

Communications with Experts and Privilege

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Litigation, experts and privilege

- 1 Issues about ‘privilege’ for expert reports arise in litigation because case management principles and issues of fairness require the disclosure before trial of the expert evidence which each party proposes to rely upon and call at trial.
- 2 Sometimes an expert report may refer to documents seen by the expert and so the other party may call for discovery of those documents or subpoena them. Even where there is no mention of specific documents in the expert report, the other party may call for discovery and disclosure of all material and instructions provided to or in the possession of the expert with a view to challenging the expert’s opinion or ascertaining the basis for it. Such a call for discovery or the issue of a subpoena may be met by a claim that those documents have come into existence for the dominant purpose of submitting these to legal advisers for advice or for confidential use in the litigation and are thus the subject of legal professional privilege.
- 3 The general principle concerning waiver of privilege is that if it would be unfair for the person to maintain privilege after a disclosure, then there may be a waiver of privilege by operation of law.¹
- 4 In relation to privilege and expert witnesses the rule is that an expert report and confidential communications between solicitors and an expert witness do attract privilege but, of course, once the expert witness report is provided to other parties

¹ *Attorney-General for the Northern Territory v Maurice* (1986) 161 CLR 475; *Goldberg v Ng* (1995) 185 CLR 83; *Mann v Carnell* (1999) 201 CLR 1

in the litigation, privilege in the expert report is waived.² That then raises the question of what documents provided to and communications with the expert are privileged.

5 In *Australian Securities & Investments Commission v Southcorp Ltd*³, Lindgren J set out the principles which apply to whether and what communications with an expert are privileged⁴:

- ‘ (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: cf *Wheeler v Le Marchant* (1881) 17 ChD 675; *Trade Practices Commission v Sterling* (1979) 36 FLR 244 at 246; *Interchase Corp Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 1)* [1999] 1 Qd R 141 (‘*Interchase*’) at 151 per Pincus JA, at 160 per Thomas J.
- (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: *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 (‘*Propend*’); *Interchase*, per Pincus JA; *Spassked Pty Ltd v Commissioner of Taxation (No 4)* (2002) 50 ATR 70 at [17].
- (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: cf *Interchase* at 161–162 per Thomas J.
- (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

² SCR O36 r7

³ (2003) 46 ACSR 438

⁴ *Ibid* at paragraph [21]

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; cf *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 481 per Gibbs CJ, 487–488 per Mason and Brennan JJ, 492–493 per Deane J, 497–498 per Dawson J; *Goldberg v Ng* (1995) 185 CLR 83 at 98 per Deane, Dawson and Gaudron JJ, 109 per Toohey J; *Instant Colour Pty Ltd v Canon Australia Pty Ltd* [1995] FCA 870; *Australian Competition and Consumer Commission v Lux Pty Ltd* [2003] FCA 89 (‘ACCC v Lux’) at [46].

- (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; *Interchase* at 148–150 per Pincus JA, at 161 per Thomas J.
- (6) It may be difficult to establish at an early stage whether documents which were before an expert witness influenced the content of his or her report, in the absence of any reference to them in the report; cf *Dingwall v Commonwealth of Australia* (1992) 39 FCR 521; *Tirango Nominees Pty Ltd v Dairy Vale Foods Ltd (No 2)* (1998) 83 FCR 397 at 400; *ACCC v Lux* at [46].’

6 The principles of Lindgren J in *Southcorp* have been applied in a number of cases.⁵ These principles are very important to keep in mind when briefing an expert witness.

7 If privileged materials are provided to the expert who then refers to that material in the expert report which is then disclosed to the other parties in the action, privilege in the matter or document referred to in the report may be waived.

⁵ See for example *Australian Competition and Consumer Commission v Lux Pty Ltd* [2003] FCA 89; *Temwell Pty Ltd v DKGR Holdings Pty Ltd* [2003] FCA 930, 948, 985, 1032, 1078, 1296 and 1348; *R v Ronen & Ors* [2004] NSWSC 1305; *Gate Gourmet Australian Pty Ltd (in liq) v Gate Gourmet Holding AG* [2004] NSWSC 768 at [24] to [29]

Implied waiver of privilege in instructions to the expert

- 8 It is common for an expert to refer to the written instructions provided in his or her report and although, strictly speaking, the instructions are privileged⁶, reference to those instructions may give rise to an implied waiver of that privilege.⁷
- 9 Instructing solicitors should be prepared to produce their instructions to the expert if called upon. It is therefore important that the written instructions to the expert do not contain any privileged material such as comment on the client's case, discussions with Counsel or the solicitors' or Counsel's views on the client's case.

Implied waiver of privilege for witness statements provided to the expert

- 10 If witness statements are provided to an expert, and the expert opinion is based on those witness statements or they were possible sources for information relied on by the expert in producing the report, then privilege in those witness statements may be waived.⁸ Whether privilege is waived or not will turn on issues of fairness.
- 11 The issue of waiver of privilege for a witness statement was discussed in Doyle CJ of the South Australian Supreme Court in *Cole v Dyer*⁹. In that case, a personal injury action involving a motor vehicle accident, two expert reports referred to things said in two statements given by one of the defendants to assessors engaged by her solicitors. The plaintiff sought copies of the two

⁶ *Tirango Nominees v Dairy Vale Foods Ltd (No 2)* (1998) 156 ALR 364 at 365

⁷ In *Instant Colour Pty Ltd v Canon Australia Pty Ltd* unreported, Federal Court, delivered 30 October 1995 Nicholson J ruled, after consideration of matters of fairness in the circumstances of the case, that implied waiver of privilege had occurred in relation to a letter of instruction from instructing solicitors to an accounting expert in circumstances where the expert had said the letter of instruction was a source of his knowledge

⁸ *Jessup v Gorjup* unreported, Supreme Court of Tasmania, delivered 20 November 1997; *Interchase Corporation Ltd v Grosvenor Hill (Qld) Pty Ltd* (supra) at 148 and 160-161 and see the discussion of this and other cases in the article by Paul Mendelow "Expert Evidence: Legal Professional Privilege and Experts' Reports" (2001) Australian Law Journal 258; see also *Clark v Boden* [2004] TASSC 81

⁹ (1999) 74 SASR 216

statements. Privilege for the statements was claimed by the defendant's solicitors. It was held that the defendant was not required to disclose her statements. Doyle CJ said he did not regard it as unfair that the defendant should be permitted to withhold the statements from production because the plaintiff's solicitors could adequately prepare for trial with the material they had. They knew the facts drawn from the statements that apparently had been relied upon by the experts. Doyle CJ commented, however:

‘Finally, for what it is worth, I mention that some of the problems that have arisen in this case could be avoided if a solicitor instructing an expert does so by means of a letter of instructions that sets out the matters upon which the expert is asked to base the expert's opinion. The provision of a bundle of secondary material to an expert for consideration is no doubt convenient, but will often give rise to difficulty in determining the material upon which the expert has based the expert's opinion. If the matters to be so used are set out in the letter of instructions, that difficulty or doubt should not arise. If it does arise, the disclosure of the letter of instructions need not give rise to the disclosure of other privileged material.’¹⁰

Whether there is privilege in documents generated by the expert

12 Documents generated by the expert in preparing an opinion (such as working notes or calculations, file notes and e-mails¹¹), information recorded by an expert in preparing an opinion or materials used by the expert in forming the opinion are not the subject of privilege unless made between the expert and instructing solicitor for the purpose of confidential use in the litigation.

13 In *Australian Competition and Consumer Commission v Lux Pty Ltd*¹², Nicholson J ruled on privilege for a number documents including letters to and from an expert and handwritten notes of communications between her and

¹⁰ Ibid at [59]

¹¹ *Temwell Pty Ltd v DKGR Holdings Pty Ltd* [2003] FCA 930; *Temwell Pty Ltd v DKGR Holdings Pty Ltd* [2003] FCA 1078

¹² [2003] FCA 89

various persons including solicitors for the applicant. A claim of privilege was upheld for some of the documents on the basis that the ‘communication is between third party and client’s legal adviser, is confidential, for the requisite dominant purpose and not waived’. The claim of privilege for other documents was rejected where the document did not record a confidential communication or where, by reason of an implied waiver of the privilege, to maintain the claim of privilege would give rise to unfairness.

- 14 Also in the Federal Court, Ryan J in a series of decisions in *Temwell Pty Ltd v DKGR Holding Pty Ltd*¹³, made findings relevant to privilege of communications with experts. In two of these decisions¹⁴, Ryan J held that file notes of meetings held between the expert, solicitors and Counsel were not privileged because the notes were a record of information given to the expert and her understanding of the ‘exercise’ which she was required to carry out. Ryan J thus characterised the communications recorded as instructions, suggestions or information given to the expert to enable her to furnish an expert report and concluded that it would be unfair for the claim of privilege to be sustained in respect of those communications.¹⁵

Whether there is privilege in draft expert reports

- 15 Another contentious issue is whether draft expert reports are privileged. There is an argument that a mere draft would be privileged and an expert would not be compelled to produce draft reports unless it could be shown that the expert’s opinion had changed since the draft report.¹⁶ In a Victorian case *Linter Group Ltd v Price Waterhouse (A Firm)*¹⁷, in relation to whether before commencement of the trial a draft expert report was required to be produced, Harper J refused an order to produce the draft. He said¹⁸

¹³ *Temwell Pty Ltd v DKGR Holdings Pty Ltd* [2003] FCA 930, 948, 985, 1032, 1078 and 1348

¹⁴ [2003] FCA 948 and 1032

¹⁵ [2003] FCA 1032 at [2]

¹⁶ *Linter Group Ltd v Price Waterhouse (a firm)* [1999] VSC 245 and see the article by Paul Mendelow, (2001) Australian Law Journal 258 at 269 to 271

¹⁷ [1999] VSC 245

¹⁸ *Ibid* at [16]

‘... an expert is surely permitted, indeed to be encouraged, to change his or her mind, if a change of mind is warranted. Just as a judge ought never to allow publication of a draft of judgment, in part because it is necessary to preserve the freedom to change his or her mind on further reflection about the case, so experts 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.’

- 16 The reasoning of Harper J in the *Linter Group* decision has been applied in *Filipowski v Island Maritime Ltd*,¹⁹ however, it has not been applied in other cases which have considered privilege in a draft expert report, including the *Southcorp*²⁰ decision. The *Linter Group* decision was not referred to in Lindgren J’s decision in *Southcorp*, however, it was referred to by Lindgren J in an earlier decision of *Spassked Pty Ltd v Commissioner of Taxation (No 4)*²¹. In that case, Lindgren J considered that draft experts were not privileged if they were not part of communications between the expert and the client or the client’s solicitors.²²
- 17 A review of the cases show that whether a draft expert report is privileged (ie there is no implied waiver of the privilege) may depend upon two things:
- 17.1 The purpose for which the draft came into existence; and
- 17.2 The Court guidelines or rules which apply.
- 18 The recent cases indicate that if the drafts produced by the expert form the basis of a communication between the expert and the solicitors concerned, then there should be privilege in the draft. However, if the draft is merely an expert’s own working draft, which has not been communicated to the solicitors for the party who retains the expert, no privilege will attach to that draft.

¹⁹ [2002] NSWLEC 177

²⁰ (2003) 46 ACSR 438

²¹ (2002) 50 ATR 70; [2002] FCA 491 at [14]

²² *Ibid* at [20]

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- 19 In the case of *Interchase Corporation Ltd (in liq) v Grosvenor Hill (Qld) Pty Ltd (No 1)*²³ the drafts of various parts of what became a valuation report prepared by an expert had not been communicated to or prepared for the purpose of communication to a legal adviser. A claim for privilege in those documents was rejected. The main reason for concluding that no valid claim existed for privilege was that they consisted mainly of working papers or valuations of other properties and lacked any quality of confidential communication. They had not been communicated to anyone else, in particular, the party's solicitor, nor was it intended that they should be so communicated.²⁴
- 20 In *Southcorp*²⁵ Lindgren J considered a claim of privilege for three draft reports. He concluded that there was no privilege in two draft reports as these were the expression of the expert's own independent thinking and did not reveal communications between the expert and the solicitors. However, annotations which recorded and revealed the expert's communications with the solicitors and included expressions of legal opinion were privileged. The third draft report which had been 'marked up' or tracked by the solicitors to indicate to counsel the difference between that and earlier reports, was held to be privileged because the marking up was for a confidential communication between the solicitor and counsel.
- 21 In one of the *Temwell Pty Ltd v DKGR Holdings Pty Ltd* decisions²⁶, Ryan J, applying the principles in *Southcorp* stated that:

‘Where a draft report has been annotated in a way which seems to record instructions or further information supplied to the expert witness or records some development of the expert's own thinking, I have rejected the claim of privilege in respect of the draft as so annotated. On the other hand, if the annotations have appeared to 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

²³ [1999] 1 Qd R 141

²⁴ *Ibid* at 153 and 162

²⁵ (2003) 46 ACSR 438

²⁶ [2003] FCA 985

preparation or conduct of the applicant's case which were not directed to the provision of a fresh or revised report by the expert, I have sustained the claim of privilege.'²⁷

22 Court guidelines or codes of conduct for experts may be a factor in determining whether privilege will apply to a draft expert report. In the Federal Court, the 'Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia' apply and require the disclosure of:

- A statement of the questions or issues that the expert was asked to address,
- The factual premises upon which the report proceeds, and
- The documents and other materials which the expert has been instructed to consider.

It has been held that where these guidelines apply it would be unfair for a claim of privilege to be sustained in respect of documents which record instructions, suggestions or information given or made to an expert witness or successive draft reports from which the development of his or her expert opinion can otherwise be inferred.²⁸ It is likely that the same result would apply in other jurisdictions where similar guidelines or an expert code of conduct applies.

23 As to the application of particular Court rules in determining whether a draft expert report is privileged, it has been suggested that the *Interchase* decision²⁹, which was a Queensland decision, may also be explained by the rules which applied in Queensland at the time. The position in Queensland at that time was governed by the operation of O35 r5(2) of the Queensland Supreme Court Rules

²⁷ [2003] FCA 985 at [3]

²⁸ *Temwell Pty Ltd v DKGR Holdings Pty Ltd* [2003] FCA 985 at [6]. Note that an earlier version of the guidelines was considered in this case, with some differences, however arguably the same principles would apply with the current guidelines

²⁹ [1999] 1 Qd R 141

which provided that a document consisting of a statement or report of an expert is not privileged from disclosure.³⁰

24 In *Mitchell Contractors Pty Ltd v Townsville-Thuringowa Water Supply Joint Board*³¹, Douglas J of the Queensland Supreme Court considered whether draft reports were privileged in the light of Rule 212(2) of the Uniform Civil Procedure Rules 1999 (Qld) which provided, like O35 r5(2) of the Queensland Rules which applied at the time of the *Interchase* decision, that a document consisting of a statement or report of an expert is not privileged from disclosure. In the *Mitchell* case, however, unlike in *Interchase*, there was evidence that the draft expert reports had been prepared for the purpose of discussions with the defendant's solicitors and counsel retained on behalf of the defendant to ensure that the final report, which would follow from the drafts, would be in admissible form and respond to all relevant issues canvassed and raised on the pleadings. Nonetheless, the drafts were held to be properly described as documents consisting of a statement or report of an expert within Rule 212 and ordered to be disclosed.³² Douglas J said:

‘In my view the answer to the question may be sought by asking whether a draft statement or report by an expert is nonetheless his statement or report even though it might not be his final view. If an expert has prepared a draft report it is still his report or statement, no doubt normally reflecting his state of mind at the time he wrote it. The fact that, after consultation with lawyers in an action, he may prepare a further report or amend the draft does not prevent the draft from meeting the description in the rules...’³³

25 In Western Australian, s32A of the *Evidence Act* 1906 provides that there shall be a derogation of privilege to the extent that the rules of Court applicable to expert evidence so provide. The Supreme Court Rules Order 36A r7 provides

³⁰ see the article by Paul Mendelow (2001) Australian Law Journal 258 at 265; see also *Filipowski v Island Maritime Ltd* [2002] NSWLEC 177 at [18]

³¹ [2004] QSC 329

³² [2004] QSC 329 at [15].

³³ [2004] QSC 329 at [13]

that once a party is required by direction to disclose expert evidence, no objection can be taken to the evidence being disclosed on the ground of privilege. It has been suggested by Paul Mendelow in his article ‘Expert Evidence: Legal Professional Privilege and Experts’ Reports’³⁴ that there appears to be no difference to the position which existed under the Queensland Rules at the time of *Interchase* and the position in Western Australia once an expert report has been served. If that is correct, the decision in *Mitchell Contractors Pty Ltd v Townsville-Thuringowa Water Supply Joint Board*³⁵ which applied a rule in the same terms as that in *Interchase*, may have implications for Western Australia and other jurisdictions which specifically provide that no privilege can be claimed in an expert report once it is exchanged.

- 26 My own view is that if the draft report is provided specifically for the purpose of discussions with the solicitors and counsel to ensure that the report is in admissible form and responds to all relevant issues canvassed and raised on the pleadings, privilege should apply to that draft report. It is both proper and desirable for lawyers to be involved in the settling process of an expert report to ensure it is in admissible form³⁶ and that process should be protected by legal professional privilege.
- 27 In light of the authorities, however, care should be taken when communicating with experts. It should always be kept in mind that communications with an expert are potentially discoverable, and drafts of the expert report may need to be disclosed.

³⁴ (2001) Australian Law Journal 258 at 265

³⁵ [2004] QSC 329

³⁶ Lindgren J says this in *Harrington-Smith v Western Australia (No 7)* (2003) 130 FCR 424; [2003] FCA 893 at [19], [28] and [31]. Note, however, that in carrying out a review of the expert report and conferring with the expert about the form of his or her report, care must be taken to ensure that the review is not a rewriting of the opinion of the expert. It would not be proper to attempt to influence the expert to change his or her opinion or amend the way in which it is expressed, particularly if this results in the written report not actually corresponding with the expert’s opinion. As Lindgren J expressed it ‘lawyers *should* be involved in the writing of reports by experts: not, of course, in relation to the substance of the reports (in particular, in arriving at the opinions to be expressed) but in relation to their form, in order to ensure that the legal tests of admissibility are addressed’.

Practical Tips when briefing experts

28 Paul Mendelow in his article 'Expert Evidence: Legal Professional Privilege and Experts' Reports'³⁷ suggests that the following be adopted to maximise protection of confidentiality and legal professional privilege when briefing an expert:

- 'Brief the expert with written instructions containing assumptions, which the expert can append to the report. If materials are to be provided to the expert, be absolutely certain that no claim for privilege exists in relation to those materials or that any claims to privilege in those materials (and perhaps material referred to therein) are worthy of waiver.
- Counsel should consult with the expert prior to any draft report or report being prepared so as to avoid any misunderstandings and unnecessary drafts being generated (which could ultimately be required to be produced).
- Enter into an appropriate contract of engagement with the expert prior to any significant communications with the expert so as to maximise prospects of protecting confidentiality.
- Do not compromise your position or your client's position by stating anything to the expert which you would not be prepared to state in open court. If the expert's opinion is based on statements you make to the expert, you could find yourself in the witness box having to give evidence in that regard.'

29 To these suggestions, I would add the following:

29.1 If documents or other materials are provided to the expert, these should be listed and clearly identified, with discovery numbers if applicable.

29.2 Be sure to include all relevant documents and information and do not withhold from the expert anything which might be unhelpful or

³⁷ (2001) Australian Law Journal 258 at 273

unfavourable to your client's case. It is better to be fully informed of the expert's opinion on all of the facts, good or bad, than to proceed to trial with an expert opinion which, based on an incomplete disclosure of the facts, will be of little value at the trial.

- 29.3 When dealing with the expert after providing instructions, mark as 'confidential' any communication which discusses the litigation or legal opinion and for which you want to retain privilege. It is better to limit these types of communication, not only to limit any future request for discovery and issues about implied waiver of privilege, but also to ensure that the expert maintains his or her independence and objectivity.
- 29.4 Prepare and proceed on the basis that, once the expert report is exchanged or disclosed to the other parties in the litigation, privilege will not apply to the following:
- 29.4.1 The letter of instruction to the expert;
 - 29.4.2 The documents on which the expert's opinion is based;
 - 29.4.3 Documents created by the expert (such as notes, calculations and emails) for the purposes of forming or expressing his or her opinion, unless these form part of the expert's communications with you for the purpose of the litigation.
- 29.5 Be prepared for the possibility that legal professional privilege may also not apply to the expert's draft reports, particularly if they have not been created for the purpose of communications with you or counsel.

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