FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Noumi Ltd [2024] FCA 349

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| File number: | NSD 163 of 2023 |
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| Judgment of: | **SHARIFF J** |
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| Date of judgment: | 11 April 2024 |
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| Catchwords: | **EVIDENCE** – informal discovery – claim of legal professional privilege over investigation report and communications protocol – whether privilege attaches to these communications – requirements of legal professional privilege – held that privilege attaches to the relevant communications**EVIDENCE** – informal discovery – waiver – whether privilege attaching to the investigation report was waived by its disclosure to regulator – whether privilege attaching to the investigation report was waived by references in ASX announcements – considerations as to implied or imputed waiver – whether the privilege holder’s conduct was inconsistent with the maintenance of confidentiality in the privileged communication – held that privilege was waived by disclosure to regulator but not waived by reason of the ASX announcements **PRACTICE AND PROCEDURE** – whether non-publication and suppression orders should be made – whether orders necessary to prevent prejudice to the proper administration of justice – orders made  |
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| Legislation: | *Australian Securities and Investments Commission Act 2001* (Cth) ss 19, 68 and 76*Corporations Act 2001* (Cth) ss 180(1), 344, 674(2), 674(2A), 1309(2) and 1309(12)*Federal Court of Australia Act 1976* (Cth) ss 37AF, 37AJ(2)  |
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| Cases cited: | *Archer Capital 4A Pty Ltd as trustee for the Archer Capital Trust 4A v Sage Group plc (No 2)* [2013] FCA 1098*Australian Broadcasting Commission v Parish* (1980) 29 ALR 228*Australian Competition and Consumer Commission v NSW Ports Operations Hold Co Pty Ltd* [2020] FCA 1232*Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd (No 2)* [2020] FCA 1013*AWB Ltd v Cole (No 5)* [2006] FCA 1234; (2006) 155 FCR 30*AWB Ltd v Cole* [2006] FCA 571; (2006) 152 FCR 382*Baker v Campbell* (1983) 153 CLR 52*Barnes v Commissioner of Taxation* [2007] FCAFC 88*Benecke v National Australia Bank* (1993) 35 NSWLR 110*BHP Petroleum (Australia) Pty Ltd v Sagasco South East Linc* [2001] WASCA 159*Cadbury Schweppes Pty Ltd v Amcor Limited* [2008] FCA 88*Cantor v Audi Australia Pty Limited (No 4)* [2019] FCA 1633*Cantor v Audi Australia Pty Ltd* [2016] FCA 1391*Commissioner of Australian Federal Police v Propend Financial Pty Ltd* (1997) 188 CLR 501*Commissioner of Taxation of the Commonwealth of Australia v Pratt Holdings Pty Ltd* [2005] FCA 1247*Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278*Commonwealth Director of Public Prosecutions v Citigroup Global Markets Australia Pty Ltd* [2021] FCA 511*Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305*Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49; (2002) 213 CLR 543*DSE (Holdings) Pty Ltd v InterTAN Inc* [2003] FCA 1191; (2003) 135 FCR 151*Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49*Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCA 46; (2013) 250 CLR 303*Goldberg v Ng* (1995) 185 CLR 83*Grant v Downs* (1976) 135 CLR 674*Halford v Price* (1960) 105 CLR 23*Hanks v Admiralty Resources NL (No 2)* [2011] FCA 1464*Kenquist Nominees Pty Ltd v Campbell (No 5)* [2018] FCA 853*Kirby v Centro Properties Limited (No 2)* [2012] FCA 70; (2008) 172 FCR 376*Komlotex Pty Ltd v AMP Ltd* [2022] NSWSC 1525*LHRC v Deputy Commissioner of Taxation (No 4)* [2015] FCA 70*Mann v Carnell* [1999] HCA 66; (1999) 201 CLR 1*Marshall v Prescott* [2015] NSWCA 110*Martin v Norton Rose Fulbright Australia* [2019] FCAFC 234*Mitsubishi Electric Pty Ltd v Victorian Workcover Authority* (2002) 4 VR 332*New South Wales v Betfair Pty Ltd* [2009] FCAFC 160; (2009) 180 FCR 543*Newey v Westpac Banking Corporation* [2014] NSWCA 319*Nine Films & Television Pty Ltd v Ninox Television Limited* [2005] FCA 356*Osland v Secretary, Department of Justice* [2008] HCA 37;(2008) 234 CLR 275*Perpetual Custodians Ltd v IOOF Management Ltd* [2013] NSWCA 231; 304 ALR 436*Pratt Holdings Pty Ltd v Commissioner of Taxation* [2004] FCAFC 122; (2004) 136 FCR 357*Re Northern Energy Corporation Ltd* [2020] NSWSC 1073*Secretary, Department of Justice v Osland* [2007] VSCA 96*Singapore Airlines v Sydney Airports Corporation* [2004] NSWSC 380*Spotless Group Ltd v Premier Building & Consulting Pty Ltd* (2006) 16 VR 1 *Switchcorp Pty Ltd v Multiemedia Ltd* [2005] VSC 425*Sydney Airports Corporation Ltd v Singapore Airlines Ltd* [2005] NSWCA 47*TerraCom Ltd v ASIC* [2022] FCA 208; (2022) 501 ALR 143*TerraCom Ltd v ASIC* [2022] FCAFC 151*The Council of the Municipality of Woollahra v Westpac Banking Corporation* (1994) 33 NSWLR 529*Thomason v Campbelltown Municipal Council* (1939) 39 SR(NSW) 347*Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165*UIL (Singapore) Pte Ltd v Wollongong Coal Limited* [2023] FCA 1578*X7 v Australian Crime Commission* [2013] HCA 29; (2013) 248 CLR 92 |
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|  | Passmore C, *Privilege* (4th ed, Sweet & Maxwell, 2020) |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Economic Regulator, Competition and Access |
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| Date of last submission/s: | 1 March 2024 |
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| Date of hearing: | 14-15 February 2024  |
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| Counsel for the Plaintiff: | Mr J Arnott SC and Ms G Westgarth |
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| Solicitor for the Plaintiff: | Minter Ellison |
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| Counsel for the First Defendant: | Ms E Collins SC and Ms B Lambourne |
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| Solicitor for the First Defendant: | Ashurst |
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| Counsel for the Second Defendant: | Mr S H Hartford-Davis and Ms M Mellos |
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| Solicitor for the Second Defendant: | Norton Rose Fulbright |

ORDERS

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|  | NSD 163 of 2023 |
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| BETWEEN: | AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSIONPlaintiff |
| AND: | NOUMI LTDFirst DefendantRORY MACLEODSecond DefendantCAMPBELL NICHOLASThird Defendant |

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| order made by: | SHARIFF J |
| DATE OF ORDER: | 11 April 2024 |

THE COURT ORDERS THAT:

1. Within 7 days, the parties are to confer and provide by email to the Associate to Shariff J any agreed or competing proposed short minutes of orders:

(a) to give effect to the Court’s reasons; and

(b) in relation to the order as to costs that the Court should make.

2. In the event that the parties do not reach agreement as to the proposed orders to be made by the Court pursuant to Order 1, within 14 days the parties are to file written submissions of no more than 5 pages in support of their respective positions as to the orders the Court should make including in relation to costs.

3. Pursuant to s 37AF of the *Federal Court of Australia Act 1976* (Cth), the unredacted version of these reasons be suppressed until the completion (including by way of appeal) of Proceeding No S ECI 2020 04505 in the Supreme Court of Victoria or until further order of the Court.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

SHARIFF J:

# A. INTRODUCTION

1 By an interlocutory application filed on 13 September 2023, the first defendant, Noumi Ltd (**Noumi**) (formerly, Freedom Foods Group Ltd), seeks a declaration that legal professional privilege attaches to certain documents and resists production of those documents to the second defendant, Mr Rory Macleod (Noumi’s former Chief Executive Officer).

2 The privilege dispute has arisen in the context of proceedings brought by the Australian Securities and Investments Commission (**ASIC**) against Noumi, Mr Macleod and Mr Campbell Nicholas (Noumi’s former Chief Financial Officer) for alleged contraventions of the *Corporations Act 2001* (Cth) (**Corporations Act**). Pursuant to orders made by Jackman J, ASIC produced four tranches of documents by way of informal discovery to which Noumi was given first access for the purpose of identifying claims of legal professional privilege. Noumi claimed privilege (either in whole or in part) over 135 documents. On 5 September 2023, Mr Macleod notified a dispute in respect of 53 of the documents over which privilege was claimed. At a case management hearing on 15 September 2023, Jackman J directed that the privilege dispute be determined by another judge of this Court.

3 The dispute was thereafter allocated to my docket for determination. Noumi’s interlocutory application was listed for hearing before me on 14 and 15 February 2024. By the time of and during the course of the hearing, the dispute between the parties was narrowed to 15 documents (**Contested Documents**). Following the hearing, the parties filed and served supplementary written submissions dealing with various issues that arose during the course of the hearing.

4 The main document in dispute is a report prepared by PwC entitled “Freedom Foods Group Limited – Investigation Report” dated 28 September 2020 (**PwC Report**). Noumi claims privilege over the PwC Report. Mr Macleod challenges Noumi’s assertion of privilege and further contends that any privilege which does attach to the PwC Report has been waived by reason of:

(a) Noumi’s voluntary disclosure of the PwC Report to ASIC pursuant to the terms of a “voluntary disclosure agreement”; or, alternatively,

(b) announcements made to the Australian Stock Exchange (**ASX**) which are said to have conveyed parts of the conclusion of the PwC Report.

5 The parties agreed that the resolution of Noumi’s claim that legal professional privilege attaches to the PwC Report would also determine its claim for privilege over all but one of the remaining 14 documents. The remaining document is one entitled “Privileged Communications Protocol” between Noumi and PwC in respect of which Mr Macleod separately claims that Noumi has not established legal professional privilege.

6 The parties also agreed that the determination of Mr Macleod’s claim that the privilege, if any, in the PwC Report had been waived would also determine his claims as to waiver over Documents 2 to 5 and 8 to 14 because each of these documents referred to or disclosed the contents of the PwC Report. Mr Macleod’s claims as to waiver do not affect any of the other Contested Documents (being Documents 6, 7 and 15).

7 Initially, ASIC informed the Court that it did not wish to be heard in relation to the privilege dispute, but changed its position when it became evident from Noumi’s and Mr Macleod’s written submissions that a central issue in dispute related to the proper construction and purpose of the voluntary disclosure agreement pursuant to which the PwC Report was disclosed to ASIC. ASIC confined its submissions to this question of waiver and opposed Mr Macleod’s contentions.

8 Based on the written and oral arguments advanced by the parties, the issues that arise for determination are:

(a) whether Noumi has established that legal professional privilege attaches to the PwC Report;

(b) if so, whether Mr Macleod has established that Noumi waived privilege by:

(i) voluntarily disclosing the PwC Report to ASIC; or

(ii) conveying the conclusions of the PwC Report in materials published to the ASX; and

(c) whether Noumi has established that legal professional privilege attaches to the Privileged Communications Protocol between Noumi and PwC.

9 For the reasons which follow, I have found that:

(a) Noumi has established that legal professional privilege attaches to the PwC Report;

(b) Mr Macleod has established that Noumi waived privilege by voluntarily disclosing the PwC Report to ASIC;

(c) Mr Macleod has not established that Noumi waived privilege in the PwC Report by reason of the materials published to the ASX; and

(d) Noumi has established that legal professional privilege attaches to the Privileged Communications Protocol between Noumi and PwC.

10 Before turning to my reasons for so finding, it is necessary to address at the outset that Noumi sought orders pursuant to s 37AF of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) that disclosure of certain information contained in evidence and documents that have been filed in these proceedings be prohibited until the conclusion of separate class action proceedings which are currently before the Supreme Court of Victoria (No S ECI 2020 04505) (**Class Action Proceedings**). I was satisfied during the hearing before me that the non-publication orders should be made on an interim basis. Following the hearing, I was also satisfied that the orders should be made on an ongoing basis until the final determination of the Class Action Proceedings (including any appeals), and I made those orders on 6 March 2024. My reasons for making those orders are set out below in **Part G**. As a result of having made these orders, I have redacted certain paragraphs of these reasons so that they conform with the orders that I have made. An unredacted copy of these reasons will be distributed to the parties and I have made orders that this version of the reasons be subject to non-publication and suppression orders.

11 I have structured the balance of these reasons as follows:

(a) **Part B** sets out the background factual matters relevant to the issues that fall for my determination;

(b) **Part C** deals with the question of whether Noumi has established that legal professional privilege attaches to the PwC Report;

(c) **Part D** deals with the question of whether Mr Macleod has established that there has been a waiver of legal professional privilege in the PwC Report by reason of its disclosure to ASIC;

(d) **Part E** deals with the question of whether Mr Macleod has established that there has been a waiver of legal professional privilege in the PwC Report by reason of the ASX releases;

(e) **Part F** deals with the question of whether Noumi has established that legal professional privilege attaches to the Privileged Communications Protocol;

(f) **Part G** deals with the making of non-publication orders; and

(g) **Part H** sets out the orders that I will make to dispose of the application.

# B. BACKGROUND

12 Noumi is an Australian publicly listed company in the business of manufacturing and selling dairy and plant-based beverage and nutritional products. Prior to 2021, Noumi also manufactured and sold cereals and snack food products.

13 Mr Macleod was the CEO and Managing Director of Noumi between August 2012 and 29 June 2020.

14 Mr Nicholas was the CFO and Company Secretary of Noumi between September 2016 and 23 June 2020.

## B.1 Summary of the substantive proceedings

15 ASIC’s case in the substantive proceedings concerns the alleged accumulation within Noumi of “unsaleable inventory” in the period 1 January 2019 to 30 June 2020. In short, Noumi is alleged to have accumulated large amounts of unsaleable inventory without, at the same time, having any or adequate policy for writing down the carrying values of that inventory within Noumi’s accounts. ASIC’s pleaded case asserts that this issue (the **Inventory Issue**) was brought to Mr Macleod’s attention in or about early October 2019 by Ms Stephanie Graham, an employee of Noumi.

16 ASIC’s case relates in particular to Noumi’s annual report for the year to 30 June 2019 (**FY19 Financial Report**), and the half-yearly report for the six months to 31 December 2019 (**HY20 Financial Report**). ASIC alleges, among other things, that the FY19 Financial Report and the HY20 Financial Report: (a) included material amounts of unsaleable inventory; (b) were materially overstated as a result of the inclusion of the value of unsaleable inventory; and (c) did not make sufficient or adequate provisions or write-downs for the unsaleable inventory. ASIC seeks:

(a) declarations of contraventions by Noumi of s 674(2) of the Corporations Act;

(b) declarations of contraventions by Mr Macleod and Mr Nicholas of ss 180(1), 344, 674(2A), 1309(2) and 1309(12) of the Corporations Act;

(c) pecuniary penalty orders against all three defendants; and

(d) orders that Mr Macleod and Mr Nicholas be disqualified from managing corporations for a period to be determined by the Court.

## B.2 Chronology of events giving rise to the privilege dispute

17 During March 2020, Noumi engaged the law firm, Ashurst, to provide legal advice and services relating to a separate matter arising from its employee share option plan (**ESOP Issue**). Ms Rani John was one of the partners of Ashurst who was involved in undertaking this work for Noumi.

18 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED].

19 On or about 15 April 2020, Mr Nicholas sought assistance and advice from Ms Paddy Carney, a partner of PwC, in relation to the potential engagement of PwC by Noumi in relation to the ESOP Issue. On that day, Ms Carney sent Mr Nicholas an email with a proposed “[s]cope of work” regarding the ESOP Issue and attached an “umbrella accounting advice engagement letter” (the **PwC Umbrella Engagement**).

20 On 28 May 2020, the Inventory Issue was escalated to Noumi’s Board. At a Board meeting on that date, Mr Macleod informed the Board that $37 million of inventory was considered “at risk” with a provision to be made in the range of $20-25 million as net exposure. The Board minutes record that Mr Trevor Allen, then a non-executive director of Noumi, expressed concern “that this issue (known by Senior Management, not Board [sic]) was not stated anywhere in the Audit Report for the last 4 years” and that Mr Macleod believed that “the issues started to occur in 2018 & 2019 during rapid expansion but could offer no explanation as to why is [sic] was not stated in the report for those years”. The minutes further record that another non-executive director, Ms Genevieve Gregor, stated the need for an external review: “possibly PwC given their current engagement for the Option Series they could add this engagement [sic]”. It was further recorded that the matter needed to be “resolved and accounting treatment determined for 30 June 2020” and that Mr Allen was concerned that employees would not be confident enough to “raise the scale of the issue”.

21 On 29 May 2020, Noumi issued an ASX announcement, described as a “COVID 19 Trading Update”. One of the matters highlighted in that announcement was that there would be a “one-off non-cash write down of the carrying value of inventory in FY 20” and that “[i]nitial estimates indicate that the write down will be approximately $25 million”. It was reported that final details would be announced with the release of the FY20 results.

22 On 30 May 2020, Mr Allen sent an email to Mr Nicholas, which also copied Mr Macleod, regarding matters to be included in a brief to PwC to conduct a “review [into] the process for determining the quantification of the stock provision requirement”. Those (draft) matters included a list of various items relating to a review of stock, a reworking of inventory and an assessment of practices and methodologies. Relevantly, the email also listed the following matters:

* [W]hether management could have adopted reasonable additional internal control procedures that would have led to the earlier identification of aged stock;
* For stock described as ‘phantom stock’ review:

…

* The processes adopted by management and the failings of internal control procedures that have allowed this item not to be identified as a matter requiring correction;
* When did senior management become aware of this matter and the [dollar] value of this matter. What escalation policies were adopted by line management to bring this matter to senior managements’ attention.

23 On 23 June 2020, Mr Nicholas ceased to be the CFO and Company Secretary of Noumi.

24 At a Board meeting held at 8.30am on 24 June 2020, the Board accepted Mr Nicholas’ resignation and resolved to make an announcement to the ASX before the market opened that day that Mr Macleod (then Managing Director and CEO) had been placed on leave pending a further announcement.

25 At a further Board meeting held at 2pm on 24 June 2020, the Board discussed information it had “just received” that “there may be further irregularities in the accounts of the company… [which] could not be immediately particularised or quantified and required further investigation”. The Board resolved to request an immediate trading halt in the shares of the company. Noumi entered into a trading halt that afternoon, which continued until 22 March 2021.

26 At a Board meeting held the next morning at 8.30am on 25 June 2020, the Board discussed “recent events”. It was noted that Mr Macleod had not attended a meeting that had been scheduled to explain these recent events. The minutes of the Board meeting record that Mr Nicholas “did not provide a satisfactory explanation of the issues raised and tendered his resignation”. The minutes also record that the Board had not previously received information regarding the emerging accounting irregularities which were coming to light, and that it had become apparent to the Board that “management below Mr Macleod had been blocked from speaking with Directors”. The Board “noted that it was essential to ensure that all areas of concern in relation to the company’s accounts must be uncovered” and that “all staff need to come forward and feel it safe to do so”. Importantly, the minutes record that the Board had “determined to seek legal advice on the issue”.

27 The reference to the Board seeking legal advice requires some elaboration. The unchallenged evidence of Ms John was that, although Ashurst had been engaged in early March 2020 to advise in relation to the ESOP Issue, its engagement by Noumi was ongoing during May and June 2020 and expanded to matters about which Noumi wished to obtain advice during that period. Ashurst’s advice was provided both in writing and orally including at Board meetings. Many of the issues about which Noumi sought advice included “complex accounting matters”.

28 On 25 June 2020, Noumi issued a further ASX announcement entitled “Corporate Update”. The announcement stated that the company “continues to review its inventory levels and the carrying value of inventory” and that “further analysis undertaken since [the 29 May 2020 ASX announcement] suggests the need for further write downs”, with a revised estimate for an aggregate inventory write down for FY20 of $60 million. The announcement also advised that Noumi had requested that its securities be suspended to allow it to investigate its financial position, and that it had “engaged Ashurst and PwC to advise it in relation to these matters”.

29 On 29 June 2020, Mr Macleod ceased to be a director, CEO and Managing Director of Noumi. On 30 June 2020, Noumi issued an ASX announcement stating, among other things, that the Board had accepted Mr Macleod’s resignation as Managing Director and CEO, and that Noumi had “engaged Ashurst and PwC to advise and assist with ongoing investigations into the Company’s financial position”.

30 On 5 July 2020, Mr Stephen Longley, a partner of PwC, sent an engagement letter to Mr Perry Gunner, then the Executive Chair of Noumi, confirming “the scope of our services and the terms of our engagement which commenced on 24 June 2020” (the **PwC Longley Engagement**). The letter observed that Noumi’s CEO and CFO had recently left and that the Directors had “concerns regarding the accuracy of financial statements following the revelation of certain issues” including in relation to the Inventory Issue. The “[s]cope of work” was stated to include a number of matters including to investigate inventory valuation, and other matters relating to accounting of cash and assets, as well as financial reporting such as the “risk of error in the profit statement issued for H1 FY20…”. The PwC Longley Engagement was signed by Mr Gunner on 28 July 2020.

31 On 8 July 2020, Ashurst provided Noumi with its investigation report into the ESOP Issue (**ESOP Report**). On 9 July, Noumi disclosed that report to ASIC pursuant to a “Voluntary Confidential Legal Professional Privilege Disclosure Agreement” which was in materially the same terms as the agreement pursuant to which Noumi would later disclose the PwC Report, as described below at [47]-[51].

32 Sometime in the first half of July 2020, [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED].

33 On 16 July 2020, Ms John received an email from Ms Cassandra Michie, a forensic accounting partner at PwC. The email stated that Ms Michie had been asked by Ms Carney to send Ms John a draft engagement letter to provide “forensic assistance in relation to the concerns at [Noumi].” The email attached a first draft of the engagement letter. Ms John had not spoken to Ms Michie prior to this time, but had met with Ms Carney and Mr Longley.

34 The following day Ms John sent a revised version of the engagement letter to Ms Michie. There were subsequent communications between Ms John and Ms Michie and her team at PwC in relation to the draft engagement letter that sought to refine the scope of work that Ms Michie and her team would undertake. The final version of the engagement was not executed until 20 August 2020 (the **PwC Michie Engagement**). The salient provisions of the PwC Michie Engagement letter are as follows:

We are writing to confirm that:

1. Ashurst (or “you”) act for [Noumi]. You have been retained to provide [Noumi] with legal advice in relation to certain matters.

2. In order to assist it in providing that legal advice, Ashurst wishes to have PwC conduct enquiries and analytical procedures as set out in ‘The Services’ below.

3. PwC’s work will be performed at the direction of Ashurst in order to assist it in providing legal advice to [Noumi] and as such should be considered protected under all applicable legal professional privileges.

…

***Background***

[Noumi (“the Company”)] is a listed cereals, snacks and dairy company. The CEO and CFO have recently left the Company and the Directors have concerns regarding the conduct of these individuals (and potentially the conduct of others employed or formerly employed by the Company) following the revelation of certain issues.

***The services***

(a) *Scope of work*

[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

 [REDACTED] [REDACTED] [REDACTED]

 [REDACTED]

 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

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…

(b) *Deliverables*

We will issue a written factual report setting out the findings of our investigation and any relevant evidence. We will provide a draft of the report to you to confirm factual accuracy before we issue a final report.

Our report, working papers and correspondence will be marked “Privileged & Confidential – For the purposes of Legal Advice”.

35 Ms John said that her purpose in engaging Ms Michie was to assist her in providing advice to Noumi. Specifically, she worked with Ms Michie to formulate an approach to the factual investigation, which would involve PwC interviewing certain Noumi personnel and seeking information from them on a confidential basis. Ms Michie was assisted by Mr Patrick Millwood (then a Manager in PwC’s Risk and Forensic Practice) and Ms Olivia Bruce, an employee of PwC in Ms Michie’s team. Ms John explained that the PwC Michie Engagement did not address the matters being separately addressed by other partners of PwC, relating to accounting issues such as adjustments, restatements or write-downs in Noumi’s restated prior year accounts, or those for the then extant or upcoming financial period.

36 Consistently with Ms John’s evidence, on 20 July 2020, Ms Carney issued a “Statement of Work” to Noumi setting out the accounting services PwC would provide to Noumi under the umbrella engagement letter dated 15 April 2020 (**the PwC Carney Engagement**). The scope of those services included providing assistance with the preparation of accounting position papers and the FY20 annual report. That statement of work was updated on 10 August 2020, and ultimately signed by the then Acting CFO of Noumi on 30 September 2020.

37 On or about 24 July 2020, Ms John had a telephone discussion with officers of ASIC. The context of this discussion related to requests that ASIC had made for the production of documents in relation to the ESOP Issue. As part of that discussion, Ms John’s recollection was that one of ASIC’s officers raised the issues that had been the subject of Noumi’s ASX announcement dated 25 June 2020, but she could not recall whether there was a specific reference to that announcement. Ms John informed ASIC that an internal investigation was occurring. By that time, Ms John was aware that Ms Michie had commenced work on the forensic investigation. Ms John did not mention to ASIC that a report would be prepared. Ms John considered that there was a possibility that ASIC would be provided with a copy of the report once it was received, but she had no view about this matter at that time as such a decision would be subject to instructions from Noumi.

38 On 29 July 2020, Ashurst sent a letter to ASIC notifying it of the matters that “the investigation being conducted by PwC and Ashurst [was then] currently examining”. The unredacted part of the letter stated:

There is a particular focus on whether or not there were directives or instructions by current or former executives as to the recording of transactions or information in particular ways, or conversely the omission of transactions or information, in the Company’s books and records.

You mentioned that ASIC had received from third party sources, assertions as to subject areas that may warrant investigation. We would be grateful if you could inform us of the nature of those assertions so that the company may assess whether or not it is necessary and/or feasible to incorporate consideration of those matters, into the scope of the investigation current being conducted on behalf of the Company.

39 On 30 July 2020, ASIC responded to Ashurst’s letter of 29 July 2020, stating:

Notwithstanding the information provided, ASIC is of the view that more detailed and specific information about what the suspected conduct is that led to the accounting issues being investigated would be of great assistance to its understanding of the issues. ASIC accordingly requests such information be provided.

40 ASIC also stated:

ASIC is willing to await the outcome of the Company’s internal investigation as it currently believes it may lead to a more expedient outcome during this difficult external environment. However, should circumstances change so that ASIC considered such an approach no longer provided those expediencies, ASIC would proceed to use its compulsory powers to obtain information and advance its investigation.

41 The balance of ASIC’s response provided details to Ashurst in relation to certain concerns raised by third party sources as to Noumi’s accounting treatment and other matters.

42 On 6 August 2020, Ashurst responded to ASIC and stated that it would consider the matters raised by ASIC. The letter further stated:

As to the “suspected conduct” which has led to the investigation, you will appreciate that no findings have yet been made or conclusions drawn in the investigation. We, PwC and [Noumi] are seeking to approach the investigation without pre-determining or assuming those findings or conclusions, and we consider it premature to do so at this stage. Accordingly, as the investigation progresses, it may become apparent that the matters described below do not completely or correctly describe what has occurred. Having said that, we can confirm that the following matters (which should be understood in the context just described) have prompted the investigation:

a) a review of inventory resulted in the Board becoming aware that it had been provided with incorrect information by Mr Macleod in respect of certain obsolete stock and out of date stock. [Noumi] staff then indicated that they received various verbal instructions from Mr Macleod not to perform write downs or recording provisions relating to certain obsolete stock, out of date stock and product withdrawals;

b) revenue was recognised on certain inventory prior to it being shipped even though the relevant purchase orders for that inventory were expressed to be subject to quality confirmation and grant of export licences, which conditions were ultimately not met. Incorrect information was provided to the Board as to the classification of associated receivables and their ageing; and

c) insufficient analysis of amounts shown as being owed by the overseas distributor of [Noumi] products, which has been shown subsequently to be referable to trade marketing expenditure which was not recorded in a timely manner as an expense.

43 The PwC Report was finalised on 28 September 2020. It was then provided by Ms John to Noumi’s Board. Ms John’s evidence is that she did not receive instructions to offer the PwC Report to ASIC on terms of confidentiality until after Ashurst had received and considered the final report and Ashurst had provided it to Noumi for its consideration. It will be necessary for me to say something further about the PwC Report, within limits. I will return to it later in these reasons.

44 On 2 October 2020, Ms John on behalf of Noumi again wrote to ASIC in the following terms:

As you know, we have caused PwC to prepare a privileged and confidential report concerning the matters referred to in our letter to you dated 29 July 2020 and your letter to us dated 30 July 2020. The Board of [Noumi] wishes us to share that report with ASIC on a confidential basis and pursuant to a “Voluntary Confidential Legal Professional Privilege Disclosure Agreement” in substantially the form provided on ASIC’s website and referred to in section 5 of ASIC’s Information Sheet 165.

Could you please let us know whether ASIC is prepared to receive the report on that basis, in which case we will prepare a form of the disclosure agreement, based on the similar agreement reached in respect of our report concerning employee share option issues, for your consideration.

45 At the time, ASIC’s Information Sheet 165 relevantly provided as follows:

**Section 5: Voluntary confidential disclosure of LPP information**

ASIC may elect to accept, on a confidential basis, privileged information (or information that is claimed to be privileged) voluntarily provided by a notice recipient or other disclosing party. ASIC’s standard agreement, the ‘Voluntary confidential LPP disclosure agreement’, sets out the terms on which ASIC may elect to accept such information. The agreement provides that:

* ASIC and the privilege holder agree the disclosure of the information to ASIC is not a waiver of any privilege existing at the time of the disclosure. (Note: Although the agreement prevents ASIC from asserting that the provision of the information amounts to a waiver of privilege, the agreement does not prevent third parties from asserting that privilege has been waived. You should consider seeking legal advice in relation to this issue.)
* ASIC will generally treat the information as confidential, but the privilege holder retains responsibility for otherwise safeguarding any privilege, including asserting any privilege where ASIC is compelled by law to disclose the information (such as in the case of a court order for discovery or a subpoena)
* ASIC is permitted to review and use the information for ASIC’s investigative purposes
* ASIC agrees it will not seek the admission of the disclosed information as evidence in any proceeding other than:
* where the privilege holder has consented to its tender as evidence
* to challenge the validity of the privilege claim
* where privilege has otherwise been waived or it has been determined that the information is not privileged
* for the purposes of a criminal proceeding in respect of the falsity of a statement made by the privilege holder.

A full copy of ASIC’s ‘Voluntary confidential LPP disclosure agreement’ is available on www.asic.gov.au.

ASIC believes there can be a public benefit in accepting privileged documents (or documents claimed to be privileged) on this basis, as it may assist in the effective and efficient conclusion of ASIC’s investigation and determination of consequential steps (which might include no further regulatory action). It may also assist the parties to identify efficiently, and with precision, the critical issues to be addressed in an investigation. It will often be in the public interest for ASIC, in seeking to perform its regulatory functions, to have access to LPP material and it will often not be detrimental to the privilege holder for this to occur.

46 Noumi sought to negotiate amendments to ASIC’s standard form VDA. Relevantly, the changes included the following (seeking to retain the mark-up and deletions):

**Recitals**

A.  ~~ASIC issued a notice under section <<INSERT jurisdiction>> of the~~  ~~<INSERT jurisdiction>> to the Disclosing Party dated <<INSERT~~  ~~jurisdiction>> (the Notice)~~ Reference is made to communications between ASIC, the Disclosing Party and the Disclosing Party Representative in July 2020 in connection with an investigation related to ~~<INSERT jurisdiction>>~~ certain accounting issues (the Investigation).

B. On ~~<<INSERT jurisdiction>>~~ 2 October 2020, ASIC received notification from the Disclosing Party that it held, or had within its control documents (the Disclosed Information), which it claims are subject to legal professional privilege.

…

D. The Disclosing Party has entered into this Agreement to facilitate the provision of the Disclosed Information to ASIC, to assist ~~in the conduct of~~ ASIC being informed in relation to the Investigation, without waiving any Privilege in the Disclosed Information.

…

**3. Use of the Disclosed Information by ASIC**

…

3.2. Subject to clause 3.1, ASIC may use the Disclosed Information for the purposes of its consideration of the matters the subject of the Investigation and any proceedings commenced by ASIC in connection with the subject matter ~~as a result of~~ the Investigation, including any appeals in respect of those proceedings.

47 On 14 October 2020, ASIC and Noumi entered into a “Voluntary Confidential Legal Professional Privilege Disclosure Agreement” (**VDA**) in respect of the PwC Report.

48 Given the centrality of the proper construction and effect of the VDA to the determination of these proceedings, I will set out its salient provisions in full. The Recitals section of the VDA provided:

**Recitals**

A. Reference is made to communications between ASIC, the Disclosing Party and the Disclosing Party Representative in July 2020 in connection with an investigation conducted by the Disclosing Party related to certain accounting issues (the **Investigation**).

B. On 2 October 2020, ASIC received notification from the Disclosing Party that it held, or had within its control documents (the **Disclosed Information**), which it claims are subject to legal professional privilege (**Privilege**).

C. The Disclosing Party has sought to provide the Disclosed Information to ASIC under this Agreement in a manner which is consistent with the maintenance of any Privilege. ASIC has agreed to receive the Disclosed Information subject to the terms of this Agreement.

D. The Disclosing Party has entered into this Agreement to facilitate the provision of the Disclosed Information to ASIC, to assist ASIC being informed in relation to the Investigation, without waiving any Privilege in the Disclosed Information.

E. Neither the entry by ASIC into this Agreement, nor its receipt of the Disclosed Information subject to the terms of this Agreement, indicates that ASIC accepts that the Disclosed Information is subject to Privilege.

49 Clause 1 of the VDA provided:

**1. ASIC acknowledgments and undertakings**

1.1 ASIC acknowledges that:

(a) the Disclosing Party does not lose the right to make a claim that the Disclosed Information is subject to Privilege by having provided the Disclosed Information to ASIC in accordance with this Agreement;

(b) the Disclosed Information has been provided to ASIC in confidence by the Disclosing Party;

(c) the provision of the Disclosed Information to ASIC by the Disclosing Party is not a waiver of any Privilege existing at the time of disclosure and is consistent with the maintenance of any Privilege;

(d) subject to clause 3.1, it will not seek to present the Disclosed Information as evidence in proceedings against the Disclosing Party, or any third parties.

1.2 ASIC undertakes that it will not contend in any proceeding, that by reason of the Disclosing Party having disclosed the Disclosed Information to ASIC under this Agreement, that the Disclosing Party has lost its right to make a claim that the Disclosed Information is subject to Privilege.

1.3 Subject to clause 1.2, ASIC reserves its rights to contend in any proceeding that the Disclosed Information disclosed to ASIC by the Disclosing Party is not subject to Privilege (including, without limitation, by reason of the Disclosed Information lacking the necessary quality of confidentiality).

50 Clause 3 of VDA provided:

**3. Use of the Disclosed Information by ASIC**

3.1 ASIC will not seek to present the Disclosed Information as evidence in any proceeding other than:

(a) where the Disclosing Party has consented to its admission as evidence in the proceeding;

(b) subject to clause 1.2, to challenge the validity of the Privilege claim (including, without limitation, by asserting that the Disclosed Information lacks the necessary quality of confidentiality);

(c) where Privilege in respect of the Disclosed Information has otherwise been waived or it has been determined that the Disclosed Information is not privileged;

(d) in a criminal proceeding in respect to the falsity of a statement made by a person who has a claim of privilege in respect of the Disclosed Information.

3.2 Subject to clause 3.1, ASIC may use the Disclosed Information for the purposes of its consideration of the matters the subject of the Investigation and any proceedings commenced by ASIC in connection with the subject matter of the Investigation, including any appeals in respect of those proceedings.

3.3 Without limiting clause 3.2, ASIC is permitted to obtain, and to present as evidence in proceedings against the Disclosing Party or third parties, material and information obtained as a result of the Disclosing Party having provided the Disclosed Information to ASIC.

51 Finally, clause 4 of VDA relevantly provided:

**4. Disclosure of the Disclosed Information by ASIC**

4.1 ASIC will treat the Disclosed Information as confidential, and will not disclose the Disclosed Information, other than in accordance with the procedures set out in this clause 4.

4.2 ASIC is permitted to disclose the Disclosed Information to:

(a) ASIC’s external advisers or experts, on a confidential basis, in performance of their duties, who will provide an acknowledgement to ASIC that the Disclosed Information is received by them on that basis; and

(b) any Commonwealth Minister or any committee established by the Parliament of the Commonwealth of Australia, or to any advisor to such Minister or committee, in response to any questions or requests to which ASIC may be expected to respond, whether by reason of compulsion or not. If Disclosed Information is to be disclosed pursuant to this clause 4.2(b), ASIC will request that the recipient of the Disclosed Information maintain the confidentiality of the Disclosed Information.

…

52 Schedule A to the VDA, entitled “Privilege Claims Schedule”, set out the documents over which privilege was claimed by Noumi and the bases on which such privilege was claimed. Those documents were described as:

(a) “Privileged and confidential report prepared for Ashurst by PwC on the outcome of an investigation into certain accounting and reporting matters (**PwC Report**)”, said to have been “[p]repared for the purpose of providing legal advice”; and

(b) “Appendices to the PwC Report”, said to have been “[p]repared for the purpose of providing legal advice”.

53 On 19 October 2020, Ashurst provided the PwC Report to ASIC pursuant to the VDA.

54 At this time, Ms John did not know whether or not ASIC had formally commenced any investigation relating to Noumi. Noumi had not been served with any statutory notices by ASIC in relation to the Inventory Issue. Ms John said that ASIC commenced to issue statutory notices in late November 2020. Those statutory notices identified that ASIC was investigating various alleged contraventions of the Corporations Act, including contraventions of s 180 of that Act.

55 On 30 November 2020, Noumi released its end of financial year Annual Report (**FY20 Annual Report**), accompanied by an ASX release, in which it announced a major write down of the carrying value of inventory and a restatement of prior period accounts, as part of its financial statements for the year to 30 June 2020.

# C. WHETHER THE PWC REPORT IS PRIVILEGED

56 The first area of dispute between the parties relates to whether Noumi has established that the PwC Report is subject to legal professional privilege. The parties proceeded on the basis that my determination of this question in relation to the PwC Report would flow through to Noumi’s claim for privilege over the balance of the documents in dispute save for the Privileged Communications Protocol.

## C.1 The applicable principles relating to privilege

57 It was common ground between the parties that Noumi’s claims for privilege were to be determined by reference to common law principles rather than Pt 3.10 of the *Evidence Act 1995* (Cth): ***Esso*** *Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49 at [16]-[17] (Gleeson CJ, Gaudron and Gummow JJ).

58 A communication will only attract legal professional privilege if it was brought into existence for the dominant purpose of giving or obtaining legal advice or the provision of legal services: *Esso* at [61] (Gleeson CJ, Gaudron and Gummow JJ); ***Daniels Corporation*** *International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49; (2002) 213 CLR 543 at [9] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

59 Privilege can only exist and be maintained when the conditions of the test for its existence are strictly complied with and continue to apply: ***Grant v Downs*** (1976) 135 CLR 674 at 677 (Barwick CJ), 685, 688, 690 (Stephen, Mason and Murphy JJ); *Baker v Campbell* (1983) 153 CLR 52 at 86 (Murphy J), 95-96 (Wilson J), 114-116 (Deane J), 122 (Dawson J); *Commissioner of Australian Federal Police v* ***Propend*** *Financial Pty Ltd* (1997) 188 CLR 501 at 508 (Brennan CJ), 540, 543 (Gaudron J), 552 (McHugh J), 568 (Gummow J), 584-585 (Kirby J); *Esso* at [35] (Gleeson CJ, Gaudron and Gummow JJ); and *Daniels Corporation* at [9]-[11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

60 For legal advice privilege, a confidential communication with a legal adviser will not attract privilege unless it has the requisite dominant purpose associated with obtaining or giving *legal* advice, although that concept is to be interpreted widely so as to include advice as to what a client should prudently and sensibly do in the relevant legal context: ***AWB*** *Ltd* ***v Cole*** [2006] FCA 571; (2006) 152 FCR 382 at [100]; ***DSE (Holdings)*** *Pty Ltd v InterTAN Inc* [2003] FCA 1191; (2003) 135 FCR 151 at [45]. In this sense, courts have taken a “pragmatic and realistic approach” in circumstances where advice involves legal and commercial elements, provided always that the dominant purpose test is met: *Barnes v Commissioner of Taxation* [2007] FCAFC 88 at [8].

61 The dominant purpose test can be difficult to apply when there are competing purposes. To characterise a purpose as “dominant” entails that it is the “prevailing or paramount purpose or one which predominates over other purposes”: *AWB v Cole* at [105]; *Archer Capital 4A Pty Ltd as trustee for the Archer Capital Trust 4A v Sage Group plc (No 2)* [2013] FCA 1098 at [11]; ***Kenquist*** *Nominees Pty Ltd v Campbell (No 5)* [2018] FCA 853 at [11]. If two purposes are of equal weight, “neither can be said to be the dominant purpose”: *Commonwealth Director of Public Prosecutions v* ***Citigroup*** *Global Markets Australia Pty Ltd* [2021] FCA 511 at [95](f). If the most that can be said on the evidence is that one of the purposes of the communication included providing legal advice to the client, privilege will not apply: *Esso* at [50]. If the decision to bring the document into existence would have been made irrespective of any purpose of obtaining legal advice, the latter purpose cannot be dominant: *Commissioner of Taxation of the Commonwealth of Australia v Pratt Holdings Pty Ltd* [2005] FCA 1247 at [30](8).

62 Legal professional privilege is not limited to communications between lawyer and client, but may also cover communications with a third party if those communications are made for the dominant purpose of a lawyer providing legal services: ***Pratt Holdings*** *Pty Ltd v Commissioner of Taxation* [2004] FCAFC 122; (2004) 136 FCR 357. However, privilege does not extend “to third party advices to the principal simply because they are then ‘routed’ to the legal adviser”: *Pratt Holdings* at [46] (Finn J). The principle in *Pratt Holdings* extends to communications from the client to the third party and not only communications emanating from the third party. In this way, the privilege captures communications between the client and third party during the “iterative process” of the third party preparing a commissioned document: *New South Wales v* ***Betfair*** *Pty Ltd* [2009] FCAFC 160; (2009) 180 FCR 543 at [36]-[40].

63 The party claiming privilege bears the onus of establishing its existence: *Grant v Downs* at 689 (Stephen, Mason and Murphy JJ). The claimant must provide evidence of facts from which the court can determine whether an assertion as to the purpose of the communication is properly made. Generally, the “best evidence” will be that given by the person whose purpose is in question: *Australian Competition and Consumer Commission v NSW Ports Operations Hold Co Pty Ltd* [2020] FCA 1232 at [49].However, while subjective purpose will be relevant and often decisive, dominant purpose is a question of fact that must be determined objectively: *Esso* at [172] (Callinan J).

64 Ordinarily, the relevant purpose will be that of the author of the document in question: *AWB v Cole* at [108]; “or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence”: *Grant v Downs* at 677 (Barwick CJ). Where a “technical report” has been commissioned by a solicitor, the relevant intention may be that of the solicitor: ***Mitsubishi Electric*** *Pty Ltd v Victorian Workcover Authority* (2002) 4 VR 332 at [14] (Batt JA, Charles and Callaway JJA concurring). In other cases, it may be necessary “to examine the evidence concerning the purpose of other persons involved in the hierarchy of decision-making or consultation that led to the creation of the document and its subsequent communication”: *AWB v Cole* at [110].

65 As a matter of general principle, it is not possible to describe the evidence necessary to support such a claim in all cases, which may depend on the circumstances such as the factual and legal issues dividing the parties and the number of documents said to attract the claim: *Martin v Norton Rose Fulbright Australia* [2019] FCAFC 234 at [30].

66 In many instances, the character of the documents will illuminate the purpose for which they were brought into existence: *Grant v Downs* at 689 (Stephen, Mason and Murphy JJ). Where that is not the case, it may be demonstrated by identifying the circumstances in which the communication took place and the topics to which the instructions or advice were directed: *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278 at [146] (and the cases there cited).

## C.2 The parties’ submissions

### C.2.1 Noumi’s submissions

67 Noumi contended that the dominant purpose for the creation of the PwC Report was for it to obtain legal advice from Ashurst. It submitted that the objective circumstances established that at the time PwC was engaged under the PwC Michie Engagement, Noumi was seeking to obtain advice from Ashurst as to the matters within the scope of that Engagement, specifically, matters that may best be described as those pertaining to who knew what and when, and what they did or did not do, and what were the causal factors relating to the Inventory Issue (the **Accountability and Causal Issues**).

68 Noumi sought to distinguish the PwC Michie Engagement from its other engagements of PwC. Noumi contended that there were three other relevant engagements of PwC that were connected with the accounting issues that had emerged during April to July 2020. The first engagement was the PwC Umbrella Engagement which initially related to the ESOP Issue. The second engagement was the PwC Longley Engagement which was considering issues relating to the accuracy of past reporting, adjustments, restatements and write-downs. The third engagement was the PwC Carney Engagement which was focussed upon the preparation of accounting position papers and the FY20 annual report. It was contended that each of these other three engagements of PwC related to “nuts and bolts” issues as to accounting and financial reporting, and the investigations that would be involved in them. It was submitted that the PwC Michie Engagement was qualitatively different to the other three engagements as it related to the factual investigations relating to the Accountability and Causal Issues.

69 It was submitted that the objective features of each of the separate engagements had to be considered together with Ms John’s evidence that her purpose in engaging Ms Michie was to provide legal advice to Noumi. Noumi submitted that where a report has been commissioned by an external solicitor, the purpose that must be ascertained is that of the solicitor. In this case, it was submitted that Ms John had commissioned Ms Michie to investigate the Accountability and Causal Issues for the purpose of advising Noumi and therefore it was her purpose that was relevant. Whilst Noumi acknowledged that Ms John’s state of mind would not be determinative, her subjective purpose was said to be corroborative of the objective one. In this regard, it was emphasised that Ms John’s credit was not challenged by Mr Macleod.

### C.2.2 Mr Macleod’s submissions

70 Mr Macleod submitted that there were other purposes for which the PwC Report was obtained or created and that Noumi had not discharged its onus of excluding these as dominant, or at least equal, purposes. In particular, Mr Macleod pointed to evidence that prior to any involvement of Ms John in retaining Ms Michie, Mr Allen had already expressed concerns in relation to the Accountability and Causal Issues at the Board Meeting on 28 May 2020 and in his subsequent email of 30 May 2020. It was submitted that, as a result, Mr Allen, or the Board, had a pre-existing purpose in retaining PwC to investigate and address the Accountability and Causal Issues. Whilst Mr Macleod accepted that Ms John commissioned the PwC Report, the essence of his submission was that she was only one relevant person and that Noumi itself wished to have a report commissioned. Mr Macleod accepted that Ms John’s subjective purpose, or even her objectively discerned purpose, was relevant but not determinative.

71 In support of his contentions, Mr Macleod placed considerable reliance on the decision of McDougall J in ***Singapore Airlines*** *v Sydney Airports Corporation* [2004] NSWSC 380. Mr Macleod submitted that *Singapore Airlines* establishes that, in cases involving a third party investigative report commissioned by a solicitor, it can be relevant to look at the period from the date the report is commissioned “up until the time when the document is brought into existence”. Mr Macleod submitted that in the present case, the relevant period for determining the purpose for the creation of the PwC Report was from on or about 20 July 2020 (when Ms John first liaised with Ms Michie) up until 28 September 2020 (when the PwC Report was finalised).

72 Mr Macleod submitted that, even though Ms John had commissioned the report, the Court had to assess both Ms John’s purpose *and* that of other persons, including at least Mr Allen. Mr Macleod noted that in *Singapore Airlines*, although McDougall J accepted that one corporate officer (an in-house counsel) had commissioned an investigation report, that officer’s purpose alone was not determinative. McDougall J had reasoned that the individual purposes of other employees acting within the scope of their authority were relevant to the overall inquiry. Mr Macleod submitted that, in the present case, there were multiple purposes for the commissioning of the PwC Report, one of which was Ms John’s purpose to provide legal advice to Noumi, but another of which was Noumi’s purpose in seeking to find out what had happened and why. It was submitted that the evidence established that Noumi’s purpose did not arise contemporaneously with Ms John’s purpose; rather, it indicated that Noumi had a purpose in determining what had happened in relation to the Inventory Issue which existed over a month beforehand. [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] which he contended was more consistent with the fact that Noumi’s primary, or at least equal, purpose was to understand the Accountability and Causal Issues.

73 Mr Macleod also submitted that the evidence established a further purpose, namely, that from at least 24 July 2020, Noumi intended to share the PwC Report with ASIC to assist it with its investigation so as to advance Noumi’s strategic interests. Mr Macleod contended that the discussions and correspondence between Ms John and ASIC revealed that Noumi wished to obtain a factual and other account of relevant events for the purpose of disclosing them to ASIC in its capacity as a regulator, or at least to respond to ASIC’s likely investigation or request for documents and information. Mr Macleod submitted that this purpose accorded with a more general purpose that Noumi had reported to the market via its ASX releases that it was investigating the matter. For these reasons, Mr Macleod submitted that Bromwich J’s conclusion in ***Cantor*** *v Audi Australia Pty Ltd* [2016] FCA 1391 at [68]that “a later decision to use legal advice… will not displace the dominant purpose otherwise established” was not applicable here where “the ASIC purpose” arose at least contemporaneously with, if not prior to, Ms John’s purpose.

74 Further, Mr Macleod submitted that it was not necessary to demonstrate that there was in fact a different dominant or equal purpose, but only that, as in *Singapore Airlines*, Noumi had not excluded the other purposes as being equal or dominant purposes. In support of this contention, Mr Macleod drew attention to the fact that no attempt was made by Noumi to adduce any evidence from any employee of Noumi other than its current legal counsel, whose employment post-dated the relevant events, and, in particular, from Mr Allen. Mr Macleod invited the Court to infer that in those circumstances, Mr Allen’s evidence would not have assisted Noumi in establishing that the dominant purpose of commissioning the PwC Report was to seek legal advice.

### C.2.3 Noumi’s reply submissions

75 Noumi submitted that, as the person who commissioned the PwC Report, it was Ms John’s purpose that mattered and that she had no purpose other than to obtain the PwC Report for the purpose of advising Noumi. It was submitted that Noumi’s purpose to understand the Accountability and Causal Issues purpose was “part of, or ancillary to” Ms John’s purpose, and that the “ASIC purpose” advanced by Mr Macleod was not established on the evidence.

76 Noumi submitted thatthe decision of the Court of Appeal of the Supreme Court of New South Wales in ***Sydney Airports*** *Corporation Ltd v Singapore Airlines Ltd* [2005] NSWCA 47 does not stand for the proposition that “wherethere are multiple purposes, the Court must have regard to both Ms John’s purpose and that ofother persons”, and that Mr Macleod’s reliance on the first instance decision of McDougall J, rather than the decision of the Court of Appeal, led Mr Macleod into error in this respect. Noumi submitted that the Court should not look for “an intention outside of, objectively construed, Ms John as the commissioner of the report.” It was submitted that, as Ms John’s evidence as to her sole and dominant purpose was not challenged, and this was corroborated by the terms of the PwC Michie Engagement, Ms John’s purpose was conclusive.

77 Noumi further submitted that its purpose of obtaining legal advice and the purpose of it finding out the answers to the Accountability and Causal Issues were not mutually exclusive: relying on *Singapore Airlines* at [24], *Sydney Airports* at [20] and *Komlotex Pty Ltd v AMP Ltd* [2022] NSWSC 1525 at [31]. In this regard, Noumi accepted that the relevant time for assessing purpose may extend from the time the PwC Report was commissioned up until the time it was brought into existence. It submitted that just as a purpose could evolve during the commissioning of the PwC Report, it is equally true that an anterior purpose to find out “what happened”, that existed over a month before the commissioning of the PwC Report, could evolve following consultation with lawyers and before the time the PwC Report came to be commissioned.

78 Finally, Noumi submitted that no inference should be drawn from Noumi’s failure to call Mr Allen. It was submitted that it was Ms John’s objective purpose that the Court must determine and that, to the extent Mr Allen’s purpose could be relevant, his objective purpose in engaging Ms Michie’s team was evidenced by the terms of the Michie PwC Engagement letter, which he signed.

## C.3 Consideration

79 I am satisfied that the dominant purpose for the creation and bringing into existence of the PwC Report was for Ms John to provide legal advice to Noumi, and for Noumi to obtain that legal advice.

80 The bringing into existence of the PwC Report needs to viewed in context, and in light of the moving parts that led to it being “commissioned” and brought into existence. In this regard, I agree with the parties’ submission that the purpose of the PwC Report is to be ascertained across the continuum of time leading up to its creation on 28 September 2020: see *Singapore Airlines* at [17]-[22] (being a part of McDougall J’s reasons that were not disturbed on appeal per *Sydney Airports* at [9], [20] (Spigelman CJ, Sheller JA and Campbell AJA agreeing)).

81 On the evidence before me, the Inventory Issue was first brought to the attention of Noumi’s Board at a meeting on 28 May 2020. Thereafter, there were a series of cascading developments drawn to the Board’s attention, with each subsequent development presenting a worsening position in relation to unsaleable and obsolete inventory, as well as raising other serious concerns. The Board was grappling with these developments as an evolving process. Some of the issues confronting the Board related to the, aptly described, “nuts and bolts” accounting issues, and others related to whether management had any knowledge about these issues.

82 The initial report from Mr Macleod to the Board on 28 May 2020 indicated that the Inventory Issue would lead to a write down in Noumi’s accounts in the range of $20-25 million. Given the quantum involved, it is unsurprising that Mr Allen expressed concern as to whether Noumi’s senior management knew about the Inventory Issue and, if so, why it had not been disclosed in the Audit Reports of previous years. In the context of Noumi having reporting obligations, it is also unsurprising that Ms Gregor expressed the need for an external review possibly to be conducted by PwC given it had (then) recently been involved in reviewing the ESOP Issue. Consistent with these initial reactions, a few days later, on 30 May 2020, Mr Allen sent an email referring to the fact that the Board had asked “PwC to review” the process for the quantification of stock. Mr Allen’s email raised a number of issues that would need to be considered including whether management knew about the issue and the efficacy of control procedures. However, it does not follow that the purposes for the engagements of the professional advisers that followed were immutably anchored in time to these initial reactions. Nor does it follow that the purposes were incapable of refinement after further consideration. The fact is that there were subsequent developments. Those developments satisfy me that Noumi, through its Board including Mr Allen, refined its purposes in seeking out legal and accounting assistance to deal with the overlapping but distinct issues at hand.

83 By late June 2020, the Board had been informed of further “irregularities”. Noumi then published a revised estimate for the write down in inventory in the order of $60 million for FY20. By the time of the Board meeting on 25 June 2020, the Board considered that it had not received a satisfactory explanation from Mr Nicholas in his position as CFO, and Mr Macleod had not attended a meeting to explain the (then) recent developments. Importantly, by this time, the Board considered that “management below Mr Macleod had been blocked from speaking with Directors” and that it was essential that “all staff need[ed] to come forward and feel it safe to do so”. As these matters came to light after the Board meeting on 28 May 2020, in my view it would be wrong to fix the Board and Mr Allen with a purpose based on their initial reactions, or to do so solely by reference to those earlier reactions.

84 In light of the developments which came to light after the Board meeting of 28 May 2020, the Board at its meeting on 25 June 2020 determined that it would seek legal advice. Mr Allen was present at that Board meeting. The course taken by the Board and the determination that it made to seek legal advice is important in ascertaining the purpose for the commissioning and creation of the PwC Report. It was after the Board meeting on 25 June 2020 that Ms John was approached in the first half of July 2020 by Mr Allen to provide advice, and it was after this time that PwC came to be engaged by Ashurst to, in effect, conduct a forensic investigation for the purpose of Ashurst advising the Board in relation to various matters including the Accountability and Causal Issues.

85 Consistent with the above, in the days and weeks following the 25 June 2020 Board meeting, Noumi entered into a number of engagements. Each engagement related to a different stream of work and was distinct to the other, but obviously enough all related to the general topic of the Inventory Issue. By 5 July 2020, Mr Longley was tasked with (in a simplified sense) looking backwards in time in relation to the accounting and reporting issues in so far as any revisions were required, and, by 20 July 2020, Ms Carney was tasked with (in a simplified sense) looking forward in time to impending reports and announcements. Throughout this period, Ms John was retained to provide ongoing legal advice, which expanded in scope as more information came to hand. By early July 2020, Ms John was specifically retained to provide advice in relation to the Inventory Issue, and [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]. This then brought about the PwC Michie Engagement.

86 On 16 July 2020, Ms Michie contacted Ms John by email to introduce herself. Mr Macleod placed emphasis on the fact that it was Ms Michie who made contact with Ms John as being consistent with Ms Michie’s engagement being at the initiative of Noumi and Mr Allen. Ms Michie’s email to Ms John stated that she had been asked by Ms Carney to contact Ms John. Ms John had said she had earlier met with Ms Carney, and also Mr Longley, who were both partners of PwC working with Noumi at the time. Given the involvement of a number of partners from PwC in different streams of work and the pace at which things were moving, I do not consider that it is of any moment that it was Ms Michie who contacted Ms John. Rather, what matters is the purpose of the engagement that followed.

87 As it was Ms John who ultimately engaged Ms Michie and sought the production of an investigation report, she may be regarded as the person who came to “commission” the PwC Report. As the person who commissioned the PwC Report, Ms John’s stated, and objectively discerned purpose, is relevant: *Mitsubishi Electric* at [14]. Ms John gave evidence, which I accept, that she caused Ms Michie and her team to be engaged “for the purposes of assisting Ashurst to provide legal advice and professional legal services to Noumi”. Ms John’s evidence as to her subjective purpose accords with an objective assessment of the purpose for Ms Michie’s engagement and the creation of the PwC Report. Ms John’s purpose is corroborated by the draft and final terms of engagement by which Ms Michie came to be retained. These documents establish that Ms Michie was being engaged by Ms John for the purpose of providing legal advice to Noumi. This purpose is also corroborated by the fact that by the time Ms Michie came to be engaged, the Board wanted legal advice about the serious issues that had been raised about whether Mr Macleod and other senior executives knew about the Inventory Issue and whether they had given directions to subordinates to, effectively, conceal the Inventory Issue. The PwC Michie Engagement was qualitatively different from the other engagements of PwC at the time which were focussed on “nuts and bolts” accounting issues.

88 On the facts here, I accept that it is also necessary to have regard to whether, separately to Ms John, the Board including Mr Allen, had some different purpose in seeking out, through Ms John, to obtain the PwC Report: *AWB v Cole* at [110]. I am satisfied that, over the continuum of time leading to the creation of the PwC Report, Noumi’s Board, including Mr Allen, had the same purpose as Ms John, which was that the PwC Report was being obtained and created to provide legal advice to Noumi.

89 Contrary to Mr Macleod’s submissions, having regard to the way things evolved, I do not regard the Board’s purpose, or that of Mr Allen, to have been mutually exclusive to Ms John’s purpose. I am satisfied that the Board, including Mr Allen, wanted to know what had happened, what needed to be done, who knew what and when, and what they did about it. However, I am also satisfied that the Board, including Mr Allen, came to want to know and be advised about these matters by way of legal advice provided by Ms John. Specifically, at the Board meeting on 25 June 2020, when other developments were raised including that staff subordinate to Mr Macleod had been blocked from disclosing information to the Board and may not have felt comfortable in coming forward, the Board determined to seek legal advice. It was after this time that Ms John was approached about specific advice and that, in turn, led to Ms Michie being engaged.

90 In substance, Mr Macleod’s submissions proceeded on the premise that the initial reactions expressed by Mr Allen fixed him with a purpose from which neither he nor the Board could diverge, and which purpose could not be refined or evolve. The premise of these submissions is unsound. It does not reflect the commercial reality as it was lived by Noumi’s Board at the relevant time. That is not to say that in other cases a pre-existing purpose will not continue to be a dominant purpose or at least a competing or other purpose. The *Singapore Airlines* litigation provides an example of cases where there may be other purposes, none of which dominate, or which at least compete. This may be especially so in large organisations where different officers, with different regulatory considerations in mind, and having different duties from each other, may have different purposes in seeking to obtain an investigation report. Whatever may the position in other cases, in this case I am satisfied that by the time the PwC Report was commissioned and created, it was being commissioned by Ms John for the purpose of providing legal advice to Noumi and it was created for that purpose.

91 I do not accept Mr Macleod’s submission that, as it was Mr Allen [REDACTED] [REDACTED] [REDACTED], he had some purpose different to Ms John. Given that PwC was already engaged in other respects, and the PwC Umbrella Engagement was in place, [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]. It was left to Ms John to make the decision as to how best to provide legal advice to Noumi, including as to whether she would retain Ms Michie and her team to assist in this regard.

92 I do not regard it as critical that Mr Allen was not called to give evidence. The evidence before me is as I have set it out above. On the basis of that evidence, I am satisfied that Noumi has discharged its onus of establishing that there was no other purpose that was inconsistent with Ms John’s purpose.

93 I also do not accept that there was any rival purpose in Noumi or Ms John seeking to commission and obtain the PwC Report for the purpose of it being provided to ASIC. I accept Ms John’s evidence that at the time she retained Ms Michie, Ms John had not given any thought to whether a report would be provided to ASIC and I accept her evidence that this was a matter for further consideration and instructions. I also accept that Ms John was not instructed to provide a copy of the PwC Report to ASIC until *after* it had been created and provided to Noumi’s Board, and, as a result, it was not the purpose for which that Report had been brought into existence. This is not a case where the later disclosure of the privileged communication gives rise to an inference as to the anterior purpose of that communication being brought into existence: see *Cantor* at [68].

94 I am satisfied that Noumi has established that the PwC Report is subject to legal professional privilege. This finding means that the documents identified as Documents 2 to 14 are also the subject of legal professional privilege.

# D. WAIVER OF THE PWC REPORT BY DISCLOSURE TO ASIC

95 Mr Macleod submitted that the disclosure of the PwC Report to ASIC gave rise to an implied waiver of privilege. Such a waiver is imputed by operation of law where the actions of the privilege holder are inconsistent with the maintenance of the confidentiality which the privilege is intended to protect: ***Mann*** *v Carnell* [1999] HCA 66; (1999) 201 CLR 1 at [29].

96 Mr Macleod, as the party asserting that privilege has been waived, bears the onus of establishing waiver: *Betfair* at [54].

## D.1 The applicable principles relating to waiver

97 The present application concerns the common law principle of waiver: *Mann* at [23]; ***Osland*** *v Secretary, Department of Justice* [2008] HCA 37;(2008) 234 CLR 275 at [49]. At common law, the question of waiver is governed by an examination of whether there has been inconsistent conduct by the privilege holder. The overriding principle of inconsistency was expressed by the plurality in *Mann* at [29] as follows:

… What brings about the waiver is the inconsistency, which the courts, where necessary informed by consideration of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.

98 The central concept in implied or imputed waiver is relevant and plain inconsistency of position. Where necessary, inconsistency may be informed by considerations of fairness, but “not some overriding principle of fairness operating at large”: *Mann* at [29]. Waiver in this sense focuses upon the conduct of the privilege holder. It is a doctrine introduced to prevent a person from taking up two inconsistent positions: see ***Expense Reduction*** *Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCA 46; (2013) 250 CLR 303 at [30]-[31], citing***Craine*** *v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305.

99 However, it has been recognised that there are instances where the privilege holder may disclose privileged communications to a third party for limited or specified purposes without that disclosure giving rise to a waiver. In ***Goldberg*** *v Ng* (1995) 185 CLR 83 it was said by the majority at 95-96:

That does not mean, however, that an imputed waiver must completely destroy the privilege. Like an express waiver, it can be limited so that it applies only in relation to particular persons, materials or purposes.

100 The plurality in *Mann* at [30] observed that, although the Court in *Goldberg* was divided upon whether privilege had been waived in that case, “the reasoning of all members of the Court was inconsistent with the proposition that any voluntary disclosure to a third party necessarily waives privilege”. Their Honours extracted the following statement of Jordan CJ in *Thomason v Campbelltown Municipal Council* (1939) 39 SR(NSW) 347 at 355:

The mere fact that a person on some one occasion chooses to impart to another or others advice which he has received from his solicitor indicates no intention on his part to waive his right to refuse on other occasions to disclose in evidence what that advice was, and supplies no sufficient reason for depriving him of a form of protection which the law has deemed it specially necessary to throw around communications between solicitor and client.

101 Similarly, Maxwell P observed in *Secretary, Department of Justice v Osland* [2007] VSCA 96 at [51] (in reasoning that was expressly endorsed by the High Court on appeal: *Osland* at [50]):

[T]he inconsistency test readily accommodates the notion that, in appropriate circumstances, the privilege-holder may disclose the content of legal advice to a third party for a particular purpose without being held to have waived privilege in the advice.

102 The “notion” of “limited waiver” was examined by Bromwich J in *Cantor*. After reviewing the authorities in detail, Bromwich J stated at [88]:

The conclusion available to be reached following *Goldberg v Ng* and *Mann v Carnell* is that:

(1) A limited waiver may in some situations be effective in preserving privilege. The minority in *Goldberg v Ng* supported that outcome effectively in all cases subject to the necessary steps being taken to preserve privilege.

(2) In other situations limited waiver may be ineffective and be treated as constituting complete waiver and privilege is lost altogether.

(3) In yet other situations, limited waiver may provide a basis for some degree of limited implied or imputed waiver, provided there is also present conduct by (or perhaps on behalf of or in the interests of) the party asserting privilege that is relevantly inconsistent with its preservation. The conclusion reached may be informed by questions of specific unfairness, not general unfairness, as to be unfair in all the circumstances to the person against whom privilege is maintained. It is a question of factual analysis against the principles stated in those cases as to whether privilege has been preserved and if so as to whether, despite having been preserved, waiver should be imputed or implied.

103 I respectfully adopt Bromwich J’s analysis, with which I agree.

## D.2 The parties’ submissions

### D.2.1 Mr Macleod’s submissions

104 Mr Macleod submitted that in assessing the question of waiver, it was necessary to discern the objective and not the subjective purpose of the disclosing party. It was submitted that the “contractual context” brought about by the VDA meant that the parties’ subjective intentions were not relevant to the question of waiver. Mr Macleod submitted that Noumi should be held to the terms of the VDA, even if the terms, objectively construed, did not accord with Noumi’s subjective intentions.

105 Central to Mr Macleod’s submissions were the uses that ASIC could make of the PwC Report on the proper construction of the VDA. Mr Macleod submitted that the terms of the VDA were relevant in three ways: first, the terms of the VDA assist in the characterisation of Noumi’s purpose in disclosing the PwC Report to ASIC; second, the proper construction of the VDA is relevant to the analysis of the legal and practical consequences of the disclosure; and, third, the use which ASIC was permitted to make of the PwC Report under the VDA is relevant to the question of fairness.

106 Mr Macleod submitted that the starting point of any analysis was the definition of the term “Disclosed Information” in Recital B of the VDA, which he claimed was limited to the actual physical documents disclosed to ASIC. It was pointed out that the definition of that term refers to “*documents* in control of the Disclosing Party”, which was reinforced by cl 2.1 referring to the provision of a schedule “of each document that comprises the Disclosed Information”. Accordingly, Mr Macleod submitted that it is the *documents* described in Schedule A (namely, the PwC Report and its Appendices) which are the Disclosed Information, and, not, as Noumi and ASIC contended, the information contained in those documents.

107 Mr Macleod acknowledged that there are limitations on the use which ASIC may make of the Disclosed Information pursuant to cl 3 of the VDA, but submitted that these limitations are subject to important qualifications. *First*, the limitation in cl 3.1 that ASIC will not seek to “present” the Disclosed Information as evidence in any proceedings should be read to mean only that ASIC will not seek to “tender” *the documents* in Schedule A in proceedings. Mr Macleod submitted that cl 3.3 expressly authorises ASIC to obtain and present as evidence material and information obtained “as a result of” the disclosing party having provided the Disclosed Information to ASIC. Mr Macleod contended that the material and information contained within the PwC Report *is* material and information obtained “as a result of” the provision of the PwC Report. Mr Macleod submitted that, if cl 3.1 precluded ASIC from presenting as evidence the PwC Report *and* any material or information contained within it, this construction of the VDA would seriously undermine ASIC’s ability to present as evidence “material and information obtained as a result” of the disclosure of the PwC Report to ASIC, as expressly permitted by cl 3.3.

108 *Second*, Mr Macleod submitted that cl 3.2 permitted the Disclosed Information to be used by ASIC for certain specified purposes. In response to ASIC’s submission that the words “for the purposes of its consideration of” in cl 3.2 qualify the words “the Investigation” *and* “any proceedings commenced by ASIC”, Mr Macleod submitted that this was not a natural reading of the clause. He submitted that a more natural reading of cl 3.2 is that it permits ASIC to use the Disclosed Information not only for the purpose of *considering* the matters the subject of the Investigation, but also to *use* that Information *in* any proceedings save that ASIC could not tender the Disclosed Information as a *document* in evidence in such proceedings in light of cl 3.1.

109 *Third*, Mr Macleod contended that even if, contrary to his argument, the Disclosed Information extended to materials and information contained within the PwC Report, ASIC was permitted by cll 4.2 and 4.3 to disclose such material and information to its external advisers or experts on a confidential basis, to any Commonwealth Minister or parliamentary committee (in which case ASIC could only request that the recipient maintain confidentiality), and, if compelled by law, in which case ASIC would “endeavour” to notify the disclosing party prior to ASIC producing that information. Relying on the judgment of Gordon J in ***Cadbury Schweppes*** *Pty Ltd v Amcor Limited* [2008] FCA 88, Mr Macleod contended that, by agreeing to those exceptions, Noumi had “given up control” as to further dissemination of the PwC Report, which was inconsistent with Noumi’s submission that disclosure under the VDA only gave rise to a limited, rather than general, waiver.

110 Finally, Mr Macleod pointed to a number of “serious practical difficulties” which would flow from Noumi’s and ASIC’s contention that the limitations imposed by the VDA extend not only to the documents but also to all material and information contained within those documents. According to Mr Macleod, if these contentions were upheld, ASIC would not be able to put any information contained in the PwC Report to a witness in the course of its investigation, as this would conflict with its obligations under cl 4.1; ASIC would not be able to file a statement of claim relying on material referred to in the PwC Report in any proceedings, as this would conflict with cll 1.2, 3.1 and 4.1; and ASIC would not be able to rely in Court on any expert report it commissioned as part of its investigation, as the expert would not be able to simultaneously comply with his or her obligations under the relevant Court practice notes in a way which allowed ASIC to comply with its obligations under cll 1.2, 3.1 and 4.2(a).

111 Mr Macleod also relied on the reasoning of the majority in *Goldberg* which he submitted was an analogous case. Amongst other things, Mr Macleod relied upon the majority’s observations that although the Law Society possessed powers of compulsion, they had not been “invoked” (at 100) and that the voluntary disclosure of documents by Mr Goldberg in that case was not limited to the investigating officer at the Law Society, but the documents were “handed over on the understanding that… other officers of the Law Society could make whatever internal use of them [as] was thought appropriate in dealing with the various aspects of Mr Ng’s complaint” (at 101). Drawing upon *Goldberg*, Mr Macleod submitted, amongst other things, that Noumi had voluntarily produced the PwC Report to ASIC on terms which permitted a breadth of use by ASIC including in a manner potentially adverse to him.

112 In response to Noumi’s submissions (as set out below), Mr Macleod submitted that the decision of Bromwich J in *Cantor* should not be followed because it was distinguishable. Mr Macleod pointed out that the relevant disclosure in that case arose in the context of a German regulatory investigation process and involved different parties to the class action proceedings before the Court. Mr Macleod submitted that Bromwich J found that the disclosure to the German regulator occurred in a very particular regulatory context “which place[d] the public interest in candid disclosure to such a regulator above any general public interest in further disclosure”. Mr Macleod contended that there is a very different regulatory context in Australia, where ASIC lacks power to compel production of privileged information and yet, by the VDA, reserved to itself a broad ability to use any privileged information which is voluntarily provided to it. Mr Macleod submitted that the disclosure was made to ASIC in the course of an investigation leading to the commencement by ASIC of the substantive proceedings against Noumi and him. Mr Macleod submitted that those differences were sufficient to distinguish *Cantor* from the present case.

113 Alternatively, Mr Macleod submitted that the decision in *Cantor* was plainly wrong. Mr Macleod contended that Bromwich J incorrectly applied a two-step test for imputed waiver. It was submitted that his Honour’s reasoning treated inconsistency as a factual element which needs to be satisfied before fairness can be considered as a separate element, rather than a conclusion to be drawn from all the context and circumstances. Drawing on *Osland* at [45], Mr Macleod submitted that the correct approach is that inconsistency is a conclusion or “judgment” that is reached based on “the context and circumstances of the case, and in the light of any considerations of fairness arising from that context or those circumstances”. Mr Macleod further submitted that Bromwich J erred in concluding that there must be a “relevant nexus between the disclosure… and the conduct of the litigation to give rise to inconsistency”, such that the “relevant inconsistency must arise in the substantive proceedings”. Mr Macleod contended that this limitation is not supported by the authorities and, had it been applied, would have resulted in different outcomes in both *Goldberg* and ***TerraCom*** *Ltd v ASIC* [2022] FCA 208; (2022) 501 ALR 143.

### D.2.2 Noumi’s submissions

114 Noumi submitted that, as a matter of principle, the voluntary disclosure of privileged information does not necessarily give rise to waiver but may constitute a limited waiver only. In this regard, Noumi relied upon the decision of Rees J in *Re* ***Northern******Energy*** *Corporation Ltd* [2020] NSWSC 1073 at [61], where her Honour stated:

Limited waiver is perhaps most often seen in a regulatory context, when a person is requested or obliged to disclose privileged material to a regulator but may nonetheless maintain privilege to prevent the material being used in a wider context… The Australian Securities and Investments Commission (ASIC) offers such an arrangement in Information Sheet 165, “Claims of legal professional privilege”, and ASIC’s “Voluntary confidential LPP disclosure agreement” published on www.asic.govau.

115 Noumi contended that the disclosure of the PwC Report to ASIC was not inconsistent with the maintenance of confidentiality of the privilege attaching to it given the terms of the VDA and the circumstances of the disclosure. Noumi submitted that, whilst provision of the PwC Report on the terms of the VDA was one important act, Noumi’s conduct was to be assessed objectively by reference to all of the circumstances, and its purpose was also to be gleaned from matters such as: (a) Ashurst’s email to ASIC dated 2 October 2020 expressing the Board’s desire to share the report with ASIC “on a confidential basis”; (b) the contents of ASIC’s Information Sheet 165; and (c) the manner in which Ashurst (on Noumi’s behalf) marked up the pro forma VDA.

116 As to Noumi’s purpose in disclosing the PwC Report to ASIC, Noumi submitted that to constitute limited waiver, the purpose of a disclosure must not be inconsistent with the purpose for which the privilege exists: *Benecke v National Australia Bank* (1993) 35 NSWLR 110 at 111 from which the test in *Mann* was derived at [29]; *Singapore Airlines* at [30]; *Cantor* at [87(5)]. However, it submitted that there was no additional test, beyond that in *Mann*, to prove that the purpose is positively “limited”. In Noumi’s submission, it did not matter what the purpose was, provided it was not inconsistent with the purpose of privilege, and Mr Macleod bears the onus of establishing the relevant inconsistency.

117 As to the proper construction of the VDA, Noumi submitted that:

(a) The purpose of the VDA is evident from its face, and in particular from Recitals C and D, which establish that the objective purpose was to provide information to ASIC in a manner that preserved privilege;

(b) The defined term “Disclosed Information” is to be read consistently with the nature of the information being provided under the agreement, being “privileged” information, where such privilege attaches to communications and not to documents;

(c) Since the maintenance of privilege turns on the maintenance of confidentiality, cl 4.1 of the VDA is not to be read down or read subject to cl 3.2, especially where there is no textual indicator for doing so. The VDA is to be read cohesively in light of the parties’ objective purpose;

(d) Clause 3.1 expressly carves out from the uses that may be made of the “Disclosed Information” the use by ASIC that would be inconsistent with Noumi’s maintenance of privilege, namely, “present[ing] the Disclosed Information as evidence in any proceeding”. In this respect, the choice of the word “present” in cl 3.1 and cl 1.1(d) is meaningful as the prohibition is not limited to “tendering” the document, and extends to “presenting” the material as evidence in any manner, whether that be by way of tender or by repackaging the material in the form of a witness statement;

(e) Clause 3.2 is to be read in the manner for which ASIC contended (as set out below). Noumi’s mark-up of the pro forma VDA, which inserted the words “its consideration of the matters” evidenced Noumi’s careful prescription of the terms of use—ASIC was only entitled to use the report for its *internal consideration*. Information Sheet 165 also shed light on the proposed use. It explained that the information “may assist in the… determination of consequential steps” and “may also assist the parties to identify efficiently, and with precision, the critical issues to be addressed in an investigation”;

(f) Clause 3.3 distinguishes between material and information comprised in the Disclosed Information and material and information “obtained as a result of” having the Disclosed Information. For example, ASIC may identify a relevant witness from the privileged report and it may then present as evidence the testimony that it obtained from that witness itself;

(g) Clause 4.1 prevents ASIC from disclosing the contents of the PwC Report. This would include, for example, disclosing the contents of the PwC Report to a witness in a section 19 examination. Noumi submitted that this did not mean that ASIC could not take an “idea” from the PwC Report, for example, by directing its questions towards certain stock or certain accounting practices or certain people in order to unravel, by its own investigative powers, a “story” contained in the PwC Report, but it could not ask, for example: “In PwC’s investigation, you spoke to Ms Michie and told her ‘x’, correct?”. In this respect, Noumi submitted that its claims for privilege over the transcripts of section 19 examinations conducted by ASIC, which concern the PwC Report, demonstrate that it did not claim privilege over any question asked by ASIC and only claimed privilege where employees or officers of Noumi disclosed the content of the PwC Report, or privileged communications leading up to the PwC Report. It was submitted that the bounds of Noumi’s privilege claims over the section 19 examinations reveal the workability of ASIC “using” the PwC Report without disclosing its contents;

(h) The exceptions in cl 4.2 are not sufficient for the Court to find that Noumi acted inconsistently with the maintenance of confidentiality. Noumi drew attention to the fact that cl 4.2(a) required any provision of the Disclosed Information to ASIC’s advisors or experts to be “on a confidential basis, in the performance of their duties” and that they must “provide an acknowledgment to ASIC that the Disclosed Information is received by them on that basis”. Noumi submitted that these clauses did not provide a right to share confidential information with the recipient’s external advisors in a manner inconsistent with the maintenance of confidentiality. Further, to the extent that disclosure would be required to be made to a Commonwealth Minister or parliamentary committee, Noumi drew attention to the fact that ASIC was required to request the recipient to maintain the confidentiality of the Disclosed Information. Noumi submitted that cl 4.2(b) was a provision that would be engaged in exceptional circumstances. It is a provision that was necessary in order to ensure that ASIC, as a statutory body, remained accountable to Parliament.

118 Noumi contended that its construction of the VDA does not produce “practical absurdities” and is consistent with the “limited” use which underlies limited waiver with its express intention to preserve privilege. Noumi submitted that because “Disclosed Information” embraced the content of the privileged document and not simply the document as a physical (or virtual) object, this produced no difficulty with ASIC being able to “use” the information in the PwC Report in a limited way, consistent with the maintenance of privilege. Noumi submitted that it is commonplace for privileged communications to be “used” in litigation without derivative use waiving privilege in the source document. By way of example, it contended that privileged information is often provided to a “dirty expert” for the purpose of assisting in the cross-examination of another party’s expert, much like ASIC could use the information in the PwC Report to question witnesses in a section 19 examination. A privileged legal advice may contain both facts and ideas, which could be used and reformulated in the form of a pleading without waiving privilege in the underlying advice. Where a witness gives an incriminating answer in a section 19 examination, it is not admissible in evidence against that witness in criminal or civil penalty proceedings, but ASIC is not prevented from making “derivative use” of the answer for its investigation which does not destroy the privilege.

119 Noumi drew support from the decision of Bromwich J in *Cantor* where his Honour held that there was no implied waiver of privilege by the provision by Volkswagen of legal advice to a German regulator. Noumi submitted that in order to demonstrate inconsistency in the relevant sense, the class action plaintiffs in the Australian proceedings were required to point to specific aspects of Volkswagen’s conduct in those proceedings which could not be established given there was no connection with the German regulatory process. Noumi rejected the submission that the decision in *Cantor* was plainly wrong. In relation to the alleged error concerning the need for a “relevant nexus between the disclosure… and the conduct of the litigation”, Noumi submitted that it is important to situate Bromwich J’s analysis within the specific context of a “limited imputed waiver” arising from a third party disclosure, where the relevant question is: when will a confidential disclosure from A to B give rise to an imputed waiver *as against C*? Noumi submitted that, if the disclosure from A to B is not sufficiently confidential, the disclosure may give rise to a general waiver (as against the whole world); but if the disclosure from A to B *is* confidential, there must be some inconsistency between A’s act of disclosing to B, and A’s conduct towards C, to give rise to an imputed waiver as against C. By reference to Bromwich J’s analysis, Noumi submitted that the “nexus” to which his Honour referred was simply a relationship or connection between the conduct of the privilege holder A towards B and the conduct of the privilege holder towards C that makes the two acts inconsistent. In *Cantor*, the question was whether Volkswagen’s conduct in disclosing an advice to the German regulator was inconsistent with its conduct towards the applicants in the class action. Bromwich J concluded that, in the absence of some relationship between those two acts, the “bare fact of disclosure” to the regulator was not sufficient to produce inconsistency.

120 In relation to the alleged error by Bromwich J concerning the role of fairness in the determination of waiver, Noumi reiterated the propositions from *Mann* that the test for waiver does not involve “some overriding principle of fairness operating at large”, and that fairness will not always be a “necessary” component of the analysis. Drawing on the judgment of Young J in ***AWB*** *Ltd* ***v Cole (No 5)***[2006] FCA 1234; (2006) 155 FCR 30, Noumi submitted that in cases where a purported waiver is based on disclosure to a third party, the question “unfair or inequitable to whom?” must be asked. That is, what makes the disclosure from A to B unfair to C? Noumi submitted that, in the absence of a relationship or “nexus” between A’s conduct to B and A’s conduct to C, considerations of fairness as against C are simply “overriding principles of fairness operating at large”. Noumi accepted that “inconsistency” is a legal conclusion, but submitted that that does not mean that factual inconsistency is not an ingredient in arriving at the legal conclusion of inconsistency. Noumi contended that there must be inconsistent conduct before one can ask what unfairness arises out of it, such that Bromwich J’s consideration of factual inconsistency before consideration of fairness was not in error.

121 Noumi rejected the contentions made by Mr Macleod as to the forensic advantage that Noumi had obtained from the disclosure of the PwC Report to ASIC on the basis of an early admission and early plea. Noumi pointed out that the PwC Report was provided to ASIC almost three years before any admission or plea and prior to any investigation having been commenced, let alone the proceedings before this Court. Noumi contended that in those circumstances there was no strategic or calculated benefit that Noumi was seeking to obtain by disclosure of the PwC Report to ASIC. Noumi further contended that there was no unfairness to Mr Macleod given that he had access to ASIC’s pleaded case against him, the evidence to be relied upon by ASIC and all the documents and information in the case that is being put against him. Noumi submitted that there is no evidence that the PwC Report had been used, relied upon or deployed in the proceedings.

122 Noumi accepted that all limited waiver involves some risk. Noumi noted that in *Cadbury Schweppes*, Gordon J framed the relevant question as whether the privilege holder “still retain[s] full control as to the further dissemination of the document”, but contended that her Honour’s framing of that question must be understood in the context of the facts of that case—namely, where the ACCC had “ceded complete control over disclosure to [its opponent] by filing and serving the documents” in court. Noumi submitted that this was a radically different proposition to disclosing a document on strict terms of confidentiality with a narrow and necessary exception to recognise ASIC’s status as a statutory body.

123 Noumi submitted that Mr Macleod’s reliance upon *Goldberg* and other cases was misplaced. It was contended that the decisions in *Betfair* and *The Council of the Municipality of* ***Woollahra*** *v Westpac Banking Corporation* (1994) 33 NSWLR 529 were more analogous. In *Woollahra*, a law firm retained by the Council provided a factual investigation report to an inspector of the Department of Local Government on a voluntary basis, but under the threat of the exercise of compulsory powers. It did so on the express basis that the report was privileged and obtained an assurance that it would be “treated with the greatest confidentiality”. Relying on *Woollahra* at 540, Noumi contended that it is the privilege holder’s “endeavour to retain confidentiality” that is of central importance, not the actual efficacy of the agreement entered into for that purpose. Noumi submitted that, where a document was provided on the express basis that it was subject to privilege and the privilege holder had “endeavour[ed] to retain confidentiality,” the fact that there was always a risk that the document could be tabled in Parliament was not sufficient to impute waiver.

124 Noumi submitted that full and frank disclosure of an internal investigation report to the regulator, which facilitates the administration of justice, on conditions that the material cannot be used or relied upon in court, is at the very heart of what privilege is intended to protect. The fact that ASIC might use the information internally to inform its own investigation and decision whether to commence proceedings is not to the point – it submitted that this was simply the scope of the limited waiver.

### D.2.3 ASIC’s submissions

125 ASIC observed that, while it has a range of compulsory information-gathering powers, it cannot compel regulated entities or other persons to provide it with privileged information. However, it may elect to accept, on a confidential basis and with restrictions on the use to which it can be put, privileged information voluntarily provided by a disclosing party. Consistently with Information Sheet 165, ASIC contended that there is a public benefit in it being able to accept privileged documents via a voluntary disclosure agreement as it may assist in the effective and efficient conclusion of its investigations and determination of consequential steps. It submitted that such disclosure may also assist ASIC to identify the critical issues to be addressed in an investigation, which saves public resources and reduces the burden on regulated entities.

126 ASIC submitted that the VDA entered into with Noumi was in substantially the same terms as the pro forma VDA published on the ASIC website with some minor amendments made to Recitals A and D and cll 2.4 and 3.2. ASIC submitted that the terms of the VDA make clear that the information provided to ASIC by Noumi was provided on a confidential basis and for a specific and limited purpose.

127 Like Noumi, ASIC contended that “Disclosed Information” means both the document and its contents. It submitted that this was consistent with the fact that obligations of confidence attach to *information* irrespective of how it is recorded: ***Marshall*** *v Prescott* [2015] NSWCA 110 at [50]-[54] (Beazley P, Macfarlan and Emmett JJA agreeing). ASIC submitted that the contrary view advanced by Mr Macleod would render the confidentiality obligations in the VDA meaningless as it would permit ASIC to disclose the contents of the PwC Report but not the PwC Report itself, which was at odds with the objective purpose of the VDA. ASIC contended that the purpose of the VDA could be ascertained not only from its Recitals, but also from ASIC’s Information Sheet and the fact that it was based on a standard form agreement regularly used by ASIC.

128 ASIC submitted that the deliberate use of defined words is not to be lightly passed over, even where the definition leaves open the possibility of another meaning of a defined phrase: *BHP Petroleum (Australia) Pty Ltd v Sagasco South East Linc* [2001] WASCA 159 at [24] cited in *Newey v Westpac Banking Corporation* [2014] NSWCA 319 at [114]. It was contended that there is no rule of law or of construction which requires courts to apply a definition where to do so would be at variance with the context or with the general intent to be gathered by the whole of the instrument: *Halford v Price* (1960) 105 CLR 23 at 33. ASIC submitted that defined terms must yield to wider context or contrary intention and a definition does not necessarily apply to every usage of the term in a contract because the ordinary approach to construction insists on reading the contract as a whole and doing so harmoniously, so as to resolve or minimise internal inconsistency: ***Perpetual Custodians*** *Ltd v IOOF Management Ltd* [2013] NSWCA 231; 304 ALR 436 at [86] (Leeming JA, McColl and Gleeson JJA agreeing). It was further submitted that it is not a rule that “defined terms inevitably bear every aspect of their defined meaning”: *Perpetual Custodians* at [86]. ASIC submitted that cll 1.1, 1.2, 3.1, 3.2, 3.3 and 4.1 could all be read harmoniously if “Disclosed Information” encompassed both the document and the information contained in it, whereas Mr Macleod’s submissions would lead to a situation where the object of the VDA would not be met.

129 ASIC submitted that the proper construction of cl 3.2 is that it permits ASIC to *use* the Disclosed Information for its *consideration of* the matters the subject of the Investigation; and any proceedings commenced by ASIC in connection with that subject matter. ASIC contended that Mr Macleod’s approach to the proper construction of cl 3.2—to the effect that ASIC could *use* the Disclosed Information for its consideration of the Investigation, and could *use* the Disclosed Information in any proceedings commenced by ASIC—was not consistent or harmonious with other provisions of the VDA. ASIC accepted that on either construction cl 3.2, the VDA allowed it to use the Disclosed Information in its consideration of the matters the subject of any proceedings and that this was not inconsistent with the maintenance of privilege. ASIC made the following submissions in this regard:

The rationale for such an inclusion of an explicit permitted use of the Disclosed Information in ASIC’s consideration of the matters the subject of proceedings is self-evident: so that ASIC is not held to breach the [VDA] if the substance of the Disclosed Information formed *any part* of its consideration of the matters the subject of any proceedings commenced by ASIC in connection with the investigation. It would be impossible for ASIC to put to one side and exclude any knowledge it has of the Disclosed Information in considering the matters the subject of any proceedings. The voluntary disclosure regime would become unworkable if ASIC was restricted from using the Disclosed Information in this way.

However, the ability for ASIC to consider the Disclosed Information pursuant to cl 3.2 has limited practical utility to ASIC *in the context of court proceeding*. That is because ASIC is bound by the Legal Services Directions which requires ASIC to act as a model litigant and not start legal proceedings unless satisfied that litigation is the most suitable method of dispute resolution (and then only after receiving written advice that there are reasonable grounds for starting the proceedings): Legal Services Directions 2007, schedule 1, part 1. It necessarily follows that ASIC must predominately consider the *admissible* evidence that it can rely on in any proceedings, because it is only based on material that can actually be used as evidence that it could form a view, and receive advice about, whether it has reasonable grounds.

130 ASIC proceeded to submit that the “main value” of the “voluntary disclosure regime” was that the Disclosed Information was able to be used to assist ASIC to decide how and what to examine in its own investigation. This would enable it to more efficiently direct its resources and progress its investigation “expeditiously and potentially have misconduct revealed to it that it would not otherwise have come to know about”. It was submitted that this did not give rise to any practical difficulties of the type asserted by Mr Macleod. ASIC submitted that it was able to use the Disclosed Information to inform its next steps in the investigation including issuing notices for certain documents, selecting witnesses to require for section 19 examinations and asking witnesses open and nonleading questions. However, ASIC submitted that it could not disclose the Disclosed Information to any person (other than in accordance with cll 4.2 to 4.4 as provided for in cl 1.1(b) and subject to cl 4.1), meaning that ASIC could not show the Disclosed Information to a witness, could not inform a witness of the substance of the Disclosed Information (for example, it could not put propositions to a witness based on the Disclosed Information and could not say “in the relevant document you said ‘x’, didn’t you?”) and it could not copy and paste the document into a draft statement or affidavit. It was submitted that each of these acts would be inconsistent with the maintenance of confidentiality.

131 ASIC contended that the fact that the legislature had not empowered it to compel the production of privileged materials was beside the point. It submitted that there were sound policy reasons for the legislature not doing so as it would discourage a person from obtaining full and frank advice, but the “voluntary disclosure regime” was directed at enabling persons to make *voluntary* disclosures and, unlike a statutory abrogation of legal professional privilege, the existence of such a regime did not deter persons from receiving legal advice for fear that the regulator might compel them to produce or reveal those communications. That is, it allows ASIC to obtain privileged communications to inform its work, but only to do so if the privilege holder elects to disclose that material. The voluntary disclosure regime is therefore in the public interest because it promotes the twin aims of: (1) allowing entities to obtain legal advice without fear of disclosure; and (2) allowing ASIC to review such material to aid its work, with the consequent time and cost savings that may flow if the privilege holder elects to allow such review.

132 As to cl 3.3, ASIC submitted that it simply allowed derivative use of the Disclosed Information. It submitted that:

… [I]t is not uncommon for investigators to use inadmissible evidence to obtain admissible evidence against that same person in circumstances where the investigator is permitted by law to do so. For instance, ASIC is permitted to use information obtained as a result of an examination of a person conducted pursuant to s 19 of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) to obtain other evidence. This is permissible even in circumstances where the examination transcript is not later admissible against that person because of their privilege against penalty: ss 68 and 76 of the ASIC Act. For example, ASIC may learn about the location of certain documents during the course of a s 19 examination and then subsequently issue a notice requiring the production of those documents. As ss 68 and 76 of the ASIC Act do not prohibit derivative use of evidence obtained during the course of s 19 examinations, the documents obtained as a result of the notice can be used against the person even though they have been obtained indirectly from information received during the s 19 examination which is, itself, inadmissible by virtue of s 68(2) of the ASIC Act.

The concept is similar here. Clause 3.3 makes it clear that ASIC is able to follow leads or lines of inquiry from the Disclosed Information to obtain admissible evidence.

The inclusion of cl 3.3 makes commercial sense. If derivative use of the Disclosed Information was prohibited then the Disclosed Information could not assist ASIC’s investigation because ASIC would be unable to obtain any evidence as an indirect consequence of its receipt of the Disclosed Information. There would simply be no utility in ASIC receiving the information.

Clause 3.2 complements cll 3.1 and 3.3 as it makes it clear that while the Disclosed Information is inadmissible, it will be used in ASIC’s *considerations* of the matters the subject of the investigation, and the matters the subject of any proceedings commenced by ASIC in connection with the subject matter of the investigation.

133 ASIC’s submissions as to cl 4 were largely in line with those advanced by Noumi. It submitted that cl 4 was simply a recognition that a situation may arise where ASIC may in effect be required to produce the Disclosed Information but this possibility does not effect a waiver of Noumi’s privilege more generally.

134 ASIC submitted that Bromwich J’s reasons in *Cantor* contained no relevant error. Contrary to the submissions of Mr Macleod, ASIC submitted that, by referring to the need for a “nexus” between the relevant act and the substantive proceedings, Bromwich J was simply making the point that, on the facts of that case, for there to be a finding of inconsistency there needed to be some relationship between the disclosure to the German regulator and the Federal Court proceedings.

135 ASIC contended that no unfairness arises to a former company officer such as Mr Macleod if a company provides information to a regulator to enable it to properly carry out its regulatory functions. To the contrary, ASIC submitted that it is in the public interest for ASIC to have access to privileged material if the material will assist it to undertake an efficient and thorough investigation.

## D.3 Consideration

136 The relevant question that arises for determination is whether Noumi’s disclosure of the PwC Report to ASIC was inconsistent with the maintenance of the confidentiality which the privilege in that Report was intended to protect: *Mann* at [29].

### D.3.1 The content and nature of the enquiry as to limited waiver

137 Not every voluntary disclosure of a privileged communication to a third party will be inconsistent with the maintenance of confidentiality in that communication: *Mann* at [30]-[32]. The question of whether limited waiver arises is one to be determined in each given case by reference to the circumstances of the relevant disclosure: *Osland* at [45].

138 The parties agreed that a privilege holder may disclose a privileged communication to a third party for a specific or limited purpose, without that disclosure constituting a waiver in all circumstances. The parties also agreed that in examining the *purpose* of such a disclosure, it was not necessary for the privilege holder to establish that the dominant purpose of the disclosure to the third party was to obtain legal advice: ***Spotless Group*** *Ltd v Premier Building & Consulting Pty Ltd* (2006) 16 VR 1at [20] and [23]. In *Spotless Group*, Chernov JA (with whom Warren CJ agreed; Neave JA dissenting), dealing with an argument that *Propend* applied to the inverse position, said as follows at [20]:

What is of relevance is that, on its proper characterisation, the communication that was made to the third parties, effectively by the respondent, was the legal advice which it had received and to which privilege attached. There is no need, in those circumstances, to ask whether the recommunication was made for a “privileged purpose”. Rather, the relevant question is, as it was in *Mann*, whether by “passing on” *that* communication to the third parties the respondent had waived the privilege.

139 As a result, it does not fall to Noumi to establish the purpose of its disclosure of the PwC Report to ASIC. Rather, Mr Macleod bears the onus of establishing that, in making that disclosure, Noumi acted inconsistently with the maintenance of the confidentiality which the privilege in the PwC Report was intended to protect: *Mann* at [29]; *Expense Reduction* at [30]-[31].

140 The determination of whether Mr Macleod has discharged his onus of establishing that Noumi acted inconsistently with the maintenance of confidentiality involves an examination of all of the context and circumstances including by reference to the terms of an express or implied agreement as to confidentiality: e.g., see *UIL (Singapore) Pte Ltd v Wollongong Coal Limited* [2023] FCA 1578 per Beach J at [79]-[80]. As noted above, Mr Macleod submitted that, where, as here, there is a contract recording the express terms of the disclosure, the usual principles of contractual interpretation should be applied and Noumi’s purpose and intention had to be gleaned from the proper construction of those terms. It was submitted that it did not matter that Noumi may have subjectively intended a more limited waiver than that provided for on the proper construction of the VDA. He also contended that reliance upon extrinsic materials was not permitted in a contractual context. Noumi contended that it was relevant to take into account not only extrinsic materials, but also the privilege holder’s subjective intention as it is the privilege holder’s “endeavour to retain confidentiality” that is of central importance, not the efficacy of the agreement that was entered into for that purpose: citing *Woollahra* at 540.

141 In my view, the question of whether there has been waiver of privilege by disclosure of a privileged communication to a third party is not to be approached in a mechanistic way. The answer to the question is informed by the relevant context and circumstances in which the disclosure is made including by reference to the terms upon which the disclosure is made. It is also informed by the nature of the matter in respect of which legal advice was received, the evident purpose of such disclosure that is made and the legal and practical consequences of limited rather than complete disclosure: *Osland* at [46] (Gleeson CJ, Gummow, Heydon and Kiefel JJ). As was explained in *Expense Reduction* at [31], relying upon *Craine* at 326:

… ‘[W]aiver’ is a doctrine of some arbitrariness introduced by the law to prevent a [person] in certain circumstances from taking up two inconsistent positions… It is a conclusion of law when the necessary facts are established. It looks, however, chiefly to the conduct and position of the person who is said to have waived, in order to see whether he has ‘approbated’ so as to prevent him from ‘reprobating’.

The “necessary facts” that inform whether the privilege holder has acted inconsistently will depend on both the context and the (express or implied) terms of the disclosure.

142 The parties’ submissions assumed the VDA was a “contract” and that the usual principles of contractual interpretation applied to it. There may be room for debate as to whether the VDA is truly a contract at law, but it does not matter. Given that Noumi and ASIC reduced the terms of the disclosure to writing, I consider that, as a starting point, it is necessary to construe the terms of the VDA by the application of the usual principles of interpretation to determine the ambit and scope of that which had been agreed between them. However, resolution as to the proper construction of the VDA may not of itself yield the answer as to whether Noumi’s conduct was inconsistent with the maintenance of confidentiality. An express or implied agreement between the privilege holder and the third party, properly construed, will inform the enquiry as to whether there has been a relevant inconsistency. In some cases, the express or implied agreement may be determinative as to whether there has been an act or conduct inconsistent with the maintenance of the confidentiality that the privilege is intended to protect, but that may not always be the case.

143 Reference to extrinsic materials may be both appropriate and permissible because the question is not one governed by the application of contractual principle, but by an examination of the relevant conduct of the privilege holder. The privilege holder’s subjective intention may also be relevant, but in my view, consistently with the principles applicable to ascertaining dominant purpose, such intentions cannot be determinative, especially if those intentions are at odds with the express terms of an agreement with the third party or by reference to an objective assessment of the privilege holder’s conduct. In a similar vein, the privilege holder’s “endeavour” to retain confidentiality is relevant, but must be examined by reference to all of the relevant conduct in question. For example, a privilege holder’s “endeavour” to retain confidentiality may be of little or no consequence if, despite the insistence on, or obligation of, confidentiality, the third party is permitted to use the relevant communication in ways that are inconsistent with that confidentiality.

144 All of this may merely be another way of stating that there is no substitute for the test in *Mann.* That test requires an examination of whether the privilege holder’s act or conduct was inconsistent with the maintenance of confidentiality in the privileged communication. As the plurality stated in *Osland* at [45], inconsistency is a “judgment to be made” based on the context and circumstances in light of “any considerations of fairness arising from that context and circumstances”.

145 In the present case, I have had regard to the context and the circumstances in which the PwC Report was disclosed to ASIC, including by reference to the terms of the VDA (properly construed) and Noumi’s endeavour to retain confidentiality as set out in the terms of the VDA, as well as by reference to the surrounding circumstances including an examination of the materials extrinsic to the terms of the VDA.

### D.3.2 The terms of the VDA and their proper construction

146 The terms of the VDA inform the question of whether there has been a waiver of legal professional privilege, as it records the terms upon which Noumi disclosed the PwC Report to ASIC.

147 The parties were at issue about the proper interpretation of some of the terms of the VDA. In other respects, the parties were at issue about the operative effect of the VDA in respect of the use ASIC could make of the PwC Report. I have approached the task of construing the VDA on the basis of giving effect to the common intention of the parties to the VDA, being an examination of what reasonable persons in their respective positions would have understood by the language used in the VDA and its purpose, reading the document as a whole: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165at [40].

#### **(a) The Recitals and cll 1.1, 3.1 and 4.1**

148 The parties were not in dispute as to the meaning or effect of the Recitals to the VDA, other than as to the meaning of the term “Disclosed Information” as contained in Recital B. The Recitals warrant examination as they bear upon the purpose of Noumi’s disclosure of the PwC Report to ASIC.

149 Recital A identifies the context within which the VDA was being made. It refers to the “communications” between ASIC, Noumi and Ashurst in July 2020 in relation to the investigation being conducted by Noumi. The word “Investigation” is defined in Recital A by reference to these communications.

150 Recitals B and C record that Noumi had in its control documents, defined to be the Disclosed Information, in respect of which it claimed legal professional privilege and that Noumi had “sought to provide the Disclosed Information to ASIC… in a manner which is consistent with the maintenance of any Privilege”, and that ASIC had agreed to receive the information on the basis of the terms of the VDA.

151 Noumi’s purpose in making the disclosure is recorded in Recital D. It provides that Noumi had entered into the VDA to provide the Disclosed Information to assist “ASIC being informed in relation to the Investigation” without waiving any privilege in the Disclosed Information.

152 Noumi’s endeavour to retain confidentiality and maintain privilege is also manifested in other clauses of the VDA including cll 1.1, 3.1 and 4.1. Clause 1.1 records ASIC’s acknowledgements that the Disclosed Information was being provided to it in confidence and did not give rise to a waiver. By cl 1.1(d), ASIC acknowledged that it would not “present” the Disclosed Information as evidence in proceedings against Noumi or any third parties. This acknowledgment is reinforced by cl 3.1 which repeats that ASIC will not present the Disclosed Information as evidence in any proceedings other than in specified circumstances. Whereas cl 3 deals with “use”, cl 4 deals with “disclosure”. In this regard, cl 4.1 records that ASIC will treat the Disclosed Information as confidential and will not disclose it.

153 It is apparent from the Recitals and cll 1.1, 3.1 and 4.1 that Noumi was seeking to assert legal professional privilege over the Disclosed Information, maintain confidentiality in that Information and not waive its privilege, despite its disclosure to ASIC. It was seeking to mark out that the limited purpose of its disclosure was to assist ASIC being informed in relation to the Investigation. That Investigation was one which included an examination of allegations pertaining to current and former executives and, specifically, Mr Macleod’s conduct, as borne out in the correspondence between Ashurst and Noumi.

154 I am satisfied that, through these clauses of the VDA, Noumi was careful and deliberate in its endeavour in seeking to maintain confidentiality and retain privilege. However, whether its expressed intention, including its careful and deliberate endeavour, gave rise to a relevant inconsistency must be considered by reference to other clauses of the VDA and the context and circumstances of the disclosure of the PwC Report to ASIC seen as a whole. This examination of inconsistency may be informed by specific unfairness to Mr Macleod (not some generalised unfairness), to which I will return.

#### **(b) Meaning of “Disclosed Information”**

155 The parties were in dispute as to the meaning to be given to the defined term, “Disclosed Information”. The term is defined in Recital B to the VDA as follows:

On 2 October 2020, ASIC received notification from the Disclosing Party that it held, or had within its control documents (the **Disclosed Information**), which it claims are the subject to legal professional privilege (**Privilege**).

156 Mr Macleod submitted that the defined term Disclosed Information was limited to the actual or physical documents specified in Schedule A to the VDA, which, relevantly, included the PwC Report. He submitted that the definition did not extend to the contents or information contained in those documents. I am not persuaded that the construction advanced by Mr Macleod is correct for the following reasons.

157 It is true (as Mr Macleod submits) that Recital B defines Disclosed Information by reference to “documents”, and that cll 2.1 and 2.2 (together with Schedule A) contemplate that the Disclosed Information is comprised of documents. I also accept that in some contexts within the VDA, the defined term Disclosed Information more aptly applies to physical documents. For example, cl 2.1 requires the production of the physical document, cl 2.3 requires it to be stored and cl 2.4 requires it to be returned.

158 However, as ASIC submitted, relying upon *Perpetual Custodians* at [86], it is not necessary that defined terms inevitably bear every aspect of their defined meaning in every part of the agreement. That is the case here. The defined term must be workable in the other parts of the VDA where it is used. For example, cl 3.2 provides that ASIC may “use the Disclosed Information” for the purposes of its consideration of the matters the subject of the Investigation. If Mr Macleod’s contentions were accepted, the text of cl 3.2 would permit ASIC to use only the *physical* document and not its contents in respect of its investigations. It would not be very useful at all to be permitted to use the physical document but not its contents. I do not consider that Noumi objectively intended that ASIC would be unable to use the contents of the PwC Report in its consideration of the matters the subject of the investigations. To a like effect, cl 3.3 seeks to permit ASIC to obtain and present as evidence “material and information” obtained as a result of the Disclosing Party having provided the Disclosed Information to ASIC. Such derivative information could only sensibly be drawn from the *contents* of the PwC Report.

159 As a matter of purpose and context, the subject matter of the VDA deals with legal professional privilege. Such privilege attaches to “communications” and not the particular documents or form in which the communications are recorded: *AWB v Cole (No 5)* at [44](11); *Spotless Group* at [20]. Recitals C and D of the VDA indicate that the parties intended to seek to preserve Noumi’s privilege. Putting to one side for the moment whether the stated objective was achieved, it would be inconsistent with that purpose for the defined term Disclosed Information to be construed as narrowly as Mr Macleod submitted such that it is limited to physical documents. The conclusion urged by Mr Macleod is not only inconsistent with the fact that privilege attaches to communications, it is also inconsistent with the fact that obligations of confidence attach to *information* irrespective of how it is recorded: *Marshall* at [50]-[54].

160 As a result, reading the VDA as a whole and in light of its purpose (as asserted in the VDA), the correct construction is that the defined term Disclosed Information includes, where the context permits, the documents and the information contained in them.

#### **(c) Proper construction of cl 3.2**

161 The next issue in dispute between the parties was the proper construction of cl 3.2 of the VDA. Clause 3.2 must be read within its context in the VDA.

162 As noted above, cll 1.1(d) and 3.1 provide that, other than in specified circumstances, ASIC will not seek to “present” the Disclosed Information as evidence in any proceedings. I do not accept Mr Macleod’s submission that the word “present” in this context means “tender”. The parties did not use the word “tender” and, given the commercial and regulatory context, I infer that this was a deliberate choice. The word “tender” would have been a more apt reference to the use of the document itself in proceedings by its tender into evidence, but by the use of the word “present”, the parties to the VDA (which comprised a commercial entity and a corporate regulator) sought to prevent ASIC from doing something more. I read cl 3.1 to mean that the parties to the VDA intended to prevent ASIC from adducing the Disclosed Information (both the documents and their contents) as evidence in any proceedings irrespective as to the form in which the information would be adduced as evidence.

163 The limitation in cl 3.1 needs to be read together with the uses that are permitted in other clauses. Within this context, cl 3.2 operates to give rise to a permitted “use” that ASIC may make of the Disclosed Information that is to be read subject to cl 3.1. The text of the clause is as follows:

Subject to clause 3.1, ASIC may use the Disclosed Information for the purpose of its consideration of the matters the subject of the Investigation and any proceedings commenced by ASIC in connection with the subject matter of the Investigation including any appeals in respect of those proceedings.

164 The scope of the permitted use granted upon ASIC included its consideration of the matters the subject of the Investigation and any proceedings commenced by ASIC in relation to that subject matter. It will be recalled that the word “Investigation” is defined in Recital A by reference to the communications between ASIC, Noumi and Ashurst. The subject matter of the Investigation had a particular focus on the conduct of current and former executives, and specifically included allegations concerning Mr Macleod. Thus, by cl 3.1, Noumi was permitting ASIC to use the Disclosed Information in relation to its consideration of matters that were not limited to Noumi as the privilege holder, but also extended to ASIC’s consideration of the allegations (as then) made against Mr Macleod.

165 The parties were in dispute as to the extent of the use that ASIC could make of the Disclosed Information in any statutory investigation and subsequent proceedings (if any). The impasse between the parties was whether the text of the clause permitted ASIC to:

(a) *use* the Disclosed Information:

(i) *for its consideration* of the matters the subject of the Investigation; and

(ii) *for its consideration* of any proceedings commenced by ASIC in connection with the subject matter of the Investigation; or

(b) *use* the Disclosed Information:

(i) *for its consideration of* the matters the subject of the Investigation; and

(ii) *in* any proceedings commenced by ASIC in connection with the subject matter of the Investigation.

166 The difference between (a) and (b) is that, on Mr Macleod’s contention (being (b) above), the words “for its consideration of the matters subject of” applied as a limitation only to the use of the Disclosed Information in an Investigation, and did not attach to the words “any proceedings commenced by ASIC…”.

167 I do not agree with the construction advanced by Mr Macleod. The effect of Mr Macleod’s contention is that although ASIC was to be limited in its use of the Disclosed Information in considering the matters the subject of the Investigation, it would thereafter be at liberty to use that Information without limitation in any proceedings commenced by ASIC connected with that subject matter. I see nothing within the text or context of cl 3.2 that supports the logic that Noumi would have sought to limit ASIC’s use of the Disclosed Information in essentially an investigation phase but not limit its use of that same Information in the commencement of proceedings by ASIC or after such proceedings had been commenced. A more cohesive, and correct, reading of cl 3.2, consistent with the stated purpose of the VDA, is that cl 3.2 permitted ASIC to use the Disclosed Information for its consideration of the subject matter of the Investigation and for its consideration of any proceedings commenced by ASIC in relation to that subject matter.

168 I have reached the above conclusion as to the proper construction of cl 3.2 as a matter of text, context and purpose. It is a construction that is also consistent with the extrinsic materials which establish that Noumi sought to impose a limitation in cl 3.2. ASIC’s standard form VDA did not contain the limitation inserted by the words “of its consideration of the matters the subject of”. The standard form VDA provided that ASIC “may use the Disclosed Information for the purpose of the Investigation and any proceedings…”. This text in the standard form VDA would have supported Mr Macleod’s contention as to a broader use of the Disclosed Information. However, Noumi sought to limit the operation of that clause by the insertion of the additional words, and ASIC agreed to the insertion of those words. This extrinsic material confirms the conclusion I have reached as to the proper construction of cl 3.2 (independently to the review of that material).

169 The parties were also in dispute as to the operative effect of cl 3.2 and, specifically, what it permitted ASIC to do and not do. I address these matters below at **Part D.3.2(e)**.

#### **(d) Proper construction of cl 3.3**

170 To the extent that the parties disagreed about the proper construction of cl 3.3, it was informed by their rival positions as to the proper meaning of the defined term Disclosed Information. The parties otherwise accepted that cl 3.3 expressly permitted *derivative use* in that it authorised ASIC to obtain and present as evidence in proceedings materials and information obtained *as a result of* Noumi having provided the Disclosed Information, including the PwC Report, to ASIC. I accept the parties’ submissions that by providing in cl 3.3 that ASIC is permitted to obtain and present as evidence in proceedings material and information “obtained as a result of” Noumi having provided the Disclosed Information to ASIC, Noumi was authorising ASIC to make derivative use of this information, which included the PwC Report. In doing so, Noumi did not limit what parts of the information could be so used, such that ASIC was at liberty to make derivative use of any of that information as it saw fit including in relation to all of the evidentiary materials that might be contained within that which was disclosed.

171 ASIC contended that the derivative use permitted by cl 3.3 was not unusual in that it permitted ASIC to obtain evidence in an admissible way that it held in a non-admissible form. ASIC submitted that the effect of the VDA was analogous to circumstances where, by reason of ss 68 and 76 of the *Australian Securities and Investments Commission Act 2001* (Cth)(**ASIC Act**), ASIC is permitted to use information obtained as a result of a compulsory section 19 examination even in circumstances where that transcript is not admissible against a person in criminal proceedings or in proceedings seeking the imposition of a civil penalty. The same might be said in relation to an answer given in an examination under privilege. It was submitted that ss 68 and 76 do not prohibit derivative use without waiving confidentiality in the transcript: see *X7 v Australian Crime Commission* [2013] HCA 29; (2013) 248 CLR 92 at footnote 26. However, the analogy is not apposite. The provisions of the ASIC Act create a statutory prohibition on ASIC seeking to tender or use as against the examinee, the transcript of that examination in proceedings against that person for a criminal offence or the imposition of a civil penalty other than in specified circumstances (s 76(1)). Whilst it may be accepted that these statutory prohibitions against tender do not proscribe derivative use, the use of that information in that way does not by reason of the statutory restraint in s 76(1) give rise to any waiver. The question before me involves different considerations.

172 The real issue in dispute between the parties related to scope of use of the Disclosed Information permitted by the combined effect of cll 3.2 and 3.3, to which I now turn.

#### **(e) The combined operative scope and effect of cll 3.2 and 3.3 read in context of cl 3.1 and 4.1**

173 The operative scope and effect of cll 3.2 and 3.3 must be considered in light of the purpose of the VDA, considered in its context, and by reference to other clauses of the VDA including cll 3.1 and 4.1.

174 The stated purpose of the disclosure as expressed in Recital D was to “assist” ASIC in being “informed in relation to the Investigation”. However, cll 3.2 and 3.3 go further than merely providing for ASIC to be informed in relation to the Investigation.

175 Clause 3.2 permitted ASIC to use the Disclosed Information for the purposes of its consideration of the matters the subject of the Investigation, and it also permitted ASIC to use that Information in its consideration of any proceedings commenced by ASIC in relation to that subject matter. I accept Noumi’s submission that cl 3.2 permitted ASIC to use the Disclosed Information for its internal considerations, but those internal considerations were not limited to any one particular officer, team or section of ASIC, such that the information could be used by both officers involved in any statutory investigation as well as those involved in any enforcement proceedings that might be commenced. As ASIC submitted, cl 3.2 gives rise to an “explicit permitted use of the Disclosed Information” including in relation to any part of its consideration of any proceedings that may be commenced by ASIC in relation to the subject matter.

176 As set out at [170] above, by its text, cl 3.3 permitted ASIC to obtain and present as evidence in proceedings “material and information” obtained “*as a result of* the disclosing party having provided the Disclosed Information to ASIC” (emphasis added). The words “material and information” indicate that ASIC was not to be limited as to the form or content of what it was being permitted to derivatively use in proceedings. Next, the words “as a result of” are connected to the words “Disclosed Information”, which indicates that ASIC was permitted to use anything that could be directly or indirectly derived from the Disclosed Information. Unlike cl 3.2, cl 3.3 does not limit ASIC’s use of the Disclosed Information to “internal considerations”. It permits ASIC to derivatively use the Disclosed Information for the purposes of ultimate use in proceedings.

177 Thus, although cl 3.1 prevents ASIC from presenting the Disclosed Information as evidence in proceedings, cl 3.2 permitted ASIC to consider that Information including for the purposes of any proceedings commenced by it, and cl 3.3 did not prevent ASIC from obtaining and presenting as evidence the material and information that could be derived from the PwC Report.

178 Noumi and ASIC submitted that cll 3.2 and 3.3 permitted ASIC to borrow ideas or follow leads from the PwC Report. They accepted that ASIC could identify the ways and manner in which it could conduct a statutory investigation. The matters that Noumi and ASIC accepted as being the permitted uses that ASIC could make of the PwC Report need further elaboration in practical terms. The practical effect of what was accepted by Noumi and ASIC is that ASIC could direct its powers to compel production of documents and examinations of witnesses in a focussed way, and to gather and marshal evidence for the purpose of proceedings. ASIC would know which documents to seek, which witnesses to examine, the questions to ask, the likely evidence that a witness would give and the likely information that would thereby be disclosed by the exercise of its statutory powers. Further, ASIC could also use the Disclosed Information for its consideration in any proceedings commenced by it, and to use that information to obtain admissible evidence in any such proceedings. This might include using the Disclosed Information for the purpose of preparing and responding to pleadings, obtaining evidence including in affidavits or outlines, preparing witnesses to give evidence and informing the contents of their evidence, developing cross-examination of another party’s witnesses, seeking the production of and tendering documents, and so on. Whether ASIC would in fact do any of these things, or has done so, is not to the point (as I return to below). What is relevant is an examination of Noumi’s conduct in permitting ASIC to do so, if it so wished.

179 Noumi and ASIC submitted that the effect of cll 3.1 and 4.1 was that ASIC could not disclose the PwC Report or its contents to another person, or use them in evidence. The effect of the submissions made by Noumi and ASIC was that cl 4.1 prevented ASIC from disclosing to any other person the Disclosed Information (other than as permitted by the balance of cl 4), which they contended applied to both the physical documents and the information contained in them. Noumi and ASIC contended that ASIC could not show the PwC Report to any other person or disclose its contents. For example, it was submitted that ASIC could not ask a question along the lines that, “In PwC’s investigation, you spoke to Ms Michie and told her ‘x’, correct?”.

180 Whilst I accept that cl 4.1 has the effect that ASIC could not disclose the PwC Report and its contents to another person (other than in the circumstances prescribed by cll 3.1 and 4), in my view cl 4.1 has to be read in a way that is workable with cll 3.2 and 3.3. Specifically, I do not read and construe cl 4.1 as preventing ASIC from engaging in, what may be best described as, derivative disclosure of the Disclosed Information, or disclosure of that Information brought about in circumstances where it would not be possible for ASIC to disassociate whether the source of the Information was the PwC Report or some other source.

181 To make sense of this point, the fact is that the primary document that was disclosed here was an investigation report. It would have been known to the parties to the VDA that an investigation report of this type would include findings and matters of opinion expressed by the investigator, as well as evidence. To the extent that it included evidentiary matters, cl 3.2 permitted ASIC to use that evidence in its consideration of the subject matter of the Investigation and any proceedings commenced by it, and cl 3.3 permitted it to obtain that information in another form. In relation to the latter point, ASIC (correctly) submitted that it is “not uncommon for investigators to use inadmissible evidence to obtain admissible evidence against that same person in circumstances where the investigator is permitted by law to do so”. ASIC also submitted that the rationale for cl 3.2 (which it described as providing for “explicit permitted use”) and 3.3 (which was described as permitting “derivative use”) was in part because it “would be impossible for ASIC to put to one side and exclude any knowledge it has of the Disclosed Information in considering the matters the subject of any proceedings” and the “voluntary disclosure regime would become unworkable if ASIC was restricted from using the Disclosed Information in this way”. I agree with these submissions. It follows that cl 4.1 has to be read sensibly and harmoniously with the uses permitted by cll 3.2 and 3.3 so as not to prevent derivative disclosure of the information contained in the Disclosed Information, including the PwC Report.

182 To put things in more practical terms, for example, if the PwC Report included a summary or recitation of evidence given by, hypothetically, “Witness A”, to the effect that Mr Macleod had directed him or her to conceal and not write-down unsaleable inventory or suborned the witness by some means, such evidence would be part of the information contained in the PwC Report. It would be artificial to construe cl 4.1 as meaning that ASIC would be prevented from using the information as to Witness A’s evidence as contained in the PwC Report by having elicited that same information from Witness A in an affidavit or statement for use in proceedings. Clause 4.1 has to be construed in a way that is harmonious with cl 3.3 so that it accommodates ASIC’s derivative use of the information contained in the PwC Report. It does not follow from this that cl 4.1 takes precedence to cl 3.3, or vice versa. Rather, the two clauses must be read cohesively and harmoniously. Thus, it may be accepted that ASIC would be prevented from showing Witness A a copy of the PwC Report, but ASIC would not be prevented from eliciting from Witness A the same evidence as that which that witness had given to PwC.

183 Having regard to the above, in my view, the combined effect of cll 3.2 and 3.3, read together with cll 3.1 and 4.1, is that although ASIC could not tender or present the Disclosed Information in any proceedings or disclose the Information, it could consider the Disclosed Information and use its statutory powers to obtain the same or similar information for use in its statutory investigations and in any proceedings commenced by it. Specifically, it could use the information to take leads and inform its next steps in its regulatory response to the Inventory Issue including to issue notices for certain documents, select witnesses to attend compulsory examinations under s 19 of the ASIC Act, and ask witnesses questions knowing what their likely evidence would be. By doing so, ASIC could, if it wished, seek to elicit the same or similar evidence as contained in the PwC Report through these indirect or derivative means. It could then use that information as evidence in proceedings or for other purposes connected with such proceedings.

184 It is significant that these uses were permitted in the context of Noumi’s disclosure to ASIC where one of the matters that had prompted the Investigation was Mr Macleod’s conduct. It follows that Noumi was permitting ASIC to use the Disclosed Information in the ways I have described above in potential statutory investigations and proceedings against not only itself, but also Mr Macleod and others.

#### **(f) Clause 4.2**

185 Mr Macleod contended that cl 4.2 had the effect of giving rise to inconsistency in that Noumi had placed ASIC in a position where it could on-disclose the Disclosed Information to third parties such as external advisers and experts and to a Minister or by reason of parliamentary process. Mr Macleod relied upon the reasoning of Gordon J in *Cadbury Schweppes* at [17] to contend that in permitting such on-disclosure, Noumi had “lost control” of the confidentiality in the communication.

186 I do not agree with Mr Macleod’s submissions. To the extent that cl 4.2(a) permitted disclosure to external advisers or experts, such disclosure was required to be on terms of confidentiality and would in turn also be for a limited purpose. The requirement that the on-disclosure be subject to terms of confidentiality satisfies me that Noumi did not by reason of cl 4.2(a) act in a way that was inconsistent with the maintenance of confidentiality.

187 Further, cl 4.2(b) does little more than record Noumi’s recognition that ASIC was and is accountable to the Commonwealth Parliament. Disclosure to committees of Parliament and Ministers of the Commonwealth would ordinarily be involuntary. Noumi’s recognition that ASIC may be required to involuntarily disclose the Disclosed Information in this way was not inconsistent with the maintenance of confidentiality. To the extent that cl 4.2(b) contemplates that such disclosure may be made by ASIC on a voluntary basis, I do not consider Noumi’s conduct in permitting use of the Disclosed Information in that way as being an inconsistent act in circumstances where ASIC is a statutory regulator overseen by Parliament and the Executive.

188 It follows that I do not regard cll 4.2(a) or 4.2(b) as being clauses that of themselves manifest any relevantly inconsistent conduct on the part of Noumi.

### D.3.3 Inconsistency informed by the context and considerations of fairness

189 Inconsistency is a judgment to be made in the context and circumstances of the case, and in the light of any considerations of fairness arising from that context or those circumstances: *Osland* at [45].

190 Mr Macleod’s case is that by disclosing the PwC Report to ASIC, Noumi waived privilege. In response, Noumi accepted that it disclosed this confidential communication to a third party, ASIC, but contended that it did so on terms of confidentiality in respect of that communication and without waiving privilege so as to fall within the scope of a “limited waiver”. Noumi submitted that the circumstances of the disclosure and the terms of the VDA established that it was making the disclosure without waiving privilege and on terms of confidentiality. Noumi accepted that terms of the VDA permitted particular uses pursuant to cll 3.2 and 3.3, but contended that this was the extent of the limited purpose for which the disclosure was made and was not inconsistent with the maintenance of the confidentiality of the communication. Noumi contended that its endeavour to retain confidentiality and maintain privilege was critical.

191 I accept that Noumi intended and sought to maintain confidentiality and privilege in the PwC Report. I also accept that it engaged in an endeavour to do so. Its intention in this regard is evident from Ms John’s communication to ASIC that Noumi’s Board was wishing to share the PwC Report on a confidential basis in accordance with Information Sheet 165 and the terms of the VDA. Clauses 1.1, 3.1 and 4.1 of the VDA reinforced that Noumi wished to protect the confidentiality attaching to the PwC Report, both as to its form and contents.

192 However, Noumi’s intention and endeavour to maintain confidentiality and not waive privilege must be considered in light of the context and circumstances surrounding the disclosure including the terms of the VDA. Noumi’s disclosure of the PwC Report to ASIC did not occur in a factual vacuum. Those facts are largely set out in **Part B.2** of these reasons. The following facts are relevant to the context and circumstances surrounding the disclosure.

193 The Inventory Issue was not an insignificant one. By the time of the disclosure to ASIC, Noumi had announced a write down in the order of $60 million in its accounts, with the potential for further write downs. Noumi knew that the Inventory Issue was a matter in respect of which ASIC would take, and had taken, a regulatory interest. Noumi knew that ASIC wanted, and would want, further information about these matters and was prepared to exercise its statutory powers to obtain that information, but was in the meantime prepared to receive the information on a voluntary basis given the circumstances of the pandemic that prevailed at that time.

194 Ms John had informed ASIC of the fact of the investigation and in her letter dated 29 June 2020 informed that a “particular focus” of the investigation was:

… **whether or not there were directives or instructions by current or former executives** as to the recording of transactions or information in particular ways, or conversely the omission of transactions or information in particular ways, or conversely the omission of transactions or information, in the Company’s books and records.

(emphasis added)

195 From ASIC’s response dated 3 July 2020, Noumi knew that ASIC had received information from third party sources in relation to the Inventory Issue and related accounting matters. Importantly, from ASIC’s correspondence, Noumi also knew that ASIC wanted to know what was the “suspected conduct” that had prompted Noumi’s investigation. In her letter dated 6 August 2020, Ms John directly addressed ASIC’s request and, amongst other things, she stated that “the suspected conduct” that led to the investigation was a matter itself that was being investigated and those matters could not be prejudged, but subject to those qualifications, said she could “confirm” that the following matters had “prompted the investigation”:

a) a review of inventory resulted in the Board becoming aware that it had been **provided with incorrect information by Mr Macleod** in respect of certain obsolete stock and out of date stock. **[Noumi] staff then indicated that they received various verbal instructions from Mr Macleod** not to perform write downs or recording provisions relating to certain obsolete stock, out of date stock and product withdrawals;

b) revenue was recognised on certain inventory prior to it being shipped, even though the relevant purchase orders for that inventory were expressed to be subject to quality confirmation and grant of export licences, which conditions were ultimately not met. **Incorrect information was provided to the Board** as to the classification of associated receivables and their ageing; and

…

(emphasis added)

196 Pausing here, given that Ms John was informing ASIC, at least in a preliminary way, that the suspected conduct that had prompted the investigation included concerns about Mr Macleod’s conduct, I am satisfied that Noumi knew that the PwC Report would, amongst other things, address those allegations. Further, as the letter recording the terms of the PwC Michie Engagement stated that PwC would “issue a written factual report setting out the findings of our investigation and any relevant evidence”, I am also satisfied that Noumi knew that the PwC Report would not only include PwC’s findings in relation to the allegations concerning Mr Macleod, it would also contain any relevant evidence in relation to those allegations. Specifically, I am satisfied that Noumi knew that the PwC Report would contain findings and evidence in relation to whether Mr Macleod had provided incorrect information to the Board and given directions to subordinates that they not perform write downs or record certain obsolete and out of date stock.

197 The question of whether there has been waiver is informed by the nature of the matter in respect of which legal advice was received, the evident purpose of such disclosure that is made and the legal and practical consequences of limited rather than complete disclosure: *Osland* at [46]. Taking these points up it is relevant here that the privileged document was not a legal advice; it was an investigation report. At least one evident purpose of the investigation report was to gather the evidence in relation to the “suspected conduct” which included allegations about Mr Macleod. It is of some significance that the report was being disclosed to a regulator. Applying commercial common sense, given that Noumi had stated to ASIC that a particular focus of the investigation was to be the conduct of current and former executives, and that one matter that had prompted the investigation was Mr Macleod’s alleged conduct, Noumi knew that the investigation report would do more than impart legal advice. It would disclose the evidentiary materials relating to any findings made in respect of the allegations concerning Mr Macleod at a time when ASIC had not itself conducted any investigation of the matters.

198 It is also significant that, by the time of the disclosure to ASIC, Noumi’s Board had had an opportunity to read and consider the contents of the PwC Report, and the disclosure was being made with knowledge of the contents of the PwC Report. The parties consented to me being provided with an unredacted copy of the PwC Report and examining it for the purpose of my determination as to whether privilege had been waived. As a result, it is unnecessary for me to deal with or decide the issues which Stewart J considered in *TerraCom* at [71]-[77]. Albeit Stewart J there examined a privileged investigation report to ascertain whether its contents, gist, conclusions or substance were disclosed, similar considerations arise here where I have to determine whether Noumi’s conduct gave rise to a waiver by its disclosure to ASIC in circumstances where ASIC was permitted to use the PwC Report for particular purposes. It is necessary for me to say something about the PwC Report within limits, being mindful of Noumi’s rights of appeal by not disclosing too much about the content of the PwC Report (as was the case in *TerraCom* at [81]ff). In doing so, I will follow the approach taken by Stewart J in *TerraCom* at [81]-[86] and by Bromwich J in *Cantor* at [101] by limiting myself to that which is necessary. Having examined the PwC Report, I am satisfied not only that it contained information that, on any view, would have been probative to a regulator in the position of ASIC, I am also satisfied that Noumi’s Board knew that the information contained in the PwC Report was going to be probative to any statutory investigation conducted by ASIC and its consideration of any proceedings that may be brought against Noumi or third parties, including Mr Macleod.

199 Although there was at that time no statutory investigation on foot and no powers of compulsion were being exercised, I am satisfied that it was in Noumi’s reasonable contemplation, given the seriousness of the matters being raised with ASIC, that ASIC would consider all information provided to it in its determination of an appropriate regulatory response as against both Noumi and Mr Macleod. From the contents of Information Sheet 165 and the terms of the VDA, Noumi knew that the purpose of the disclosure to ASIC was to assist ASIC with its investigative and statutory processes, including the determination of whether a statutory investigation would be commenced or concluded, and whether enforcement proceedings would be commenced including against Mr Macleod. Thus, although Noumi was only seeking to disclose the PwC Report on a confidential basis, without waiving privilege, on the terms of the VDA, and as informed by the Information Sheet, I am satisfied that Noumi knew that the PwC Report would contain the evidence that PwC had gathered, as well as its findings, in relation to the Inventory Issue including an examination of what Mr Macleod and other executives knew about that Issue and what they did. It follows that by the time of the disclosure to ASIC, Noumi knew or it was within its reasonable contemplation that ASIC could use the information contained in the PwC Report to conduct statutory investigations including a realistic possibility that such investigations would examine Mr Macleod’s conduct, together with a potential that proceedings could be commenced against him. To use the expression in *Osland* at [46], the legal and practical consequence of the disclosure of the PwC Report was to permit ASIC to use the information contained in the Report as against Mr Macleod, including, as discussed further below, permitting ASIC to have derivative use of that information in proceedings against Mr Macleod.

200 These contextual matters bear upon the scope, breadth and extent of the uses of the Disclosed Information permitted by cll 3.2 and 3.3. The purpose of the disclosure as expressed in Recital D was to “assist” ASIC being “informed in relation to the Investigation”. The contextual circumstances demonstrate that this was consistent with Information Sheet 165 which indicated that ASIC could review and use the information for its investigative purposes. However, the terms of the VDA extended beyond this for the reasons I have outlined above at **Part D.3.2(e)**.

201 Whilst Noumi largely accepted the uses that ASIC could make of the material in the PwC Report (as set out at [178] above), it contended that these purposes were limited and fell within the scope of a “limited waiver”. As noted above, Noumi submitted that disclosure of the PwC Report to ASIC as the regulator facilitated the administration of justice. It submitted that the conditions that the material could not be used or relied upon in court was at the very heart of what privilege is intended to protect. It contended that the fact that ASIC might use the information internally to inform its own investigation and decision whether to commence proceedings is not to the point as this was “simply the scope of the limited waiver”.

202 However, it does not follow from the fact that there has been disclosure to a third party for a limited purpose that there will be no inconsistency. In *Osland* at [50], it was stated that “[t]he inconsistency test readily accommodates the notion that, in *appropriate circumstances*, the privilege-holder may disclose the content of legal advice to a third party for a particular purpose without being held to have waived privilege in the advice”. The reference to “appropriate circumstances” in this passage gives an indication that regard must be had to the circumstances of the limited disclosure and whether it can be readily accommodated within the inconsistency test.

203 As Bromwich J reasoned in *Cantor* at [88], in some situations a limited waiver may be effective in preserving privilege, in other situations it may not, and in yet other situations it may give rise to some degree of limited implied or imputed waiver provided there is conduct that is relevantly inconsistent with the preservation of privilege. Bromwich J further reasoned that these conclusions may be informed by questions of specific unfairness, not general unfairness. None of the parties before me contended that this aspect of Bromwich J’s reasoning was erroneous in any respect. As I have observed at [103] above, I agree with Bromwich J’s reasoning.

204 The real question that arises here is whether the disclosure to ASIC, even if for limited purposes, was inconsistent with the maintenance of confidentiality in the privileged communication. In this case, I am satisfied that Noumi’s conduct was inconsistent with the maintenance of confidentiality in the PwC Report.

205 Although Noumi disclosed the PwC Report to ASIC for a limited purpose, in doing so Noumi placed ASIC in a position where it was permitted to use the PwC Report and the information contained in it for the purposes of its consideration of the Investigation and for its consideration of any proceedings that it might commence against either Noumi or any other third party including, relevantly, Mr Macleod. Importantly, these purposes were not limited to ASIC’s internal considerations. By cl 3.3 of the VDA, Noumi permitted derivative use of the Disclosed Information for the purpose of any proceedings that may be brought against any third party, including Mr Macleod. Noumi knew that it had placed ASIC in a position whereby it was permitted to use the information contained in the PwC Report to obtain evidence in an admissible form (including the evidence contained in the PwC Report) in proceedings that could be commenced against Mr Macleod. The effect of this was to permit ASIC (if it so wished) to obtain the evidence contained in the PwC Report (which it would hold in an inadmissible form) in an admissible way to use against Mr Macleod.

206 Noumi did so in circumstances where (as stated at [198] above) it knew the contents of the PwC Report and knew that the information contained in the PwC Report would be probative to ASIC’s regulatory response, if any, against both Noumi and Mr Macleod. The effect of Noumi’s disclosure was to place ASIC in a position where it was armed with information that it did not have at that time, given there was at the time no statutory investigation on foot. Noumi knew that ASIC would be able to consider not only PwC’s findings, but also the underlying evidence leading to those findings. From the uses which it permitted ASIC to make of that information, Noumi knew that ASIC was in a position to identify which witnesses to examine, the topics to be explored with them, the questions to be asked, the answers they would give, the documents to obtain, the relevant documents to show witnesses, the likely evidence that would be given by witnesses and located in documents, and so on.

207 In my view, this conduct, when viewed in context in light of the surrounding circumstances, was inconsistent with the maintenance of confidentiality in the PwC Report as a privileged communication. In particular, permitting ASIC to use the Disclosed Information in a derivative way as against Mr Macleod in proceedings that could be brought against him was conduct that was inconsistent with the maintenance of confidentiality in the PwC Report as a privileged communication. It does not matter that ASIC could not present the PwC Report as evidence in proceedings or disclose it to any third party, other than in specified circumstances. That is because, in essence, ASIC was placed in a position where (if it so wished) it could seek to elicit any of the relevant evidence in the PwC Report by derivative means. The placing of ASIC in that position was, in my view, conduct that was inconsistent with the maintenance of confidentiality in the PwC Report.

208 Consistent with authority, Noumi accepted that questions of fairness may inform an analysis and conclusion as to inconsistency. It relied upon the decisions in *Cantor* and *AWB v Cole (No 5)* to contend that in cases where a purported waiver is based on disclosure to a third party, the question “unfair or inequitable to whom?” must be asked. It submitted that if the disclosure from A to B *is* confidential, there must be some inconsistency between A’s act of disclosing to B, and A’s conduct towards C, to give rise to an imputed waiver as against C. It posed the question: what makes the disclosure from A to B unfair to C?

209 I am satisfied that there was and is a specific unfairness that arises here which informs the conclusion as to inconsistency. The unfairness that arises is that, on the one hand, Noumi has disclosed information to ASIC that it could consider and use in statutory investigations and potential proceedings against Mr Macleod, but, on the other hand, it has maintained confidentiality over that same information as against Mr Macleod. In my view, that gives rise to a specific unfairness.

210 Noumi submitted that there was no unfairness to Mr Macleod in that, as things have come to pass, proceedings have been commenced against him in which he has had full disclosure of the case he has to meet and the evidence that ASIC is bringing forth in that case. That submission assumes that an inconsistency or nexus must exist between the disclosure and some extant proceedings, or at least some unfairness must be manifested in this regard. Whilst that may have been *a* prism of analysis in *Goldberg* and *Cantor* (leading to different outcomes), it will not always be necessary to point to such a connection or nexus. It may be that, as Young J observed in *AWB v Cole (No 5)* at [131] an inconsistency informed by unfairness may be easier to point to in the context of *inter partes* litigation. However, this need not always be the case. Here, the inconsistency arises for the reasons I have set out above.

211 ASIC contended that no unfairness arises to a former company officer if a company provides information to a regulator to enable it to properly carry out its regulatory functions. This submission misses the point. The issue here is whether there is specific unfairness to the former company officer when such information is provided to the regulator, but withheld from that officer. That issue informs whether the privilege holder has acted inconsistently in the maintenance of confidentiality in the privileged communication.

212 In coming to this conclusion, I have not accepted Mr Macleod’s submission that Noumi acted for a calculated or forensic purpose. Noumi was seeking to assist ASIC in respect of a matter of serious concern. I do not consider that to be a calculated purpose engaged in for a forensic purpose. Nor do I consider that Noumi was making its disclosure to secure some advantage from ASIC. At the time that the VDA was entered into, ASIC had not commenced any proceedings against Noumi and there is no evidence that any specific assurance or promise was given by ASIC to Noumi.

213 I also do not consider that it answers the question as to inconsistency that ASIC has not in fact disclosed the PwC Report to Parliament or other third parties. It may also be observed that ASIC did not adduce any evidence that it did not use the Disclosed Information for the purpose of its investigation, the commencement of the proceedings against Mr Macleod, or any step that has been taken in those proceedings. These points do not matter to the outcome of the present case. As Noumi submitted, “it is only an act of the privilege holder that can produce relevant inconsistency”. The relevant question here is whether Noumi’s conduct was inconsistent with the maintenance of confidentiality in the relevant communication.

214 Both ASIC and Noumi relied upon public policy arguments. Broadly stated, those arguments were to the effect that the “voluntary disclosure regime” under which ASIC accepts confidential information encourages candid disclosure with the regulator, which, in turn, facilitates the administration of justice by allowing relevant information to be brought to the regulator’s attention, with consequent time and cost savings in the investigation and bringing of proceedings. It will be apparent from these reasons that at various times ASIC made reference to a “voluntary disclosure regime”. To the extent that this is a regime, it is not a statutory one. I have no doubt that regulators such as ASIC have good reason to encourage regulated entities to share information, including privileged communications. Whether the sharing of that privileged material will give rise to waiver will be a matter to be determined on a case by case basis. Encouraging candid and voluntary disclosures to regulators may be accepted as a generally sound objective. However, Parliament has not abrogated legal professional privilege. With that in mind, the objective of candid disclosure could have been equally promoted by Noumi disclosing the PwC Report to ASIC without attaching confidentiality to it or seeking to maintain privilege. Having elected to assert privilege and maintain confidentiality, Noumi took the risk that its conduct may give rise to waiver of its privilege.

215 The underlying assumption of the argument that was advanced is that regulated entities will be less willing to be candid with regulators if sharing privileged communications would lead to a waiver of privilege. Whilst this assumption may reflect the attitudes of some regulated entities on some occasions, I do not accept that it is an assumption that can be uniformly applied to every regulated entity on every occasion. For example, the facts in *Komlotex* (as recorded at [32], [44] and [94] of that judgment) demonstrate that some regulated entities will waive any privilege attaching to investigation reports without condition. In any event, as was observed in *Osland* at [50], the inconsistency test “readily accommodates the notion that, in appropriate circumstances, the privilege-holder may disclose the content of legal advice” without waiving privilege. Whether that has occurred will fall to be determined on a case by case basis, and not by application of a rule of automatic application in respect of disclosures to regulators.

216 I do not regard Rees J in *Northern Energy* as enunciating a principle giving rise to a category of limited waiver to regulators that could be applied in every case. In other jurisdictions, disclosure of privileged communications to regulators have led to different outcomes. In *AWB v Cole (No 5)*, Young J at [151]-[155] considered the approach that has been taken in the United States to questions of limited waiver in the context of voluntary disclosures of privileged material to regulatory bodies. The position is different in the United Kingdom, Ireland and Hong Kong, as examined by the learned author in *Privilege* (4th ed, Sweet & Maxwell, 2020) at pp 679-697. Neither the developments in the United States nor other jurisdictions are particularly helpful. The principle of inconsistency as it has been developed and applied in Australian courts is one that does not produce fixed or absolute outcomes in terms of voluntary disclosures of privileged information to regulators.

217 In light of the above analysis, I am satisfied that Noumi waived privilege in the PwC Report by voluntarily disclosing it to ASIC. This finding also means that privilege has been waived in the documents identified as Documents 2 to 5 and 8 to 14.

### D.3.4 The decisions in Cantor, Goldberg, Woollahra, Betfair and Kirby

218 For completeness, I have addressed the parties’ various submissions which relied upon other cases.

219 Both ASIC and Noumi placed reliance upon *Cantor*. Mr Macleod contended that it was distinguishable and, alternatively, wrongly decided. I do not regard the decision in *Cantor* as analogous. There, the disclosure by Volkswagen to the German regulator did not contemplate that the regulator would use the information outside the limited purpose for which it was disclosed, such as the commencement of proceedings against Volkswagen or third parties. There was also no relevant unfairness to inform the question of inconsistency as there was no correspondence or, as Bromwich J described it, “nexus”, between the parties to the regulatory investigation in Germany and the class action proceedings in Australia. By contrast, in the present proceedings, the disclosure was made to ASIC in the course of an investigation leading to the commencement by ASIC of proceedings against both Noumi and third parties including Mr Macleod.

220 As to Bromwich J’s reference to the requirement for a “nexus” in [169] of *Cantor*, his Honour’s reasons need to be read and understood in the context of the arguments advanced in that case as to “unfairness”. His Honour reasoned that, because there was no relevant connection or nexus between the regulatory process in Germany and the class action proceedings before the Court, there was no relevant unfairness to the class action litigants by which to inform the conclusion as to inconsistency. I do not understand his Honour to have been erecting a general test of nexus, and I do not understand his Honour to have been applying a two-step test or giving precedence to a test of unfairness above any question of inconsistency.

221 Mr Macleod placed considerable reliance on *Goldberg*. I do not regard the factual circumstances of that decision as being determinative here. In *Goldberg*, it was found that the disclosure to the Law Society was made for the “calculated purpose” of demonstrating the reliability of Mr Goldberg’s denial of the allegation of failure to account. No such calculated purpose on the part of Noumi can be discerned here. *Goldberg* was also decided prior to *Mann*, such that the question of whether the disclosure gave rise to an imputed waiver of privilege was resolved by reference to general considerations of fairness. That is no longer the law.

222 Noumi placed considerable reliance upon the decision of Giles J in *Woollahra.* That caseis also distinguishable. The critical parts of Giles J’s reasoning at 540D-F were that the “disclosure was confined to the inspectors” and that evidence demonstrated that there had been no greater dissemination than flowed from the fact that inspectors were officers of the Department. Critically, there was no evidence before Giles J that the Council had permitted particular uses of the relevant document by the inspector, only that it was given subject to obligations of confidence. In the present case, Noumi knew and expressly agreed that ASIC could use the information for the purposes specified in the VDA in the context of what it knew to be the prospect of a regulatory investigation and potential proceedings against a third party, Mr Macleod.

223 Noumi also relied upon *Betfair*. There the disclosure was found to have occurred for the limited purpose of a consultative process of formulating and finalising the State’s drafting instructions to Parliamentary Counsel under an implicit regime of confidentiality, with no other express authorised purposes. That is different to the position here.

224 Reference was also made by both parties to the decision in ***Kirby*** *v Centro Properties Limited (No 2)* [2012] FCA 70; (2008) 172 FCR 376*.* That case is also distinguishable. The documents there under consideration had been produced in a redacted form in answer to compulsory notices issued under s 30 of the ASIC Act, rather than being voluntarily produced pursuant to a disclosure agreement.

225 The effect of the above analysis is that none of the cases cited by the parties are determinative of the outcome of this case. This is unsurprising given the fact that inconsistency is a question which must always turn on a close analysis of the circumstances and context attending the disclosure in question.

# E. WAIVER OF PRIVILEGE BY REASON OF THE ASX RELEASES

226 Having found that Noumi waived privilege in the PwC Report and associated documents through their voluntary disclosure to ASIC, it is not strictly necessary for me to consider Mr Macleod’s alternative argument that Noumi waived privilege in the PwC Report by way of certain ASX releases. However, for completeness, I deal with that contention here.

## E.1 The parties’ submissions

### E.1.1 Mr Macleod’s submissions

227 Mr Macleod submitted that, by various ASX announcements which conveyed parts of the conclusion of the PwC investigation in relation to inventory, Noumi waived privilege over the PwC Report at least as to the extent of that subject matter.

228 Relying on *Citigroup* at [140], Mr Macleod submitted that inconsistency of the requisite kind can arise where the privilege holder makes assertions or representations about the nature, character or effect of the contents of the privileged documents, especially where the privilege holder wishes to have others rely on the accuracy of the assertion or representation.

229 Mr Macleod cited *TerraCom* as a recent and instructive example. In that case, Stewart J held that there had been implied waiver of privilege in relation to a ‘Project Rex Report’ prepared by PwC in the context of an engagement by TerraCom of Ashurst to act for and advise it on issues relating to allegations of misconduct by a former employee against the company and company personnel. The Project Rex Report was provided to TerraCom on 16 December 2019, and was referred to in an announcement on 12 March 2020, in the following terms: “As previously stated, [TerraCom] took allegations that its CEO and CFO had been involved in a scheme relating to the fake analysis of coal samples seriously and an independent forensic investigation was conducted and found no evidence of wrongdoing”. A statement in those terms was repeated on 3 April 2020. Stewart J found that this constituted a waiver over the report to the extent that it addressed the subject matter of allegations relating to fake analysis of coal samples (at [66]), which conclusion was not challenged on appeal (*TerraCom Ltd v ASIC* [2022] FCAFC 151).

230 Mr Macleod submitted that the circumstances are analogous in this case. In June 2020, Noumi announced that it had engaged PwC. In the November 2020 ASX Announcement, Noumi reported that it had commissioned an independent investigation into its financial position, and that the financial year 2020 audit by Deloitte and “a forensic accounting investigation by PwC” identified “a range of accounting matters going back a number of years”. It was also stated that one of the “[k]ey impacts” of the independent investigation was that “$60.1 million in write-downs of out-of-date, unsaleable and obsolete inventory” had been made. Similar statements were made in the FY20 Annual Report, and in the HY21 Financial Report and HY21 Results Release, Noumi referred to the independent investigation conducted by PwC to confirm the write-offs had been made.

231 Mr Macleod submitted that the reliance by Noumi on findings in the PwC Report by these public statements was inconsistent with the maintenance of any privilege that otherwise attached to that document. It was submitted that Noumi was taking advantage of PwC’s professional status and its independent investigation to deflect criticism of its balance sheet and controls, and that it sought to add force and authenticity to what it told the market by virtue of the fact that independent professionals had agreed to the amount of the write-down. Mr Macleod submitted that Noumi could not rely upon the public statements whilst at the same time maintaining privilege so as to prevent Mr Macleod from testing those statements.

232 Mr Macleod submitted that the Court should examine the PwC Report to determine whether there had been waiver of it through the ASX releases.

### E.1.2 Noumi’s submissions

233 In response to Mr Macleod’s submissions, Noumi submitted that none of the ASX announcements or company reports cited by Mr Macleod disclosed the conclusions of the PwC Report. It was submitted that the reference in the 30 November 2020 Announcement to an “investigation of the Group’s financial position in June 2020” was the investigation undertaken by Mr Longley and Ms Carney following the departure of Noumi’s CFO.

234 Noumi further submitted that, even if the disclosures in Noumi’s ASX announcements and company reports could be characterised as references to Ms Michie’s investigation, they would be insufficient to amount to waiver for the following reasons:

(a) *First*, the composite expressions used to refer collectively to investigations performed by Noumi’s numerous external advisers mean that it could not be said that the substance or content of any privileged communication was disclosed “with specificity and clarity”: *Nine Films & Television Pty Ltd v* ***Ninox*** *Television Limited* [2005] FCA 356 at [26].

(b) *Second*, disclosure to the effect that a company has considered advice and taken action based on that advice is not sufficient to amount to waiver: *Kirby* at [116]; *Hanks v Admiralty Resources NL (No 2)* [2011] FCA 1464 at [17]-[18].

(c) *Third*, a statement of belief, even if based on a privileged communication, does not amount to waiver: *Switchcorp Pty Ltd v Multiemedia Ltd* [2005] VSC 425 at [12.2]; *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd (No 2)* [2020] FCA 1013 at [31]. To this end, a statement regarding the Board’s satisfaction as to certain generic corporate governance matters, supported by the activities and work of advisers, did not amount to waiver.

(d) *Fourth*, Noumi’s disclosures to the market regarding the basis for its financial restatements were not disclosures made to secure some advantage in litigation, but rather, were “to satisfy the public that due process had been followed” and that Noumi had “taken a proper course in obtaining and considering advice from appropriate persons”: see *Osland* at [48] (Gleeson CJ, Gummow, Heydon and Kiefel JJ) and [97] (Kirby J). By contrast, the announcement in *TerraCom* was an “exculpatory statement” on the subject matter of pending litigation and possible ASIC investigation. Forensic unfairness arose because “ASIC [could not] test whether TerraCom’s statements to shareholders and to the market [were] false or misleading in circumstances where it kn[ew] from the letter to it by EY that there we[re] reasonable grounds to suspect that there was wrongdoing”: at [62]. The position here was different to that in *TerraCom*.

## E.2 Consideration

235 In oral submissions, counsel for Mr Macleod conceded that the “high point” of the argument as to disclosure through ASX releases was the November 2020 ASX Release. In other words, if waiver through disclosure to the ASX was not established by reference to that document, it would not be established at all. I will therefore confine my analysis of this issue to that document.

236 The November 2020 ASX Release relevantly provided as follows:

**Board investigations and restatement of prior year accounts**

In March 2020, the Board initiated an investigation into issues regarding the operation and administration of the company’s equity incentive plan. Separately, the implementation of a warehouse consolidation program led to the identification in May 2020 of out-of-date, unsaleable and obsolete inventory, as reported to the ASX on 29 May 2020 and 25 June 2020.

In June 2020, the Board expanded the investigation to take a broader look at the Group’s financial position and operations with the assistance of external advisors including PwC, Ashurst, Arnold Bloch Leibler and Moelis Australia.

The FY20 audit by Deloitte and a forensic accounting investigation by PwC identified a range of accounting matters going back a number of years.

Most significantly, the reviews determined that most of the costs capitalised during the commissioning phase of the Group’s capital investment program should be more appropriately treated as expenses. These accounting treatments contributed to decisions on new products and expansions that were based on unrealistic assessments of market opportunities and margin assumptions that were not realised. As a result, too many Group products were sold at prices that did not fully recover their costs.

These matters have resulted in a material restatement of the Group’s FY19, FY18 and prior period accounts and material write-downs and adjustments.

The total impact of the adjustments and write-downs for FY20 and prior periods is approximately $590 million.

237 I accept Mr Macleod’s submission that relevant inconsistency can arise where the privilege holder discloses the gist, substance or conclusion of a privileged communication. However, I am not persuaded this occurred here.

238 *First*, having inspected the contents of the PwC Report, I do not consider that the November 2020 ASX Release in fact discloses the conclusions, gist or substance of that Report.

239 *Second*, the November 2020 ASX Release refers variously to the investigation into the ESOP Issue, “a broader look at the Group’s financial position and operations” in June 2020, “the FY20 audit by Deloitte” and “a forensic accounting investigation by PwC”. The reference to the ESOP Issue does not relate to the PwC Report. The reference to the broader look at the Group’s financial position does not relate to the contents of the PwC Report and I consider it to be a reference to the “nuts and bolts” accounting investigations led by Ms Carney and Mr Longley which led to the “material restatement of the Group’s FY19, FY18 and prior period accounts and material write-downs and adjustments” referred to later in the ASX release. The reference to the audit conducted by Deloitte does not relate to the PwC Report. This leaves in play the reference to the “forensic accounting investigation by PwC”. I do not consider this to be a reference to Ms Michie’s investigation. The full text is that “The FY20 audit by Deloitte and a forensic accounting investigation by PwC identified a range of accounting matters going back a number of years”. Read in its full context, I consider this to be a reference to the “nuts and bolts” accounting investigations conducted by Ms Carney and Mr Longley. In any event, even if I am wrong about this, I do not consider that the words “identified a range of accounting matters going back a number of years” disclosed the substance, gist or conclusions of the PwC Report.

240 *Third*, the November 2020 ASX Release refers to a number of reviews and investigations collectively, and at such a high level of generality such that it cannot be said that the substance or content of any single privileged communication is disclosed with the degree of specificity and clarity required to effect waiver: *Ninox* at [26].

241 *Fourth*, I do not consider the analogy with *TerraCom* to be apt. In that case, the ASX announcement was found to be an “exculpatory statement” by which TerraCom sought to publicly exonerate the CEO and CFO of wrongdoing in the context of pending litigation and possible investigation by ASIC. Forensic unfairness arose because “ASIC [could not] test whether TerraCom’s statements to shareholders and to the market [were] false or misleading in circumstances where it kn[ew]… that there [were] reasonable grounds to suspect that there was wrongdoing”: at [62]. Here, the relevant parts of the November 2020 ASX Release are more correctly characterised as statements intended to “satisfy the public that due process had been followed” and that Noumi had “taken a proper course in obtaining and considering advice from appropriate persons”: see *Osland* at [48] (Gleeson CJ, Gummow, Heydon and Kiefel JJ) and [97] (Kirby J). Unlike in *TerraCom*, where the accuracy of the statements regarding the culpability of the CEO and CFO was in issue, the subject of the November 2020 ASX Release—namely the accuracy of Noumi’s write-downs and restatements—is not in dispute in the substantive proceedings.

242 In the result, I am not satisfied that Noumi waived privilege in the PwC Report by disclosing the conclusions, gist or substance of that report through the November 2020 ASX Release. As this was expressly said to be the high point of Mr Macleod’s ASX release argument, I need not consider this argument any further.

# F. PRIVILEGED COMMUNICATIONS PROTOCOL

243 The remaining document in dispute is the one entitled “Privileged Communications Protocol”, said to have been “put in place in relation to the Ashurst PwC Engagement” on or around 17 July 2020 (**Protocol**). The Protocol was referred to by Ms John in an affidavit of 3 October 2023. Mr Macleod issued a notice to produce seeking production of the Protocol on 27 October 2023. That notice was resisted by Noumi on the basis that the Protocol was privileged.

244 At the hearing, counsel for Mr Macleod invited me to inspect the Protocol to determine whether, on its face, it was created for the dominant purpose of Ashurst providing Noumi with legal advice. Counsel for Mr Macleod stated that he “apprehended that it might be a document… the purpose of which was to obtain immunity from production of other documents”, but that “if it is, in substance, an advice to Noumi, then we accept it’s privileged”.

245 I have inspected the Protocol and I am satisfied it is privileged. I accept Ms John’s evidence that the Protocol was prepared by her for the dominant purpose of providing legal advice to Noumi regarding the protection of its privilege over documents in the context of the various engagements of PwC. It is not appropriate for me to say anything further about the contents of the document. As Mr Macleod does not make any assertion of waiver in relation to this document, Noumi’s privilege claim in this regard should be upheld.

# G. NON-PUBLICATION ORDERS

246 Noumi sought orders pursuant to s 37AF of the FCA Act that disclosure of certain information contained in evidence and documents that have been filed in these proceedings be prohibited until the conclusion of the Class Action Proceedings which are currently before the Supreme Court of Victoria. Noumi is also a defendant in the Class Action Proceedings, which overlap in terms of subject matter with the present proceedings.

247 Noumi sought the non-publication orders on the grounds that they are necessary to prevent prejudice to the proper administration of justice, in particular, that they are necessary to preserve the integrity of Orders made by the Supreme Court of Victoria in the Class Action Proceedings and to prevent the administration of justice in those proceedings from being frustrated or undermined.

248 The material in respect of which the non-publication orders were sought is material which is either:

(a) the subject of a determination by the Supreme Court of Victoria that the information is privileged or should be redacted pending determination of Noumi’s claims for privilege and subject to a confidentiality order prohibiting disclosure to any person other than Noumi, its legal representatives and the Court; or

(b) the subject of a confidentiality order made by the Supreme Court of Victoria under which disclosure is only permitted to certain specified persons or to persons who sign a confidentiality undertaking with Noumi’s consent.

249 Neither Mr Macleod nor ASIC opposed the making of the non-publication orders sought by Noumi. I also invited each of the parties to the Class Action Proceedings to appear before me in the event that they wished to oppose the making of such orders, however, none took up that opportunity. Though not determinative, I considered these to be relevant factors in support of making the orders: *LHRC v Deputy Commissioner of Taxation (No 4)* [2015] FCA 70 at [25]; *Australian Broadcasting Commission v Parish*(1980) 29 ALR 228 at 255.

250 At the hearing, counsel for Noumi invited me to make the non-publication orders on an interim basis, which I did. Following further correspondence with the parties after the hearing, I was satisfied that the orders should be made on an ongoing basis and did so in chambers on 6 March 2024. I considered that the orders were necessary for the reasons put forward by Noumi, namely that if such orders were not made, the orders of the Supreme Court of Victoria could be circumvented or undermined by the uplift of materials in these proceedings, including by the plaintiffs in the Class Action Proceedings whose access to those materials has been limited by that Court. This would be a direct interference with the administration of justice in the Supreme Court of Victoria and could lead to the destruction of the subject matter of an interlocutory dispute in those proceedings.

251 In this regard, I note that the power to issue non-publication orders extends to securing the interest of the administration of justice in connection with proceedings other than those before the Court: *Cantor v Audi Australia Pty Limited (No 4)* [2019] FCA 1633 at [26]-[28] and [36] and the cases there cited.

252 I was also satisfied that, consistently with s 37AJ(2) of the FCA Act, Noumi sought to ensure that the orders would operate for no longer than is reasonably necessary to achieve the purpose for which they were made, that is, by limiting the effect of the orders until the completion (including by way of appeal) of the Class Action Proceedings.

253 Finally, as I have already noted, certain paragraphs of these reasons have been redacted so that they conform with the non-publication orders I have made, with an unredacted version of the judgment to be distributed to the parties. For the same reasons as in relation to the materials discussed above, and pursuant to s 37AF of the FCA Act, I will make a further order to suppress the unredacted version of these reasons until the completion (including by way of appeal) of the Class Action Proceedings or until further order of the Court.

# H. DISPOSITION

254 In light of the above reasons, I have concluded that Noumi has established legal professional privilege over all of the Contested Documents, but that it has waived that privilege over 11 of them, being the PwC Report and the documents that are contingent on my finding as to waiver in the PwC Report. I have concluded that Noumi has established privilege over the Protocol document.

255 Noumi sought declarations to the effect that all 15 of the Contested Documents were privileged, but in light of my conclusions I will give the parties an opportunity to confer about the orders I should make to dispose of the interlocutory application. If the parties are unable to reach an agreement about the orders within 7 days, I will determine that matter after receiving written submissions from the parties and hearing from them if they wish to be heard.

256 In relation to costs, Noumi has succeeded in establishing privilege over all 15 Contested Documents, but Mr Macleod has succeeded in establishing that privilege in 11 of those Documents has been waived. Again, I will give the parties an opportunity to confer about the appropriate costs orders that I should make. If the parties are unable to reach an agreement about costs within 7 days, I will also determine that matter on the same basis as set out at [255] above.

257 Accordingly, I will make the following orders:

(a) Within 7 days, the parties are to confer and provide any agreed or competing proposed short minutes of orders:

(i) to give effect to the Court’s reasons for judgment; and

(ii) in relation to the order as to costs that the Court should make;

(b) In the event that the parties cannot agree to proposed orders pursuant to (a), within 14 days, the parties are to file written submissions of no more than 5 pages in support of their respective positions as to the orders the Court should make, including in relation to costs.

(c) Pursuant to s 37AF of the *Federal Court of Australia Act 1976* (Cth), the unredacted version of these reasons be suppressed until the completion (including by way of appeal) of Proceeding No S ECI 2020 04505 in the Supreme Court of Victoria or until further order of the Court.

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| I certify that the preceding two hundred and fifty-seven (257) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Shariff. |

Associate:

Dated: 11 April 2024