



DECISION

Fair Work Act 2009
s.394—Unfair dismissal
s.739 – Dispute resolution

Mr James Crafti

v

Cohealth Limited

(C2024/6415; U2025/11346)

DEPUTY PRESIDENT FAROUQUE

MELBOURNE, 31 OCTOBER 2025

Application for order to produce documents— whether claim for legal professional privilege – whether privilege waived – order for production issued

Background

[1] James Crafti is the applicant in a dispute notification to the Commission under s 739 of the *Fair Work Act 2009* (Cth) (the **Act**) and a dispute resolution procedure in an enterprise agreement. Mr Crafti is also an applicant in an unfair dismissal application made to the Commission under s 394 of the Act. The respondent in both applications is Cohealth Limited.

[2] Mr Crafti’s dispute notification to the Commission was made prior to his dismissal.

[3] There will likely be some overlap in respect of evidence and issues between the dispute notification and the unfair dismissal. Consequently, they will be heard together, with the evidence in one matter being evidence in the other. The parties were at one in respect of this course, which as Cohealth submitted, would be the most time and cost-effective way for the Commission to deal with both matters.

[4] Mr Crafti has applied to the Commission for an order for production of documents under s 590(2)(a) of the Act. Mr Crafti seeks an order¹ requiring cohealth to produce a report prepared by Mr Daniel Fawcett of counsel (the **Fawcett Report**) and associated materials² relating to an investigative process conducted by Mr Fawcett arising from a complaint made against Mr Crafti.

[5] Cohealth asserts a client legal privilege in respect of the Fawcett Report and any associated materials.³ The precise privilege claim made by Cohealth is one of legal advice privilege.⁴ Cohealth do not make a litigation privilege claim. Cohealth object to the making of an order for production directed to the Fawcett Report and associated materials based on a legal advice privilege. Cohealth also reject any suggestion that it has waived privilege.

[6] In support of its privilege objection, cohealth rely on a witness statement of Ms Sally Mizzi (Senior Human Resources Business Partner) of cohealth dated 8 April 2025. Ms Mizzi's witness statement was filed by cohealth in support of the substantive matters arising in the dispute notification. However, at the hearing on 3 October 2025, counsel for cohealth confirmed that Ms Mizzi's witness statement was before me in dealing with the privilege claim. Ms Mizzi has been the human resources practitioner involved in the disciplinary process the subject of Mr Crafti's dispute notification.

[7] Cohealth also rely on a Witness Statement of Mr Calum Woods (Senior Associate, Lander & Rogers) dated 7 October 2025. Lander & Rogers are solicitors for cohealth in respect of the dispute notification and the unfair dismissal.

Factual Matters

[8] Cohealth is a not-for-profit community health organisation which provides health and support services. Cohealth conducts a drop-in space known as Innerspace in Collingwood, Victoria. Innerspace provides health and support services for people who use drugs including medical, counselling, nursing and family drug support.

[9] Mr Crafti was employed by cohealth as a Community Health Worker between 18 March 2019 until his dismissal effective 19 June 2025. Mr Crafti worked at Innerspace. His duties broadly include assisting clients of cohealth who attended Innerspace. Mr Crafti is employed under the SACS EA.

[10] Clause 13 (Dispute Settling Procedures) of the SACS EA specified a dispute resolution procedure which applies to "*workplace grievances including but not limited to*" various subjects including "*(a) this Agreement*" and "*(b) Disciplinary action*". In the event that a dispute could not be resolved at the workplace, the dispute resolution procedure permitted a "*party to the dispute*" to refer the matter to the Commission for conciliation and where conciliation was not able to resolve the dispute, arbitration. Clause 13 also contained an obligation concerning unsatisfactory work performance and behaviour, which was in the following terms:

13.6 Unsatisfactory Work Performance and Behaviour

- a) *For matters involving unsatisfactory work performance or behaviour, disciplinary action will be consistent with the principles of procedural fairness and natural justice.*
- b) *The Employer will advise the Employee of the concerns in question and any allegation in writing. Where applicable, the Employer will also provide the Employee with any relevant material which forms the basis of the concerns.*

[11] On 26 June 2024, there was an interaction between Mr Crafti and a client of cohealth at Innerspace. On that day, the client made verbal complaint against Mr Crafti regarding the interaction.⁵

[12] At some point between 26 June 2024 and 9 July 2024, cohealth determined to commence an internal investigation into the complaint against Mr Crafti. Ms Mizzi's statement does not identify who at cohealth made this decision. Ms Mizzi's statement styles the internal investigation as a "*Preliminary Investigation*". I don't understand her to mean that this decision to conduct an internal investigation was then 'preliminary' in the sense of a scoping investigation to be conducted before a final investigation. In that regard, the correspondence

sent by cohealth, in the period 9 July 2024 and 1 August 2024, to Mr Crafti or his union representative clearly conveys that the internal investigation was intended to be the investigation into the complaint against Mr Crafti.⁶

[13] On 9 July 2024, cohealth sent Mr Crafti a letter dated 9 July 2024⁷ entitled “*Re: Alternative Duties Pending Formal Investigation*” informing him that cohealth has been notified of concerns regarding his interactions with a client, that “*due to the nature of these concerns cohealth has an obligation to undertake an investigation*” [emphasis added], that the alleged interaction had left the client feeling uncomfortable and unwelcome, cohealth would seek a response from Mr Crafti, Mr Crafti would be placed on non-client facing duties, following the investigation cohealth would determine the applicable outcome and notify Mr Crafti and such outcome may include disciplinary action including termination of employment. The letter notified Mr Crafti that the investigation was confidential and that Mr Crafti was directed not to discuss or share details of the process with any cohealth employees or its clients. The letter was signed by the cohealth Director – Community Based Drug and Alcohol.

[14] On 10, 11 and 15 July 2024, Ms Sally Mizzi (Senior HR Business Partner, cohealth) interviewed four cohealth employees relating to the interaction between Mr Crafti and the client on 26 June 2024 and received statements from each of those employees.⁸

[15] On 23 July 2024, Mr Rogut of cohealth emailed Mr Crafti⁹. Mr Rogut’s email was entitled “*Notice of meeting*” and stated that “*attached are the notice of meeting and accompanying witness statements.*” The email noted that a meeting will be held on 25 July 2024 and adverted to a previous conversation between Mr Crafti and Mr Rogut where Mr Crafti had apparently indicated that he may be unavailable on 25 July 2024. The email requested Mr Crafti to contact Ms Mizzi as soon as possible to confirm his attendance at the meeting. Ms Mizzi’s witness statement at [28] seems to indicate that the statements provided to Mr Crafti were in fact summaries reduced from more detailed witness statements taken by her.

[16] Attached to Mr Rogut’s email was a letter dated 23 July 2024 entitled “*Re: Formal investigation meeting to discuss allegations of misconduct*”. This letter, like the letter of 9 July 2024, was signed by the cohealth Director – Community Based Drug and Alcohol. The 23 July letter referred to concerns regarding Mr Crafti’s conduct and interaction with a client, noted that “[w]e have to have discuss these concerns with you in accordance with cohealth’s *Workplace Grievance and Misconduct Procedure (Please see attached)*” [emphasis added], referred to alleged breaches of the cohealth Code of Conduct, made four allegations concerning Mr Crafti’s interaction with the client on 26 June 2024, notified Mr Crafti of an investigation meeting on 25 July 2024 in order to give Mr Crafti an opportunity to respond to the allegations, indicated that the investigation meeting would be conducted by Mr Dean Rogut (Cluster Leader, cohealth) supported by Ms Mizzi, indicated that after considering Mr Crafti’s response a decision would be made to proceed with formal disciplinary action and reaffirmed confidentiality of the process including directing Mr Crafti not to discuss any information disclosed through the process to any cohealth employee or client. Attached to the letter was a copy of the Workplace Grievance and Misconduct Procedure, the Code of Conduct and summaries of witness statements taken by Ms Mizzi in her interviews with witnesses.

[17] The Workplace Grievance and Misconduct Procedure¹⁰ is a somewhat discursive document referring variously to misconduct procedures, standards of inappropriate behaviour,

grievance resolution procedures, employee rights, individual responsibilities, grievance resolution process, formal investigation, outcomes, and appeal processes. In any event, it appears that the following passages of the document are presently relevant:

PURPOSE

The purpose of this Workplace Grievance and Misconduct Procedure is to promote workplace harmony and reduce conflict by providing a clear and effective way for all employees to raise and resolve grievances.

cohealth is committed to ensuring a safe and professional work environment and ethical work practices that reflect our values.

cohealth will respond with due seriousness and urgency to performance or behaviour which constitutes misconduct or serious misconduct and the resolution of formal and informal grievances through a fair and consistent process, in line with the principles of natural justice.

This procedure establishes cohealth principles and processes for responding to allegations of misconduct, serious misconduct, and the resolution of grievances

SCOPE

This procedure is applicable to all cohealth staff, contractors, students and volunteers.

PROCEDURE

1. Misconduct and Serious Misconduct Procedure

- *Where an employee, volunteer or contractor becomes aware of conduct which may amount to misconduct or serious misconduct as defined in this procedure by another employee, the employee, volunteer, or contractor must advise their Manager, Management representative or HR Business Partner as soon as possible.*
- *The Management representative will investigate the matter confidentially, which may include conferring with relevant employees, including the person to whom the allegations have been made against, to ascertain the details.*
- *Where the Management representative believes an employee has committed misconduct or serious misconduct they must consult with senior management and their People Operations Business Partner.*
- *A recommendation may then be made to the relevant Senior Manager outlining the alleged breach of misconduct or serious misconduct and proposed options for resolution or a formal investigation.*

....

7. Formal Investigation

The formal investigation may be conducted by an internal or external investigative officer in close consultation with the Management representative and a People Operations Business Partner. The investigation will be undertaken with the utmost discretion and confidentiality and is to be completed within 28 days from the agreed commencement date of the investigation.

The Management representative and the People Operations Business Partner will ensure all parties are kept informed of time frames and actions. The People Operations Business Partner will provide written confirmation of closure of the investigation.

If a resolution is not reached through a formal process, the matter may be referred to the Director Workforce Operations if further action or discipline is required.

8. Outcomes

A grievance resolution may include:

- *An undertaking from the person that no further similar conduct will occur*
- *A mediated agreement with an agreed outcome and an action plan in place*
- *A reversal or alteration of the decision, if the grievance relates to a decision*
- *A formal apology*
- *Disciplinary procedures, including but not limited to termination of employment*
- *Training or coaching for employees on appropriate conduct at work and*
- *Monitoring of employees, or a combination of the above.*

9. Appeals Process

Where disciplinary action is the outcome following a workplace investigation, an employee may be able to appeal to have their case reviewed. The employee is to state formally in writing why they believe there should be an appeal process, clearly articulated why the conclusions drawn from the investigation were not valid.

The appeal will be review by an alternative third party who will be appointed to review the investigation report and supporting documents to confirm that the conclusions drawn were sound and substantiated by the evidence, or to overrule them.

[18] Mr Crafti is a member of the Australian Services Union (ASU). On 25 July 2024, Mr Kerman Daruwalla (ASU Organiser) emailed Mr Rogut and Ms Mizzi raising various issues including as to the adequacy of the statements obtained by cohealth, and because of the asserted absence of evidence, sought confirmation that cohealth would drop the internal investigation.

[19] On 25 July 2024, Ms Mizzi responded to Mr Daruwalla by email and conveyed that cohealth considered it had a reasonable basis to investigate, that cohealth would continue to investigate, that cohealth had provided Mr Crafti sufficient information to respond, and reaffirmed that if Mr Crafti did not respond cohealth would make a determination based on the information to hand¹¹.

[20] On 26 July 2024, Mr Crafti sent an email responding to Ms Mizzi's email, in which he asserted that cohealth was required by clause 13.6(b) of the SACS EA to provide procedural fairness and natural justice and asserted a lack of procedural fairness as there was no statement from the complainant client and the alleged vagueness in two of the four allegations.¹²

[21] On 1 August 2024, Ms Mizzi responded to Mr Crafti's email and asserted a sufficiency of the material provided by cohealth, noting that cohealth had provided Mr Crafti statements from two employees who Ms Mizzi noted had heard Mr Crafti's interaction with the client and statements from two employees who Ms Mizzi noted had spoken to the client. Ms Mizzi also in substance denied Mr Crafti's suggestion that two of the allegations were vague. Ms Mizzi indicated that cohealth considered Mr Crafti had had sufficient time to consider the information provided and sought his confirmation that he would attend an investigation meeting.¹³

[22] On 1 August 2024, shortly after receiving Ms Mizzi's email, Mr Crafti sent a reply email to Ms Mizzi in which he, amongst other things, asserted that he lacked confidence that the investigation processes "*are actually consistent with the EA*". In the email, Mr Crafti indicated that he was "*putting the entire investigation in dispute*" and sought a meeting to "*discuss the procedural issues only*".¹⁴

[23] Ms Mizzi indicates that "[f]ollowing Mr Crafti's objections to the Preliminary Investigation and refusal to attend an interview to provide a response, cohealth contacted its legal representatives, Landers and Rogers, for advice on how to proceed." Clearly, cohealth made this decision on 1 or 2 August 2025. Ms Mizzi's statement does not indicate who at cohealth made the decision to obtain legal advice from Lander & Rogers.

[24] On 2 August 2024, Ms Mizzi contacted Mr Woods of Lander & Rogers¹⁵. Mr Woods' statement recounts that Ms Mizzi asked for "*legal advice related to a complaint [cohealth] has received from a client about Mr Crafti*". Mr Woods further states "[s]pecifically, [cohealth]

asked me to provide legal advice on (amongst other things) its options to deal with Mr Crafti's refusal to participate in an internal workplace investigation conducted by [cohealth]".

[25] Mr Woods' recounts that on 9 August, on behalf of Lander & Rogers, he "*on behalf of Lander & Rogers, engaged Mr Daniel Fawcett of counsel to conduct a factual investigation into the complaint to enable Lander & Rogers to provide legal advice to cohealth about the complaint made against Mr Crafti*".¹⁶

[26] On 21 August 2024, cohealth instructed Lander & Rogers to engage Mr Fawcett.¹⁷ This is set out in Ms Mizzi's statement as follows:

43. On 21 August 2024, cohealth instructed Lander & Rogers to engage Mr Daniel Fawcett of Counsel (Mr Fawcett) to conduct a workplace investigation into the Complaint (Workplace Investigation)

[27] Ms Mizzi's statement does not set out who at cohealth decided that this instruction to Lander & Rogers be given. Furthermore, there is no express account in her statement of the reason that the instruction was given.

[28] On 21 August 2024, Lander & Rogers sent Mr Fawcett a letter¹⁸ formalising his engagement and setting out the terms of reference for the investigation. The terms of the letter from Lander & Rogers engaging Mr Fawcett contained the following terms:

Dear Daniel

Investigation for cohealth Ltd - Terms of Reference

- 1. We act for cohealth Ltd (cohealth).*
- 2. To enable us to provide legal advice to cohealth, we have been instructed to engage you to undertake a workplace investigation into its employee, Mr James Crafti (NSP/Community Development Worker).*

Relevant background

...

- 8. Mr Crafti declined to attend an interview with cohealth and has alleged that there is "no evidence" to support the Complaint. While not expressed in these terms, it appears that Mr Crafti is seeking that the Internal Investigation be summarily discontinued.*
- 9. Mr Crafti further alleged that he had been denied procedural fairness, and has enlivened the dispute resolution process in the Community Health Centre (Stand Alone Services) Social and Community Service Employees Multi Enterprise Agreement 2022. cohealth is currently engaged in this process however in our view this does not limit cohealth's ability to continue its investigation into the Complaint.*

...

Investigation

- 10. The scope of your investigation is to:
(a) review the Complaint and the relevant materials from the Internal Investigation;
(b) via our firm, request any additional material required;*

- (c) identify potential breaches by Mr Crafti of cohealth's policies or procedures, and the cohealth Code of Conduct;
- (d) identify any witnesses (including potential respondents to any alleged breaches of policies or procedures) required for interview;
- (e) in consultation with our firm, draft allegations against Mr Crafti by reference to potential breaches of cohealth's policies or procedures. We expect this is likely to involve the following materials:
 - (i) cohealth's Code of Conduct; and
 - (ii) Workplace Grievance and Misconduct Procedure.
- (f) investigate and make findings of fact regarding the allegations in accordance with the below process;
- (g) provide an investigation report to our firm which:
 - (i) consolidates all of the material gathered during the investigation process;
 - (ii) summarises and details the allegations;
 - (iii) outlines the investigation process;
 - (iv) in relation to the allegations, sets out your findings as to whether the allegations are substantiated, partially substantiated, not substantiated or unable to be determined, and the relevant evidence relied on to support your views;
 - (v) expresses a view on whether any substantiated allegations would be in breach of Mr Crafti's employment obligations pursuant to cohealth's policies and procedures;
 - (vi) includes all relevant attachments, such as transcripts of interviews and/or witness statements; and
 - (vii) is signed and dated.

Confidentiality

11. All interviews conducted, and documentation produced, throughout the process must be done in the strictest confidence.

...

[29] On 23 August 2024, Ms Mizzi sent Mr Daruwalla (ASU Organiser) an email¹⁹ responding to Mr Crafti's email of 1 August 2024. The email was copied to Mr Rogut and Mr Crafti. Ms Mizzi's email was in the following terms:

Hello Kerman,

cohealth write to you as James's representative, following on from James's email below whilst noting the dispute resolution procedure has been enlivened, which is being dealt with as a separate matter.

cohealth rejects there has been a denial of procedural fairness in this matter. The principles of procedural fairness/natural justice require: an unbiased investigator/decision-maker; a person to be provided with sufficient particulars to be able to respond to an allegation; and the opportunity to respond to the allegation/s, which have been afforded in this instance.

cohealth deems it entirely appropriate to continue the investigation and reach a concluded view about the conduct. However, given the concerns that have been raised in relation to the investigation to date and due to the serious nature of the allegations, cohealth has made the decision to engage an external independent investigator to finalise the investigation on our behalf.

cohealth will be in touch with you in due course to outline the next steps in relation to this matter.

(emphasis added)

[30] On 5 September 2024, Ms Mizzi forwarded Mr Crafti her email to Mr Daruwalla of 23 August 2025. Mr Crafti sent an email to Mizzi in response, in which he protested various

matters, sought details of the “*private investigating company and investigator*” and foreshadowed notifying a dispute to the Commission. On 5 September 2024, Ms Mizzi sent Mr Crafti an email which stated, “*I confirm the external investigator engaged to finalise the investigation is Daniel Fawcett (Barrister).*”²⁰

[31] In early September 2024, Mr Fawcett commenced interviewing witnesses.²¹

[32] On 11 September 2024, Mr Crafti lodged the dispute notification in the Commission.

[33] On 23 September 2024, the Commission conducted a conciliation in relation in the dispute notification.²²

[34] On 24 September 2025, the ASU wrote to Cohealth and raised issues and concerns. Amongst the matters raised by the ASU, was a request by Mr Crafti Cohealth’s permission to speak to colleagues about the allegations on the basis that he was aware of witnesses that “*have not been approached by CoHealth*”. In her witness statement, Ms Mizzi sets out that such a course would be highly unusual and goes on to say in relation to Mr Crafti’s request:

56. The purpose of engaging Mr Fawcett was so that he could make up his own mind about whether or not the allegations were substantiated after speaking to all of the relevant witnesses.

[35] On 3 October 2024, cohealth sent Mr Crafti an email and attached notice of allegations letter dated 3 October 2024²³. The letter notified Mr Crafti that he was required to attend an interview with Mr Fawcett on 9 October 2024. The letter included a Schedule of setting out seven allegations relating to the incident between Mr Crafti and the client. The Schedule included a statement that substantiated conduct may be a “*breach of cohealth’s Code of Conduct Policy and Workplace Grievance and Misconduct Procedure*”. Attached to the letter were copies of the Workplace Grievance and Misconduct Procedure and the Code of Conduct. The letter included the following text:

Dear James

Confidential investigation – Notice of allegations

- 1. Further to my letter to your union representative dated 26 September 2024, I confirm that cohealth Limited (**cohealth**) has received a complaint about your conduct that, if substantiated, may amount to misconduct or serious misconduct.*
- 2. After a preliminary assessment, Lander & Rogers, on behalf of cohealth, engaged Mr Daniel Fawcett of counsel (**Mr Fawcett**) to conduct an independent workplace investigation.*
- 3. I am writing to provide you with the details of the relevant allegations, and to advise you of the next steps in the investigation.*

Allegations

- 4. The details of the allegations made against you are set out in the schedule to this letter.*

...

Investigation outcomes

- 30. You will be informed of whether the allegations against you are substantiated when the investigation is complete.*

31. *If any of the allegations are substantiated, this may result in disciplinary action being taken against you, up to and including the termination of your employment.*

...

[36] On 7 October 2024, Mr Crafti emailed Ms Mizzi, the substance of which was to assert that the allegations now being made against him were a “*different set of events*” and referring to clause 13.5 of the SACS EA. Clause 13.5 provides that while a dispute procedure is being conducted, work shall continue normally. Mr Crafti indicated that if cohealth insisted on the interview proceeding on 9 October 2024, he would seek urgent relief in the Commission²⁴.

[37] On 7 October 2024, Ms Mizzi sent Mr Crafti an email acknowledging him that the allegations “*were different to those originally provided to you*” but explained that this difference had arisen because Mr Fawcett had obtained a statement from the client²⁵. Ms Mizzi further indicated that cohealth expected Mr Crafti to attend the interview on 9 October 2024 to provide a response to Mr Fawcett.

[38] On 8 October 2024, Mr Crafti emailed the Commission seeking urgent interim relief relating to the investigation, relying on clause 13.5 of the SACS EA.²⁶

[39] Mr Crafti did not attend an interview with Mr Fawcett on 9 October 2025.

[40] On 15 October 2024, a conference in the Commission was held in relation to the dispute notification. On 16 October 2024, the presiding Commissioner made a recommendation that the investigation interview between Mr Crafti and Mr Fawcett proceed, Mr Crafti bring a support person and that the interview be conducted on 25 October 2025 or as soon as practicable thereafter.²⁷

[41] On 25 October 2024, Mr Fawcett conducted an investigation interview with Mr Crafti. A further meeting between Mr Fawcett and Mr Crafti appears to have occurred on 21 November 2025.

[42] On 12 December 2024, Mr Woods received a copy of the Fawcett Report from Mr Fawcett.²⁸ Mr Woods indicates that he provided legal advice to cohealth based on the Fawcett Report. Mr Woods’ Statement is silent as to whether or not Lander & Rogers provided the Fawcett Report to cohealth.

[43] Ms Mizzi’s Statement identifies that Mr Carlo Demaio, cohealth’s Executive Lead Strategy and Development decided to issue Mr Crafti with a warning and Performance Improvement Plan (**PIP**). Ms Mizzi’s Statement does not set out what Mr Demaio had before him in making such decision including whether he had a copy of the Fawcett Report. Ms Mizzi’s Statement is silent as to whether or not Lander & Rogers provided the Fawcett Report to cohealth.

[44] On 19 December 2024, cohealth sent Mr Daruwalla (ASU Organiser), a letter setting out the outcome of the investigation (**Investigation Outcome Letter**)²⁹. The Investigation Outcome Letter identified that two allegations (allegation one and seven) were substantiated, one allegation (allegation two) was partially substantiated, and four allegations were not substantiated. The letter also identified evidence relied on for the making of the findings. The

Investigation Outcome Letter notified Mr Crafti that he was issued with a written warning and placed on a PIP. The Investigation Outcome Letter requested Mr Crafti to keep the process and findings confidential. In respect of the two substantiated and one partially substantiated findings, the findings were delivered in a common style (under the headings of “Allegation”, “The Evidence” and ‘Finding”). I set out below extracts of the Investigation Outcome Letter indicate the manner in which the “Allegation”, “The Evidence” and ‘Finding was set out under Allegation 1:

Dear James,

Re: Investigation Outcome

Thank you for attending the meeting on 25 October 2024 and 21 November 2024 with investigator Mr. Daniel Fawcett, where your response was sought in relation to alleged misconduct following a complaint received from a client on 26 June 2024. Outlined below are the substantiated allegations, the supporting evidence, as well as Mr. Fawcett’s findings:

Outlined below are the substantiated allegations, the supporting evidence, as well as Mr. Fawcett’s findings:

Allegation 1 - Mr Crafti banged on the bathroom door six times, and in a loud manner, while [REDACTED] was showering in the bathroom.

The Evidence – *Mr. Fawcett has reviewed the evidence provided during the course of the investigation and has determined that you banged on the bathroom door six times, and in a loud manner while [REDACTED] was showering in the bathroom.*

Finding – Substantiated – *This allegation is substantiated by your statement and the statement of witnesses.*

Allegation 2 – ...

...

Allegation 7 ...

...

Mr Fawcett has determined that Allegations 3, 4, 5 and 6 were not able to be substantiated due to an absence of evidence supporting the allegations.

The above substantiated allegations are in breach of the cohealth Code of Conduct, specifically;

cohealth Code of Conduct

- The cohealth principle of Impartiality: Treat all people fairly*
- The cohealth principle of Integrity: Maintain public trust by acting in the public interest*
- The cohealth principle of Accountability: Accept a high level of responsibility to staff, colleagues and clients in the management of resources and delivery of service*
- The cohealth principle of Responsive Service: Provide a relevant and timely service to clients. Provide information to which a person is entitled, promptly and in an easily understood form. Make sure it is accurate, current and complete.*

• *Personal and Professional Behaviour:*

o Staff must adhere to cohealth's human rights based approach and contribute to culturally safe and inclusive work environments and services, where people of all gender identities, sexualities, ages, abilities, faiths and cultural backgrounds are respected.

1.1 The Public

o Treat all people with whom staff have contact in the course of your work fairly, and with courtesy and sensitivity

o Act with propriety and be able to demonstrate this in relation to any advice or service you give. You must be able to justify any decisions you make.

Outcome

Given the findings to the above allegations, including the breach of the cohealth Code of Conduct, along with the cohealth Workplace Grievance and Misconduct Policy, and due to the nature of the substantiated allegations towards a client you are being issued with a Written Warning in relation to your misconduct. This Written Warning will stay on your file for a period of twelve months.

Your conduct requires immediate improvement. This warning has been reviewed and endorsed at Executive level as outlined in the Workplace Grievance and Misconduct Policy.

In addition to the warning, you will be placed on a Performance Improvement Plan to support you in engaging in respectful communication and interactions with clients. You are expected to return to site based duties on 9 January 2025, where this Performance Improvement Plan will be shared with you and implemented.

We request that the process and findings of this investigation remain confidential and are only discussed with those outlined in this letter.

...

[45] On 19 December 2024, Mr Crafti emailed Ms Mizzi and asserted a failure of natural justice in the disciplinary process as the decision maker in relation to the sanction had failed to speak to him before determining the sanction and problems with the investigation conclusions. Mr Crafti indicated that “*I am exercising my right to appeal the decision per the grievance and misconduct policy*”.³⁰

[46] On 20 December 2024, Ms Mizzi sent an email response to Mr Crafti in which cohealth denied any failure of process or problems in the findings of investigation³¹. In relation to Mr Crafti's appeal, Ms Mizzi's email said as follows:

Hi James,

Find below a response to the concerns and queries adopting the headings in your email.

Failure of process

cohealth does not agree that there has been a failure in the process and is confident in the accuracy, integrity and robustness of the investigation and disciplinary process. The decision to issue you a warning and place on you on a performance improvement plan was determined at the executive level at cohealth based on an review of the investigation findings.

Problems with conclusions

Again, cohealth is confident in the findings of the investigation, and that the substantiated allegations constitute a breach of the cohealth Code of Conduct. The specific breaches of the cohealth Code of Conduct were detailed in the Investigation Outcome Letter provided to you.

Right of appeal

Your request for an appeal of the outcome decision is noted. cohealth will arrange for an independent internal review of the investigation materials and disciplinary action and let you know of the outcome.

The appeal will be undertaken under clause 9 of the Workplace Grievance and Misconduct procedure, copied below for your reference. I am presuming that your email is designed to meet the requirements of "The employee is to state formally in writing why they believe there should be an appeal process, clearly articulated why the conclusions drawn from the investigation were not valid", but please let me know if this is incorrect and you wish to add any further information.

Clause 9. Appeals Process - cohealth Workplace Grievance and Misconduct Procedure

Where disciplinary action is the outcome following a workplace investigation, an employee may be able to appeal to have their case reviewed. The employee is to state formally in writing why they believe there should be an appeal process, clearly articulated why the conclusions drawn from the investigation were not valid.

The appeal will be review by an alternative third party who will be appointed to review the investigation report and supporting documents to confirm that the conclusions drawn were sound and substantiated by the evidence, or to overrule them.

Privacy

The direction to maintain the confidentiality of the investigation, the findings and disciplinary outcome remains in place. On your return to work the participants in any performance improvement plan will be outlined to you, and you are permitted to discuss the performance improvement plan with them.

With respect to the correct procedure in dealing with clients who are taking a shower, please consult with your manager.

Thanks,

[47] Mr Crafti’s appeal was evidently allocated to the cohealth General Counsel & Company Secretary. On 20 December 2024, the General Counsel & Company Secretary informed the cohealth Director of Workforce Operations that she had “*reviewed the attached investigation report and supporting documents in relation to James Crafti and believe that the conclusions drawn were sound and substantiated by the evidence.*”³²

[48] On 22 December 2024, Mr Crafti sent cohealth an email addressed to Mr Stanic and copied to Ms Mizzi in which he contested performance management and sought that performance management not be implemented on the basis that he previously notified a dispute in the Commission and a ‘status quo’ should prevail. Mr Crafti also put further information in support of an appeal in the following terms:

Dear Adam,

After thinking over the last few days and receiving advice I am putting forward the following.

Performance management

.....

Appeal

As mentioned to Sally, I am seeking an appeal to the disciplinary findings. 13.6(b) of the EA clearly states 'Where applicable, the Employer will also provide the Employee with any relevant material which forms the basis of the concerns.' I should have received that (and been given a chance to respond) prior to the previous outcomes, I also need them now. Allegation 1 was allegedly substantiated by the statement of the [REDACTED] (which I still don't have) and allegation 7 doesn't even provide any evidence, it just says that it is based on the 'evidence provided during the course of the investigation.' Please provide the relevant materials so I can prepare my response. Given that, the last person who made a decision had access to a full investigation report (which I have not had access to) really I should have that. However at bare minimum, I should have access to all material which forms the basis of concern, which should also be the only evidence provided to the person reviewing the appeal. Because if it doesn't demonstrate concern, why would the decision maker have access to it? And if it is of concern then I have a right to see it as per the EA

...

[49] On 24 December 2024, Mr Adam Stanic (cohealth Director Workforce Operations) responded by email³³ to Mr Crafti and indicated as follows in relation to the appeal:

Dear James

In response to the issues raised in your below email.

Performance management

...

Appeal

Thank you for providing further information about your appeal. These will be provided to the decision-maker, who will make their decision prior to your return to work on 9 January 2025.

You will not be provided with the investigation report or other any materials used in the investigation.

[50] It is not apparent from Ms Mizzi's Statement if Mr Crafti's email of 22 December 2024, was provided to the cohealth General Counsel & Company Secretary. I note that Ms Mizzi's Statement³⁴ indicates that the cohealth General Counsel & Company Secretary had made a decision on Mr Crafti's appeal on 20 December 2024.

[51] As noted in par [9] above, Mr Crafti was dismissed by cohealth effective 19 June 2025. The Form F3 filed by cohealth in response to Mr Crafti's unfair dismissal application asserts that the reason for the dismissal was Mr Crafti's refusal to follow a lawful and reasonable direction to participate in the PIP, and for demonstrating insufficient improvement over the course of the period that he did participate in the PIP. As set out in paragraph [43] above, the PIP was the one mandated by cohealth in the Investigation Outcome Letter following the Fawcett Investigation.

Consideration

[52] The proper principles concerning legal professional privilege have been set out as follows by a Full Bench of the Commission in *Stephen v Seahill Enterprises Pty Ltd*:³⁵

- (1) *Legal professional privilege is a right belonging to the client, not the lawyer or any relevant third party.*
- (2) *Legal professional privilege protects confidential communications rather than documents as such, and it is the nature of the communication within the document which determines whether or not the privilege attaches.*
- (3) *A client making a claim of privilege carries the onus of establishing its claim.*
- (4) *The “dominant purpose” for a communication is its “ruling, prevailing, paramount or most influential purpose”, and is not merely the “primary” or “substantial” purpose.*
- (5) *A communication in a document brought into existence for the dominant purpose of a client being provided with professional legal services will be privileged notwithstanding that some ancillary or subsidiary use of the document was contemplated at the time.*
- (6) *What is the dominant purpose is a question of fact, to be determined objectively.*
- (7) *An appropriate starting point when applying the dominant purpose test is to ask what was the intended use or uses of the document which accounted for it being brought into existence.*
- (8) *Usually the purpose of a document will be that of the maker of the document, but in some cases it will be the purpose of the person who called the document into existence, such as a solicitor commissioning the provision of a technical report.*
- (9) *Conduct inconsistent with the maintenance of the confidentiality which legal professional privilege is intended to protect may give rise to an imputed waiver of the privilege. Whether inconsistent conduct gives rise to waiver is informed by notions of fairness. Questions of waiver are matters of fact and degree.*

(footnotes omitted)

Whether Satisfied that Privileged Purpose was Dominant Purpose

[53] The first issue to determine is whether I am satisfied that the dominant purpose for the Fawcett Investigation was a privileged purpose. Cohealth contend that the letter of engagement from Lander & Rogers to Mr Fawcett dated make clear that the purpose of his engagement was to enable Lander & Rogers to provide legal advice to cohealth.

[54] As noted above, the dominant purpose is a matter of fact to be ascertained objectively. In *Robertson v Singtel*³⁶, Beach J stated as follows concerning identification of the dominant purpose:

89 *In summary, the purpose for which a document was created is a matter of fact to be determined objectively, having regard to the evidence, the nature of the document and the parties’ submissions. Dominant purpose may be established by evidence and other material and circumstances showing such a description is justified. Proof of dominant purpose can be achieved in a variety of ways, depending on the case at hand. In discharging the onus, focused and specific evidence is needed. But the nature and extent of the evidence needed to prove the existence of privilege is fact and circumstance dependent.*

90 *The evidence of the intention of the person who made the document, or the person who authorised or procured it, is not conclusive of purpose. In many instances, it is the character of the documents over which privilege is asserted that will illuminate the purpose for which they were created.*

[55] The evidence indicates that there are multiple purposes for commencing the Fawcett Investigation.

[56] There was a purpose to provide or obtain legal advice about the complaint made against Mr Crafti (the **legal advice purpose**).

[57] There was a purpose to determine whether Mr Crafti had breached the cohealth Code of Conduct and if so discipline him in his employment in a manner consistent with the Workplace Grievance and Misconduct Procedure (the **employment disciplinary purpose**).

[58] The employment disciplinary purpose was a purpose held by cohealth. That purpose crystallised in or about early July 2024, when cohealth determined that it had an ‘obligation’ to determine whether Mr Crafti had breached the cohealth Code of Conduct and if so disciplined and to conduct that process in accordance with its Workplace Grievance and Misconduct Procedure.

[59] This purpose was initially put into effect by commencement of the internal investigation. Clearly, the internal investigation had no legal advice purpose.

[60] However, the employment disciplinary purpose was clearly also a purpose cohealth held in authorising Lander & Rogers to engage Mr Fawcett to conduct the Fawcett Investigation.

[61] In finding that the employment disciplinary purpose was a purpose held by cohealth in its decision to authorise the Fawcett Investigation, I am mindful that Ms Mizzi’s statement does not say that she was the officer or employee of cohealth who decided to authorise Lander & Rogers to engage Mr Fawcett. The evidence Ms Mizzi gives at par [43] of her statement (which is set out under par [26] above) , regarding cohealth’s instruction to Lander & Rogers to engage Mr Fawcett, does not go so far as to indicate that she herself gave the instruction, let alone that she was the decision maker in respect of the instruction. Furthermore, par [43] of Ms Mizzi’s Statement does not expressly identify cohealth’s purpose in giving the instruction to Lander & Rogers.

[62] However, the operation of the employment disciplinary purpose in cohealth’s decision to authorise the Fawcett Investigation can be ascertained from a number of matters.

[63] Firstly, from in or about early July 2024 cohealth had concluded that it was obliged to determine whether Mr Crafti had breached the Code of Conduct in his interaction with the client and discipline him if he had done so.

[64] Secondly, cohealth’s Workplace Grievance and Misconduct Policy set out a procedure by which it addressed allegations of misconduct including by way of external investigation.

[65] Thirdly, Ms Mizzi’s email to Mr Darwualla of 23 August 2024 (set out under paragraph [29] above) discloses cohealth’s purpose being an employment disciplinary purpose. In that regard, it indicates that cohealth’s purpose in the engagement of Mr Fawcett was because it determined that an “*external independent investigator*” should be engaged to conduct the investigation due to Mr Crafti’s expressed concerns about the internal investigation and also the gravity of the allegations against Mr Crafti. As such, it was indicative of a purpose that a

more robust ‘external independent investigation’ be conducted on behalf of cohealth to determine whether Mr Crafti had breached the Code of Conduct and should be disciplined, because of Mr Crafti’s objections and cohealth’s view about gravity of the allegations. This was within the scope of an employment disciplinary purpose.

[66] Fourthly, the continued operation of the employment disciplinary purpose in respect of the cohealth decision to authorise the Fawcett investigation can also be discerned for Ms Mizzi’s email to Mr Darwuallah of 23 August 2024. In that regard, the email says “*cohealth deems it entirely appropriate to continue the investigation and reach a concluded view about the conduct*” and further that “*cohealth has made the decision to engage an external independent investigator to finalise the investigation on our behalf.*” Clearly, this is indicative that the pre-existing employment disciplinary purpose was at least a purpose of cohealth in its decision that Mr Fawcett be engaged. The phrase word “*finalise*”, in particular, points to the continuity of the employment disciplinary purpose in respect of the decision by Cohealth to authorise the Fawcett Investigation

[67] Fifthly, the cohealth notice of allegations letter dated 3 October 2024 which required Mr Crafti to attend an interview with Mr Fawcett to respond to allegations, specified that “[i]f any of the allegations are substantiated, this may result in disciplinary action being taken against you, up to and including the termination of employment.” Furthermore, the schedule setting out the seven allegations stated that “[s]uch conduct if substantiated, may constitute bullying and harassing behaviour against a client, in breach of cohealth’s Code of Conduct Policy and Workplace Grievance and Misconduct Procedure”. Both the Code and the Procedure were attached to the letter. The fact that the 3 October 2024 letter set out those matters and attached a copy of the Workplace Grievance and Misconduct Procedure, are factual matters which indicates that the employment disciplinary purpose operated in cohealth’s decision to authorise the engagement of Mr Fawcett.

[68] I note that the matters in paragraphs [65] – [67] above post-date the engagement of Mr Fawcett. In terms of ascertaining purpose including the dominant purpose, the relevant time to assess purpose is when the decision to obtain a report from Mr Fawcett was made. This time is either 9 August 2024, when Mr Woods statement indicates he engaged Mr Fawcett, or 21 August 2024 which is the date of the formal letter of engagement was sent by Lander & Rogers to Mr Fawcett and also the date when Ms Mizzi says cohealth instructed Lander & Rogers to engage Mr Fawcett. However, in assessing purpose it is permissible to have regard to events up to the time that a report is brought into existence.³⁷

[69] I turn now to the legal advice purpose.

[70] In the three emails sent, by or on behalf of Mr Crafti, of 25 July 2024, 26 July 2024 and 1 August 2024, Mr Crafti disputed aspects of the internal investigation with a concluding assertion that he was not being accorded procedural fairness and natural justice as required by clause 13.3 of the SACS EA. In Mr Crafti’s email of 1 August 2024, he expressly placed “*this entire investigation in dispute*” and sought a meeting with cohealth to “*discuss procedural issues only*”.

[71] In this circumstance, on 2 August 2024 cohealth through Ms Mizzi, sought legal advice from Lander & Rogers due to Mr Crafti’s objections and what cohealth considered was Mr

Crafti's refusal to attend an interview. Mr Woods statement indicates that the cohealth specifically asked for advice on options to deal with Mr Crafti's refusal to participate in an internal workplace investigation. However, Mr Woods' statement seems to advert to other subjects in respect of which his advice was sought, but his statement does not specifically identify those other subjects beyond a general

[72] Mr Woods statement indicates that on 9 August 2024, Lander & Rogers engaged Mr Fawcett to conduct a factual investigation to provide legal advice to cohealth about the complaint made against Mr Crafti. Furthermore, the letter of engagement from Lander & Rogers to Mr Fawcett dated 21 August 2024, expressly states that to "*enable [Lander & Rogers], to provide legal advice to cohealth, we have been instructed to engage you to undertake a workplace investigation into its employee, Mr James Crafti ...*"

[73] I accept that Mr Woods' subjective purpose was to obtain a report to enable him to provide legal advice to cohealth about the complaint made against Mr Crafti.

[74] Having identified the existence of multiple purposes, it is necessary to consider whether I am satisfied that the dominant purpose to commence the Fawcett investigation was to obtain or provide legal advice. To restate matters, this requires that the legal advice purpose is the "ruling, prevailing, paramount or most influential purpose", and not merely the "primary" or "substantial" purpose. Furthermore, cohealth bears the onus of establishing that the dominant purpose as being the legal advice purpose.

[75] This requires an assessment of both cohealth's purpose and Mr Woods' purpose. In assessing the matter of purpose, Mr Woods' purpose, whilst obviously relevant, is in the present matter, not the exclusive source of relevant purpose. In many matters, the evidence of an external solicitor acting for a party and who commissions an investigation, may be decisive on the factual issue whether the dominant purpose for such investigation is commenced is a privileged purpose. This may particularly be so where an external solicitor is acting for a party in actual or pending litigation and a report is expressly commissioned for the purpose of the litigation or potential litigation (ie a litigation privilege) perhaps in addition to an advice privilege.

[76] But whether a statement of an external solicitor is sufficient, in any particular matter, regardless of the precise privilege claimed, will turn on the facts of each case. In the present matter, I am not satisfied that Mr Woods' statement or the letter of engagement from Lander & Rogers to Mr Fawcett can be considered conclusive. This is because the evidence before me contains a number of references to cohealth itself engaging or deciding to engage Mr Fawcett, statements made by cohealth in the context of an extant employment disciplinary process commenced in respect of Mr Crafti. The clearest statement to that effect is set out in the 23 August 2024 email from Ms Mizzi to Mr Darwualla that "*cohealth has made the decision to engage an external independent investigator to finalise the investigation on our behalf*", a statement which is referable to cohealth's employment disciplinary purpose (see pars [29] & [65]-[66] above). Ms Mizzi's Statement at par [45] also describes her 5 September 2024 email as "*an email to Mr Crafti advising him that cohealth had engaged Mr Fawcett to conduct the Workplace Investigation.*" In addition, the cohealth letter of allegation dated 3 October 2023 refers to "*Lander & Rogers, on behalf of cohealth, engaging Mr Fawcett* [emphasis added]." In these circumstances, I am not satisfied that Mr Woods' purpose to provide legal advice is

conclusive of the relevant operative purpose or purposes. Further, in these circumstances, I consider that it is important to assess the operative purpose or purposes of the relevant cohealth officers or employees who decided to authorise the engagement of Mr Fawcett, both in respect of identifying whether cohealth held multiple purposes, and also in respect of assessing whether I am satisfied that its dominant purpose was a legal advice purpose. In reaching this view, I reiterate that the legal advice purpose expressed by Mr Woods and set out in the engagement letter to Mr Fawcett is relevant to my assessment of whether I am satisfied of whether the legal advice purpose was the dominant purpose. However, in the context of the present matter, I do not consider it decisive or conclusive.

[77] In relation to Mr Woods' purpose, I am satisfied that his dominant purpose for commencing the Fawcett Investigation was to provide legal advice to cohealth about the complaint made by the client against Mr Crafti.

[78] In assessing cohealth's purpose, as set out above, the material before me indicates that a purpose held by cohealth to commence the Fawcett investigation was the employment disciplinary purpose. That employment disciplinary purpose may well be described as at least a substantial purpose held by cohealth. I note that there is no direct witness statement or affidavit from an officer or employee of cohealth, that they authorised the engagement of Mr Fawcett for the purpose of obtaining legal advice or that the dominant purpose of the investigation was for the purpose of obtaining legal advice. Ms Mizzi's Statement is not to that effect. Nevertheless, it can be inferred from the sequence of events, that cohealth held at least a legal advice purpose (ie to obtain advice) in addition to the employment disciplinary purpose for authorising the commencement of the Fawcett Investigation. However, absent direct evidence from a relevant officer or employee of cohealth setting out that the dominant purpose for cohealth's authorisation of the Fawcett Investigation was to obtain legal advice, I am not satisfied that the legal advice purpose was the dominant purpose held by cohealth. My lack of satisfaction regarding this matter is reached having regard to the clear significance of the employment disciplinary purpose in the cohealth decision to authorise the engagement of Mr Fawcett, which emerges from the matters set out in paragraphs [63] - [67] above.

[79] In these circumstances, I am not satisfied that the evidence establishes that the legal advice purpose was the dominant purpose for the Fawcett Investigation. I do not consider that Mr Woods' statement and the letter of engagement from Lander & Rogers to Mr Fawcett is conclusive or decisive of dominant purpose.

Whether Waiver

[80] I now turn to the issue of waiver.

[81] A person who is entitled to the benefit of privilege may waive that privilege. Mr Crafti contends that there has been a waiver of any privilege by cohealth. A party asserting a waiver of privilege bears the onus of establishing a waiver.

[82] In the present matter, the issue of waiver is relevant if the Fawcett Report was subject to legal professional privilege.

[83] In *Mann v Carnell*³⁸, a plurality of the High Court said as follows regarding waiver in relation to a claim for legal professional privilege and the communication of legal advice to a third party said:

‘Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is ‘imputed by operation of law’. This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege. ... What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.’

[84] As set out in paragraph [44] above, the Investigation Outcome Letter³⁹ notified Mr Crafti of Mr Fawcett’s findings. The letter expressly referred to the substantiated or partially substantiated allegations and Mr Fawcett’s determination in respect of each allegation (ie whether it was substantiated or partially substantiated) and the evidence relied upon to substantiate the findings. However, the letter also disclosed the evidentiary basis upon which Mr Fawcett made such findings by referring to one or more of combination of the following:- being either or a combination of “[Mr Crafti’s] *statement*”, “*the statement of witnesses*” or “*the statement of [the client complainant]*”.

[85] Cohealth’s disclosure of Mr Fawcett’s findings and the evidentiary basis of those findings was not done for the purpose of providing Mr Crafti an opportunity to respond the findings, a proposed disciplinary sanction or proposed corrective outcome. This is because the Investigation Outcome Letter notified Mr Crafti of the warning and the PIP. In that regard, the present case differs from other cases, where an employer’s disclosure of investigative findings for the purpose of providing the employee an opportunity to respond to substantiated allegations, was said not to waive privilege⁴⁰.

[86] However, cohealth submitted that the disclosure in the Investigation Outcome Letter was “*of the fact that certain allegations had been substantiated*”.⁴¹ Furthermore, cohealth contended made the disclosure of the substantiated allegations was because it had determined to place Mr Crafti on a PIP and it was necessary to explain to Mr Crafti the basis upon which he was placed on a PIP directed at “*supporting [Mr Crafti] in engaging in respectful communications and interactions with clients*”. This was submitted by cohealth to be consistent with what Mr Crafti was told in pars 30 and 31 of the cohealth letter to Mr Crafti dated 3 October 2024. Cohealth’s submission suggest that to have done otherwise, would have rendered cohealth “*vulnerable to criticism on grounds of procedural unfairness.*”⁴² Cohealth effectively submit that this cannot be considered a waiver.

[87] In the present matter, the disclosures made by cohealth in the Investigation Outcome Letter went beyond a mere indication of a finding by Mr Fawcett that particular allegations were substantiated or not substantiated. Rather, cohealth identified the evidentiary basis of substantiated or partially substantiated allegations, being either or a combination of “[Mr Crafti’s] *statement*”, “*the statement of witnesses*” or “*the statement of [the client complainant]*”.

[88] The disclosure of the particular evidentiary source of Mr Fawcett’s findings in respect of the substantiated and partially substantiated allegations expose Mr Fawcett’s reasoning beyond that which was necessary for cohealth to explain to Mr Crafti the basis upon which he was placed on a PIP directed at “*supporting [Mr Crafti] in engaging in respectful communications and interactions with clients*”. Consequently, I consider that if the Fawcett Report was privileged, there has been a waiver of the privilege by the extent of the disclosure made to Mr Crafti, as the extent of that disclosure to Mr Crafti is inconsistent with the maintenance of confidentiality. I do not consider that cohealth’s disclosure of evidentiary matters in respect of only the two substantiated or one partially substantiated allegations militates against my conclusion that waiver has been established. In that regard, each of the seven factual allegations set out in the Schedule to the letter of allegations dated 3 October 2024 clearly arise from a single interaction or transaction between Mr Crafti and the complainant client on 26 June 2025. Furthermore, even in relation to the unsubstantiated allegations, the Investigation Outcome Letter discloses Mr Fawcett’s reasoning as being “*due to an absence of evidence supporting the allegations.*”

[89] The view that I have expressed regarding waiver and confidentiality is consistent with an observation in *Stephen v Seahill Enterprises*, where the Full Bench said as follows at [71]:

A procedurally fair workplace investigation initiated by an employer the outcome of which is intended to be made known to relevant employees in the workplace and which is to lead, where necessary, to corrective or disciplinary action is not one which ordinarily has a purpose confidential to the employer.

[90] Consequently, I am satisfied that Mr Crafti has made out a waiver by cohealth of the Fawcett Report and other documents referred to in my Order.

Order

[91] Having regard to my reasons, I will separately issue an order that cohealth produce the Fawcett Report and certain other documents relating to the Report by 4:00pm on 7 November 2025. I consider that these documents are potentially relevant to the matters before the Commission.

[92] Absent any objection by cohealth to immediate inspection of those documents by Mr Crafti, those documents will thereafter be made available for inspection by him.



DEPUTY PRESIDENT

Appearances:

J Crafti, Applicant
A Thomas of Counsel for the Respondent

Hearing details:

2025.
Melbourne (by video using Microsoft Teams):
October 3.

Final written submissions:

Respondent, 7 October 2025.
Applicant, 10 October 2025.

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¹ Mr Crafti sought other categories of documents in his Application for an Order for Production of Documents. Those other categories were separately dealt with and an order issued requiring production of certain categories of documents, being categories in respect of which cohealth did not object to production based on client legal privilege.

² The associated materials in respect of which Mr Crafti seeks production (in addition to the Fawcett Report) are identified in par [44] by Mr Crafti in *Applicant's Response to the Respondent's Outline of Submissions on Client Legal Privilege* dated 10 October 2025. The additional documents are "2. *All documents (including copies of summaries of interview and draft investigation reports). This will also include the 'regular confidential reports to the nominated contact person [Ms Mizzi]'*". 3. *The report provided to cohealth from Lander and Rogers containing a summary finding and recommendations.*"

³ *Respondent's Outline of Submissions* dated 24 September 2025 par [7], items 1 and 2.

⁴ *Respondent's Outline of Submissions on Client Legal Privilege* dated 7 October 2025 par [10]

⁵ Sally Mizzi Statement [22]

⁶ SM-4; SM-6; SM-7; Email from Mizzi to Crafti dated 1 August 2024 at SM-9

⁷ Mizzi Statement [27]; SM-4

⁸ Mizzi Statement [28]

⁹ Mizzi Statement [30]; SM-6. The letter of 23 July 2024 is signed by cohealth's Director – Community Based Drug and Alcohol Response.

¹⁰ The Workplace Grievance and Misconduct Procedure is an attachment to SM-6

¹¹ Mizzi Statement [35]; SM-7

¹² Mizzi Statement [36]; SM-8

¹³ Mizzi Statement [36]; SM-8

¹⁴ Mizzi Statement [38]; SM-9

¹⁵ Calum Woods Statement [7]

¹⁶ Calum Woods Statement [7].

¹⁷ Mizzi Statement [43].

¹⁸ Calum Woods Statement [9] and CW-1

¹⁹ SM-10. The email from Ms Mizzi to Mr Daruwalla of 23 August 2024 is within the chain of emails in SM-10.

²⁰ Mizzi Statement [45]; SM-10

²¹ Mizzi Statement [45]

²² SM-11

²³ Mizzi Statement [60]; SM-13

²⁴ Mizzi Statement [61]; SM-14.

²⁵ Mizzi Statement [61]; SM-14

²⁶ Mizzi Statement [68]; SM-15

²⁷ Mizzi Statement [67]; SM-16

²⁸ Woods Statement [10].

²⁹ Mizzi Statement [96]; SM-27

³⁰ Mizzi Statement [101]; SM-30

³¹ Mizzi Statement [101]; SM-30

³² Mizzi Statement [104]; SM-33

³³ Mizzi Statement [103]; SM-32

³⁴ Mizzi Statement [104]; SM-27

³⁵ *Damien Stephen v Seahill Enterprises Pty Ltd & Denise Fitzgibbons* [\[2021\] FWCFB 2623](#) at [63]

³⁶ *Robertson v Singtel Optus Pty Ltd* [2023] FCA 1392 at [89] – [90]. An application for leave to appeal was refused in *Singtel Optus v Robertson* [2024] FCAFC 58.

³⁷ *Robertson v Singtel Optus Pty Ltd* [2023] FCA 1392 at [135].

³⁸ *Mann v Carnell* [1999] HCA 66; (1999) 201 CLR 1 at [29] Gleeson CJ, Gaudron, Gummow and Callinan JJ

³⁹ SM-27

⁴⁰ See *Tainsh v Co-Operative Bulk Handling* [\[2021\] FWC 3381](#)

⁴¹ *Respondent's Outline of Submissions on Client Legal Privilege* dated 7 October 2025 par [27].

⁴² *Respondent's Outline of Submissions on Client Legal Privilege* dated 7 October 2025 at [26] & [27].