IN THE DISTRICT COURT
AT AUCKLAND

CRI-2017-004-000242
[2018] NZDC 4053

COMMERCE COMMISSION
Prosecutor

v

BUNNINGS LIMITED
Defendant

Hearing: 7 December 2017

Appearances: Mr Dixon QC, I Brookie & Ms Farquar for the Prosecutor
T Lindsay and Mr Pasley for the Defendant

Judgment: 24 April 2018

DECISION OF JUDGE P A CUNNINGHAM
[Applications by Bunnings seeking disclosure of withheld documents]

Introduction

[1] There are 44 charging documents filed by the Commerce Commission ("CC") against Bunnings Limited ("Bunnings") which allege breaches of the Fair Trading Act 1986 ("FTA"). The CC alleges that claims made by Bunnings in its advertising that their prices were the lowest on offer in the market were not correct. The charge period is between June 2014 and February 2016. All charging documents are category 1 fineable only offences.

[2] The hearing before me on 7 December 2017 related to applications by Bunnings for documents which have been withheld by the CC under various provisions both in the Criminal Disclosure Act 2008 ("CDA") and s 56 of the Evidence Act 2006.

[3] By the time the applications were heard, some documents previously withheld by the CC had been disclosed. At the hearing I was provided with a spreadsheet which set out the 67 documents still being sought by Bunnings and under which provision the withholding relied on. In most cases the right of the prosecutor to withhold the documents was pursuant to at least two legislative provisions, and in some cases three.

Bunnings applications

[4] In an application dated 16 August 2017 Bunnings sought documents withheld by the CC under several subsections of s 16 CDA.

[5] The first group of documents sought to be disclosed have been withheld by the prosecutor under s 16(1)(a), being withheld on the basis that:

> Disclosure of the information is likely to prejudice the maintenance of law, including the prevention, investigation, and detection of offences;

There are 27 documents withheld under this subsection and they have a date range of 6 January 2015 to 27 October 2016. The basis for the challenge is that these documents were all created before the date the charges were filed on 23 December 2016 and therefore they should be disclosed. Further that disclosure of these documents would not prejudice the maintenance of law.

[6] Secondly, there is a challenge to documents withheld under s 16(1)(c)(ii) CDA on the basis that they are:

> A communication dealing with matters relating to the conduct of the prosecution and is between;
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> A – prosecutor and another person employed by the same person or agency that employs the prosecutor and
>
> B – the prosecutor and any advisor to the prosecutor.

There are three of these documents which are all described as internal correspondence of the CC. The date range is between 1 July 2016 and 22 July 2016, which is prior to the date of filing the charges (23 December 2016). Accordingly it is submitted they are not documents that relate to the direction and management of the proceeding.

[7] Thirdly, documents withheld pursuant to s 16(1)(j) CDA being:

> The information could be withheld under any privilege applicable under the rules of evidence.

The challenge is that these documents were not received, compiled or prepared for the dominant purpose of preparing for this proceeding or any apprehended proceeding because they were prepared prior to 23 December 2016 and for the purpose of investigating a potential contravention of the Fair Trading Act.

[8] Fourthly, in an application dated 6 November 2017 challenge is made to documents withheld pursuant to s 16(1)(c)(iii) being:

> Analytical or evaluative material prepared, in connection with an investigation that led to the defendant being charged, by a person employed by a person or agency for another person employed by that person or agency or for the prosecutor;

There were 12 documents withheld on this basis that they are not analytical or evaluative material prepared in connection with an investigation. This is because they fall outside the pre-charge material and/or relate to the actual evidence in issue in this proceeding.

[9] The CC opposes all applications on various grounds and in particular that the focus by Bunnings on the date of creation of the documents is wrong in law. I will refer to more of the detail of the opposition to each category when canvassing the submissions for each party.

Submissions for Bunnings

[10] For Bunnings, Mr Lindsay emphasised that the concern was that it had access to any documents relevant to the evidence. There were three price surveys in issue

(being surveys that compared the prices of items sold by Bunnings and comparisons of prices in other stores).

(i) Price surveys carried out by Commission staff.

(ii) Surveys carried out by the marketing firm Perceptive.

(iii) Surveys undertaken by Mitre 10, the results of which have been provided to the CC.

[11] Evidence to be given by Dr Gendall, an expert for the CC, is based on the results of these surveys.

[12] How these surveys were designed, the methodology employed and how they were carried out is what Bunnings is interested in. This is because those factors are all relevant to the credibility of the evidence.

[13] There are two factors that have made it difficult for Bunnings to understand why documents are being withheld, or even what they are. The first was where there were two or more legislative provisions listed for the withholding claim. Secondly, in some cases the CC has changed the reasons given for withholding documents.

Litigation privilege

[14] In relation to 33 of the 67 documents "litigation privilege" is the only claim. Yet none of these documents are communications between the CC and its external lawyers, therefore they should be disclosed.

[15] In support of that contention reference was made to the English case of *The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd*[1] ("SFO" and "ENRC") where there was a claim to litigation privilege by ENRC of documents created between 2011-2013. The SFO began a criminal investigation in early 2013. However between the dates of August 2011 and April 2013 there had been dialogue between ENRC and the SFO characterised by the SFO as engagement in a

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[1] *The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 (QB).

self-reporting process in accordance with the SFO's 2009 Self-Reporting Guidelines. ENRC disputed that characterisation.

[16] The SFO claimed that documents generated by ENRC during its investigation between November 2011 and April 2013 were not subject to legal professional privilege. One category of documents subject to the privilege claim was that the documents were created in contemplation of a criminal investigation. At para [154] of the judgment the Court said this:

> The reasonable contemplation of a criminal investigation does not necessarily equate to the reasonable contemplation of a prosecution. The investigation and the inception of a prosecution cannot be characterised as part and parcel of one continuous amorphous process, as Mr Lissack contended, so that the reasonable expectation of the one necessarily involves the reasonable contemplation of the other. There may be cases in which an expectation of an investigation can be equated with a reasonable contemplation that the person with that expectation will be prosecuted, but that will depend on the facts. It is always *possible* that a prosecution might ensue, depending on what the investigation uncovers; but unless the person who anticipates the investigation is aware of circumstance that, once discovered, make a prosecution likely, it cannot be established that just because there is a real risk of an investigation there is also a real risk of prosecution. The question whether the person anticipating a criminal investigation also contemplates that prosecution is likely (though not more likely than not) to follow the investigation, rather than just possible, must therefore be considered on a case by case basis.

[17] Reference was also made to *R v Bublitz & Others*[2] where s 13 CDA, which deals with disclosure obligations on the prosecutor, was described by Woolford J as follows:

> It is clear from s 13 that the obligation to disclose is incumbent on the prosecutor. This duty has both principled and practical underpinnings. Not only is the Crown required to disclose information to allow for equality of arms, but also because of the practical reality that the information relevant to the trial is in its hands. The obligation is further strengthened by the nature of the prosecutorial role. Crown prosecutors are required to act fairly. Heath J emphasized the impact of prosecution obligations when it comes to disclosure in *R v Sullivan*:
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>> … [the prosecutor's] role is not as an adversary party, but, rather, as a "minister of justice" with the obligation of disclosing all relevant information to the accused. Disclosure issues must always be considered on the basis that information in the possession or control of the Crown is not something held by it for the purpose of securing a conviction. Rather, as Sopinka J aptly put it in *R v Stitchcombe:*

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[2] *R v Bublitz & Others* [2017] NZHC 1059.

> I would add that the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done.

[18] Mr Lindsay referred to the difficulty in establishing whether certain documents met the "dominant purpose" test set out in s 56 of the Evidence Act 2006 (which codified the law on litigation privilege) without looking at the documents. In *FMA v Hotchin & Ors*[3] Winkelmann J said this:

> … The privilege attaches to communications by a litigant or his lawyer or a third party, where the communication is for the dominant purpose of preparation for actual or reasonably apprehended litigation. Preparation does not have to be the only purpose. It does not matter if there is a secondary purpose, so long as the dominant purpose.

Relying on *Guardian Royal Exchange Assurance of New Zealand v Stuart*[4]

[19] Reliance was also placed on the CC's Prosecution Guidelines which sets out the process for deciding whether to prosecute. It was submitted that the decision to prosecute Bunnings was the last step in the process and therefore litigation privilege could not be claimed until after 28 June 2016 when that decision was taken. Up to that point the Commission was conducting an investigation.

[20] Applying the law to the documents in this case, Mr Lindsay submitted that evidence filed by the CC in opposition did not identify a number of things. For example, in relation to documents held pursuant to s 16(1)(j) CDA ("litigation privilege") the affidavit of Mr Wallace did not identify that the dominant purpose for the creation of documents was an actual or reasonably apprehended prosecution.

[21] Documents 9, 10, 11 of the 67 withheld documents all occurred in September 2015. Documents 9 and 10 relate to the (then proposed) Perceptive survey and document 11 is a letter to Dr Gendall. Document 12 in the list is described as an internal email of the CC containing evaluative material regarding further investigative steps. Therefore Mr Lindsay submitted that during this time the CC was in an investigation mode and therefore the dominant purpose test was not satisfied and litigation privilege could not be claimed.

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[3] *FMA v Hotchin & Ors* [2014] NZHC 2732.

[4] *Guardian Royal Exchange Assurance of New Zealand v Stuart* {1985} NZLR 596 (CA) at 606.

[22] These documents could be relevant to Bunnings' defence because the instructions to experts could be relevant to the design of the study.

[23] Documents numbered 18, 25, and 32-54 are either correspondence with or draft reports from Dr Gendall. The date range is 15 February 2016 to 3 May 2016 (before the decision of the CC to prosecute). Thus it was submitted that these documents appear to be investigative rather than being for the dominant purpose of a prosecution.

[24] In relation to withheld documents pursuant to s 16(1)(c)(ii) CDA, communications relating to the conduct of the litigation, there are none where this is the only claim to privilege.

[25] At paragraph 47 of his affidavit Mr Wallace refers to documents withheld under s 16(1)(c)(ii) CDA but he does not identify which particular documents he is referring to in the list. Mr Wallace refers to documents which discuss the price survey data (para 47.1). The surveys and what investigative staff understand from them is relevant to Bunnings' defence.

Documents withheld on the basis that disclosure was likely to prejudice the maintenance of law

[26] Bunnings argue that once an investigation has ceased (when charges were filed) there is no reason not to provide documents withheld under s 16(1)(a). Even more so in this case as the behaviour concerned has ceased. Thus there is no further offending to be detected.

[27] Mr Wallace referred to examples of documents withheld pursuant to s 16(1)(a) CDA, likely to prejudice the maintenance of law, in paragraph 35 of his affidavit. This included internal emails created from February 2015 between members of the investigation team about preparing documents for the Steering Group. Perceptive was not instructed at this stage. Mr Lindsay submitted that this suggested to Bunnings that the documents were evidential in nature and not about how the CC goes about its investigations, which is what Mr Wallace was conveying in his affidavit. Any documents relevant to how a sample size was selected, how it was proposed the survey

be undertaken are matters that will be part of the defence case at trial and therefore should be disclosed.

Analytical or evaluative material

[28] In relation to s 16(1)(c)(iii) CDA, analytical or evaluative material, Bunnings was concerned to see documents created in the process of constructing a survey or any other evidence that may be led at trial. Documents that post-date the decision to prosecute (28 June 2016) are not able to be withheld. Similarly those which predate any surveys cannot be analytical or evaluative material.

Submissions for the Commerce Commission

[29] Mr Brookie made submissions on behalf of the CC. He acknowledged that full disclosure must be made by the prosecutor (unless there was a reason not to disclose) and that a defendant is entitled to know the case against it. However that falls short of what he described as "admitting the defendant into the control room of the investigation or how the litigation is conducted".

[30] In terms of the listing of documents, the approach taken was that relevance is a low threshold and that a cautious and inclusive approach could be used when compiling the list. However relevant documents are not necessarily material evidence, particularly those documents relating to internal CC processes.

[31] The fact that a document may contain a discussion about "evidence" does not make it "evidence". How CC staff assess a survey, what they make of a survey and what they might do to support it are run of the mill conversations amongst CC staff and are not required to be disclosed.

[32] In the context of this case, the first survey was conducted in April/May 2015, the "HOED SURVEY". It concluded that Bunnings did not have the lowest prices 20% of the time. Discussions amongst CC staff about what they make of survey results and what else the CC might do to support those results are not required to be disclosed.

Litigation privilege

[33] Where the reason for withholding a document is a claim to litigation privilege, the fact that documents pre-date the decision of the Commissioners to prosecute (28 June 2016) is not determinative. Section 56(1) of the Evidence Act states that communication or information must be made, received, compiled or prepared for the dominant purpose of preparing for a proceeding or an <u>apprehended</u> proceeding (emphasis added).

[34] In *FMA v Hotchin & Ors* Winkelmann J discussed what was meant by an apprehended proceeding.

> [46] As to when a proceeding is "apprehended" for the purposes of s 56, it is clear that the mere spectre of eventual litigation is not enough for the privilege to trigger. As noted by Brooke LJ in *United States of America v Phillip Morris Inc (No.1):*
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> > It has been recognised on many occasions that there is a conflict between the need to enable clients to communicate freely with their legal advisers in relation to litigation and the need to ensure that all relevant material is before the court: see, for example, Lord Wilberforce in Waugh v British Railways Board at page 531-532 and Lord Simon at pages 535-537. The point at which litigation should be regarded as sufficiently likely for confidential communications between client and his lawyer to attract privilege on this ground therefore involves striking an appropriate balance between these two factors. The requirement that litigation be 'reasonably in prospect' is not in my view satisfied unless the party seeking to claim privilege can show that he was aware of circumstances which rendered litigation between himself and a particular person or class of persons a real likelihood rather than a mere possibility.
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> [47] In *Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart,* Tompkins J described the privilege as enlivened when the party regards litigation as probable.

[35] Mr Stuart Wallace, the Consumer Manager with the CC had filed an affidavit in which he deposed that by January 2015 the CC had conducted own pricing surveys. CC has already provided the methodology and results of this survey to the defendant. At paras 17 and 18 Mr Wallace deposed that on 27 May 2015 the CC received the HOED price survey from Bunnings (market research carried out by Bunnings). Once the CC had all this information plus the advertising, "... the investigation team

contemplated that a prosecution was likely: particularly in view of the fact that Bunnings had previously received a warning from the Commission". At para 19 Mr Wallace stated:

> These views were shared and confirmed at a meeting of senior investigations (investigators) and legal managers in July 2015.

[36] In the latter part of 2015 and early 2016 the CC was involved in an evidence gathering stage.

[37] In March 2016 the CC issued a Stop Now letter to Bunnings in accordance with its published *Competition & Consumer Investigation Guidelines,* notwithstanding that Bunnings had already received a warning. Mr Wallace described this as a chance for Bunnings to change its behaviour. There was a partial change in Bunnings' behaviour in May 2016.

[38] In May 2016 the CC received the results of the Mitre 10 price comparison surveys and in June 2016 the investigation team recommended to the Consumer Division of the CC that charges be laid.

[39] Mr Brookie submitted that communications and other documents including those of CC staff at least as far back as 2015 could rightfully be withheld on the basis of litigation privilege.

[40] Mr Brookie noted the wide definition of a prosecutor in s 6 CDA:

> Prosecutor means the person who is for the time being in charge of the file or files relating to a criminal proceeding; and includes –
>
> (a) any other employee of the person or agency by whom the prosecutor is employed who has responsibilities for any matter directly connected with the proceedings; and
>
> (b) any counsel representing the person who filed the charging document in the proceedings; and
>
> (c) in the case of a private prosecution, the person who filed the charging document and any counsel representing that person.

[41] In *MBI&E v Centerport Ltd*[5] Williams J said:

> … there is no doubt that drafts of evidence and discussion around the content of that evidence is generated in contemplation of litigation and will therefore be subject to litigation privilege.

Evaluation and analytic material

[42] It was accepted by the CC that the defendant was entitled to the methodology of price surveys and the results. However a line needed to be drawn between the evidence on the one hand and the internal communications, evaluation and analysis by CC staff.

[43] In terms of documents withheld under s 16(1)(c)(ii) CDA (see para [6] herein) Bunnings requested particulars relating to these documents which the CC had provided.

Maintenance of law

[44] In terms of documents dated post the decision to prosecute, if they relate to ongoing investigation, those may be withheld pursuant to s 16(1)(a) CDA. An investigation does not necessarily cease when charges are filed. Relying on *CC v Air NZ & Ors*[6]:

> … an investigation may be continuing once proceedings are issued. Whether an investigation is continuing is a question of fact …

[45] At para 27 of his affidavit Mr Wallace confirmed that the investigation continued after charges were filed. That was notwithstanding that in a letter dated 1 July 2016 the CC advised Bunnings that they were to be prosecuted and that the "investigation" was completed. He explained that meant the CC had enough evidence to bring a prosecution (para 49 Wallace affidavit). After the date of filing the prosecutions there were ongoing discussions and correspondence with Bunnings (para 50) and ongoing investigatory steps including reviewing Bunnings' ongoing conduct around the representations in issue.

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[5] *MBI&E v Centerport Ltd* [2014] NZHC 2751.
[6] *CC v Air NZ & Ors* [2011] NZCA 64 para 107.

Reply by Bunnings

Litigation privilege

[46] Mr Lindsay referred to the fact that discussions between Mr Lourie, a senior investigator and the CC were not subject to litigation privilege. That is because they are both witnesses. Mr Lourie is not a lawyer, so privilege on that basis cannot be claimed.

[47] In order for a claim to privilege on this basis, the CC had to satisfy the *dominant purpose test*. For example, the CC seeking an opinion from Professor Gendall in February 2016. Mr Lindsay submitted that the dominant purpose was not a prosecution, rather it was investigative in nature.

Air NZ case

[48] This case was about the powers of the CC in the exercise of its statutory powers to require persons to attend an interview. And whether s 98G of the Commerce Act 1986 contemplates an ongoing investigation. There is no equivalent provision in the Fair Trading Act which applies in this case.

Particulars of withheld documents

[49] The CC has to justify the claim to privilege and it should describe all documents in such a way as to claim privilege.

Documents withheld under s 16(1)(c)(ii)

[50] Bunnings' focus is on the evaluative or analytical content of the documents rather than temporal. When the application was made by Bunnings, a number of the documents did not have a date on them.

[51] I allowed Mr Brookie a brief opportunity to respond to the submission about discussions between two witnesses. He submitted that Mr Lourie is an investigator and as such he is not a witness of fact. That is the same as in the *Centrepoint* case where the communications were between a safety inspector and an expert.

Discussion and analysis

[52] I approach this matter on the basis that my first task is to determine the legal principles applicable to each category under which the prosecutor seeks to withhold the documents. In doing so I will canvass the relevance of two dates namely, 28 June 2016 which is when the Commissioners resolved to prosecute Bunnings, and 23 December 2016 when the charging documents were filed. Once that is achieved and only then, I will decide if I need to view the actual documents themselves.

Documents withheld under s 16(1)(a) Criminal Disclosure Act

[53] The relevant section says:

> **16 Reasons for withholding information**
>
> (1) A prosecutor may withhold any information to which the defendant would otherwise be entitled under this Act if—
>
> (a) disclosure of the information is likely to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences.

Affidavit of Stuart Malcolm Wallace

[54] Stuart Malcolm Wallace is a Consumer Manager in the Competition Branch of the Commission. Part of his job is to manage investigations into alleged offences under the FTA. He had oversight of the investigation that is subject to the charges. Over the 20 years he has worked for the Commission Mr Wallace has been either an investigator or manager of investigations.

[55] He described how investigations are carried out by the Commission. Explaining that investigators are assisted by in-house legal counsel advisers who provide legal advice, analysis and evaluation and who assist with decision-making.

[56] Mr Wallace set out some of the internal Commission processes that govern how decisions are made. Each investigation has a "Steering Group" comprised of senior investigation staff and lawyers. This group engages in discussions and correspond through the life of any case. These interactions can include what lines of enquiry are undertaken and strategies for obtaining information, evaluating evidence and statements received from suspects/defendants and non-parties, which experts and counsel to select, drafting of charging documents and summaries of fact.

[57] Mr Wallace stated at para (32) of his affidavit that:

> ...the free and frank exchange of ideas between staff who are leading the investigation and preparation of a case is an important part of the Commission being effective in reaching the right decisions, but the views and opinions expressed by Commission staff about the conduct of the investigation or proposed proceedings do not carry evidential value...

[58] Mr Wallace expressed his concern:

> ...that the provision of such documentation to defendants may compromise the integrity and confidentiality of the Commission's internal processes.
>
> - see para (33) Wallace affidavit.

[59] He went on to say (at para 34):

> Providing internal documentation of this kind to defendants would also likely have a chilling effect on the willingness of Commission staff to engage in internal decision-making processes, including expression of conflicting views, for fear of being used against the Commission at a later time. Such views are statements of opinion, are often preliminary or in draft form, and carry no evidential value.

[60] At para (35) of his affidavit, Mr Wallace gave examples:

> 35.1 Internal emails, from February 2015, between members of the investigation team about preparing documents for Steering Group meetings. Such emails would give third parties an insight into how the Commission approaches its investigations and internal decisions. The document contains some evaluative comments regarding the evidence but no evidence that has not been disclosed by other means. It is therefore likely to be of limited relevance to the defendant. This type of document that is routinely withheld in criminal proceedings under this head.

> 35.2 Emails between the lead investigator and the lead lawyer providing updates on the matter and the plan for how it would be progressed. These types of emails are not evidential in nature and discloses internal views of the Commission and insight into its strategy and investigative techniques. They are routinely withheld under this head.
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> 35.3 Internal Commission memoranda summarising progress on the matter and setting out discussion points for next steps, including contemplation of applicable FTA offence provisions. Such documents contain both evaluative material relating to the evidence gathered to that point, and second, internal information regarding the investigative process. They may also contain privileged material. This type of information is routinely withheld under this head.
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> 35.4 File notes of internal meetings where the attendees exchange views on various options to advance the matter, including, for example, different approaches to pricing surveys. These internal documents are routinely withheld from defendants under this head.
>
> 35.5 Internal emails from legal counsel at the Commission reporting and commenting on discussions/correspondence with representatives of Bunnings. These are internal communications intended only for Commission staff.

At para (36) Mr Wallace stated:

> Accordingly, the Commission holds as confidential all internal communications and, unless the information contains information of evidential significance that is not available from any other source, does not disclose this information to defendants.

Documents created after 23 December 2016

[61] Mr Wallace referred to Bunnings' claim that once charges were filed the investigation by the Commission ceased. He also said that the Commission does not necessarily accept that the changes to its advertising made by Bunnings mean it is not breaching the FTA. At para (38) Mr Wallace stated:

> ...that is not a matter that the Commission has yet reached a firm view on.

[62] Paras (39) and (40) of Mr Wallace's affidavit said:

> 39. Even if the Commission's investigation had concluded at the time that charges had been filed (which, for reasons explained above, is not accepted), the Commission continues to hold as confidential all documents that it had withheld in relation to the investigation up until that stage.

> 40. This is because the Commission seeks to maintain the confidentiality and integrity of its internal processes, regardless of the position of the individual defendant at the relevant time. Even if a particular defendant is no longer suspected of further offending, the Commission would seek to withhold such material from such defendants and their counsel because of the chilling effect it would have if disclosure would be ordered and because once such material is disclosed, the Commission cannot control the dissemination of it to third parties – including other potential suspects and/or defendants.

[63] The purpose of the FTA is set out in s 1A of the Act:

> (1) The purpose of this Act is to contribute to a trading environment in which—
>
> (a) the interests of consumers are protected; and
>
> (b) businesses compete effectively; and
>
> (c) consumers and businesses participate confidently.
>
> (2) To this end, the Act—
>
> (a) prohibits certain unfair conduct and practices in relation to trade; and
>
> (b) promotes fair conduct and practices in relation to trade; and
>
> (c) provides for the disclosure of consumer information relating to the supply of goods and services; and
>
> (d) promotes safety in respect of goods and services.

[64] The CC has responsibility to ensure compliance with the provisions of the FTA including to bring criminal charges where the provisions of the FTA are not adhered to. This is necessary in order to ensure the interests of consumers are protected and to prohibit unfair practices and to promote fair conduct in relation to trade.

[65] Prior to any decision to lay criminal charges, the CC commences an investigation which based on Mr Wallace's affidavit appears to be thorough, fair and with impressive checks and balances. For example communications between the members of the investigation team to collect all views on a particular aspect of the case including consultation with legal advisors before decisions are taken. This process enables people involved in the investigation to express their views and have them taken into account in the decision making process. The best decisions are made when this happens.

[66] Plans about how to progress an investigation (see paras 35.3 and 35.3 of Mr Wallace's affidavit for example) are sought to be protected from disclosure because they contain insight into the Commission's strategy and investigative techniques. The issue being that dissemination of these strategies and techniques could impact on the effectiveness of the investigation or a future investigation if it came public knowledge.

[67] One argument advanced on behalf of Bunnings Ltd was that once charges were laid there was nothing further to investigate, hence disclosure should occur once charges are laid. That proposition is on the basis that the maintenance of law, including the prevention, investigation and detection of offences refers to this case alone. I disagree.

[68] If that were so, there would be no point having the protections afforded by s 16(1)(a) because disclosure relates to charges before the Court. Thus all documents relevant to an investigation that preceded the charges would become disclosable. Thus there would be no point in having s 16(1)(a).

[69] The only case that was provided to me relevant to s 16(1)(a) was *R v Liu*[7]. The defendant had applied for disclosure of certain documents. Paras [9] – [13] of the decision read as follows:

> *Directives*
>
> [9] The Crown has withheld nine directives. I am satisfied that each of these documents relates directly to the manner in which the investigation was being progressed. Taken as a whole, they disclose strategy and techniques used by the police during the course of the investigation. I therefore consider that the Crown is entitled to withhold the directives under s 16(1)(a) of the Act.
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> *Documents 50066 and 50067*
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> [10] These documents are emails that relate directly to strategy that the investigative team proposes to use. The Crown is entitled to withhold them under s 16(1)(a) of the Act.

[7] [2014] NZHC 3154, a decision of Lang J, 10 December 2014.

> *Document 50007 – initial surveillance request*
>
> [11] This is an internal police document that, if disclosed, would reveal police investigative strategy. The Crown is therefore entitled to withhold it under s 16(1)(a) of the Act.
>
> *50123 – Summary of investigative events*
>
> [12] I am satisfied that this document reveals investigative strategy and may therefore be withheld under s 16(1)(a).
>
> *50160 – HSMU request*
>
> [13] This document will also, if disclosed, reveal investigative strategy. It may therefore be withheld under s 16(1)(a).

Para [16] is also relevant:

> 50236 – CMC 7
>
> [16] This is an internal document setting out the members of the police who are authorised to have access to interception communications. This document is not relevant and would, if disclosed, reveal investigative strategy and techniques. The Crown may therefore withhold it under s 16(1)(a) and 16(o)(ii).

[70] *Tonkin v Manukau District Court and New Zealand Police*[8] contained discussion of s 6(c) of the Official Information Act 1982 which gives statutory protection to the disclosure of documents which would be likely to prejudice the maintenance of law "…including the prevention, investigation and detection of offences…".

[71] Hansen J said at para [10] of the decision:

> In my view, it is necessary and desirable that police officers should be able to communicate internally in writing without fear that matters of opinion and comment will later be disclosed. I see it as necessary to the efficient workings of the police and in no way contrary to the right to a fair trial for internal memoranda to be protected from disclosure in proper cases. Informal communications in which tentative, provisional and subjective views are expressed, must be a necessary part of the investigation and detection of offences. As long as they do not contain evidence which is not available from other sources, I see no threat to the administration of justices in their being protected by s 6(c) of the Act.

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[8] M437/SW01 Auckland High Court 26 July 2001 per Hansen J.

[72] I agree with counsel for the prosecutor that those documents which have protection under s 6(c) Official Information Act applies equally under s 16(1)(a) Criminal Disclosure Act. Both refer to the same category of documents.

[73] Based on the *Tonkin* and *Liu* cases and my reasoning in paras [63] – [68] above I summarise the issues identified by Mr Wallace which fall within s 16(1)(a) because they fall within the category of "investigative strategy or techniques" as follows:

(i) discussions and correspondence amongst Commission staff about the lines of enquiry to be undertaken and strategies for obtaining information;

(ii) documents such as emails between members of an investigation team, preparing documents for a steering group which would give third parties an insight to how the Commission approaches its investigations and internal decisions including those that contain evaluative comments regarding the evidence;

(iii) emails between lead investigator and lawyer providing updates and the plan for how it would be progressed (presumably "it" means the investigation), which would disclose the internal views of the CC and inside into its strategy and investigative techniques;

(iv) internal information regarding investigative process;

(v) notes of internal meetings where views are exchanged on various options to advance an investigation, including different approaches to pricing surveys.

unless the document contains information of evidential significance not available from another source.

[74] That leaves the following in Mr Wallace's affidavit which do not at first blush appear to fall within s 16(1)(a):

(a) comments about the evidence – other than evidence already disclosed to the defendant (para 35.1);

(b) privileged material (para 35.3);

(c) internal communications intended only for Commission staff.

I will return to these categories of documents in due course including because they are covered in the remaining categories of reasons why documents have been withheld by the CC.

Documents withheld under a claim to litigation privilege

[75] Section 16(1)(c)(ii) Criminal Procedure Act says:

> (1) A prosecutor may withhold any information to which the defendant would otherwise be entitled under this Act if—
>
> …
>
> (c) the information is—
>
> (ii) a communication dealing with matters relating to the conduct of the prosecution and is between—
>
> (A) the prosecutor and another person employed by the same person or agency that employs the prosecutor; or
>
> (B) the prosecutor and any adviser to the prosecutor.

[76] There are three documents withheld under the provision. They are all emails and are described as "internal Commission correspondence".

[77] The two dated 1 July 2016 and 4 July 2016 are also withheld pursuant to s 16(1)(a) (see paras [53] to [68] herein). Thus on the face of the list they appear to be a mixture of investigative techniques and strategy and communications dealing with matters relating to the prosecution.

[78] For Bunnings the focus is on the word "prosecution" in s 16(1)(c)(ii) the wording of which is set out in para [6] herein. Given that the decision to prosecute was 28 June 2016, any documents which predate 28 June 2016 cannot be protected by s 16(1)(c)(ii).

[79] Reference was also made to *MBIE v Centerport Ltd* (see footnote 5) at para [46] where Williams J held that prosecution is about carriage of the proceeding – its direction and management, in relation to s 16(1)(c)(ii).

[80] Hence any documents that concern price survey data are evidence and not the direction or management of the prosecution.

[81] The Commission submitted that a "prosecution" does not necessarily mean when charges are filed which is consistent with practice. The responsible agency and prosecutor may communicate before charges are filed. If that meaning of prosecution is wrong, then communications which relate to the prosecution can predate it. Pointing out that the Commission "apprehended" criminal proceedings by 27 May 2015.

[82] The word prosecution is not defined in either the Criminal Disclosure Act or the Criminal Procedure Act 2011. The commencement of a criminal proceeding is set out in s 9 Criminal Disclosure Act which says:

> **9 Time of commencement of criminal proceedings**
>
> For the purposes of this Act, criminal proceedings are commenced at the earliest of—
>
> (a) the service of a summons:
>
> (b) the first appearance of the defendant in court following his or her arrest, or in response to the filing of a charging document:
>
> (c) the date on which the defendant is granted bail under section 21 of the Bail Act 2000:
>
> (d) the filing of a notice of hearing under, or in accordance with, section 21(8) of the Summary Proceedings Act 1957.

[83] "A prosecution exists where a criminal charge is made before a judicial officer or tribunal, and any person who makes or is actively instrumental in the making or prosecuting of the charge is deemed to prosecute it, and is called the prosecutor". See Halsbury's Law of England (4th Edn) (Reissue) para 460.

[84] Prosecution is defined in the Shorter Oxford English Dictionary (Fifth Edition) 2002:

> 1. The following up, continuation, or pursuit of a course of action etc with a view to its completion.
>
> ...
>
> 5. Law. The institution and conducting of legal proceedings in respect of a criminal charge in a court. The institution and conducting of legal proceedings against a person or in pursuit of a claim, an instance of this. Also, the prosecuting party in a case.

[85] In light of the above paras [82] – [84] herein the way in which the word prosecution is used in s 16(1)(c)(ii) supports an interpretation that it is connected to the bringing of a criminal charge. Without one, there is nothing "to prosecute". On the face of it, consideration must be afforded to the submission that any internal CC communications that predate the laying of criminal charges which was 23 December 2016 would not be protected by this subsection.

[86] The three documents in issue fall inside the month of July 2016 which is after the date the Commissioners agreed a prosecution should be brought. The provision concerned (s 16(1)(c)(ii)) contains the phrase "dealing with matters relating to the prosecution". In my view that covers communications that relate to the bringing of criminal charges including before they are filed. This is consistent with the definition of a prosecution in a legal sense (see para [84] herein). I accept the submission of the CC that communications about a prosecution can occur after a decision to prosecute has been made but before charges are filed.

[87] Mr Wallace has deposed that the investigation continued including after the charges were laid (23 December 2016) so it may be that claims under s 16(1)(a) as well is possible if the emails are communications between members of the prosecuting

agency about both investigative techniques and strategy and communications dealing with matters relating to the conduct of the proceeding.

[88] The third document dated 22 July 2016 is also withheld under s 56 Evidence Act. So a mixture s 16(1)(c)(ii) and s 56 Evidence Act. The reasons for withholding are a mixture of communications dealing with matters relating to the conduct of the prosecution by persons employed by the CC and litigation privilege. The two may be able to co-exist.

Litigation privilege

[89] Section 16(1)(j) and s 56 Evidence Act 2006 ("EA") work in together. Section 56 Evidence Act 2006 says:

> **56 Privilege for preparatory materials for proceedings**
>
> (1) Subsection (2) applies to a communication or information only if the communication or information is made, received, compiled, or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding (the proceeding).
>
> (2) A person (the party) who is, or on reasonable grounds contemplates becoming, a party to the proceeding has a privilege in respect of—
>
> (a) a communication between the party and any other person:
>
> (b) a communication between the party's legal adviser and any other person:
>
> (c) information compiled or prepared by the party or the party's legal adviser:
>
> (d) information compiled or prepared at the request of the party, or the party's legal adviser, by any other person.
>
> (3) If the proceeding is under, or to be under, Part 2 of the [Oranga Tamariki Act 1989] or the Care of Children Act 2004 (other than a criminal proceeding under that Part or that Act), a Judge may, if satisfied that it is in the best interests of the child to do so, determine that subsection (2) does not apply in respect of any communication or information that the Judge specifies.

[90] There are two requirements that must be met:

(i) the communication or information must be made, received, compiled or prepared for the dominant purpose of;

(ii) preparing for a proceeding or an apprehended proceeding (emphasis added).

A proceeding or an apprehended proceeding

[91] There are 54 documents withheld under a claim to litigation privilege, s 56 Evidence Act. For 31 of the documents it is the only claim to privilege. They are all communications with expert witnesses for the most part and predominantly Dr Gendall who will give expert evidence on market research for the Commission.

[92] The first in time (September 2015) is described in the list as a generic letter of instruction. Then follows correspondence with Perceptive, a company which completed a survey for the CC and a letter to Dr Gendall. The affidavit evidence of Mr Wallace is that by July 2015, a meeting of senior investigators and senior managers confirmed that prosecution was "likely".

[93] For Bunnings, the submission was made that at this time the CC was in an investigation mode and not "litigation". Moreover Bunnings want to see these documents as instructions to experts as to how the study or survey is to be constructed may be relevant.

[94] If the 2015 communications between Dr Gendall and the CC are to assist the prosecutor in conducting the trial then they are protected by litigation privilege (see *Centerpoint* case para [52]).

[95] Set out below is a chronology produced by me but largely based on the affidavit evidence of Mr Wallace:

16 February 2014	Complaint by Mitre 10 that Bunnings continuing to make lowest prices claims to the market.
25 November 2014	Investigation commenced by CC into allegations that Bunnings was misleading customers by offering lowest prices when it did not.
January 2015	CC conducts its own price scoping survey.
27 May 2015	CC receives info from Bunnings regarding price surveys carried out by Hoed Research NZ on its behalf. These surveys confirmed Bunnings did not have lowest prices on a material number of products and had been made aware of this. The investigation team contemplated that a prosecution was likely.
July 2015	Meeting of senior investigators and legal managers confirmed prosecution likely.
October 2015	CC continues to gather evidence for the contemplated prosecutions.
6 October 2015	Perceptive instructed to carry out survey.
October/November 2015	CC receives confidential price comparison information from Mitre 10 – which indicated a more significant level of breach than was disclosed in Bunnings own surveys.
February 2016	Results of Perceptive survey available.
February 2016	CC instructs Professor Gendall to provide an expert marketing opinion – contemplated it would form the basis for a brief – expert witness.
March 2016	"Stop Now" letter to Bunnings.
6 May 2016	Mr Wallace says Bunnings partially changed its conduct.
May 2016	Mitre 10 provides CC with the results of its price surveys – Bunnings did not have the lowest prices – on average 33% of the items.
22 June 2016	Investigation team recommend to the Consumer Division that charges should be laid.
28 June 2016	Commissioners resolve to prosecute Bunnings

1 July 2016	Bunnings advised that charges would be laid.
July – December 2016	CC and Bunnings engaged in communications.
23 December 2016	Charges filed.

[96] The mere spectre of eventual litigation is not enough to trigger that a proceeding is "apprehended" (see Winkelmann J, *FMA v Hotchin* – para [34] herein). Her Honour approved the dicta of Tompkins J that the privilege is enlivened which litigation is "probable" (see para [47]) in the *Hotchin* case.

[97] In *The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd*[9] it was emphasised that whether an investigation can be equated with a reasonable contemplation that a person will be prosecuted depends on the facts. And that whether a prosecution is likely to follow an investigation must be considered on a case by case basis.

[98] On 25 January 2018 the English Court of Appeal delivered a decision in *R v Paul Jukes*[10]. On appeal the defendant challenged the ruling of the trial Judge to admit a statement made by him in a trial concerned with his liability for a fatal workplace accident (the deceased was crushed in a baling machine). In particular whether or not he had responsibility for health and safety at the relevant time. The statement was prepared by the solicitors who acted for his employer at the time and it contained an acceptance that he was responsible for health and safety on site including the implementation of site safety and working practices. The statement was dated 9 February 2011.

[99] The Court held that the document was not privileged because there were no investigations or proceedings in existence at the time. The appellant was not interviewed by the police and the Health and Safety Executive until June 2012, some 16 months after the statement was in the course of the decision the Court approved statements made by Andrews J in *SFO v ENRC*.

[9] [2017] EWHC 1017 (paras [15] and [16] herein).
[10] [2018] EWCA Crim 176.

[100] Bunnings contend that the decision in *Jukes* supports its view that a document will only attract litigation privilege:

> (1) once litigation is in progress or reasonably in contemplation;
>
> (2) the relevant communication or document is made or created with the sole document purpose of conducting that litigation;
>
> (3) the litigation is adversarial, not investigatory or inquisitorial. Further that criminal proceedings cannot be started unless and until the prosecutor is satisfied that there is a sufficient evidential basis for prosecution and the public interest test is met.

[101] The CC submitted that neither of the English cases change the law in relation to privilege. That the *Jukes* case is simply an example of a party not being able to establish that litigation was reasonably in apprehension at the time. Here the unchallenged evidence of Stuart Wallace is that litigation was apprehended from around May 2015.

[102] Mr Wallace's evidence is that prosecution was contemplated on 27 May 2015 and likely in July 2015. Over the following seven months the Commission continued to gather evidence, specifically:

> (i) instructed Perceptive to carry out a price survey;
> (ii) received the price comparison information from Mitre 10;
> (iii) received the survey results from Perceptive;
> (iv) instructed Dr Gendall to provide an expert marketing opinion.

The "stop now" letter was sent to Bunnings in March 2016.

[103] The word "likely" is the best way to determine if a proceeding is contemplated. It was the word used in the *ENRC* and *Jukes* cases and has a comparable meaning to "probable". (see *FMA v Hotchin*). At the earliest the date is July 2015. At the very latest, is that the "stop now" letter in March 2016 meant litigation was likely. I need to decide as a matter of fact which date applies.

[104] On the basis of the chronology the receipt of the HOED surveys in late May 2015 seems to be the first date when the CC was in receipt of data that Bunnings Ltd did not have the lowest prices on a material number of products. There followed the claim by Mr Wallace that prosecution was contemplated and later "likely".

[105] Based on the material I have seen so far, I agree a date in July 2015 is when a prosecution was "likely".

Dominant purpose test

[106] Mr Lindsay submitted that whether a document was for the "dominant purpose" of a proceeding was not clear from Mr Wallace's affidavit. What is apparent from the list itself is that Dr Gendall (who will be a witness for the CC) was sent a letter of instruction by the CC in a letter dated 12 February 2016. A document described as a draft report – Gendall is dated 15 February 2016. During all of April and early May there is substantial correspondence between the two. Dr Gendall is going to be an expert witness for the Commission at trial. However as far back as September 2015 the Commission was in correspondence with Dr Gendall.

[107] The issue for me is whether some or all of this material meets the dominant purpose test which will have to be based on the content of the document.

Documents withheld pursuant to s 16(1)(c)(iii)

[108] Bunnings concern here is to see documents created in the process of constructing a survey or any other evidence that may be led at trial.

[109] In opposition to Bunnings' application is an affidavit by Wiremu Joseph Holder Lourie who is a Senior Investigator with the Competition Branch of the CC. He led this investigation and has also been involved in the prosecution. He reviewed all 46 of the documents in issue and also checked on some dating issues.

[110] As to the dating issues, some documents were coded as 00/00/0000. Mr Lourie explains that this is because there is no date apparent on the face of the document. He was however able to confirm when each document was last modified. Those dates all predate the filing of charges.

[111] In relation to the substance of the document, Mr Lourie confirms that they are all internal documents containing analytical or evaluative material. And that none of them contain primary evidence relating to the case. He attached to his affidavit a table giving further details of what these documents contain.

[112] Bunnings sought to divide a temporal line between the investigation and the prosecution. The response of the CC was two-fold. Firstly that s 16(1)(c)(iii) itself which identifies the date the defendant <u>is charged</u> (emphasis added) rather than the decision to charge.

[113] Secondly that the investigation can continue after the decision to charge has been made (as has happened here). This is because as the charges and the summary of facts is prepared, new issues arise that cause the agency staff to stop, analyse and evaluate the case in order to make the best decisions for the prosecution.

[114] Whether the investigation continued after charges were laid is a matter of fact. Similarly, if the documents contain primary evidence not already disclosed is also a fact. Matters which can only be resolved on sighting the documents themselves.

[115] I said at para [52] of this decision that once I had determined the applicable legal principles, I would decide whether I should look at the documents themselves. I have come to the decision I must do that because there are many unknowns for example the two matters referred to in the preceding paragraph, whether the dominant purpose test is met in relation to privileged documents.

[116] That has included looking at the additional documents provided to me by the CC under cover of a letter from Mr Brookie dated 26 March 2018 (refer to my minute dated 9 March 2018).

Documents themselves

[117] Document 1 – Withholding claims pursuant to s 16(1)(a) and s 16(1)(c)(iii) both upheld.

[118] Document 2 – Withholding claim s 16(1)(c)(iii) upheld provided that if the CC wishes to use any of the "survey results and other evidence" contained in this document in the substantive case and it has not been otherwise disclosed, it should be. The CC advised that on 26 March 2018 that four screen shots (photos 3-6) will be disclosed. Other evidence has previously been disclosed.

[119] Document 3 – withholding claim s 16(1)(a) upheld.

[120] Document 4 – Withholding claim s 16(1)(a) and s 16(1)(c)(iii) upheld. I am not persuaded that litigation privilege applies. In particular because of the "dominant purpose test" in s 56 of the Evidence Act 2006. This document is actually dated 25 June 2015, not 29 June 2015 as per the list.

[121] Document 5 – On 26 March 2018 the CC confirmed that this is a duplicate of document 4.

[122] Document 6 -Withholding claim pursuant to s 16(1)(a) upheld.

[123] Document 7 – Withholding claim s 16(1)(a) upheld.

[124] Document 8 – Withholding claim s 16 (1)(a) upheld.

[125] Document 6, 7 and 8 are in fact notes of meetings of personnel involved in the investigation, withholding claim s 16(1)(a) upheld.

[126] Document 9 – I am satisfied from a previous document that there was an apprehended proceeding by September 2015. On that basis the claim to litigation privilege is upheld. In my minute dated 9 March 2018 I asked the CC to review

whether the specifications for the price surveys as set out in paragraphs (5) – (9) of that document were the same as the final instructions to Perceptive and whether this information should be disclosed to Bunnings. The response was that they were draft guidelines withheld under litigation privilege. Further that email chains previously disclosed as CC.BUN.01.1845 and CC.BUN.01.1642 reflect that instructions to Perceptive changed over time. Accordingly withholding claim as to litigation privilege is upheld.

[127] Document 10 – Withholding claim to litigation privilege upheld as per document 9.

[128] Document 11 – In my minute of 9 March 2018 I said that this document did not match the description in the list. On 28 March 2018 the CC confirmed that was so. This document was part of a communication with Perceptive and litigation privilege is claimed. Given the date of the document (September 2015) that claim is upheld.

[129] Document 12 – Withholding claim s 16(1)(a) and s 16(1)(c)(iii) upheld. I would also have upheld a claim to litigation privilege in relation to this document.

[130] Document 13 – Withholding claim pursuant to s 16(1)(c)(iii) and litigation privilege upheld.

[131] Document 14 – Withholding claim s 16(1)(c)(a) upheld and I also uphold a claim to litigation privilege.

[132] Document 15 – This contains some of the same information as in Document 14 and therefore the withholding claim pursuant to s 16(1)(c)(a) and litigation privilege upheld.

[133] Document 16 – Withholding claim to litigation privilege upheld. This document refers to an apprehended Court proceeding and it is the dominant purpose of the letter.

[134] Document 17 – Upheld for the same reasons as document 16. This is a response from Dr Gendall to the Commission.

[135] Document 18 – Withholding claim to litigation privilege upheld. This was enclosed with document 17.

[136] Document 19 – This document discusses CC's strategy (s 16(1)(a)) and was prepared for the dominant purposes of litigation at a time when there was an apprehended proceeding. Both withholding claims upheld.

[137] Document 20 – Withholding claim s 16(1)(a) and s 16(1)(c)(iii) upheld.

[138] Document 21 - Withholding claim to litigation privilege upheld.

[139] Document 22 – This relates to an OIA (Official Information Act) request in mid-2016. I sought further information about this document. Having seen the attached draft letter, I am satisfied that the claim to withholding pursuant to s 16(1)(a) is upheld because it contains communications which has express tentative provisional and subjective views of the type described by Hansen J in *Tonkin v Manukau District Court* (see para [71] herein). Because this is a draft response to an OIA request, I was reluctant to uphold the claim to litigation privilege. The content in the draft letter refers to surveys undertaken by the CC both internally and externally. These are the same surveys the parties are aware of in relation to the criminal charges. Therefore the claim to litigation privilege is upheld.

[140] Document 23 – This is the same document as document 22 with a brief comment from an additional person. I uphold the claims to s 16(1)(a) and litigation privilege for the reasons set out in relation to document 22.

[141] Document 24 – In my minute dated 9 March 2018 I required more information about this document from the CC. The attachment is a letter from Buddle Findlay dated 30 March 2016 at the time. The primary document seeks comment in relation to the letter and as such the internal communication is clearly covered by both litigation privilege and s 16(1)(a).

[142] Document 25 – Litigation privilege upheld.

[143] Document 26 – This document also relates to the OIA request. However it also contains reference to the proceeding and the Mitre 10 survey data. So it is covered by litigation privilege and it is also able to be withheld under s 16(1)(a).

[144] Document 27 – Withholding claims pursuant to s 16(1)(a) and litigation privilege upheld.

[145] Document 28 – Withholding claims pursuant to s 16(1)(a) and litigation privilege upheld.

[146] Document 29 – Withholding claims pursuant to s 16(1)(a) and litigation privilege upheld.

[147] Document 30 – Withholding claims pursuant to s 16(1)(a) and litigation privilege upheld.

[148] Document 31 – Withholding claims pursuant to s 16(1)(a) and litigation privilege upheld.

[149] Document 32 – Withholding claim to litigation privilege upheld. It appears to enclose document 33.

[150] Document 33 – Withholding claim to litigation privilege upheld. These are attachments to document 32.

[151] Document 34- Withholding claim to litigation privilege upheld.

[152] Document 35 – Withholding claim to litigation privilege upheld.

[153] Document 36 – Withholding claim to litigation privilege upheld.

[154] Document 37 – Withholding claim to litigation privilege upheld.

[155] Document 38 – Withholding claim to litigation privilege upheld.

[156] Document 39 Withholding claim to litigation privilege upheld.

[157] Document 40 – Withholding claim to litigation privilege upheld.

[158] Document 41 – Withholding claim to litigation privilege upheld.

[159] Document 42 – Withholding claim to litigation privilege upheld.

[160] Document 43 – Withholding claim to litigation privilege upheld.

[161] Document 44 – Withholding claim to litigation privilege upheld.

[162] Document 45 – Withholding claim to litigation privilege upheld.

[163] Document 46 – Withholding claim to litigation privilege upheld.

[164] Document 47 – Withholding claim to litigation privilege upheld.

[165] Document 48 – Withholding claim to litigation privilege upheld.

[166] Document 49 – Withholding claim to litigation privilege upheld.

[167] Document 50 – Withholding claim to litigation privilege upheld.

[168] Document 51 – Withholding claim to litigation privilege upheld.

[169] Document 52 – Withholding claim to litigation privilege upheld.

[170] Document 53 – Withholding claim to litigation privilege upheld.

[171] Document 54 – Withholding claim to litigation privilege upheld.

[172] Document 55 – Withholding claim s 16(1)(a) and litigation privilege upheld.

[173] Document 56 – The attachment referred to in the document was not enclosed. This has now been provided. The email is validly withheld under litigation privilege and s 16(1)(a). The information in the attachment appears to be evidential. If this information has not been disclosed elsewhere, it should be.

[174] Document 57 – The email dated 30 May 2016 refers to an attached letter which is not enclosed. The attached letter is dated 30 May 2016 and is from Bunnings to the CC. The email is validly withheld pursuant to s 16(1)(a) and litigation privilege.

[175] Document 58 – Withholding claim s 16(1)(c(iii) and litigation privilege upheld.

[176] Document 59 – I have been advised by the CC this is identical to document 58 so the same withholding claims are upheld.

[177] Document 60. The CC has confirmed this document attaches a duplicate of document 58 so the claim to litigation privilege is upheld.

[178] Document 61 – The attached has now been provided. Document 61 itself is validly withheld pursuant to s 16(1)(a) and s 16(1)(c)(ii). The spreadsheet appears to be evidential and if it has not been disclosed elsewhere, it should be.

[179] Document 62 – The email is validly withheld pursuant to s 16(1)(a), s 16(1)(c)(ii) and litigation privilege. The attached document is the same document attached to document 61. The same comments made there apply.

[180] Document 63 - Withholding claim under s 16(1)(c)(iii) upheld. Provided that this is not evidence that is not disclosed elsewhere.

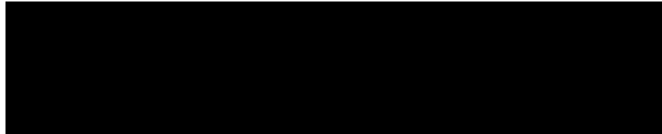
[181] Document 64 - Withholding claim s 16(1)(c)(iii) and litigation privilege upheld.

[182] Document 65 – The attached document is a letter from Bunnings to the CC dated 22 July 2016. Withholding claims pursuant to s 16(1)(c)(iii) and litigation privilege upheld.

[183] Document 66 - Withholding claim s 16(1)(a) and litigation privilege upheld.

[184] Document 67 - Withholding claim s 16(1)(c)(iii) upheld. I would also have upheld a claim to litigation privilege.

Dated at Auckland this 24th day of April 2018 at 10.30 am/~~pm.~~



District Court Judge