the plaintiff to agitate for all of the material; the 'administrative correspondence' is unlikely to satisfy the plaintiff, particularly in light of the fact that it appears to be completely irrelevant.

Further consideration should be given to producing the letters of instruction. However, in view of his Honour's comments during the cross examination of Maxwell – re the scope of his instructions – there is an issue as to whether this correspondence is relevant to a fact in issue given that the nature and scope of Maxwell's retainer no longer appears to be in issue.

At present, DoCS instructions are to claim privilege over all of the material – if the subpoena is not set aside or otherwise narrowed.

The documents are prima facie privileged as confidential communications pursuant to s 119 and possibly also under s 118 of the *Evidence Act 1995* (NSW).

FOLDER 4 – “FACTUAL INVESTIGATIONS BY PETER MAXWELL”

FOLDER 8 – “WITNESS STATEMENTS FROM PETER MAXWELL”

FOLDER 9 – “WITNESS STATEMENTS FROM PETER MAXWELL”

Folder 4 should also be named “WITNESS STATEMENTS FROM PETER MAXWELL”.

With a few (inconsequential) exceptions, folder 4 contains letters from Maxwell to the CSO attaching witness statements.

The exceptions are letters from Maxwell to the CSO variously referring to attaching (but not actually attaching): previous correspondence between them; an invoice; and the Bethcar finance file.

Folder 8 contains witness statements but also other types of documents including:

- correspondence between the CSO and Maxwell (some of which includes counsel and DoCS) in relation to the investigation including letters referring to enclosed statements
- Parliamentary transcript extracts
- Index to documents (created by the CSO and not responsive)
- Table of witnesses

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- The Bethcar finance file and covering letter

Ideally, the folders should be reorganised so that they contain only the documents described by the cover page ie correspondence or job sheets or witness statements etc. For example, the documents in folders 4 and 8 should be limited to witness statements and the covering letters by which those statements were sent to the CSO. Any other correspondence in those folders should be moved to the correspondence folders (folders 1-3). The other documents should be treated in a similar way. Anything of a miscellaneous nature should go into folder 5. However, as the folders have been paginated and given the limited time available this may not be possible – and I will discuss this with Ms Haider.

Folder 9 contains witness statements only.

A number of the statements refer to documents (usually from the Bethcar files) shown to the witness at the time they gave the statement. Those documents often follow the statement in the bundles. I have assumed they form part of the statements (even though the statements make no specific reference to attaching them). At the very least they appear to be exhibits. I will ask the CSO to confirm that the documents form part of the statements.

The documents in folders 4, 8 and 9 are prima facie privileged as confidential communications attaching confidential documents within s 119 (litigation) and also possibly s 118 (legal advice).

FOLDER 5 – “DRAFTS, FILE NOTES, INVOICES & SOL/SOL & SOL/CLT CONVERSATIONS RELATING TO PETER MAXWELL”

This folder contains a mix of responsive and non-responsive documents.

The unresponsive documents comprise:

- Internal CSO correspondence (usually forwarding an email from Maxwell)
- Emails between the CSO and counsel (usually forwarding an email from Maxwell)
- Emails between the CSO and DoCS (usually forwarding an email from Maxwell)
- CSO internal file note re Maxwell invoice and dispute between Manollaras and Maxwell

The responsive documents comprise:

- Investigation correspondence
- Administrative correspondence, namely letters from Maxwell attaching invoices
- File notes of conversations between the CSO and Maxwell
- Notes of a conference attended by Saidi, Arblaster, Young (DoCS), Maxwell and Allison (CSO)

The conference notes (pages 1613-1626) are of particular sensitivity as they disclose views on the matter which would result in considerable prejudice if disclosed to the plaintiff. In any event, it is difficult to see how production of this material has anything to do with providing the rest of the evidence arising from the investigation, as suggested by Curtis DCJ.

The responsive documents are privileged pursuant to s 119 (litigation).

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FOLDER 6 – “RUNNING SHEETS AS AT 23/8/10”**FOLDER 7 – “JOB SHEETS AS AT 5/5/11”**

These folders contain three versions of Maxwell's job sheet which are of 265, 251 and 270 pages in length respectively. The first was provided to the CSO by email dated 23 August 2010, the second is undated and the third was provided by email dated 5 May 2011.

Given that they are headed job sheets rather than running sheets and the fact that the second version is undated, these folders should be renamed “JOB SHEETS”

The job sheets appear to be a running summary of the contents of the DoCS Bethcar files. It is not clear whether they go any further than simply summarising the files in an editable/searchable Word format for the purpose of facilitating Maxwell's investigations. I will ask Ms Haider to clarify this.

Query whether these documents disclose anything beyond what is already in evidence and the material produced under subpoena. The real prejudice may be gifting the fruits of Maxwell's efforts to the plaintiff – and in particular documents in a form that enable keyword searches to be quickly conducted.

The covering emails are confidential communications and the job sheets are confidential documents prepared for the purpose of the litigation – and are prima facie privileged pursuant to s 119.

UNRESPONSIVE DOCUMENTS

The following documents do not appear to fall within the scope of the subpoena schedule.

Folders 1 to 3 - pages 155-156, 763-768? (chain of emails between the CSO and DoCS except the last email which is copied to Maxwell), 849, 888-890, 891 which are CSO internal emails

Folder 4 - TBC

Folder 5 – pages 1521-1522, 1523-1525, 1527-1528, 1529, 1530-1532, 1533-1534, 1535-1537, 1538, 1578, 1598, 1602-1603, 1608-1609, 1610-1611 which are CSO internal emails or emails between the CSO and counsel and/or DoCS

Folders 6 and 7 - nil

Folder 8 – pages 2482 and 2760-2761

Folder 9 - page 2961

Folder 10 - nil