Expert reports and waiver of privilege

By Hugh Stowe

Introduction

This article addresses the following vexed questions concerning expert reports: in relation to the documentary materials generated during the production of expert reports in legal proceedings, when does privilege arise and when is it waived? These materials may include instructions, source materials, other confidential communications with lawyers, drafts, and internally generated working documents ('associated materials').

Regrettably, a crisp answer to the questions cannot be given. Privilege may arise, and privilege may be waived on service or tender of the report. However, the scope of privilege and waiver are uncertain.

This article sketches an overview of the law of legal professional privilege, briefly reviews the authorities and principles relevant to the application of privilege to associated materials, proposes a working rule to regulate the scope of waiver over associated materials, and outlines possible strategies to minimise the prospect and prejudice of waiver. These are large and significant topics which bristle with controversies and uncertainties. The thorough analysis which these topics merit is beyond the scope of this brief article.

Which body of evidence law applies?

In the Federal Court, questions of legal professional privilege are governed by the common law in pre-trial proceedings[1], and by the *Evidence Act 1995* (Cth) at trial. By contrast, in NSW question of privilege are governed by the *Evidence Act 1995* (NSW) in all stages of proceedings, by reason of the *Uniform Civil Procedure Rules 2005* (NSW) extending its application to pre-trial proceedings.[2]

Purpose of legal professional privilege: the policy tension

The scope of privilege represents the resolution of a fundamental policy tension:

> A person should be entitled to seek and obtain legal advice in the conduct of his or her affairs, and legal assistance in and for the purposes of the conduct of actual or anticipated litigation, without the apprehension of being prejudiced by subsequent disclosure of the communication. The obvious tension between this policy and the desirability, in the interests of justice, of obtaining the fullest possible access to the facts relevant to the issues in a case lies at the heart of the problem of the scope of the privilege. Where the privilege applies, it inhibits or prevents access to potentially relevant information.... For the law, in the interests of the administration of justice, to deny access to relevant information, involves a balancing of competing considerations.[3]

The operation of privilege gives paramountcy to the first policy consideration. The 'raison dêtre of legal professional privilege is the furtherance of the administration of justice through the fostering of trust and candour in the relationship between lawyer and client'.[4] By its very nature, it will exclude admission of relevant evidence.

Privilege and waiver under the common law

The question as to the scope of privilege under the common law is 'more easily asked than answered, despite all that is to be found in the decided cases and all that has been said in the learned articles'.[5] Nevertheless, the following general traditional categories can be identified:[6]

- 'advice privilege': protects from disclosure confidential communications between a client and lawyers, made for the dominant purpose of seeking or providing legal advice;
- 'litigation privilege': protects from disclosure confidential communications between clients and lawyers, and lawyers or clients (on the on hand) and third parties (on the other hand), for the dominant purpose of pending or reasonably contemplated legal proceedings.

It has been said that the doctrine of privilege itself reflects the final resolution of the policy tension described above,[7] and that 'no further balancing exercise is required' in the application of privilege.[8] However, the doctrine of privilege is 'subject to defined qualifications and exceptions'.[9] These act as 'the common law's safety valve',[10] when the operation of privilege places undue pressure on the search for truth. In other words, within the recognised 'qualifications and exceptions' to privilege, there remains embedded the scope for the further balancing of the conflicting policies which underpin the operation of privilege. The doctrine of 'waiver of privilege' is one of those safety valves. Waiver of privilege may be 'express' or 'implied'.

Express waiver arises when a party 'deliberately and intentionally discloses protected material'.[11]

Implied waiver arises under the common law when there has been an 'intentional act' which was 'inconsistent with the maintenance of ...confidentiality. 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'.[12] 'Fairness' is thereby identified as relevant to (but not determinative of) the matter.

'Fairness presupposes a balancing of interests between parties who are in dispute'.[13] The 'question of 'fairness' involves an inquiry as to whether the facts supply sufficient reason for depriving the client of the form of protection which the law confers upon communications between solicitor and client'.[14]

An assessment of 'inconsistency' and 'fairness' depends upon all the circumstances of the case,[15] but a full exploration is beyond the scope of this paper.

One example of implied waiver is known as 'associated material waiver', which arises when it is deemed 'unfair or misleading to allow a party to *refer to or use* material and yet assert that that material, *or material associated with it*, is privileged from production'.[16] In such circumstances, privilege will be waived in relation to associated materials necessary for a 'proper understanding' of the primary privileged materials which have been referred to or used.[17]

The difficulty with the concepts of 'inconsistency' and 'unfairness' is that they reflect a policy conclusion on specific facts that the law will override privilege, but leave unarticulated the precise basis for that conclusion. Although the operation of implied waiver is well settled in many areas, the law awaits a comprehensive statement of the criteria relevant to the underlying policy balance. I suggest that the (unarticulated) reality is that the application of implied waiver

involves the court re-opening and re-striking the balance between the fundamentally irreconcilable policies which underpin the law of privilege (referred to above).

Privilege and waiver under the Evidence Act

Sections 118 and 119 generally mirror the 'advice' and 'litigation' privileges of the common law.

Implied waiver of privilege in relation to associated materials potentially arises under section 126 and section 122.

Section 126 provides that privilege is lost in relation to documents which are 'reasonably necessary for a proper understanding' of other documents in respect of which privilege has been lost. By operation of section 126, 'if a privileged document is voluntarily disclosed for forensic purposes, and a thorough apprehension or appreciation of the character, significance or implications of that document requires disclosure of source documents, otherwise protected by client legal privilege, ordinarily the test laid down by s126 of the Evidence Act will be satisfied.'[18]

Section 122(1) provides that privilege is lost in respect of 'evidence given with *the consent* of the client or party concerned'. By operation of a shameless but convenient fiction, it is the law in NSW that the scope of section 122 extends to 'implied consent', and that a party is deemed to give implied consent to the giving of evidence when waiver would be implied at common law.[19] In light of that construction of section 122, the Evidence Act effectively incorporates the doctrine of implied waiver under the common law.

Privilege & expert reports - overview

Any privilege in relation to expert reports and associated materials in the context of legal proceedings arises as an application of the 'litigation privilege'.

Any loss of privilege in relation to a final expert report which is served or tendered, will arise (if at all) by operation of 'express waiver'.[20]

Any loss of privilege in relation to associated materials will arise (if at all) by operation of 'implied waiver'. As noted above, implied waiver is triggered by some conduct of the privilege holder. If implied waiver is to operate in relation to associated material, the 'triggering conduct' will typically be the service (or tender) of the expert report. Any such implied waiver can be classified as an example of 'associated material' waiver.[21]

As noted above, implied waiver involves a balance of policy considerations. In addition to the general policy tensions described above, there are a number of specific policy matters that are relevant to the 'balance' in the context of the scope of implied waiver in associated materials, following service or tender of an expert report.

The following matters have been identified as weighing in favour of implied waiver in relation to associated materials (following service or tender of the report).

Firstly, 'the important principle that there is no property in a witness means that an adverse party may subpoena an expert retained by the original party and require that expert to give all relevant information in his possession, including an expression of his opinion, to the court'.[22]

Secondly, the fact that in the 'field of expert evidence it is difficult to sever an opinion from the information and process upon which it is based. It would seriously jeopardise the proper testing of such witnesses if privilege were extended to documents' upon which the opinion is based.[23]

Thirdly, 'opinion evidence is a special kind of evidence, and courts have traditionally encouraged experts who are qualified to give such evidence to be objective...an expert's duty to the court is more important than the duty to a client'.[24]

Conversely, there are a number of policy considerations which may weigh against waiver in relation to associated materials.

Firstly, the waiver of privilege with respect to drafts would inhibit the expert from changing his opinion. 'An expert is surely permitted, indeed to be encouraged, to change his or her mind, if a change of mind is warranted..... [E]xperts should not be inhibited by fear of exposure of a draft from changing their minds when such change is warranted by the material then before the expert'.[25]

Secondly, the risk of waiver in relation to associated materials may deter a party from vigorously searching for evidence. 'The efficacy of the adjudicative process depends on the readiness and ability to each party to vigorously search for evidence. A party might be discouraged from making anything but the most cursory enquiries were he to be required to hand over unfavourable evidence to the adversary.'[26]

Thirdly, the spectre of waiver in relation to associated materials is likely to compromise the process of the formulation and articulation of expert opinion.[27] In complex matters, the diligent preparation of an expert report may demand the generation of extensive work notes, drafts and correspondence which facilitate the progressive refinement of the opinion. However, if waiver operates widely in relation to associated materials, prudent litigation management may dictate that working documents not be generated. Further, a possible corollary of the broad application of waiver to *written* associated materials is that privilege would also be waived in relation to *oral communications* between the expert and lawyers. This raises the unedifying prospect of lawyers in the case being called to give evidence of their conferences with experts (which in turn would deter lawyers from conferring with experts and thereby further compromise the process of report and case preparation).

Fourthly, the widespread application of waiver in relation to drafts (and other associated materials) would likely generate a miscellany of collateral inquiries in cross-examination, directed to exploring and challenging the reasons for the evolution of the opinions expressed in the final expert report. In some cases that may be a forensically important process. However, in many cases that will be a time-consuming distraction from the essential task of testing the articulated assumptions and reasoning process recorded in the final report.[28] Further, if associated materials are taken out of context, there is scope for skilful cross-examination to cause unwarranted damage to the credit of the expert.

Fifthly, the relevance to waiver of the expert's supervening duty to the court should not be exaggerated. 'Assistance to the court must be the witness's dominant purpose in providing an opinion for use in the

proceedings. But the purpose of communications between the party's legal representatives and the witness is nonetheless predominantly to assist the party.....The fact that the witness is constrained to assist the court and to be impartial does not displace that purpose'. The argument that the special role of an expert militates against privilege 'fails to recognise the adversarial nature of the proceedings.....The witness's evidence must be impartial, but communications with a view to securing and facilitating the provision of such evidence are entered into for the purpose of assisting the party, not for the purpose of assisting the court'.[29]

Privilege and associated materials: the starting point - ASIC v Southcorp

The leading case which specifically addresses privilege in the context of expert reports is probably *Australian Securities & Investments Commission v Southcorp Ltd* (2003) 46 ACSR 438, in which Lindgren J summarised the relevant principles as follows:[30]

1 Ordinarily the confidential briefing or instructing by a prospective litigant's lawyers of an expert to provide a report of his or her opinion to be used in the anticipated litigation attracts client legal privilege.

2 Copies of documents, whether the originals are privileged or not, where the copies were made for the purpose of forming part of confidential communications between the client's lawyers and the expert witness, ordinarily attract the privilege.

3 Documents generated unilaterally by the expert witness, such as working notes, field notes, and the witness's own drafts of his or her report, do not attract privilege because they are not in the nature of, and would not expose, communications.

4 Ordinarily disclosure of the expert's report for the purpose of reliance on it in the litigation will result in an implied waiver of the privilege in respect of the brief or instructions or documents referred to in (1) and (2) above, at least if the appropriate inference to be drawn is that they were used in a way that could be said to influence the content of the report, because, in these circumstances, it would be unfair for the client to rely on the report without disclosure of the brief, instructions or documents.

5 Similarly, privilege cannot be maintained in respect of documents used by an expert to form an opinion or write a report, regardless of how the expert came by the documents.

The case has been widely approved.[31] Despite the general endorsement it has received, Lindgren J's summary of principles contains ambiguous and controversial propositions. These are explored below by reference to different categories of associated materials.

'Instructions'

There is no significant controversy as to the fact the instructions are at least initially privileged, and the subject of waiver if the report is served or tendered.

There is however some authority for the proposition that privilege over letters of instruction will not be waived, if there is no basis for the inference that the instructions had some influence on the content of the report.[32]

In the Federal Court the issue of waiver in relation to instructions is immaterial, because the Expert Code mandates the disclosure of the instructions (oral and written). There is no equivalent provision in the Uniform Civil Procedure Rules. The obligation to disclose oral instructions raises interesting questions (beyond the scope of this paper) as to the nature of the instructions which must be disclosed. When does a suggestion as to style, or a query as to substance, become an 'instruction' that must be disclosed?

Other 'confidential briefings': i.e., dealings between lawyer and expert

In addition to the formal letters of instructions, there may be correspondence between the lawyers and the expert which contain comments and queries in relation to draft reports, and address general case management.

Southcorp provides that privilege over this material initially arises, but will generally be waived upon service of the report. Other authorities affirm that principle.[33]

However, there is a line of authority which supports the immunity from waiver of communications between the expert and lawyer (aside from instructions defining the scope of the required opinion).[34]

'Documents used by an expert' - source materials

Privilege in copy documents

When an originally non-privileged document is copied and provided to an expert for the purpose of briefing him in litigation, the copy is privileged in the hands of the expert (subject to waiver). The privileged status of that copy is determined by the purpose for which it was created.[35]

Waiver

Southcorp affirms that any privilege in source materials will be waived on service of the report, but there are some areas of uncertainty.

Partial reliance and limited waiver?

There is some authority for the propositions that the scope of waiver in relation to source documents relied upon by the expert may be:

- limited to the particular portions of document relied upon, if the expert specifies with particularity the discreet portions of the document relied upon (and did not thereby create any inaccurate perception of the privileged material);[36]
- excluded altogether, if the expert structures his report so that it is based on precisely identified assumptions (rather then privileged source materials).[37]

However, other authorities affirm that waiver should extend to the whole of the privileged document on which at least partial reliance has been placed. This is because the party relying on the report is not the appropriate judge of whether the representations as to the extent of reliance is reasonable.[38]

Proof of actual reliance?

Southcorp seems to affirm that a condition of waiver in relation to a source document is that it was actually 'used' or relied upon by the expert in the formation of his opinion. The weight of authority clearly affirms that principle.[39]

However, it is arguable that waiver should extend to all privileged source materials provided to the expert without regard to the expert's assertion as to the extent of reliance upon them. By analogy from well established principles with respect to waiver of privilege following partial disclosure of privileged materials, it is arguable that fairness dictates that the opposing party should have the opportunity of investigating through cross-examination what aspects of the privileged source material were relevant to the final opinion: i.e. fairness dictates that the 'the opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question'.[40]

There are two further considerations which weigh in favour of the waiver being extended to all materials that are provided to the expert.

First, 'it is not only information which has been affirmatively taken into account, but information which has been disregarded or discounted by the expert witness which may be useful in evaluating his or her opinion'.[41]

Secondly, as was recognised in the recent decision of *ASIC v Rich*, there is a risk that the expert may have 'unwittingly relied on, been influenced by or taken into account material that has not been identified as part of the factual basis for the opinions he or she has expressed'.[42]

On the assumption that reliance is a condition for waiver, then reliance is 'a question of fact' to be resolved by reference to the 'testimony of [the deponent] and the inferences properly to be drawn from the documents in dispute themselves'.[43]

'Documents generated unilaterally'

There are numerous authorities (consistent with *Southcorp*) which affirm that unilaterally generated working documents brought into existence by the expert to assist in the preparation of the expert report are not privileged.[44]

The basis of that position is the contention that privilege never arises at all in these documents (as distinct from the contention that service of the report effects a waiver of existing privilege). The basis for that contention is stated to be that the foundation of legal professional privilege is the protection of 'communications' made for the purpose of legal advice and assistance,[45] and 'it is difficult to see why any of a potential witness' documents, not obtained from a party's solicitor, must be kept secret 'to preserve the confidential relationship between client and legal adviser'.[46]

However, there are strong arguments that support the proposition that privilege should arise in such documents in certain circumstances (subject to waiver).

First, the better view is that confidential documents are privileged if they are brought into existence to facilitate subsequent privileged communications. This is based on the analogous principle which arguably applies in relation to such documents brought into existence by clients or lawyers.[47] 'This principle, while obviously falling within the rationale of the privilege, qualifies to this extent the general proposition that legal professional privilege does not protect documents, as such, but protects communications between lawyer and client'.[48] Further, section 119 of the Evidence Act expressly provides that the litigation privilege extends to 'the contents of a confidential document (whether delivered or not) that was prepared' for 'the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding'.

Secondly, privilege may extend to internal working papers which evidence otherwise privileged communications (which will often be the case in relation to associated materials).[49]

'Drafts'

'Drafts' comprise one example of the 'unilaterally generated documents' referred to above. Identical considerations apply to support the proposition that drafts may be prima facie privileged in some circumstances (subject to waiver). The following arguments may further support that conclusion.

First, privilege should attach if the drafts were prepared by the expert for the purpose of communication to the lawyers (whether or not the drafts were actually sent).[50] This is consistent with the general principle that legal professional privilege inheres in a document 'because it records or constitutes a communication prepared, given or received for the purposes of obtaining legal advice or assistance'[51] (whether or not the document was in fact sent).

Secondly, there is authority for the proposition that drafts will be privileged if they contained 'marked up' edits to a draft by the lawyer, thus evidencing a privileged confidential communication.[52]

Thirdly, there is authority which affirms that privilege may be retained over drafts, if they contain annotations which 'record an understanding by counsel or one of the applicant's solicitors of the effect of a passage in the draft or to record suggestions made for the preparation or conduct of the applicant's case which were not directed to the provision of a fresh or revised report by the expert'.[53]

Notwithstanding the *Southcorp* line of authority, there are other decisions which emphatically reject that service or tender of an expert report necessarily waives privilege in relation to any previous drafts.[54]

Supplementary reports

An expert is obliged under the expert codes in various court rules to provide a supplementary report in the event that the expert's opinion changes. Rule 31.24 of the Uniform Civil Procedure Rules provides that 'if an expert witness provides a *supplementary report* to a party', the party may not use the expert's evidence unless the supplementary report is served.

A question arises as to whether the provision of a 'draft' constitutes a 'supplementary report' for the purpose of the rule (which must therefore be served, irrespective of privilege). In relation to the construction of an analogous provision under the old Queensland rules it has been held that draft reports are within the scope of the relevant rule.[55] However, I suggest that Rule 31.24 should be construed as being limited to a report which the expert subjectively determines is a final statement of his supplementary opinion. Such a construction will protect the privilege of draft supplementary reports, and is consistent with the principle that privilege should not be abrogated in the absence of clear legislative intent.[56]

When is waiver triggered?

The timing of any waiver is potentially important for case preparation. Under the *Southcorp* principles, it is the service of the expert report (as distinct from its tender) which generally triggers any waiver. However, there is significant controversy about the proposition that waiver should occur before tender by reason of service alone. This derives from the facts that implied waiver is substantially founded on unfair advantage being taken of privileged materials; and such advantage is difficult to establish before the expert report is formally tendered and relied on.

Some authorities (consistent with *Southcorp*) simply assert that it is service which triggers the waiver, without explaining how such service gives rise to unfairness or inconsistency prior to the tender.[57]

Some authorities support the conclusion that service is sufficient to trigger waiver by reference to some strategic or forensic advantage arising from mere service (which was independent of formal tender in the final hearing): e.g. bolstering a case for mediation.[58]

Other authorities affirm that that privilege is not lost until the report is tendered, being the time at which the party relevantly seeks to take advantage of the report.[59]

An interesting complication arises from the principle in NSW that service of statements pursuant to a court Practice Note or a court direction is deemed to be 'under compulsion of law' for the purpose of section 122(2)(c) of the Evidence Act,[60] by reason of which an expert report retains privilege despite service. It has been held that the absence of waiver in respect of the report itself precludes waiver of associated materials under section 126 of the Evidence Act, because the operation of section 126 is only triggered by the loss of privilege in relation to some primary privileged materials.[61] However, that principle is best regarded as a red herring in relation to the waiver of privilege in relation to associated materials, for the following reasons:

1. section 122(1) of the Evidence Act provides that privilege is lost when 'evidence is given with the consent of the client or party';
2. the expression 'consent' is construed as including 'implied consent', which is deemed to arise whenever there is an implied waiver under the common law;[62]
3. implied waiver at common law in relation to associated materials is not necessarily precluded by a finding that the expert report was served under compulsion;[63]
4. therefore, despite the fact that compulsion precludes the waiver of privilege in relation to the report itself, section 122 may nonetheless lead to a waiver in relation to the associated materials.

Conclusion

The application of privilege in this area is uncertain. This partially reflects the circumstance that waiver of privilege turns on 'inconsistency' and 'unfairness', which are crucially fact-sensitive. It also reflects inconsistencies in the authorities concerning the resolution of the fundamental policy tensions underpinning the operation of privilege in this area.

The law would be assisted by a more coherent statement of the factors relevant to the operation of waiver in relation to associated materials.

There is presumably no controversy about the general principle that the scope of waiver over associated materials (following service or tender of the report) should be limited to what is *reasonably necessary for a proper understanding* of the report.[64] There will presumably be considerable controversy in relation to my tentative suggestions set out below as to the elaboration and application of that general principle (which presently have no express judicial support).

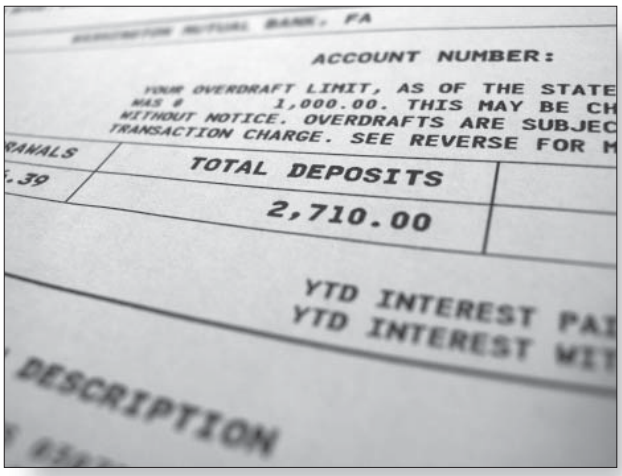
By way of elaboration of the general principle, I suggest:

- the expression 'proper understanding' should be construed as an understanding as to the *admissibility* and *probative force* of the expert report;
- the requirement that waiver be '*reasonably* necessary' for a proper understanding should be construed as facilitating a balance between the policy objectives of facilitating a proper understanding of the expert report, and the countervailing policy considerations supporting the retention of privilege over the associated materials. (That balance is inherently difficult because it involves the weighing of essentially incommensurable factors).

By way of application of the general principle, I suggest that mere service or tender of expert reports should generally not trigger the waiver of privilege in associated materials, for the following reasons.

First, associated materials will typically be of no relevance to the admissibility of the expert report, and of limited relevance to its probative value: i.e., the associated materials are of limited relevance to a 'proper understanding' of the expert report.

- *Effect of disclosure of associated materials*. The waiver of privilege over associated materials effectively reveals the evolution of the final opinion recorded in the expert report. This may be relevant to an assessment of whether the opinion was influenced by matters not specified in the report.
- *Nature and purpose of expert opinion*. If an expert report is prepared consistently with the Makita principles, it will identify the 'facts and reasoning process' which the expert 'asserts justify the opinion'[65]. This will facilitate the discharge of the 'prime duty of experts in giving opinion evidence: to furnish the trier of fact with criteria enabling evaluation of the validity of the expert's conclusions'.[66] In other words, the purpose of expert opinion evidence is to 'enable [the judge] to form his own independent judgment by applying the criteria furnished to the facts proved'.[67]
- *Admissibility*. Associated materials which disclose the evolution of the final opinion are irrelevant to admissibility. The test for admissibility is that the 'expert identify the facts and reasoning process which the expert *asserts* to be an adequate basis for his or her opinion'.[68] 'The fact that the expert's opinion was at one time - or even still is - reinforced by undisclosed facts and reasoning processes is irrelevant to the admissibility of the opinion'.[69]
- *Probative value*. Although not relevant to strict admissibility, the fact that an expert's opinion is or was 'reinforced by undisclosed facts and reasoning processes' may nevertheless go to the 'weight' of the opinion.[70] There 'will be occasions' where this will be a proper subject of cross-examination,[71] in respect of which the disclosure



of associated materials may clearly be relevant. Nonetheless, the degree to which the history of the evolution of the expert opinion 'affects the weight of an opinion must, however, depend on the force of the evidence which the expert has given to the effect that, by applying a certain process of reasoning to certain specific facts, a particular conclusion should be drawn'.[72] In many cases the asserted justification for the opinion is entirely manifest in the report, in a way which readily permits independent evaluation by the court of the reasoning processes upon which that justification was based. In such cases, the disclosure of the associated materials for the purpose of understanding the process of the evolution of the opinion would be of limited probative value: the expert opinion should stand or fall on the court's assessment of the self-sufficient justification disclosed in the final report.[73] However, any such conclusion 'must depend on the particular circumstances of the case'.[74]

Secondly, there are strong countervailing policy considerations supporting the retention of privilege over the associated materials, notwithstanding the service or tender of the expert report.[75] These generally relate to preventing the processes of the evolution of the expert opinion being stifled by the prospect of waiver, and preventing irrelevant or unfairly prejudicial lines of cross-examination.

I suggest the following qualifications to the proposed general rule that mere tender (or service) of the expert report should not trigger an implied waiver in relation to associated materials.

First, implied waiver should extend to associated materials comprising *instructions* (in the sense of directions as to the scope and substance of the report) and *source materials* (in the sense of privileged documents containing a record of factual matters which the expert took into account).[76] The basis for this exception is as follows:

- disclosure of instructions will generally be of fundamental importance to a full understanding of the opinion; and disclosure of source materials will be of fundamental importance to testing the factual basis for the stated opinion;
- the general countervailing policy considerations supporting the retention of privilege of associated materials (referred to above), do not apply in relation to these materials. This is because these materials are typically provided to the expert before the evolution of the expert opinion begins;
- it is within the power of an instructing party to eliminate entirely any prejudice associated with waiver in relation to source materials. This can be done by briefing the expert with explicit assumptions, rather than privileged communications (such as draft statements) which contain the relevant facts upon which the expert is directed or invited to express the opinion.

Secondly, the policy balance should shift in favour of implied waiver in relation to all associated materials,[77] when there is some positive basis for inferring that the expert report:

- does not constitute an accurate and comprehensive statement of the nature and justification of the expert's opinion; or
- is otherwise corrupted by 'adversarial bias' (being a conscious or unconscious bias that stems from an expert's partisan leaning in favour the instructing party).[78] In such a case, privilege over associated materials should be waived to permit further investigation of what unstated factors influenced the formation of the stated opinion.

Such a basis might be established if:

- the report fails to articulate assumptions and reasoning processes which adequately justify the stated conclusion (to the extent such an explanation is possible);
- the expert concedes in cross-examination that the report does not reflect the expert's actual opinion, in some material respect;
- the expert concedes in cross-examination that the report fails to include a material qualification to the stated opinion, to which the expert had turned his or her mind at the time of preparing the report;
- the expert concedes in cross-examination that the report does not include reference to other assumptions and processes of reasoning, which were material to the stated opinions;
- the expert concedes in cross-examination that his or her opinion on the relevant matter has changed during the course of preparing the report, and the change is not reasonably explicable in a manner which reasonably excludes the operation of (conscious or unconscious) adversarial bias; or
- the stated opinion is inherently implausible.

Thirdly, the policy balance should shift in favour of implied waiver over associated materials, if the subject matter of the opinion is one which substantially precludes the court from independently evaluating the stated justification for the opinion. As to this:

- Although the objective of expert evidence is to 'furnish the trier of fact with criteria enabling evaluation of the validity of the expert's conclusions', an expert 'frequently draws on an entire body of experience which is not articulated and, is indeed so fundamental to his or her professionalism, *that it is not able to be articulated*'.[79]

- In such cases, the report will be incapable of providing a self-sufficient justification for the opinion, which can readily be independently evaluated by the court. There will remain an irreducible 'judgment call' by the expert. By way of example, this may be the case where the subject matter for expert opinion concerns the correctness of a professional judgment, which must take into account a wide range of incommensurable variables: eg, in a medical negligence case, the question of the point at which a reasonable medical practitioner would have medically intervened in a complex and unusual case.
- To the extent that critical aspects of the expert's reasoning process can not be fully articulated and exposed, the court is effectively being invited to accept the opinion on the basis that it is proffered by the expert (rather than because of the court's independent evaluation of the cogency of the stated justification for the opinion). In such cases, investigations of the factors which might have influenced the formulation of the stated opinion are arguably more relevant to an assessment of the weight of that opinion (than would be the case if the stated justification could be independently assessed). associated materials may be relevant to such investigations.
- This conclusion is reinforced by consideration of the greater vulnerability of such an opinion to adversarial bias. To the extent that the subject matter of the opinion necessitates irreducible 'judgment calls', it logically follows that there is scope for experts plausibly to justify a range of different opinions on given assumptions. This creates greater scope for an expert's opinion to sway (consciously or unconsciously) in a partisan way. This reinforces the relevance of an investigation of associated materials to explore the extent to which the process of the evolution of the report exacerbated the risk (or reflected the operation) of adversarial bias.

Waiver of privilege in respect of associated materials may of course be appropriate in other circumstances, depending upon the application of the policy balance to the particular facts of the case. However, to minimise the prospect of interlocutory disputes in relation to the issue of waiver, there is a real advantage in the law developing clear working guidelines for the operation of waiver in this area.

Strategies

Experts should be engaged on the assumption that privilege may be waived in relation to all associated materials. The following strategies may minimise the prospect (and prejudicial impact) of the operation of waiver. Some of the strategies involve the lawyer in the process of the preparation of expert reports. This is not inherently improper, but it does give rise to ethical and strategic considerations relating to the reality and appearance of improper interference with expert opinion. These matters must always be considered in dealings with experts. They are addressed in another article in *Bar News*: 'Preparation of expert evidence: A search for ethical boundaries'.

1 Before any instructions (or other documents) are provided to the expert, seek to confer with the expert to assess informally the expert's opinions on relevant matters, and general suitability as an expert witness. Possibly, discuss with the expert the formulation of the proposed instructions. Advise the expert that no notes be made of the conference.[80]

2 Ensure that instructions (in the sense of directions as to the required scope and substance of the report) are not recorded in the same document which also records other forms of prima facie privileged communications to the expert.[81]

3 Where possible, avoid briefing an expert with privileged source materials (such as draft statements). In the alternative, brief the expert with explicit assumptions upon which the report is to be based.[82]

4 If source materials have been provided to the expert, instruct the expert to identify with precision in the expert's report the aspects of the materials on which the expert did (and did not) rely.[83]

5 Instruct the expert to prepare drafts only with the intention of communicating them to the lawyers. Instruct the expert not to prepare any draft with the intention only of using it as a working document exclusively for the expert's internal purposes.[84]

6 Instruct the expert to clearly identify drafts, by applying 'Draft' and not applying a signature to the document.[85]

7 Request the opportunity to review drafts (clearly so marked) before any report is finalised.[86]

8 To minimise the number of drafts likely to be required, there is significant advantage in the lawyer being involved in the process of draft preparation (either during or following conference).[87]

9 Advise the expert that all internal working documents may be exposed to waiver, and that the expert should therefore confine the generation of such documents to those which are strictly necessary to the formulation of the expert's ultimate opinion.

10 Do not advise the expert to destroy internal working documents (or acquiesce in such conduct). Destruction might be contempt of a discovery obligations, and any involvement by lawyers in that process might constitute professional misconduct. At the very least, destruction may give rise to an adverse inference.[88]

11 Urge the expert to ensure that all assumptions and reasoning processes are clearly and coherently articulated in the report.

12 Instruct the expert not to refresh his memory before giving evidence by reference to any document over which privilege has been retained. The act of refreshing memory out of court may of itself provide grounds for a waiver.[89]

I am interested in exploring this topic further, and welcome comments.[90]

1 *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49; *Commissioner of Taxation v Rio Tinto Ltd* [2006] FCAFC 86, per the Court at 43.

2 *Director-General, Department of Community Services v D* [2006] NSWSC 827, per Brereton J at [29]: see definition of 'privileged information' in the Dictionary of the Uniform Civil Procedure Rules.

3 *Esso*, supra fn 1, per Gleeson CJ, Gaudron, Gummow and Callinan JJ at [35].

[4] *Attorney-General for Northern Territory v. Maurice* (1986) 161 CLR 475, per Mason and Brennan JJ at 487.

[5] *Grant v Downs* (1976) 135 CLR 674, per Stephen, Mason and Murphy JJ at 682.

[6] See discussion in *Desiatnik*, 'Legal Professional Privilege in Australia' (2005), at 24

[7] See text at fn 3.

[8] *Waterford v Commonwealth* (1987) 163 CLR 54, per Mason and Wilson JJ at 65.

[9] *Maurice*, supra fn 4, per Deane J at 490.

[10] *Desiatnik*, supra fn 6, at 131.

[11] *Goldberg v Ng* (1994) 33 NSWLR 639, per Clarke JA at 670.

[12] *Mann v Carnell* (1999) 201 CLR 1, per Gleeson CJ, Gaudron, Gummow and CallinanJJ at [29].

[13] *AWB v Cole* [2006] FCA 1234, per Young J, at [132].

[14] *Goldberg v Ng* (1995) 185 CLR 83, per Gummow J at 120-121.

[15] *Goldberg v Ng*, ibid., per Deane, Dawson and Gaudron JJ at 96.

[16] *Maurice*, supra fn 4, per Gibbs CJ at 481

[17] *British American Tobaco Australia Services Ltd v Cowell* (2002) 7 VR 524, per Phillips, Bat and Buchanan JJA at 664.

[18] *Towney v Minister for Land & Water Conservation for the State of New South Wales* (1997) 147 ALR 402, per Sackville J at 414; quoted with approval in *Director-General, Department of Community Services v D*, supra fn 2, at [32].

[19] *Chen and Ors v City Convenience Leasing Pty Ltd and Anor* [2005] NSWCA 297, Gzell J (with whom the Court agreed), at [33].

[20] This question is not examined in this article.

[21] See text at footnote 17.

[22] *Interchase Corporation Ltd (in liq) v Grosvenot Hill (Queensland) Pty Ltd (No 1)* [1999] 1 Qd R 141, per Thomas J at 160; but compare Re Forsyth; *Re Cordova v Philips Roxane Laboratories Inc* [1984] 2 NSWLR 327, at 334-7 .

[23] *Interchase*, ibid., per Thomas J at 161-2.

[24] *Interchase*, supra, fn 23, per Thomas J at 161-2.

[25] *Linter Group Ltd v Price Waterhouse (a firm)* [1999] VSC 245, [16].

[26] *NJ Williams*, (1980) 58 Canadian Bar Review 1; quoted with approval in *Southern Equities Corporation v West Australian Government Holdings Ltd* (1993) 10 WAR 1, per the Full Court at 21; see also *Mendelow*, 'Expert Evidence: Legal Professional Privilege and Experts' Reports' (2001) 75 ALJR 258, at 271.

[27] *Cole v Dyer and the Nominal Defendant* [1999] SASC 272. Doyle CJ, at [56].

[28] See Woolf, 'Access to Justice - Final Report' (1996), [31], where the Lord Chancellor cited this matter as weighing against the waiver of privilege in drafts.

[29] *Roach & Ors v Page & Ors* (No 17) [2003] NSWSC 973, at [7]-[11].

[30] at [21].

[31] *Federal Court: Temwell Pty ltd v DKGR Holdings Pty ltd (in liq) (No 7)* [2003] FCA 985, per Ryan J at [3]; *AWB v Cole* [2006] FCA 1234, [168]: *New South Wales: Gate Gourmet Australia Pty Ltd (in liq) v Gate Gourmet Holding AG* [2004] NSWSC 768, [28]; *R v Ronen & Ors* [2004] NSWSC 1305, at [18]; *Thomas v State of New South Wales* [2006] NSWSC 380, [16]

[32] *Tirango Nominees v Dairy Vale Foods Ltd [No 2]* (1998) 83 FCR 397; *Collins Debden Pty Ltd v Cumberland Stationery Co Pty Ltd* [2005] FCA 1194, [9]

[33] *Temwell*, supra fn 31, [6]

[34] *Interchase*, supra fn 22, 162; *Greenhill Nominees Pty Ltd v Aircraft Technicians of Australia Pty Ltd* [2001] QSC 7, per Wilson J at [11]; *Roach*, supra fn 29, [7]-[12] *Frances Clare Dyball (by her tutor Charles Dyball) v The Harden Shire Council; Westpac Banking Corporation v The Harden Shire Council* [2004] NSWSC 48.

[35] *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501.

[36] *Towney*, supra fn 18, 414; quoted with approval in *Director-General, Department of Community Services v D*, supra fn 2, [34].

[37] *Cole*, supra fn 27, [57]; *Lampson & 2 Ors v McKendry & Anor* [2001] NSWSC 373, [35]; *Mackinnon v BHP Steel (Ais) P/L and Anor* [2004] NSWSC 459, [24]; *Mackinnon v BHP Steel (Ais) Pty Ltd and Anor* [2004] NSWSC 1027, [20].

[38] *Henderson v Low* [2000] QSC 417, [16], *Bryce v Anderson and Anor* [2005] QSC 216, [8]-[13]; *Minister for Finance v C & I Rogers Pty Ltd* [2004] VSC 370, [9]

[39] *Dingwall v Commonwealth* (1992)39 FCR 521, 524; *R v Ronen & Ors* [2004] NSWSC 1305, per Whealy J at [19]; *Australian Competition & Consumer Commission v Lux Pty Ltd* [2003] FCA 89, [55].

[40] *Nea Karteria Maritime Co Ltd v Atlantic and Great Lakes Steamship Corp* (No 2) [1981] Com LR 138 at 139; quoted with approval in *Maurice*, supra fn 4, per Gibbs CJ at 482 and Dawson J at 498-9.

[41] *Temwell Pty Ltd v DKGR Holdings Pty Ltd* [2003] FCA 948, per Ryan J at [12].

[42] *ASIC v Rich* [2005] NSWSC 149, per Austin J at [377]; see also *ASIC v Rich* [2005] NSWCA 152, at [168]-[170].

[43] *ASIC v Southcorp Ltd* [2003] FCA 804, per Lindgren J at [22]; *Thomas*, supra fn 31, [17].

[44] *Interchase*, supra fn 22, at 162, 156; *Temwell*, supra fn 43, at [10]; *Rhiannon Rigby v Shellharbour City Council & Anor* [2003] NSWSC 906, [11]; *Ryder v Frohlich* [2005] NSWSC 1342, [12].

[45] *Maurice*, supra fn 4, at 487; see authorities at *Interchase*, supra fn 23, at 151-3.

[46] Interchase, supra fn 23, at 152.

[47] *Pratt Holdings Pty Ltd v Commissioner of Taxation* [2004] FCAFC 122, per Finn J at [19]; *Propend*, supra fn 37, at 553; *AWB v Cole*, supra fn 13, at [44](8), [46]].

[48] *Pratt*, supra fn 47, per Finn J at [19] (in an analogous but slightly different context).

[49] *Propend*, supra fn 35, 569; *Pratt*, supra fn 47, [20], [88]-[89]; *AWB v Cole*, supra fn 13, [46]; *R v P* (2001) 53 NSWLR 664, [49].

[50] *Brookfield v Yevad Products Pty Ltd* [2006] FCA 1180, [12].

[51] *Esso*, supra fn 1, per McHugh J at 79 [80].

[52] *Southcorp*, supra fn 43, at [31].

[53] *Temwell, supra* fn 31, at [3].

[54] *Linter Group*, fn 25, [16]; *Filipowski v Island Maritime Ltd & Anor* [2002] NSWLEC 177, [23]; *ASIC v Vines* [2003] NSWSC 1005, [15].

[55] *Mitchell Contractors Pty Ltd v Townsville-Thuringowa Water Supply Joint Board* [2005] 1 Qd R 373, [13].

[56] *Daniels Corporation International Pty ltd v ACCC* (2002) 213 CLR 543, per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [11].

[57] *Director-General, Department of Community Services v D*, supra fn 2, [32].

[58] *Thomas*, fn 31, [17], [20]; *Sevic v Roarty* (1998) 44 NSWLR 287, 297 [but cf 290]; *Liberty Funding Pty Ltd v Phoenix Capital Ltd* [2005] FCAFC 3, [22].

[59] *Cole v Dyer*, supra fn 27, [56]; *Mackinnon*, supra fn 37, [18]; *Sevic v Roarty*, supra fn 50, 308.

[60] *Sevic v Roarty*, supra fn 50, at 293, 296, 301; *Akins v Abigroup Ltd* (1998) 43 NSWLR 539; *Dubbo City Council v Patrick Joseph Barrett* [2003] NSWCA 267, [15]. That principle has been recently doubted in the Federal Court: *Liberty Funding*, supra fn 58, [24].

[61] *Sevic v Roarty*, supra fn 58, 293.8, 296.6, 301.7.

[62] See text at fn 19.

[63] *Sevic v Roarty*, supra fn 58, per Sheller JA at 297.

[64] This simply picks up the statutory test for implied waiver in section 126 of the *Evidence Act*.

[65] *ASIC v Rich* [2005] NSWCA 152, at [105]

[66] *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, at [59]; quoted with approval in *ASIC v Rich*, supra fn 66, at [104]; see also [105], [112]

[67] *Makita*, supra, fn 67, at [879]; quoted with approval in *ASIC v Rich*, supra fn 66, at [106]

[68] *ASIC v Rich*, supra fn 66, at [92], [134]-[136]

[69] *ASIC v Rich*, supra fn 66, at [136]

[70] *ASIC v Rich*, supra fn 66 at [136]; see also at [167]

[71] *ASIC v Rich*, supra fn 66, at [167], [170]

[72] *ASIC v Rich*, supra fn 66, at [167]

[73] *ASIC v Rich*, supra fn 66, at [170]

[74] *ASIC v Rich*, supra fn 66, at [170]

[75] see the text above, under the heading 'Privilege & expert reports - overview', from fn 25 to fn 29

[76] Or (possibly) privileged source materials which were simply provided to the expert, of which he was invited or directed to take account: see text at fn 40

[77] At least those which disclose the formulation, substantiation, testing, and evolution of the opinion.

[78] For a more detailed analysis of adversarial bias, see my other article in this edition of *Bar News*: 'Preparing expert witnesses - a search for ethical boundaries', under the heading 'Inherent Dangers of witness preparation'

[79] *ASIC v Rich*, supra fn 66, at [170]

[80] This practice will prevent the generation of possibly discoverable documents in respect of experts who may never be engaged or called.

[81] This is because implied waiver may be limited to instructions: see fourth paragraph of 'Conclusions'. If privilege is waived over instructions, the separation of instructions from other privileged communications limits the scope for 'associated waiver' over those other communications.

[82] Needless to say, the assumption must otherwise be proved to render the report admissible and probative.

[83] The identification might be done my means of the exhibiting of a folder of relevant documents (masked where necessary to exclude matters not specifically relied on); or a schedule with a detailed description of the portions of the materials relied on). This practice limits likelihood of waiver over all materials: see text at fn 38.

[84] This maximises prospect of waiver being avoided in relation to drafts: see fn 52.

[85] This may be relevant to the determine whether a supplementary report is properly classified as 'draft' or 'final', which may be relevant to the obligation under the Uniform Civil Procedure Rules to serve the report: see the text at fn 55.

[86] Especially for 'supplementary reports', which must be served once received by lawyers: see text at fn 50

[87] This will squarely raise the ethical limits of lawyer's involvement in report preparation - see 'Preparation of expert evidence - the ethical boundaries'

[88] Eg, *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524, at [173]-[175]

[89] *ASIC v Vines* [2003] NSWSC 1005, per Austin J at [3](iv).

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